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**United States Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on Federal Spending Oversight and Emergency Management**

**Hearing on Federally Incurred Cost of Regulatory Changes and
How Such Changes are Made**

July 17, 2019

**Prepared Statement of
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Mr. Chairman, Ranking Member Hassan, and members of the Subcommittee, thank you for giving me the opportunity to testify before you today. I have been asked to testify on the adequacy of current safeguards and checks on agency power in the current regulatory process; and to provide my assessment of the likely impact of further limiting federal agencies' ability to make regulatory changes in response to stakeholder input or emerging challenges.

I am a tenured professor at University of Connecticut School of Law. I have worked in federal agencies for five years, taught administrative law for 24 years, and published journal articles on the rulemaking process. I also have convened and facilitated negotiated rulemaking exercises for the Department of Energy and the Department of Transportation, and I serve on the Council of the ABA Administrative Law Section. However, the views expressed today are entirely my own. I am not employed by – or beholden to -- any organization that holds a vested interest in the subject matter of today's hearing.

I understand this Subcommittee is particularly interested in exploring issues raised by a recent report by the Pacific Legal Foundation (PLF), which has a representative testifying here today, and which I read as raising three main concerns:¹

First, PLF quotes a recent study by the Mercatus Center to the effect that federal regulations are costing the U.S. economy four trillion dollars a year. This exorbitant cost is cited as evidence of a regulatory state that is out of control and needs to be reined in.

Second, PLF claims that many of these costly regulations are issued unconstitutionally -- in violation of the Appointments Clause -- by career civil servants who are merely agency employees and not Officers of the United States as required by the Constitution. PLF cites the example of the Food and Drug Administration (FDA), which has issued literally hundreds of rules over the signature of Leslie Kux and certain other senior career civil servants.

Third, PLF and other regulatory critics are worried by the fact that many agency regulations and regulatory changes invoke broadly worded statutory delegations of authority from laws that may be decades old. Here, the concern is that the drafters of the original authorizing legislation may not have anticipated the specific situations for which

¹ Angela C. Erickson and Thomas Berry, *But Who Rules the Rulemakers: A Study of Illegally Issued Regulations at HHS* (Report by the Pacific Legal Foundation, April 29, 2019).

agencies issue or amend regulations under the authority of old statutes many years later, raising issues about the accountability of those later regulations and spending programs.

Frankly, I do not share these concerns. In fact, for reasons I will explain in my remarks, I find these concerns entirely without merit.

To begin with, there is no sound reason to believe that regulations in aggregate are costing Americans anywhere near \$4 trillion a year. I and other scholars have thoroughly debunked cost estimates of *half* that amount, and even President Trump's Office of Management and Budget acknowledges that the benefits of regulation far outweigh their costs.²

The \$4 trillion regulatory cost figure comes from a single unpublished study by the Mercatus Center, a libertarian-leaning advocacy center. That study reaches its \$4 trillion estimate not by actually measuring the cumulative cost of regulation, but by constructing a hypothetical model of the economy that assumes what it ought to prove: that regulation always *hampers* economic growth and never *promotes* such growth (for example, by keeping workers healthy and by preventing massive fraud that causes market meltdowns and recessions). In other words, the Mercatus study employs a tautological theoretical model that builds its desired conclusions into its core assumptions. And the costs it finds are not out-of-pocket costs of real people, but utterly speculative opportunity costs in form of foregone economic growth.

The implausibility of its core premise can be seen by reading the newspaper. The study assumes an economy in which regulatory compliance costs starve industry of the cash needed for innovation and investment that leads to growth. Newspapers, however, report a quite different, and happier, reality – an economy of full employment in which many US firms are so flush with surplus cash that they are buying back their own stock for want of better options.³

After conjuring \$4 trillion in phantom regulatory costs, PLF next leaps to the conclusion that the FDA is issuing “unconstitutional” rules because they appear in the Federal Register over the signature of senior career civil servants. This claim reads way too much into a signature. It also reveals a misunderstanding of how the administrative process actually works. What matters to accountability in the rulemaking process is not who signs a rule, but who is required to review and sign *off* on the rule before it can be signed. To take a simple example: the “Deeming Rule” on “vaping” of which PLF complains in its report (and lawsuit) may have been signed by Leslie Kux, a senior civil servant; but if that rule followed normal procedures, it was reviewed and cleared by multiple offices within the FDA before going up the chain of command to be reviewed and then approved by the FDA Commissioner. After that, it would be reviewed and approved by the Office of the Secretary of HHS. Indeed, for a rule of this consequence, it would have been approved only after several face to face meetings with both the FDA

² See Richard W. Parker, *The Faux Scholarship Foundation of the Regulatory Rollback Movement*, 45 *ECOL. L. QUARTERLY* 845 (2018).

³ Matt Phillips, *Trump's Tax Cuts in Hand, Companies Spend More on Themselves Than on Wages*, N.Y. Times (Feb. 26, 2018), available online at <https://www.nytimes.com/2018/02/26/business/tax-cuts-share-buybacks-corporate.html>. Michael Kranish, *Feast for investors sells workers short*, Boston Globe (May 31, 2015), <https://www.bostonglobe.com/news/nation/2015/05/30/companies-pour-billions-into-buying-back-stock-but-workers-and-economy-may-paying-high-price/8vi1toy4kZBr59ykKYzdNL/story.html>. (“Buybacks are booming because US companies have earned record profits and are hoarding a vast amount of cash”).

Commissioner and the Secretary. After that, since it was deemed a “significant” rule, it would have been reviewed and cleared by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget, which is headed by an advice-and-consent political appointee who answers directly to the President. During OMB’s review the rule would be cleared by other federal agencies. Only after clearing these multiple levels of review by political appointees (with the possibility of rejection or amendment at each stage) would the rule be issued -- over the signature of Leslie Kux, a career civil servant.

These higher-level reviews and approvals may be cursory, deep or in-between -- depending on the salience of the rule, the people involved in the rulemaking process, the level of trust they have in each other, and the management style of the leadership. The fact remains: at the end of the day the rule goes out *if and only if* all these political overseers approve it. And these political overseers are accountable to Congress, to the President, and ultimately to taxpayers, for each and every rule they clear for issuance. The buck stops with them. The same analysis applies to the other rules of the FDA and the other Executive Branch departments and agencies.

Does this mean the vaping rule is good policy? Not necessarily. Agencies may make errors even after multiple levels of review. But the remedy for those who believe a rule to be misguided is to challenge the rule’s policy choice as arbitrary and capricious in a court of law. The signature appearing at the end of the rule is beside the point.

The final concern I have been asked to address today is a deeper and more substantive one: the concern that many agencies issue sometimes costly rules under statutory delegations of authority that are old – and broad. Is this a bad thing? I do not believe it is. Indeed, I would suggest that broad delegations of authority are a salutary and necessary thing, and, in any event, are within Congress’s discretion. Two simple examples will illustrate the point.

The Public Health Service Act, first passed in 1944, provides that: “(1) Regulations prescribed under this section may provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a qualifying stage . . .”⁴ No one had heard of Ebola when this Act was passed in 1944. Should the CDC be required to go back to Congress to get a specific authorization to address Ebola before responding to the risks it poses to our health? I believe the answer is clearly no.

The National Highway Traffic Safety Administration (NHTSA) sets auto safety standards under a delegation which provides that: “The Secretary of Transportation shall prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms.”⁵ That’s broad language. But how much narrower could the delegation be without getting Congress in way over its head, technically? Over 40,000 Americans lost their lives in car crashes last year: equivalent to thirteen 9/11 tragedies *per year*. New advances in collision avoidance technology now under development could save thousands and perhaps tens of thousands of lives a year. Should *Congress* take over the job of deciding exactly which of these life-saving technologies to build into regulatory standards for the auto industry of the future?

⁴ The Public Health Service Act, 42 U.S.C. § 264(d).

⁵ 49 U.S.C. § 30111.

These examples involve regulations of private sector conduct, but comparable complexities attend the administration of Medicare, Medicaid and many other benefits programs. They illustrate why I believe congressional micromanagement of agency rulemaking simply does not work. I have studied and worked with regulations for most of my career. One thing I can say with assurance about regulations is that most of them grapple with issues that are highly technical and complex. But extreme technical complexity does not play to Congress's strengths. Congress is comprised of a relatively small number of generalists, whereas agencies are able to bring to bear large numbers of specialized in-house experts on the problems they address. Congress also lacks either time, staff, or adequate procedures to undertake the kind of detailed fact-gathering, analysis, and stakeholder involvement in the regulatory process that agencies routinely allow -- through public hearings, expert workshops, notice and comment rulemaking, negotiated rulemaking, advisory committees, and regulatory analysis.

Moreover, Congress does not require itself to prepare a detailed analysis demonstrating that the benefits of the statutes it enacts justify their costs, as executive branch agencies are required to do with their major rules. Nor does Congress bind itself to respond in detail to the comments and objections it receives from stakeholders and the public about the draft laws on which it deliberates. By contrast, agencies *must* consider and respond to the views of the public on pre-promulgation drafts of the rules they issue, or else run the risk of reversal when challenged by stakeholders in court. More fundamentally, there is the fact that agencies *can* be challenged in court for issuing standards that are arbitrary and capricious. Congress faces no comparable check.

Ultimately, of course, Congress has the final say on all agency regulations and that is as it should be. Congress writes the laws that the agencies must implement. Congress can review and reject any agency rule that Congress disagrees with, following expedited procedures with no possibility of filibuster.⁶ Congress controls the appropriations of agencies. And Congress can require agencies to account for their rules and actions in oversight hearings such as this one.

Thus, even though agencies obviously lack traditional electoral accountability, federal agencies are accountable to the public in far more direct, material and practical ways -- directly in the rulemaking process and indirectly through White House, Congressional and judicial review.

In sum: the agencies I have studied and worked with are not the rogue elephants that some regulatory critics like to pretend they are. They are subject to multiple checks and balances as they try to protect the American people from a wide variety of harms that free-market actors would otherwise impose on them in the course of seeking profits. The risks these agencies are trying to manage are often major risks of harm to public health, safety, the environment or the economy. They are risks, moreover, from which markets cannot and will not protect us without the intervention of government.

Sometimes agencies stray off course and need to be checked. More often they simply need resources, support and a reasonable level of discretion to make sound policy on what often are highly complex issues of fact and law.

⁶ Small Business Regulatory Enforcement Fairness Act, 5 USCA § 801, et. seq.