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# **Reviving Jobs and Innovation:**

## A Progressive Approach to Improving Regulation

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Today, the U.S. is suffering from a regulatory paradox: Too few *and* too many regulations at the same time. On the one hand, financial services were clearly under-regulated during the 2000s, making financial reform essential. Similarly, President Obama's healthcare reform bill was a key first step to reining in medical costs.

But in other areas we see an accumulation of rules and regulations over the past decade. The trend started with the vast expansion of homeland security regulation under the Bush administration and continued through the first two years of the Obama administration.<sup>1</sup>

That's why President Obama should be applauded for issuing his executive order "Improving Regulation and Regulatory Review" on January 18. The order asked agencies to pay more attention to promoting innovation as part of the regulatory process. In addition, agencies were directed to come up with a plan for reviewing their existing significant regulations.

However, the president's executive order did not go far enough. A regulatory 'self-review' process has been tried repeatedly in the past, and it's always fallen far short of expectations. Regulators have a tough time trimming their own regulations, given internal bureaucratic pressures. But don't blame the agencies—neither Congress nor the executive branch has a good way of reviewing and reforming existing regulations, even when they have become outdated or burdensome.

The regulatory system needs a mechanism to address this need for periodic review. We propose a Regulatory Improvement Commission (RIC), an independent body analogous to the BRAC Commissions for evaluating military base closures.<sup>2</sup> This is designed to build on the president's executive order, and in the process improve its effectiveness. The RIC will take a

### About the author

principled approach to evaluating and pruning existing regulations, gather input from all stakeholders (not just business or just agencies), and do so in a manner that ensures we protect public health, safety, and the environment.

#### THE GOAL OF REFORM

Our goal is to create a positive environment for innovation in the U.S., which is essential for maintaining competitiveness and creating jobs. This pro-innovation goal requires us to take a hard look at the excess accumulation of regulation, which may be slowing down innovation and preventing the U.S. economy from reaching its full potential.

The intent behind the RIC is not to create a mechanism to sidestep Congress and dismantle major substantive regulations...[but] to identify regulations that are not critical to protecting things we value highly but are still burdensome, inefficient, outdated, or duplicative.

That's why we are proposing the creation of a periodic review process centered around appointing experts and stakeholders in a Regulatory Improvement Commission (RIC), which will be charged with identifying a limited number of regulations that can be eliminated, consolidated, or simplified. As such, it's designed as a politically feasible alternative to ideological and indiscriminant deregulation that takes a heavy-handed axe to essential federal agencies, and ends up exposing too many Americans to harm. This process is also a more effective alternative to the president's procedures ordering agencies to evaluate their own regulations, because it will include broader stakeholder input to identify target

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regulations and examine the cumulative impact of them across agencies, not just within the silo of a single department or agency's jurisdiction.

The intent behind the RIC is not to create a mechanism to sidestep Congress and dismantle major substantive regulations that are politically controversial, like EPA pollution rules. Instead, we are trying to get beyond business as usual to identify the regulations that are not critical to protecting things we value highly but are still burdensome, inefficient, outdated, or duplicative.

Taken individually, most of these rules and regulations were probably reasonable when they were adopted, and they may still be individually defensible now. But the accumulation of regulations has the potential to hamper innovative and growing sectors, in the same way that a big enough pile of small stones can dam up a stream. Indeed, regulatory drag may be one reason why the past decade has seen few breakthrough products, outside of information technology and communications.<sup>3</sup>

The regulation issue is often wrapped up in ideological debates—big government versus small government, or rapacious private sector versus corrupt public sector. However, to a large degree the problem is a procedural one: Washington has a well-defined process for passing new regulations, but the tools are lacking to address the obvious duplications, inefficiencies, and conflicts of the current system. The result is that businesses and individuals lose faith in the direction that the economy is taking.

Thus, the Regulatory Improvement Commission is designed to address two questions:

- How do we identify existing regulations that are impeding growth and innovation?
- Can we come up with a politically feasible process for implementing targeted regulatory improvements (including consolidation, simplification, or elimination of existing regulations), while ensuring that we do not compromise essential protections for public health, safety, and the environment?

This proposal for improving and rolling back some regulations is part of a broader, progressive, forward-looking approach to the economy. Our approach focuses on building knowledge capital, physical capital, and human capital; encouraging innovation and growth; and protecting public goods.

Within this context, we want to make a pragmatic push for regulatory improvements and (where appropriate) reductions, particularly when it comes to industries that are innovative, growing, and generating jobs. In today's global supplychain economy, companies increasingly have the option of rearranging operations so that more and more production and supervision is done in other countries. That's why it is so important to get the regulatory structure right.

### A SUMMARY OF THE REVIEW PROCESS

Our proposal for a Regulatory Improvement Commission (RIC) process is based loosely on the successful process set up for the Base Realignment and Closure (BRAC) Commission, but adjusted for today's very different political and economic environment. To summarize the key components of the proposal:

- 1. Lay out specific goals for regulatory improvement in the enacting legislation. This step is absolutely essential, since the RIC is not a policymaking body. We would focus on encouraging innovation, improving competitiveness, reducing compliance costs, fostering growth, protecting public health and safety, and promoting responsible environmental stewardship. Whatever objectives we chose, the important thing is that they are chosen at the front end, so the criteria for decision making are fixed and transparent throughout the process.
- 2. Invite suggestions from the public for which regulations to cut, consolidate or simplify.

  Think of an open and transparent website, where individuals and businesses can identify problematic regulations, along with specific examples. The RIC would be encouraged to focus on the regulations

- which are discussed on the website, which will prevent backroom dealing and promote transparency
- Appoint an independent, politically balanced Regulatory Improvement Commission. The Commission's credibility and success will depend on having a group of appointed members who are highly qualified and beyond reproach, as well as expert staff seconded from the various agencies, Congress, and independent organizations. The Commission will hear testimony bearing on both positive and negative impacts. All deliberations of the commission must be public. The Commission will vote on a package of 15-20 regulatory changes that meet the original specified goals. The Commission will have a specified time and budget to complete its work, and it will terminate after submitting its recommendation package.
- 4. Send the package to Congress for an up-or-down vote, no amendments allowed. <sup>5</sup>
- 5. Following congressional approval, the package must receive the President's signature. This ensures that any changes will carry the full force of law, avoiding constitutional objections and potential litigation.

The rest of the paper will consider the RIC proposal in more detail. But it's important to note here that the RIC needs the combined efforts of both the legislative and executive branches, because regulation lives in that gray area between legislation and executive action. Neither branch by itself can get a grip on the problem. However, if Congress fails to act in this area, it would also possible in the meantime for agencies to incorporate elements of this process in the "retrospective analysis" plans they are required to submit to OMB under Section 6 of the new executive order.

Note that the RIC proposal is more flexible than cost-benefit analysis, which is often criticized for undervaluing certain benefits (like innovation) which can be hard to quantify.<sup>6</sup>

I also note that the RIC proposal is following the ground opened up by Senator Mark Warner (D-VA) with his regulatory "pay-as-you-go" proposal.<sup>7</sup> In addition, the RIC has some similarities to the Commission on the Accountability and Review of Federal Agencies (CARFA), which has been introduced several times by Senator Sam Brownback (R-KS). But compared to CARFA, the RIC would have a sharper focus on regulation and innovation rather than spending, and would be more sensitive to protecting public health, safety, and the environment.

### THE RECENT HISTORY OF REGULATION

Before discussing the RIC in more detail, we must understand the regulatory history of the United States over the past fifteen years. During the second half of the 1990s—the New Economy period—it seemed like the U.S. had managed to escape the "hardening of the arteries" that afflicted Japan and Western Europe. The combination of venture capital funding and an openness to innovation and new technology generated a wave of start-ups, jobs, and income. With information technology roaring ahead and the biotech revolution on the horizon, it seemed like nothing could stop the innovation-driven U.S. economy. <sup>8</sup>

During those years, the state of regulation in the U.S. economy didn't seem like much of a concern. The Internet was mostly protected from regulatory activity, while President Bill Clinton steered a middle ground between active deregulation and greatly increased regulation. From fiscal years 1993 to 2001, employment in the federal regulatory agencies actually fell from 174,000 to 173,000.9

But in the first decade of the 21st century, what had seemed like an economic and regulatory success story came to an end, as four perhaps unrelated events rocked the U.S.:

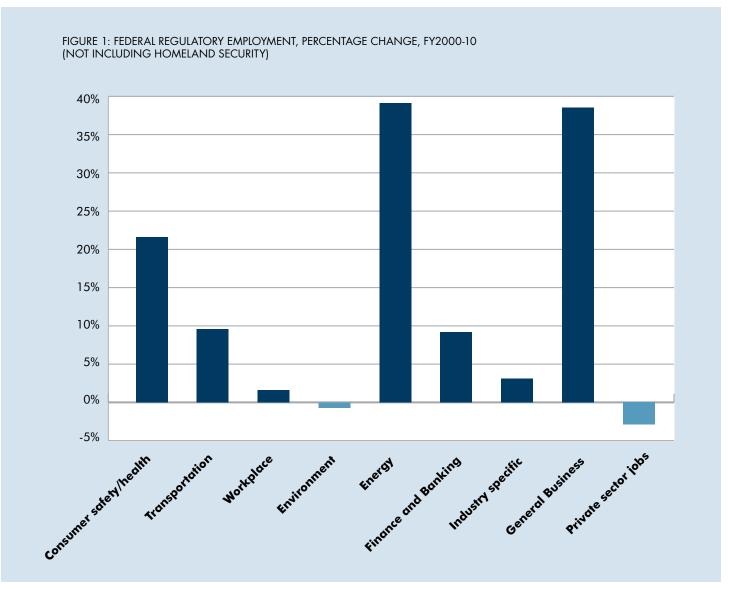
• The tech bust and the accompanying scandals at Enron, Worldcom, and Global Crossing led Congress to enact a new wave of business regulation. This included the Sarbanes-Oxley Act of 2002 and tighter controls on the use of

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- stock options, an essential tool of start-up tech companies.<sup>10</sup>
- The terrible events of September 11, 2001 understandably led to a wave of homeland security regulation, including: tighter restrictions on monetary transfers in and out of the U.S., tighter restrictions on foreigners entering the U.S., additional security measures on travel and freight, and additional surveillance both domestically and abroad. (More recently, the Obama Administration proposed that telecom providers configure their most advanced systems to allow wiretapping for law enforcement and antiterrorism purposes.<sup>11</sup>) While homeland security is not directed towards traditional regulatory ends, security-related rules have much the same effect as economic regulations.
- The broad economic crisis that started in 2007 showed the need for increased regulation of financial services.
- A 30-year upward trend in new drug approvals suddenly and unexpectedly paused in the early 2000s. Despite rapid advances on the scientific research front, including the sequencing of the human genome, much fewer new drugs were approved in the 2000s than in the 1990s. This turned into a vicious circle: fewer 'wow' drugs led regulators to become more skeptical, which in turn led them to tighten up the approval process, which in turn has made it more and more costly for drug makers to develop new treatments. <sup>12</sup> Medical devices, too, have run into the same wall of regulatory skepticism. <sup>13</sup>

All four of these trends translated into dramatically increased regulatory activity from 2000 to 2010, a period including President George W. Bush's entire administration through the first two years of President Obama's term. However, the increase in regulatory activity was highly uneven. Some key agencies—notably the FDA, the SEC, and the Homeland Security Department—got big bumps in employment and budgets that far exceeded the growth rate of private sector employment. (In the chart above,

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Data: Dudley Warren

Chart: Progressive Policy Institute

the FDA is in the consumer safety health category, while the SEC is found in the general business category). The gain in energy regulatory jobs mostly represents the expansion of the Nuclear Regulatory Commission in preparation for the approval of a new wave of nuclear reactors.

Other areas of regulation—notably environment and workplace—have lagged far behind over this ten year stretch. In addition, though it doesn't show up on this chart, the number of financial regulators shrunk between 2000 and 2007 before

expanding again once the crisis started. This shrinkage of financial regulators was in retrospect a great mistake.

### **IMPACT OF REGULATION**

The impact of regulation on the economy, pro and con, has been studied extensively since the 1970s. These include microeconomic studies looking at the costs and benefits of individual regulations, and macroeconomic studies that sum up costs and benefits for the entire economy. I'm not going to summarize the literature here, except to

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note that it's highly controversial and covers the gamut from intensely anti-regulatory to devoutly pro-regulatory. To just pick one, the 2010 report from the Office of Information and Regulatory Affairs (OIRA) sums up the costs and benefits of individual regulations, and estimates that the benefits of federal regulations far exceed the costs:

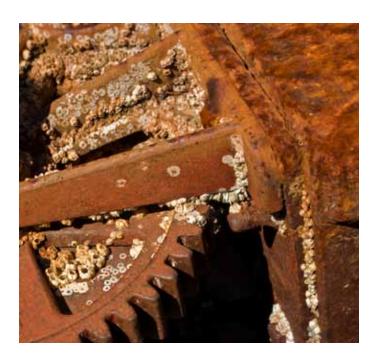
The estimated annual benefits of major federal regulations reviewed by OMB from October 1, 1999 to September 30, 2009, for which agencies estimated and monetized both benefits and costs, are in the aggregate between \$128 billion and \$616 billion, while the estimated annual costs are in the aggregate between \$43 billion and \$55 billion.<sup>14</sup>

OIRA's analysis, based on summing up the costs and benefits of individual regulations,

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unfortunately misses the point. The big issue in the U.S. is the **accumulation** of regulations. Businesses can adjust fairly easily to any single rule, but they have a much harder time with multiple and overlapping regulations in the same area.

An accumulation of regulations can sometimes create problems, even if every regulation, taken individually, is defensible. Waves of new regulations, without elimination or rationalization of old ones, end up closing off options and raising costs.<sup>15</sup>



The bad news is that regulatory drag can sneak up on us. Even if Washington passes only reasonable and well-intended regulations, we could find ourselves in a situation where economic growth and innovation is being slowed by the accumulation of rules.

However, if this analysis is correct, the good news is that we don't need wholesale deregulation, or a complete overhaul of existing regulations. What we need is to scrape away some of the excess accumulation of rules, while leaving the most effective ones alone.

If Washington can demonstrate that it can take a meaningful step toward getting the regulatory process under control, that will have important symbolic and economic value. That was the importance of getting the deficit under control in the 1990s. In his 2003 book *In an Uncertain World*, Robert Rubin explained:

In important ways, the deficit had become a symbol of the government's inability to manage its own affairs—and of our society's inability to cope with economic challenges more generally, such as our global competitiveness, then much in question.<sup>16</sup>

That's why adopting institutional procedures for improving and pruning existing regulations is so important today: it would restore confidence in government and send a clear signal that we are up to the challenge of managing regulations over the long term.

#### **DEFINING OBJECTIVES FOR REVIEW**

In some ways, the task of improving, eliminating or simplifying old regulations is similar to scraping barnacles off the bottom of a boat. It's a thankless chore that must be done, or else the boat gradually slows down.

The big difference, of course, is that regulatory 'barnacles' get to do a lot of complaining. Almost everyone agrees that the regulatory structure is too complicated, but they can't agree on which ones need to go.

The question is how to set up a process which is effective, fair, and offers enough political cover to allow legislators to approve it. In recent years, there have been a variety of political mechanisms designed to deal with complicated questions where most agree with the final goal, but the individual pieces get nitpicked to death. For example, 'fast-track trade authority' allows the President to negotiate a trade treaty, which Congress can only vote up or down without amendments. The new Medicare Independent Payment Advisory Board is an example of a commission-type structure which is designed to allow difficult decisions to make it through Congress.<sup>17</sup>

But it's still true that the BRAC process offers the best model for making difficult decisions. Today, people usually associate BRAC with the idea of an independent commission that comes up with a unified package of proposals, followed by a straight up and down vote. In fact, however, the actual BRAC process was more complicated and interesting.

Starting with the 1991 round of base closings, BRAC began with the Secretary of Defense publicly specifying the criteria for deciding which bases to eliminate or reduce. <sup>18</sup> As one scholar of BRAC notes:

While these were mostly military in nature, they also included economic and environmental considerations. A clear mission (identify bases to be cut) along with guiding criteria (military need) positioned the commission to make empirically defensible choices. <sup>19</sup>

The lesson from BRAC is clear: building clear criteria and guidelines into the enabling legislation for the RIC is essential. Without clear criteria, the RIC would become a policy-making body, which would not and should not be acceptable to Congress.

Ideally these goals or criteria should come from Congress, because ultimately the RIC process requires cooperation from both the legislative and executive branches. One set of clear goals might be:

- Reducing compliance costs.
- 2. Encouraging innovation.
- 3. Fostering growth.
- 4. Protecting public health and safety.
- 5. Improving competitiveness.
- Ensuring responsible environmental stewardship.

Other goals are possible, of course, but they should be specified up front.

### THE MEMBERSHIP, SCOPE, AND DURATION OF THE COMMISSION

The RIC will be going into uncharted territory, with broad powers. For the Commission to succeed, it must be perceived by the public and policy makers as competent and credible. It should therefore be comprised of a bipartisan collection of stakeholders who have strong qualifications and reputations that are beyond reproach: business executives, entrepreneurs, consumers, economists, politicians, labor leaders, and others. Staff would be seconded from the various regulatory agencies, as well as Congress and independent research organizations, to provide expertise and competency across a range of different areas.

In terms of scope, the RIC should be empowered to consider regulations across all departments and agencies, including independent agencies such as the Federal Communications Commission. That would make it different from the President's executive order, which did not cover independent agencies such as the FCC and the SEC. However, it's worth acknowledging that it may be politically necessary to wall off certain controversial issue areas or major substantive regulations, such as Clean Air Act rules, from the initial rounds of review to assure skeptics that the RIC is not a Trojan horse intended to dismantle entire regulatory regimes that are frequently targeted by industry groups.

To counterbalance the broad powers and wide scope of the RIC, we propose that it should only be authorized for a limited period, say a year or 18 months—long enough to put together one package of 15-20 regulatory changes that meet the specified goals, and submit the package to Congress. This would be following the BRAC example, where each round of base-closings had to be separately reauthorized. That will also help us avoid creating another bureaucratic body.

Of course, if the RIC does its job well, we would hope that it would be re-authorized for additional rounds of regulatory improvements. Then we would have a steady flow of improvements and repeals to regulations that would lift some of the regulatory burden off innovation, while protecting public health, safety, and the environment.

### **INDENTIFYING REGULATIONS OF INTEREST**

The next question is how to get the initial list of possible regulations to consider for reduction or improvement. In the BRAC process, the initial proposed list of base closings was generated internally by the Department of Defense.

In the case of the Regulatory Improvement Commission, we'd expect agencies and departments to suggest some regulations that need to be considered. But more likely the best and most interesting suggestions will come from outside—from companies and individuals who have direct experience with

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regulations that should be improved, consolidated, or simplified.

For that reason, we propose opening up the process for public suggestions, with one requirement: complete transparency. If someone wants to suggest a regulation for reduction, they have to publicly say who they are and offer their evidence. This is the equivalent of crowdsourcing: relying on affected stakeholders and other interested

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parties to attack or defend specific regulations. The process for identifying regulations has to be transparent, so that businesses and individuals can see how the decisions are made.

Note that our proposed crowdsourcing process is much more open and transparent than the chairman of a congressional committee sending private letters to corporations and trade associations asking them to suggest regulations to undo. <sup>20</sup> Moreover, the RIC process allows us to wall off some progressive values that we won't compromise, and make equal time for other groups and individuals.

### **ACTING ON THE COMMISSION'S FINDINGS**

The Commission should sort through the suggestions, examine the evidence in a serious way, and hold public hearings, as the BRAC commissions did. Then it should vote on a package of 15-20 regulatory changes that meet the original specific goals. All deliberations of the Commission must be public, to ensure public confidence in

the specific judgments that the members will ultimately make in recommending regulatory changes.

The package of regulatory changes is then subject to congressional and presidential approval. Ideally, the congressional vote should be a fast-tracked, up-or-down vote, with no room for breaking the package apart. As in the case of BRAC, this will guarantee a single vote for or against regulatory improvement, rather than individual regulations.

### WHY AGENCY SELF-REVIEW BY ITSELF IS NOT ENOUGH

The RIC, designed to improve or repeal existing executive branch regulations which were originally authorized by Congress, is a bit of a hybrid itself. Designing the authorizing legislation and getting it through Congress will not be a simple process. As a result, many people will ask why the process of regulatory improvement can't simply be done within the executive branch.

Indeed, agency self-review is exactly what President Obama calls for in his executive order:

To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.

In theory, this "retrospective analysis" approach makes sense: the simplest way to identify 'weak' regulations is to redo the original cost-benefit analysis, using actual outcomes and costs rather than anticipated ones. In theory (once again), this analysis should tell us which regulations have outperformed their original expectations and which ones have fallen short.

However, agency self-review has been tried repeatedly for the past 30 years, with limited success. According to a 2007 GAO report:



Every president since President Carter has directed agencies to evaluate or reconsider existing regulations. For example, President Carter's Executive Order 12044 required agencies to periodically review existing rules; one charge of President Reagan's task force on regulatory relief was to recommend changes to existing regulations; President George H.W. Bush instructed agencies to identify existing regulations to eliminate unnecessary regulatory burden; and President Clinton, under section 5 of Executive Order 12866, required agencies to develop a program to "periodically review" existing significant regulations. In 2001, 2002, and 2004, the administration of President George W. Bush asked the public to suggest reforms of existing regulations.<sup>21</sup>

Agency self-review has turned out to be very difficult to do, for a combination of institutional and technical reasons. First, many regulations are directly mandated by Congress, limiting the executive branch's ability to change them.

Second, doing a cost-benefit analysis with actual outcomes and costs requires a sizable and expensive data collection effect. In fact, the cost of a retrospective analysis can be much higher than the cost of the original cost-benefit study.

That limits the number of regulations that can be evaluated in this way. (Ironically, one reason why

The RIC will take a principled approach to evaluating and pruning existing regulations ... and do so in a manner that ensures we protect public health, safety, and the environment.

retrospective analysis is so rare and expensive is that it often requires permission from the OMB to collect the necessary data, under the Paperwork Reduction Act of 1980.)

Perhaps most important, it's very difficult for an agency to evaluate its own regulations and come

up with a different conclusion, as the 2007 GAO report found that:

[A]gencies' reviews more often attempted to assess the effectiveness of their implementation of the regulation rather than the effectiveness of the regulation in achieving its goal.

Agency self-review is not a bad idea. But it needs to be combined with an outside review like the RIC process to be truly effective.

### **CONCLUSION**

The hallmark of a dynamic society is that it is able to take effective action, when necessary. The U.S., through no fault of its own, finds itself heading down the path of slowing innovation and increased ossification. President Obama's executive order is a good first step—but it's time to take steps to reinvigorate the economy while protecting the values that we hold important.

#### **ENDNOTES**

- People don't usually think of the Department of Homeland Security as a regulatory agency, but as part of its mission it has issued new rules for travel, finance, immigration, education, establishing identity, and other areas of the economy.
- 2 We will discuss later in the paper whether RIC should be temporary or permanent.
- 3 See, for example, my policy memo "Why the Jobs Crisis Is Actually an Innovation Crisis," Progressive Policy Institute, March 2010.
- 4 A similar set of criteria (with the notable absence of encouraging innovation) is set forth is the first sentence of President Obama's January 18, 2011 executive order: "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."
- 5 This provision differs from the 'silent approval' process of the BRAC recommendations. "Running For Cover: The Brac Commission as a Model for Federal Spending Reform," Jerry Brito, Mercatus Center, May 2010
- 6 When agencies analyze the costs and benefits of a new regulation, they have historically rarely accounted the regulation's impact on innovation. The problem starts at the top: President Obama's Office of Information and Regulatory Affairs barely mentions 'innovation' in its latest report on the benefits and costs of federal regulations. This might change with President Obama's latest executive order.
- 7 "To revive the economy, pull back the red tape," Mark Warner, Washington Post, December 13, 2010.
- 8 See, for example, my 2004 book Rational Exuberance.
- 9 "A Decade of Growth in the Regulators' Budget," Susan Dudley & Melinda Warren, May 2010.
- 10 In 2004, I wrote in Rational Exuberance: "A broad-brush action against stock options seems distinctly counterproductive, at a time when the U.S. is concerned about competing against China and India. The phrase 'cutting off your nose to spite your face' comes to mind."
- 11 "U.S. Tries to Make It Easier to Wiretap the Internet," New York Times, September 27, 2010
- 12 See my forthcoming piece, "Biosciences and the Long-term Economic Recovery."
- 13 A recent industry-supported survey of medical technology companies found that "it takes significantly longer to navigate U.S. regulatory processes than it does to complete European approvals for the same products." "FDA Impact on U.S. Medical Technology Innovation," Josh Makower, Aabed Meer, and Lyn Denend, November 2010.
- 14 "2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," Office of Information and Regulatory Affairs.
- 15 To put it another way, the impact of regulation on the economy may be subject to threshold effects.
- 16 In an Uncertain World, Robert Rubin, 2003.
- 17 See "The Independent Payment Advisory Board", Congressional Research Service, November 2010, available at http://assets.opencrs.com/rpts/R41511\_20101130.pdf
- 18 The first base-closing commission, the 1988 Carlucci Commission, was purely a creation of the Department of Defense.
- 19 "Running For Cover: The Brac Commission as a Model for Federal Spending Reform," Jerry Brito, Mercatus Center, May 2010.
- 20 "Darrell Issa asks business: Tell me what to change," Politico, Jan 3, 2011, available at http://www.politico.com/news/stories/0111/46995.html
- 21 Government Accountability Office. 2007. Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews Report No. GAO- 07-791.

### **About the Progressive Policy Institute**



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