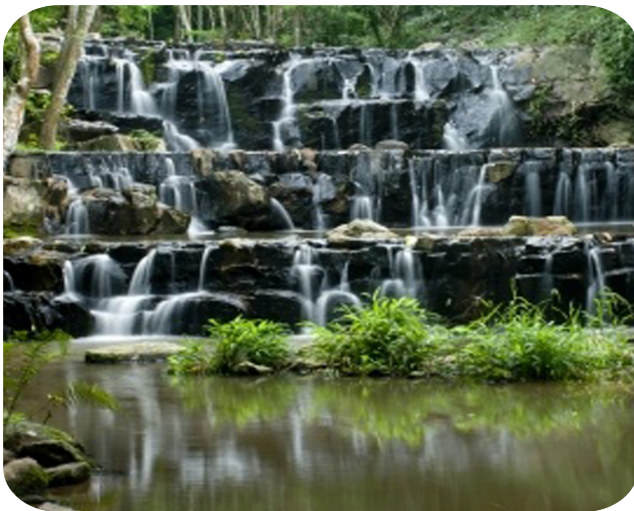


# ALEC's Latest Trojan Horse:

## *The Attack on Standards and Safeguards Moves to the States*



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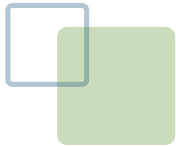
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# **ALEC's Latest Trojan Horse**

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**The Attack on Standards and  
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# EXECUTIVE SUMMARY

In recent years, special interests and their allies in Congress have pushed a number of dangerous proposals to “reform” the rulemaking process to undermine the standards and safeguards that guarantee clean air and water, safe workplaces, healthy food, and safe medicines. Now, these same special interests are pushing similar proposals in the states.

Many of these so-called “reforms” expand or institutionalize requirements that delay and weaken important regulations and increase the already outsized influence of corporations in setting environmental, food, consumer, and worker safety policies. Two key policy changes these anti-regulatory interests support include: 1) increasing the power of a politicized centralized review body with the authority to second-guess the standards proposed by scientists and substantive experts; and 2) requiring new, more extensive economic analyses of the costs of new standards. Moratoriums on new rules are also being promoted in the states.

The anti-regulatory initiatives in the states have been largely driven by the American Legislative Exchange Council (ALEC), a network of corporate interests and their allies in state legislatures. ALEC promotes “model” state bills that cover everything from the privatization of prisons and foster care services to environmental rollbacks. ALEC is pushing model state legislation that would make it harder for state public health, environmental, and labor agencies to issue new health and safety standards. In addition, ALEC has championed efforts to prohibit local governments from adopting standards stronger than those on the state or federal levels.

The Uniform Law Commission (ULC), a group of state government-appointed commissioners whose mission is to make state administrative processes more uniform, has also proposed model state administrative policies that would increase procedural requirements and reviews and make it harder for agencies to issue rules.

Experience at the federal and state level has shown that centralized regulatory review can delay rules, increase uncertainty for the public and regulated community, and politicize rulemaking. Such reviews can have a chilling effect on agencies’ willingness to propose new standards and

rules. It puts the decisions in the hands of politicians, not experts, who may base their decisions on political, partisan, or monetary considerations rather than concern for public health and safety.

Mandatory cost-benefit analyses can be expensive and time-consuming; they are often based on limited, inadequate data. Codifying cost-benefit analysis into state law removes agency discretion and mandates a one-size-fits-all approach ill-suited for many health and safety rules. Cost-benefit analyses require agencies to create artificial prices for unquantifiable benefits and exclude important fairness and morality considerations. As a result, agencies are forced to spend precious resources collecting data for analyses that often turn out to be incomplete or unreliable.

Initiatives to freeze the regulatory process or prohibit new rules altogether obviously reduce the safeguards protecting the public, and moratoriums instituted by state governors may interfere with authority that has been delegated to regulatory agencies by state legislatures.

States should be on the lookout for these proposals and oppose any regulatory process changes designed to delay, weaken, or block important agency actions. Where existing regulatory analyses and review requirements already impede state agencies' ability to promptly issue and update standards, states should consider reforms that would address issues of delay, political and special interest interference, and inadequate transparency in the regulatory process. These positive policy changes could include:

- *Curbing undue political interference in rulemaking*  
States should ensure that members of regulatory review bodies or committees disclose any conflicts of interest.
- *Limiting the agency actions that are subject to centralized regulatory review*  
Review bodies have struggled to keep up with requirements to review all rules. Even if the review body has the discretion to select the rules it will review, there may be a tendency to assert review authority over a wide range of agency actions. Narrowing the scope of the review body's authority can help conserve scarce resources.

- *Ensuring that centralized regulatory review does not result in unnecessary delay*  
It is important that state agencies be allowed to move forward with rules without being subject to unnecessary and excessive reviews. States could prescribe time limits on reviews to prevent a centralized review body from holding up agency actions.
- *Reducing reliance on cost-benefit analysis*  
Where agencies are required to conduct or rely on cost-benefit analyses, those analyses should only be informative, not determinative. States should acknowledge the limitations of cost-benefit analysis and the importance of considering qualitative factors in decision making. States should also explicitly endorse deference to the regulatory determinations of expert agencies.
- *Increasing transparency in the regulatory review process*  
Transparency can ensure accountability in the review process. The public should be informed of regulatory delays and any changes that are made to an agency's rule or analysis during review. States should require review bodies and agencies to document these changes, as well as any communications they have with outside parties concerning the rule's cost-benefit analysis or substance.

The legislative models that ALEC has been promoting are being sold as “reasonable” regulatory reforms. In fact, these pieces of legislation serve as a Trojan horse designed to quietly shut down state efforts to establish public protections that ensure all their residents enjoy safe and healthful lives. Even the model state procedures endorsed by the Uniform Law Commission would unnecessarily complicate and obstruct the regulatory process, making it more difficult to issue important rules. State legislators need to close and bar the gates against these dangerous proposals.



# INTRODUCTION

## *The Assault on the U.S. Regulatory System*

In recent years, special interests and their allies in Congress have pushed a number of dangerous reform proposals that would undermine the standards and safeguards guaranteeing clean air and water, safe workplaces, healthy food, and safe medicines. These special interests have pushed dozens of congressional proposals to “reform” the rulemaking process. Had they passed, these dangerous pieces of legislation would have made it harder for agencies to upgrade our health and safety standards despite widespread support for public safeguards. Happily, none did.

*Many of these so-called “reforms” expand or institutionalize requirements that delay and weaken important standards and increase the already outsized influence of corporations in setting environmental, food, consumer, and worker safety policies.*

However, these same special interests are now shopping similar proposals in the states.

These “reform” proposals run counter to the desires of the American public. A majority of voters polled in 2011 believed government regulations protect people from

physical harm and prevent disasters;<sup>1</sup> a plurality supported additional regulation of our air and water, the nuclear industry, the safety of workplaces, and food and drugs produced in the U.S.<sup>2</sup> A 2012 national survey of small business owners documented majority support for policies that ensure environmental health, food safety, and worker protection.<sup>3</sup> Nonetheless, a surge of anti-regulatory measures that threaten our system of public protections have been introduced in Congress since 2010.

Many of these so-called “reforms” expand or institutionalize requirements that delay and weaken important standards and increase the already outsized influence of corporations in setting

1 Summary of Lake Research Partners 2011 Regulatory Research, Coalition for Sensible Safeguards, <http://www.sensible safeguards.org/assets/documents/css-lrp-summary.pdf>.

2 *Id.*

3 Opinion Survey, Small Business Owners' Opinions on Regulations and Job Creation, commissioned by American Sustainable Business Council, Main Street Alliance, and Small Business Majority (Feb. 1, 2012), <http://mainstreetalliance.org/wp-content/uploads/2012/02/report-small-business-regulations-economy-Feb-1-2012.pdf>.



environmental, food, consumer, and worker safety policies. Two of the key reforms these anti-regulatory interests support include: giving more opportunities for a politicized central review body to second-guess the standards proposed by scientists and substantive experts from executive agencies; and requiring more extensive and detailed analyses of the costs of new standards.

At the federal level, the central review body for rules of executive branch agencies is the Office of Information and Regulatory Affairs (OIRA), a unit in the White House Office of Management and Budget. This unit is widely recognized as a “politicized” agency – i.e., both Democratic and Republican presidents can and have used it to delay and/or weaken rules and standards developed by individual agency experts.<sup>4</sup> These actions often appear to be the result of political pressure from the corporations or industries that are being regulated. But the actions of OIRA are largely shielded from public scrutiny, and the current centralized review process at the federal level is a black box.

A number of needed health and safety rules have been delayed for years by OIRA, including rules that would protect workers from cancer-causing substances like silica or require rearview cameras in new cars that would help prevent drivers from backing over children. When rules do make it through the centralized review process, they have often been weakened or modified to appease the regulated industry.<sup>5</sup>

OIRA reviews focus on calculations of the costs of compliance compared to the benefits of rules. Information on the cost of compliance is almost always provided by the regulated businesses, and retrospective studies have shown the *actual* costs to business regularly end up being much lower than these *estimated* costs.<sup>6</sup> In these analyses, the benefits to human health and welfare are “monetized” – a practice that many people object to on ethical grounds – and many benefits cannot be reduced to a dollar value. A disproportionate and exaggerated focus on costs impedes the ability of regulatory agencies to issue more comprehensive protective standards and safeguards for the health and well-being of people.

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4 See U.S. Government Accountability Office, Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews (2009) (finding that most reviews of draft rules resulted in changes), available at <http://www.gao.gov/new.items/d09205.pdf>; David M. Driesen, *Is Cost-Benefit Analysis Neutral?* (Ctr. for Progressive Reform, White Paper 507, 2005), available at [http://www.progressivereform.org/articles/CBA\\_Driesen\\_507.pdf](http://www.progressivereform.org/articles/CBA_Driesen_507.pdf); Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 2011), available at [http://www.progressivereform.org/articles/OIRA\\_Meetings\\_1111.pdf](http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf).

5 See Driesen, *supra* note 4; Steinzor, *supra* note 4.

6 See Ruth Ruttenberg and Associates, Inc., *Not Too Costly, After All: An Examination of the Inflated Cost-Estimates of Health, Safety and Environmental Protections* (2004), <http://www.citizen.org/documents/ACF187.pdf>.

Some of the federal legislation that has been proposed in the past three years is an obvious attempt to undermine environmental and safety regulations; other legislation clearly aims to diminish agencies' rulemaking authority. And some proposals are seemingly innocuous measures that claim they will "improve" the regulatory process. But these process revisions would have a destructive effect: a slower, less effective system of setting new rules and standards and a review process that would provide regulated entities with numerous opportunities to challenge and defeat rules they oppose.

## THE INTERESTS BEHIND THE DRIVE FOR "SAFEGUARD SHUTDOWN" LEGISLATION AT THE STATE LEVEL: ALEC AND ULC

### *American Legislative Exchange Council (ALEC)*

*The American Legislative Exchange Council (ALEC) promotes "model bills" to state legislators that encourage them to rewrite state laws in a way that directly benefits large corporations. ALEC's corporate backers have contributed more than \$370 million to state elections. ALEC is pushing model state legislation that would make it harder for state public health, environmental, and labor agencies to issue new health and safety standards.*

The American Legislative Exchange Council (ALEC) is corporate America's conduit to state legislatures. The organization promotes "model bills" to state legislators that encourage them to rewrite state laws in a way that directly benefits the large corporations that fund ALEC. Through its network of business-friendly state legislators, ALEC has promoted hundreds of legislative proposals on a range of subjects, from the privatization of prisons and foster care services to environmental rollbacks. ALEC's corporate backers have contributed more than \$370 million to state elections, and on average, states have adopted over 100 laws a year based on ALEC's model bills.<sup>7</sup>

<sup>7</sup> Gordon Lafer, The Legislative Attack on American Wages and Labor Standards, 2011–2012 (Economic Policy Institute Briefing Paper, 364, Oct. 31, 2013), <http://s4.epi.org/files/2013/EPI-Legislative-Attack-on-American-Wages-Labor-Standards-10-31-2013.pdf>; Legislating Under the Influence: Money, Power, and the American Legislative Exchange Council, Common Cause (2011), <http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/MONEYPowerandALEC.PDF>.

ALEC is pushing model state legislation that would make it harder for state public health, environmental, and labor agencies to issue new health and safety standards. In addition, ALEC has championed efforts to prohibit local governments from adopting standards stronger than those on the state or federal levels, and it has encouraged states to pass resolutions opposing federal regulation. For example, ALEC's "Optional Medicaid Benefits Evaluation Act" seeks to limit a state's ability to expand health care offerings to low-income residents, and ALEC resolutions support privatizing Medicare, limiting the Food and Drug Administration's authority over tobacco and drugs, and prohibiting federal regulation of harmful carbon dioxide emissions.<sup>8</sup>

A new report from the Economic Policy Institute sheds light on ALEC attacks on wage and labor standards.<sup>9</sup> ALEC's broad and troubling deregulatory agenda includes abolishing minimum-wage and prevailing-wage laws; advocating for cuts to Social Security, unemployment insurance, and food stamps; and supporting efforts to block union organizing. According to the report, "ALEC receives money from energy companies and lobbies against environmental controls; it receives money from drug companies and advocates prohibiting cities from importing discounted drugs from Canada; and it received money from Coca-Cola and lobbied against taxes on sugary soft drinks."<sup>10</sup>

## *The Uniform Law Commission*

The Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL), is an association of commissioners appointed by state governments to draft uniform state statutes in a variety of areas. The ULC is recommending that states enact the revised Model State Administrative Procedure Act (APA) that it approved in 2010.<sup>11</sup> The Model State APA is intended to make state administrative processes more uniform and contains a number of useful reforms. However, it also includes controversial provisions that would increase procedural requirements and reviews, make it harder for agencies to issue rules, and undermine important protections.

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8 Factsheet, ALEC's Legislative Agenda on Health Care, Ctr. for Media and Democracy, [http://alecexposed.org/w/images/f/f2/ALEC\\_on\\_Health\\_Care.pdf](http://alecexposed.org/w/images/f/f2/ALEC_on_Health_Care.pdf).

9 Lafer, *supra* note 7, at 9.

10 *Id.*

11 Revised Model State Administrative Procedure Act, National Conference of Commissioners on Uniform State Laws (Oct. 15, 2010), [http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf). No states have enacted the bill, but Pennsylvania introduced it in 2013. See Uniform Law Commission, <http://www.uniformlaws.org/Act.aspx?title=State%20Administrative%20Procedure%20Act,%20Revised%20Model>.

*The Uniform Law Commission is an association of commissioners appointed by state governments to draft uniform state statutes in a variety of areas. The ULC is recommending that states enact the revised Model State Administrative Procedure Act (APA) that it approved in 2010. This includes controversial provisions that would increase procedural requirements and reviews, make it harder for agencies to issue rules, and undermine important protections.*

## DAMAGING POLICIES BEING PROMOTED IN THE STATES

### *Centralized Review*

Federal and state health and safety statutes assign expert agencies the responsibility for implementing the law. For example, if a state wants to reduce public exposure to toxic chemicals, it can require a state agency with expertise on toxic substances to issue regulations that identify chemicals of concern in consumer products. In many states, an agency can only adopt a new standard after providing a notice to the public that it intends to issue a new rule and providing

*Adding another stage to the process – a central review body with the authority to review and potentially reject rules – could allow political considerations to overrule the scientific judgment of experts that went into the agency's development of the standard or safeguard in the first place.*

an opportunity for the public to comment on the proposed rule.<sup>12</sup> Adding another stage to the process – a central review body with the authority to review and potentially reject rules – whether the review is by an executive branch official or a legislative committee – could allow political considerations to overrule the scientific judgment of experts that went into the agency's development of the standard or safeguard in the first place.

<sup>12</sup> For example, Washington State requires notice and comment. See Washington State Administrative Procedure Act, available at <http://apps.leg.wa.gov/RCW/default.aspx?cite=34.05>.

Many states have adopted some kind of regulatory review process. Some simply ensure that executive branch officials outside a rulemaking agency have the opportunity to review and provide input on standards and safeguards. Other schemes give elected officials significant control over agencies, allowing them to second-guess agency expertise and delay, weaken, and even kill important agency actions.

At the very least, these centralized review requirements can exhaust scarce resources and prolong the rulemaking process. These delays increase the opportunities for special interests to interfere with regulatory actions. At the most extreme, they can hold agency rules hostage until they are approved by the legislature and/or the governor, leaving important protections subject to political interference and posturing.

States have generally adopted two types of mechanisms: legislative branch reviews and executive branch reviews, usually conducted by a state's governor, the attorney general, or a separate rule review office.<sup>13</sup> Both types of review raise problems; states should be wary of adopting expansive regulatory review processes.

Centralized review undermines the rulemaking process in several ways:

- It wastes time and resources by requiring redundant reviews after agency action has been authorized or mandated by law.
- It politicizes the process by allowing politicians with their own priorities to obstruct rules.
- It allows reviewers who lack substantive knowledge about a rule to second-guess the careful work of agency experts.
- It delays rules and can permanently stop new rules through simple inaction on the part of the review body.

### *Legislative Review*

Several types of legislative review provide an opportunity for undue political influence over an agency responsible for implementing a law. It is important to note that state legislatures have the power to change a rule or modify an agency's authority by simply enacting new laws. They may

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<sup>13</sup> Jason A. Schwartz, 52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemakings, Institute for Policy Integrity 19-20 (2010) [hereinafter Schwartz], available at [http://policyintegrity.org/files/publications/52\\_Experiments\\_with\\_Regulatory\\_Review.pdf](http://policyintegrity.org/files/publications/52_Experiments_with_Regulatory_Review.pdf).

choose the more indirect route of changing the rulemaking process to weaken or eliminate the implementation of a law that has strong public support.

A legislature may establish systematic review requirements to give itself more active oversight of rulemaking. Legislative review may be coupled with veto powers.<sup>14</sup> In some extreme cases, a legislature must actively approve a rule before it can go into effect.<sup>15</sup> Legislative veto powers undermine the entire regulatory process and may encourage regulated entities to simply concentrate their resources and efforts on lobbying the legislature to veto a rule instead of participating in the process of determining appropriate standards to protect the public's health and safety.

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Legislative reviews can deprive the public of significant health benefits and allow politics and special interests to overrule the public interest. For example, in Kentucky, the beverage industry used the legislative review process to delay and weaken new school nutrition rules to reduce the size of soda bottles in school vending machines,<sup>16</sup> despite a large body of research showing that reducing the intake of sugary drinks improves student health, reduces childhood obesity, and saves health care costs over time.<sup>17</sup> In West

Virginia, the legislature let the coal industry redraft rules on water quality, abandoning the proposals carefully negotiated by agency experts.<sup>18</sup>

### *Executive Review*

Governors, like the president, already wield significant executive controls over administrative agencies. Requiring additional review of rules by other state executive branch officials may only

<sup>14</sup> *Id.* at 17.

<sup>15</sup> The Regulations from the Executive In Need of Scrutiny (REINS) Act of 2011, H.R. 10; *see also* Press Statement, Coalition for Sensible Safeguards, Oct. 13, 2011, available at <http://www.sensible safeguards.org/assets/documents/css-statement-reins-act-is-radical-threat-to-public-protections.pdf>.

<sup>16</sup> Schwartz, *supra* note 13, at 241-42.

<sup>17</sup> *See* Roberta R. Friedman & Kelly D. Brownell, Sugar-Sweetened Beverage Taxes, Yale Rudd Ctr. (Oct. 2012), [http://www.yale-ruddcenter.org/resources/upload/docs/what/reports/Rudd\\_Policy\\_Brief\\_Sugar\\_Sweetened\\_Beverage\\_Taxes.pdf](http://www.yale-ruddcenter.org/resources/upload/docs/what/reports/Rudd_Policy_Brief_Sugar_Sweetened_Beverage_Taxes.pdf) (noting studies that estimate that reductions in consumption would reduce obesity, diabetes, and health care costs).

<sup>18</sup> Schwartz, *supra* note 13, at 241-42.

serve to delay or quash rulemakings. But governors in some states have followed the federal model and created a central review authority.

In a number of states, including Michigan<sup>19</sup> and New Jersey, governors have created their own versions of OIRA. In 2010, New Jersey Governor Chris Christie issued a series of executive orders and transition plans, creating a “regulatory czar” in the Lieutenant Governor’s Office with veto power over regulations and establishing a policy to scale back any state standards that were higher than federal minimums.<sup>20</sup> Citizens and public interest groups like Public Employees for Environmental Responsibility (PEER) criticized the state executive orders as rollbacks of crucial public health protections.

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## *Regulatory Review Proposals that Obstruct Public Protections*

### *ALEC Model Legislation*

In 2012, ALEC approved and began pushing model state legislation, the Regulatory Review and Rescission Act, which would make it harder for state regulatory agencies to issue rules and would give a governor the authority to rescind existing rules.<sup>21</sup>

<sup>19</sup> Exec. Order No. 2011-5, State of Michigan, Feb. 23, 2011, available at [http://www.michigan.gov/documents/snyder/2011-5\\_346312\\_7.pdf](http://www.michigan.gov/documents/snyder/2011-5_346312_7.pdf).

<sup>20</sup> Press Release, Public Employees for Environmental Responsibility (PEER), Mar. 15, 2010, available at <http://www.com-mondreams.org/newswire/2010/03/15-0>; see also James Goodwin, 50 OIRAs? Another State (New Jersey) Drinks the Regulatory Review Kool-Aid, CPR Blog (Mar. 29, 2010), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=AA143159-032B-2481-9C979C9D4116C359>.

<sup>21</sup> American Legislative Exchange Council, Regulatory Review and Rescission Act (Sept. 2012), available at <http://www.alec.org/model-legislation/regulatory-review-and-rescission-act/>.



This model legislation also requires the state budget office to conduct extensive cost-benefit analyses for agency rules and submit the results to the governor and the relevant oversight committee for review.

For each rule, the governor has the power to prescribe the form of cost-benefit analysis required (i.e. what goes into the analysis) and to rescind the rule if the state budget office determines that the costs exceed the benefits, or if there is an adverse impact on employment. This essentially grants the governor unfettered authority to craft analyses that can justify eliminating rules, based overwhelmingly on the economic impacts on business. In essence, the governor decides whether or not existing law will be enforced.

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ALEC is also pushing a model state resolution that supports the Regulations from the Executive In Need of Scrutiny (REINS) Act, a federal bill that requires that Congress approve any standard or safeguard within 70 legislative days.<sup>22</sup> If both chambers fail to meet this deadline, the rule in question would be “tabled,” essentially killing it. This extreme form of legislative regulatory review would completely undermine an agency’s ability to implement existing laws; it essentially allows one chamber of the legislature to stop the enforcement of a law previously passed by both chambers and signed by the executive.

#### *The Uniform Law Commission (ULC) Model State Administrative Procedure Act*

The model legislation proposed by the ULC would require agencies to conduct extensive cost-benefit analyses and submit them to a centralized state regulatory review agency similar to OIRA. It would establish a legislative rules review committee to examine existing rules and newly adopted rules. The committee could question an agency’s regulatory analysis and substitute its own

<sup>22</sup> American Legislative Exchange Council, Resolution in Support of the Regulations from the Executive In Need Of Scrutiny (REINS) Act (July 2012), available at <http://www.alec.org/model-legislation/resolution-in-support-of-the-regulations-from-the-executive-in-need-of-scrutiny-reins-act/>.

judgment of the impacts of the rule for the scientific and expert analyses generated by agencies. What is more, the committee could disapprove a new rule or propose changes to a disapproved rule within 30 days of receiving it. If the legislature defers to the committee and sustains its disapproval of the rule with a joint resolution, the rule is null and void.<sup>23</sup> This essentially creates a way to “re-legislate” the enforcement of existing law. Review committee politics could have a chilling effect on rulemaking because an agency could feel pressured to prematurely withdraw an adopted rule out of concern that the committee would disapprove it or demand unwise changes.<sup>24</sup>

These reviews would allow special interests to lobby their legislatures to kill a rule after a regulatory agency has synthesized expert knowledge, invested in impact studies, and held public hearings to gather input from citizens. This kind of legislator involvement would pit campaign contributors against scientific expertise.<sup>25</sup>

## Cost-Benefit Analysis

Cost-benefit analysis is a tool used to help compare the pros and cons of any decision. Businesses often use cost-benefit analysis as a market tool to weigh the risks and rewards of a particular

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course of action. Since the 1980s, cost-benefit analysis has been widely used by federal agencies to determine whether the benefits to public health and safety of a new rule or standard outweigh or justify the costs to affected industry.

In theory, this sounds like a reasonable, objective endeavor. We all make simple cost-benefit calculations in our lives. Should I drive the scenic route, which takes two hours, or take

<sup>23</sup> Some state constitutions require the legislature to first present the joint resolution to the governor for approval. See Revised Model State Administrative Procedure Act, *supra* note 11, at 107. There were concerns about giving the legislative review committee the power to suspend rules, but the drafters decided that the option was necessary for legislatures that did not meet year-round. See Schwartz, *supra* note 13, at 37.

<sup>24</sup> Section 703(e) of the model allows an agency to withdraw the adoption of a rule before the rule's effective date. Such a withdrawal terminates the adoption of the rule but does not prevent the agency from initiating a new rulemaking for similar adoption. Revised Model State Administrative Procedure Act, *supra* note 11, at 107.

<sup>25</sup> Lobbying efforts could incentive legislators to make purely political decisions. See Schwartz, *supra* note 13, at 18-19 (noting that stakeholders may focus on lobbying members of the legislature rather than participating in the rulemaking process and acknowledging that broad legislative reviews could result in “arbitrary actions motivated by unchecked political considerations”).

the highway, pay a \$5 toll, but save 45 minutes in travel time? Cost-benefit analysis can inform decisions about which public policies are worth pursuing and help decision makers compare alternative policy choices.

But requiring that all policy decisions pass a rigid cost-benefit test makes no sense. Some public policy decisions simply should not be monetized. Assigning dollar values to a person's health or life or to environmental damage raises ethical questions and technical problems. Moreover, prospective regulatory cost estimates are often exaggerated because they are based on speculative predictions from regulated industries that do not account for innovation.<sup>26</sup> And, in practice, developing these estimates is very time consuming, expensive, and diverts resources that could be used for furthering public health and welfare efforts.

*In Priceless: On Knowing the Price of Everything and the Value of Nothing, Frank Ackerman and Lisa Heinzerling concluded that "cost-benefit analysis promotes a deregulatory agenda under the cover of scientific objectivity."*

The standards, rules, and safeguards we establish define who we are – or aspire to be – as a nation and should not be boiled down to a dollars-and-cents calculation. In fact, many established federal environmental and worker safety laws actually prohibit the use of cost-benefit analysis as the determining factor in setting public protection standards for this reason.

Nevertheless, federal executive agencies have been required to conduct cost-benefit analyses (even when laws prohibit consideration of costs as a factor in regulatory decisions) for more than three decades, and cost-benefit analysis has an increasing presence in the federal regulatory system.<sup>27</sup> Instead of being a neutral test for determining impacts, it has served as an anti-regulatory tool to weaken standards.<sup>28</sup> In *Priceless: On Knowing the Price of Everything and the Value of Nothing*, Frank Ackerman and Lisa Heinzerling concluded that "cost-benefit analysis promotes a deregulatory agenda under the cover of scientific objectivity."<sup>29</sup>

<sup>26</sup> See Thomas O. McGarity, *Estimating Regulatory Costs*, CPR Perspectives Series, <http://www.progressivereform.org/perspectives/matingReg.cfm>.

<sup>27</sup> Executive Order 12866, issued by President Clinton, established the current cost-benefit analysis requirements and has been reaffirmed by President Obama. Exec. Order No. 12866, 58 FR 51735 (Oct. 4, 1993), available at [http://www.reginfo.gov/public/jsp/Utilities/EO\\_12866.pdf](http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf).

<sup>28</sup> See Driesen, *supra* note 4; Steinzor, *supra* note 4.

<sup>29</sup> Frank Ackerman & Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* 9 (New Press 2004) [hereinafter *Priceless*].

Business opponents of environmental, worker safety, and consumer safeguards and their political allies are now seeking to expand reliance on cost-benefit analysis at the state level. By adopting a strict cost-benefit analysis mandate, states will force agencies to rely on a tool that significantly weakens critical protections when misapplied.

## *Economic Impact Statement Proposals*

### *ALEC Model Imposes Expansive Analysis and Review Requirements*

ALEC is urging state legislatures to adopt expansive economic analysis and regulatory review requirements.

*The Regulatory Review and Rescission Act*, discussed above, requires extensive cost-benefit analyses along with centralized review of agency actions. For a proposed rule with a potential impact of \$500,000 or more, the economic analysis conducted by the state budget office would replace all other fiscal analyses, including those carried out by the regulatory agency. This means the economic impact on business, and not the protection of the public or the environment, could be the dominant policy consideration. The ALEC proposal goes even further and requires the state budget office to conduct an analysis of the actual costs and benefits of an existing rule that covers the first three years of the rule's implementation. The cost-benefit analysis must consider "any verified data provided voluntarily by interested parties" and fails to take into account benefits that have not yet been realized.

*The Regulatory Review and Rescission Act would require an economic analysis that could make the economic impact on business, and not the protection of the public or the environment, the dominant policy consideration.*

In addition, *ALEC's Model Economic Impact Statement Act*<sup>30</sup> would require state environmental agencies to, among other things, certify that every new regulation is the most cost-effective method for achieving the stated purpose. Each Economic Impact Statement would have to detail both the short-term and long-term economic effects of *any* rule. An agency could be caught in an infinite loop of analyzing alternatives to the

<sup>30</sup> American Legislative Exchange Council, *Economic Impact Statements Act*, Sourcebook of American State Legislation (1995), available at [http://www.alecexposed.org/w/images/6/6d/3H0-Economic\\_Impact\\_Statement\\_Act\\_Exposed.pdf](http://www.alecexposed.org/w/images/6/6d/3H0-Economic_Impact_Statement_Act_Exposed.pdf).

rule proposed by regulated businesses that rely on speculative and unreliable estimates of long-term effects. A rule would have to go to the state legislature for approval before it could move forward.

These endless, unrealistic analytical requirements are clearly designed to make it harder for agencies to issue standards.

#### *ULC Model Also Requires Extensive Cost-Benefit Analysis*

The ULC Model State Administrative Procedure Act also requires extensive cost-benefit analysis. Agencies would have to prepare a regulatory impact analysis for all proposed rules with an estimated economic impact above a certain dollar amount (to be specified by each state).

*Agencies generate rules to implement the laws passed by the legislature. A blanket moratorium gives cover to those who want to weaken agency enforcement of existing legislation that is too popular with the public to repeal. In passing a moratorium, the legislature is essentially sabotaging legislation that has already been passed by prohibiting executive branch agencies from making rules that implement and enforce those laws.*

Under the Model State Administrative Procedure Act, an agency must include an analysis of the costs and benefits of a proposed rule, the costs and benefits of alternatives, and a determination of whether the rule's benefits justify its costs. The model's broad cost-benefit analysis super-mandate is likely to overwhelm agencies and exhaust already scarce resources, especially if a state sets a low dollar-amount threshold for review that triggers the requirement for a significant number of rules.

The model law would provide for judicial review of agencies' economic analyses, creating the possibility of lengthy legal challenges by those seeking to stall or invalidate rules. Few judges have the scientific or technical expertise to sort through and evaluate the adequacy of extensive agency analyses.

Because of similar concerns, regulatory experts and former federal government officials have argued against writing cost-benefit analysis requirements into law and allowing for judicial review.<sup>31</sup>

## *Regulatory Moratoriums*

Moratoriums on new rules are the most aggressive way to shut down new safeguards. By shutting down the regulatory process, these moratoriums would block, or at the very least delay, important protections.

Agencies generate rules to implement the laws passed by the legislature. A blanket moratorium gives cover to those who want to weaken agency enforcement of existing legislation that is too popular to repeal. In passing a moratorium, the legislature is essentially sabotaging legislation that has already been passed by prohibiting agencies from making rules that implement and enforce those laws.

### *Federal Efforts*

Moratoriums have been considered and rejected by the federal government. Last year, the U.S. House of Representatives passed legislation that would impose a moratorium on all “significant regulatory actions” until the national unemployment rate falls below six percent. With very few exceptions, the moratorium would forbid any steps toward issuing any rule (or updating a current one) expected to have an economic impact of \$100 million or more.

The Senate rejected this bill, and the White House released a “Statement of Administration Policy” threatening to veto the bill, saying it would “undermine critical public health and safety protections, introduce needless complexity and uncertainty in agency decision-making and interfere with agency performance of statutory mandates.”<sup>32</sup> President Obama’s top regulatory official told a congressional committee that “a moratorium would not be a scalpel or a machete,

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31 See, e.g., Sally Katzen, *Why Congress Should Not Codify Cost-Benefit Analysis Requirements*, RegBlog (June 7, 2011), <https://www.law.upenn.edu/blogs/regblog/2011/06/why-congress-should-not-codify-requirements-for-economic-analysis-of-new-regulations.html>; Sidney Shapiro, *Looking in the Wrong Place: Senators Warner and Moran Join House GOP Seeking to Codify Cost-Benefit Analysis, an Erroneous Remedy for Anemic Economic Growth*, CPR Blog (Dec. 29, 2011), <http://progressivereform.org/CPRBlog.cfm?idBlog=8A3735AA-A63E-ED5A-C2315C5505E2D255>.

32 Executive Office of the President, Statement of Administration Policy, H.R. 4078–Regulatory Freeze for Jobs Act of 2012, July 23, 2012, available at [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr4078r\\_20120723.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr4078r_20120723.pdf).



it would be more like a nuclear bomb, in the sense that it would prevent regulations that, let's say, cost very little, and have significant economic or public health benefits.”<sup>33</sup>

### *State Moratoriums*

Regulatory moratoriums at the state level have been driven by both state legislatures and governors. From 2008 to 2011, at least nine states implemented some sort of moratorium driven by the state executive.<sup>34</sup> The governors of North Carolina, Arizona,<sup>35</sup> Michigan, Nevada, and Washington<sup>36</sup> have all issued moratoriums on new rules that last at least one year. Indiana's governor, Mike Pence, issued an executive order in January suspending Indiana's rulemaking process shortly after he was sworn in.<sup>37</sup> His order requires agencies to indefinitely suspend all rulemaking actions for which a notice of intent to adopt a rule under state laws was not already submitted for publication. Many other newly elected governors have suspended rulemaking for a defined period of time in order to transition into the new administration.

In Arizona and North Carolina, state legislatures have extended or passed legislation to support moratoriums issued by the governors.<sup>38</sup> In 2011, moratoriums were proposed in at least a handful of other state legislatures.<sup>39</sup> More moratoriums were proposed in states including California in 2012.<sup>40</sup>

33 See Center for Effective Government, *Vote Imminent on House Bill that Would Shut Down Safeguards* (Jul. 24, 2012), <http://www.foreffectivegov.org/node/12147>.

34 Kathryn A. Watts, *Regulatory Moratoria*, 61 Duke L.J. 1883 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1958283](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1958283).

35 Exec. Order No. 2012-03, State of Arizona, June 26, 2012, available at [http://www.azdeq.gov/function/laws/download/eo\\_2012\\_03.pdf](http://www.azdeq.gov/function/laws/download/eo_2012_03.pdf).

36 Exec. Order No. 10-06, State of Washington, Nov. 17, 2010, available at [http://www.governor.wa.gov/office/execorders/eoarchive/eo\\_10-06.pdf](http://www.governor.wa.gov/office/execorders/eoarchive/eo_10-06.pdf).

37 See Ben Goad, *On first day in office, Gov. Pence imposes regulatory moratorium in Indiana*, The Hill Blog (Jan. 15, 2013), <http://thehill.com/blogs/regwatch/business/277289-on-first-day-in-office-gov-pence-imposes-regulatory-moratorium-in-indiana#ixzz2RtM11o1k>.

38 Exec. Order No. 2010-13, State of Arizona, June 30, 2010, available at <http://azmemory.azlibrary.gov/cdm/singleitem/collec-tion/execorders/id/698/rec/16> (noting that the state legislature continued the moratorium for fiscal year 2010-2011); Exec. Order No. 70, State of North Carolina, Oct. 21, 2010, available at <http://wayback.archive-it.org/org-67/20130104020205/http://www.governor.state.nc.us/NewsItems/ExecutiveOrderDetail.aspx?newsItemID=1518> (banning new rules by cabinet agencies). The North Carolina legislature later passed a law barring agencies from adopting rules that would cost \$500,000 or more in a one-year period, then replaced the law with one that barred state agencies from adopting rules unless they were necessary to serve the public interest. North Carolina General Assembly Session Law 2011-13, available at <http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S22v6.pdf>, and Session Law 2012-187, available at <http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S810v7.pdf>.

39 See Watts, *supra* note 34, at 1918 (noting that bills or resolutions that proposed a moratorium were introduced in Connecticut, Michigan, Oregon, Washington, and West Virginia; some proposed a freeze on regulations within the state, and others encouraged the federal government to issue a moratorium on federal rulemaking).

40 The bill introduced in California did contain an exemption for public health and safety agencies. A.B. 1969, 2011-12 Reg. Sess. (Ca. 2012), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_1951-2000/ab\\_1969\\_cfa\\_20120423\\_103407\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1951-2000/ab_1969_cfa_20120423_103407_asm_comm.html).



In addition to sweeping moratoriums on all rulemaking, some states have considered moratoriums targeting specific rules or agencies. Indiana passed a resolution urging Congress to prohibit the EPA from regulating greenhouse gas emissions and to impose a two-year moratorium on any new air quality regulations. Soon after, 13 other states passed similar resolutions. ALEC promoted these moratoriums on clean air rules.<sup>41</sup>

*Unnecessary external reviews of new rules can cause delays, increase uncertainty for the public and the regulated industry, and politicize rulemaking. Such reviews can have a chilling effect on agencies' willingness to propose new standards and rules. It puts the decisions in the hands of politicians, not experts, who may base their decisions on political, partisan, or monetary considerations rather than concern for public health and safety.*

## WHY STATES SHOULD OPPOSE THESE POLICIES

### *Centralized Review of Agency Actions*

Unnecessary external reviews of new rules can cause delays, increase uncertainty for the public and the regulated industry, and politicize rulemaking. Such reviews can have a chilling effect on agencies' willingness to propose new standards and rules.<sup>42</sup> It puts the decisions in the hands of politicians, not experts, who may base their decisions on political, partisan, or monetary considerations rather than concern for public health and safety.

<sup>41</sup> Jill Richardson, *ALEC Exposed: Warming up to Climate Change*, PR Watch (July 27, 2011), <http://www.prwatch.org/NODE/10914>. See also Christa Marshall, *State Legislatures Pile Onto Anti-EPA Climate Rule Effort*, *ClimateWire* (Apr. 1, 2011), <http://www.nytimes.com/cwire/2011/04/01/01climatewire-state-legislatures-pile-onto-anti-epa-climat-49876.html?pagewanted=all> (noting that several state legislators who sponsored anti-EPA resolutions said the language in the bills came from ALEC).

<sup>42</sup> See Marcus E. Ethridge, *Consequences of Legislative Review of Agency Regulations in Three U. S. States*, 9 *Legis. Stud. Q.* 1 (1984) (finding in a study of three states that legislative review inhibits regulatory vigor).

The problems with executive and legislative reviews have been documented in several states.

- **Ohio**

Ohio's centralized review process is concerned almost entirely with costs and gives little attention to the public health and safety benefits of new rules. Agencies have difficulty complying with even the minimal, cost-centric analytical requirements in the law. Moreover, the process fails to seek out public comment.<sup>43</sup>

- **Michigan**

The state's Office of Regulatory Reinvention has boasted of eliminating 1,200 rules since it was established in 2011 by executive order. The focus on eliminating standards and rules illustrates the unbalanced, deregulatory nature of many "independent" review offices.

- **Indiana**

The attorney general and state Office of Management and Budget both have authority to review rules, but the governor has the "ultimate authority" to approve or veto rules. The governor may disapprove a rule within a 30-day period. According to Indiana state agencies, "Proposed rules do not get very far unless both OMB and the governor's office are in favor of changing the status quo."<sup>44</sup> In this kind of review scheme, politics reigns above the scientific findings and health and safety considerations of agency experts. What is more, an analysis of Indiana's process found that the governor's review lacks transparency.<sup>45</sup>

Indiana's state OMB operates much like the federal OMB in practice. Surveys of state agencies show that OMB often focuses on eliminating burdens to regulated entities and seeks changes to proposed rules if costs exceed benefits, with the central goal of reducing compliance costs.<sup>46</sup>

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<sup>43</sup> Schwartz, *supra* note 13, at 332-33.

<sup>44</sup> *Id.* at 223 n.37.

<sup>45</sup> *Id.* at 224.

<sup>46</sup> *Id.* at 223 n.39.

## Cost-Benefit Analysis

Codifying cost-benefit analysis into state law removes agency discretion and mandates a one-size-fits-all approach ill-suited for many health and safety rules. Mandatory analyses are costly and resource intensive. Agencies are forced to spend precious resources collecting data for analyses that often turn out to be incomplete or unreliable.

When applied to health, safety, and other public protections, cost-benefit analysis is flawed both in theory and in practice. The documented problems with cost-benefit analysis include the following:

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Mandatory cost-benefit analysis can be expensive, time-consuming, and is often based on limited, inadequate data. While calculating the costs of rules to businesses seems straightforward, research has shown that costs are often overestimated.<sup>47</sup> Calculating diffuse, public benefits is a far more complex exercise. The benefits of rules often include protections and quality-of-life improvements that are difficult to assign an accurate dollar value to. Even if an agency does assign a monetary value to a rule's

costs and benefits, these estimates are just that – estimates that may be grossly inaccurate. An in-depth cost-benefit analysis requires an enormous amount of timely, detailed data that agencies and businesses can seldom provide. This lack of consistent, timely, and accurate data undercuts the utility of the approach.

<sup>47</sup> See Frank Ackerman, *The Unbearable Lightness of Regulatory Costs*, 33 Fordham Urb. L.J. 1071 (2005); Thomas O. McGarity, *Estimating Regulatory Costs*, CPR Perspectives Series, <http://www.progressivereform.org/perspestimatingReg.cfm>.

*Cost-benefit analyses often overestimate costs and underestimate benefits.*

Cost-benefit calculations often rely on outdated, inaccurate, and incomplete data, and benefits can be difficult and expensive to quantify and to monetize. As a result, benefits are often undervalued and undercounted. Studies have found that for a number of rules, agencies have been unable to monetize any benefits, and in many others, significant benefits were omitted because they could not be monetized, such as biodiversity improvements and the health benefits from reduced bacterial contamination that would result from regulating stormwater runoff.<sup>48</sup> On the other side of the equation, costs are often overestimated and exaggerated because regulated entities fail to adequately account for ingenuity in efficiently meeting compliance requirements. Businesses may also simply inflate the costs of complying with proposed regulations in order to skew the cost-benefit analysis.<sup>49</sup> Cost-benefit analyses may also undervalue future benefits. The technique uses discounting methods to determine the value of future costs and benefits relative to current ones. When rules aim to prevent risks occurring over a large time span, even catastrophic events in the future can seem trivial.<sup>50</sup> Discounting gives inadequate consideration to the possibility of disasters and irreversible harms, diminishing the value of addressing problems like climate change that could worsen exponentially or cause irreversible destruction.<sup>51</sup>

*Discounting unknown future impacts undermines national policy goals to protect the public from harm, prevent health risks, and preserve resources and protections for future generations.*

Similarly, discounting can shrink the benefits of avoiding future health effects. Diseases caused by exposure to hazardous substances, such as cancer, often have long latency periods; discounting makes these future impacts seem smaller.<sup>52</sup> For example, if regulations on carcinogens would produce health benefits of \$1 million in twenty years, a five percent discount rate reduces these benefits to approximately \$380,000. Discounting unknown future impacts undermines national policy goals to protect the public from harm, prevent health risks, and preserve resources and protections for future generations.

<sup>48</sup> David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. Colo. L. Rev. 335, 376, 397 (2006).

<sup>49</sup> See Ruttenberg, *supra* note 6.

<sup>50</sup> See Priceless, *supra* note 29, ch. 8.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

*Cost-benefit analysis forces agencies to quantify the unquantifiable.*

Cost-benefit analyses require agencies to create artificial prices for unquantifiable benefits and exclude important fairness and morality considerations. How can we assign a monetary value to public policy goals, such as ensuring that lead exposures do not damage a child's intellectual potential?

In some cases, the analysis simply ignores what cannot be counted. A rule that would reduce injuries and deaths from vehicle backup crashes illustrates this weakness. In response to increasing child fatalities caused when drivers accidentally strike individuals behind a vehicle and a subsequent congressional mandate, the National Highway Traffic Safety Administration (NHTSA) developed a proposal requiring auto manufacturers to install backup cameras in new cars. This was intended to help improve visibility and reduce these tragedies. In attempting to conduct a cost-benefit analysis, however, the agency realized that many of the proposal's benefits could not be monetized, such as the fact that most victims of backup crashes are small children and the

*Other times, cost-benefit analysis is not only inappropriate, it is also nonsensical and can lead to offensive results. A stark illustration: the Department of Justice planned to conduct a cost-benefit analysis on a rule designed to reduce the incidence of prison rape.*

drivers are often parents and family members of the victims. Estimating the cost of installing backup cameras was relatively straightforward, and when comparing only the costs and benefits for which a dollar value could be developed, the costs greatly exceeded the benefits. Under such a limited consideration of the costs and benefits, the rule could not have been justified.<sup>53</sup>

Other times, cost-benefit analysis is not only inappropriate, it is also nonsensical and can lead to offensive results. A stark illustration: the Department of Justice planned to conduct a cost-benefit analysis on a rule designed to reduce the incidence of prison rape. The effort was criticized as “bizarre and unfortunate.”<sup>54</sup>

<sup>53</sup> However, the agency proposed the rule after concluding that unquantifiable benefits justified the rule even though the monetized costs exceed the monetize benefits. See Arden Rowell, *Partial Valuation in Cost-Benefit Analysis*, 63 Admin. L. Rev. 723 (2012) (examining NHTSA's consideration of the costs and benefits of the rearview camera rule). The agency has yet to issue the final rule.

<sup>54</sup> Lisa Heinzerling, *Cost-Benefit Jumps the Shark: The Department of Justice's Economic Analysis of Prison Rape*, CPR Blog (June 14, 2012), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=EB3B070D-F7A0-1489-B361DA6B35ABC16E>.

Requiring cost-benefit analyses for rules can produce undesirable and counterproductive results. Take, for instance, airline safety standards. The Federal Aviation Administration has been remarkably successful at protecting the flying public over the past decade. But under a purely economic cost-benefit analysis requirement imposed on the agency, too few people have died to justify further safety improvements – even if updated standards would save more lives.<sup>55</sup>

In the states, rigid cost-benefit mandates have also proven problematic.

- In Michigan and Indiana, analyses are often unbalanced and focus more on costs than benefits. State agencies are under resource constraints and do not have economists on staff. Under Michigan's process, agencies discuss costs and alternatives with stakeholder workgroups early on. Benefits are more likely to be discussed qualitatively than quantified, and monetization of benefits is rare.<sup>56</sup> Because benefits are difficult to monetize, they are often left out of the equation. And the lack of involvement by trained experts and economists in Michigan compromises the accuracy and reliability of the analysis. In Indiana, the cost-benefit analysis primarily focuses on the impact on businesses, not on broader social costs and benefits. Even in the rare cases where distributional impacts are considered “informally,” agencies typically do not quantify the health and safety benefits.<sup>57</sup>
- In Ohio, agencies must complete and submit for review a fiscal analysis that includes, among other things, a dollar estimate of any change in government revenues or expenditures and a summary of estimated compliance costs. These estimates are highly speculative and difficult to make with any accuracy and certainty.

*The economic analysis is one-sided and focuses on compliance costs, not benefits. An investigation of Ohio's review process found that “benefits are ignored or at best hidden in the fiscal analysis” and “agencies have had difficulty complying with even those minimal, cost-centric analytical requirements.”*

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<sup>55</sup> See Andrew Zajac, *Airline Crash Deaths Too Few to Make New Safety Rules Pay*, Bloomberg Businessweek (June 25, 2012), <http://www.businessweek.com/news/2012-06-25/airline-crash-deaths-too-few-to-make-new-safety-rules-pay>.

<sup>56</sup> See Schwartz, *supra* note 13, at 267.

<sup>57</sup> *Id.* at 222-23.

A study of Ohio’s review process found that “benefits are ignored or at best hidden in the fiscal analysis”<sup>58</sup> and “agencies have had difficulty complying with even those minimal, cost-centric analytical requirements.”<sup>59</sup>

## Regulatory Moratoriums

### *Risky and Unproven*

Moratoriums are especially concerning because the consequences of prohibiting agency action are unknown, and the costs savings allegedly achieved by moratoriums are unproven. Proponents assert that moratoriums will reduce the costs of doing business, but there is little data on the actual cost savings achieved by past moratoriums.<sup>60</sup> Nor has there been adequate consideration of the benefits to society that are lost when rules are put on hold. For example, clean air may suffer – resulting in more respiratory diseases and higher health costs; this reduces costs to industry by shifting the costs to vulnerable individuals and to society as a whole.<sup>61</sup>

### *Increase in Regulatory Uncertainty*

Contrary to the claims of moratorium proponents, freezing rulemaking will not improve regulatory certainty or improve predictability. Putting off rules can increase business uncertainty about what standards they will be required to comply with in the future and so impede planning and investments.<sup>62</sup>

### *Inherent Anti-regulatory Bias*

Moratoriums are inherently anti-regulatory and assume that rules are unnecessary, overly burdensome, and too costly. Moratoriums essentially tell agencies whose mission is to protect public health and well-being that they should not and cannot fulfill their missions.

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58 *Id.* at 331.

59 *Id.* at 332.

60 Watts, *supra* note 34, at 1921.

61 See *id.* (citing Nancy Watzman, Pub. Citizen’s Cong. Watch & Christine Triano, OMB Watch, Voodoo Accounting: The Toll of President Bush’s Regulatory Moratorium, January-August 1992, at v (1992)).

62 *Id.* at 1923.



### *Issues of Legality*

In Florida, the state Supreme Court invalidated executive orders issued by Governor Rick Scott because they impermissibly suspended agency rulemaking.<sup>63</sup> Scott's orders placed a moratorium on all regulations unless they were approved by a new executive office established by the governor. The court ruled that Scott overstepped his constitutional authority and violated the separation of powers. Moratoriums instituted by state governors may interfere with authority that has been delegated to regulatory agencies by state legislatures.

*Moratoriums essentially tell agencies whose mission is to protect public health and well-being that they should not and cannot fulfill their missions.*

## HOW STATES CAN RESPOND TO PROBLEMATIC REGULATORY PROCESS REQUIREMENTS

State public interest advocates and legislators should be on the alert for any proposed regulatory process reforms that would serve to delay, weaken, or block important agency actions, like those discussed above. In some states, however, existing regulatory analysis and review requirements already impede the ability of state agencies to promptly issue and update rules. If enacting legislation to abolish or prohibit these requirements is infeasible, a state can still pursue a number of realistic policy changes that would mitigate the anti-regulatory impacts of current state procedures.

The problems with centralized regulatory review and reliance on formal cost-benefit analysis are well documented. Current efforts to address problems in the federal rulemaking process can also be advanced in the states. Specific examples of positive policy changes include:

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<sup>63</sup> *Whiley v. Scott*, Sup. Ct. FL., No. SC11-592 (Aug. 16, 2011).

- *Curbing undue political interference in rulemaking*

States should ensure that members of regulatory review bodies or committees disclose any conflicts of interest.
- *Limiting the agency actions that are subject to centralized regulatory review*

Review bodies have struggled to keep up with requirements to review all rules. Even if the review body has the discretion to select the rules it will review, there may be a tendency to assert review authority over a wide range of agency actions, as OIRA has done at the federal level. Narrowing the scope of the review body's authority can help conserve scarce resources.
- *Ensuring that centralized regulatory review does not result in unnecessary delay*

It is important that state agencies be allowed to move forward with rules without being subject to unnecessary and excessive reviews. States could prescribe time limits on reviews to prevent the centralized review body from holding up agency actions.
- *Reducing reliance on cost-benefit analysis*

Where agencies are required to conduct or rely on cost-benefit analyses, those analyses should only be informative, not determinative. A regulation should not be invalidated or rejected by an executive or legislative review body based on cost-benefit analysis. States should, in legislation or executive policies, acknowledge the limitations of cost-benefit analysis and the importance of considering qualitative factors in decision making. States should also explicitly endorse deference to the regulatory determinations of expert agencies.
- *Increasing transparency in the regulatory review process*

Transparency can ensure accountability in the review process. When rules are published after opaque regulatory reviews, the public is left in the dark about why any delays occurred and what special interest or political interference may have been at play. The public should be informed of regulatory delays and any changes that are made to an agency's rule or analysis during review. States should require review bodies and agencies to document these changes, as well as any communications they have

with outside parties concerning the rule's cost-benefit analysis or substance. These transparency measures will help identify instances of political interference and special interest influence in the regulatory process.

## CONCLUSION: THE IMPORTANCE OF PUBLIC PROTECTIONS

Federal and state health and safety standards have dramatically improved the quality of life in the U.S. over the last half century. The air we breathe and the water we drink are cleaner. There are fewer toxic chemicals in toys and fewer unsafe drugs. Packaged foods are less likely to be contaminated. Children have higher IQs because there is less lead in the environment. Asbestos is rarely used in construction, dramatically reducing the risk of lung disease to workers. Toxic polychlorinated biphenyls (PCBs) were used in an array of industrial and consumer products before being banned in 1979.

*Our economy is simply too large and complex for consumers to be able to research the risks of every new food or medicine or service on offer; we expect government to provide this kind of essential protection. Regulatory agencies have an ongoing, critical role to play in ensuring the new goods and services that emerge are safe.*

We have these protections because laws were passed authorizing regulatory agencies to protect the health and safety of the American public – on an ongoing basis. American and foreign companies produce a steady stream of new products every year, and American consumers have always embraced the new and innovative. We do so confident that there are safeguards in place to ensure that unsafe goods and services will not be allowed into the U.S. marketplace. Our economy is simply too large and complex for consumers to be able to research the risks of every new food or medicine or service on offer; we expect government to provide this kind of essential protection. Regulatory agencies have an ongoing, critical role to play in ensuring the new goods and services that emerge are safe.

Similarly, scientific knowledge and understanding of many health risks to humans have grown exponentially over the past half century. Evidence is accumulating that some substances and products that previous generations thought were safe are in fact hazardous to human health. Asbestos-containing consumer products and cigarettes are perhaps the most obvious examples of products that at one time were thought to be safe. To be effective in protecting public health, our regulatory system must update exposure standards based on new information and ban the use of very hazardous substances.

*Any effective regulatory system has to be able to quickly and efficiently test new products and substances and incorporate new scientific evidence in its standards.*

In other words, any effective regulatory system has to be able to quickly and efficiently test new products and substances and incorporate new scientific evidence in its standards. Moratoriums on rules, economic analyses that exaggerate the costs to business, and new review processes that allow the opinions of politicians or judges to supersede

the assessments of scientists and health experts prevent federal and state regulators from fulfilling their mission: to protect public health. The anti-regulatory “reforms” described above are designed to make it difficult to develop public protections that address new threats. If passed, they could roll back decades of consumer safety standards.

Most businesses want to produce safe products with minimal damage to the environment. But powerful corporate interests in certain industries have decided to invest their profits in weakening health and environmental protections instead of in improving their products and establishing safer operations. These corporate interests hire lobbyists and run communications campaigns to weaken public protections, whether they are established at the federal level or the state level. They invest in ALEC and attempt to get weak federal legislation passed to “pre-empt” stronger state protections, and they argue that states should have the right to set their own (weaker) state standards. And now, as this report documents, their latest strategy is to undermine the entire regulatory process, to make it difficult, if not impossible, to establish or update standards in order to protect citizens from the risks posed by new products, chemicals, or production wastes.

The legislative models that ALEC has been promoting are being sold as “reasonable” regulatory reforms. In fact, these pieces of legislation serve as a Trojan horse designed to quietly shut down state efforts to establish public protections that ensure all their residents enjoy safe and healthful lives. Even the model state procedures endorsed by the Uniform Law Commission would unnecessarily complicate and obstruct the regulatory process, making it more difficult to issue important rules. State legislators need to close and bar the gates against these dangerous proposals.





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