THE REGULATORY CRISIS IN WASHINGTON

America’s regulatory system has failed, and its families, workers, consumers, and small businesses are paying the price: weaker growth, less opportunity, fewer full-time jobs, and lower wages. Instead of improving our lives, regulation today too often oppresses and stifles the economy. Americans in schools, hospitals, and small businesses—even those working within government itself—are tangled up in red tape that makes no sense to them or anyone else.

Things happen when real people are able to act, not when they are forced to consult rulebooks or hire lobbyists to to protect their interests from government bureaucrats. But leaders in Washington have increasingly fallen prey to a “regulators-know-best” mentality, which drives them to dictate choices and control the economy. This is the basis for President Obama’s infamous and sometimes unconstitutional “phone and pen” strategy to govern through regulation, disregarding Congress and the states.

Making this worse, Washington’s bureaucrats rarely evaluate how their rules actually affect people on the ground, the real daily choices made by businesses, teachers, doctors and others. And so, regulation accumulates, like sediment in a harbor, building up over time, and ensuring that Americans must consult a rulebook or hire a lobbyist to accomplish basic tasks. The United States, long the shining light of business dynamism, has consequently sunk to a dismal 46th in the world in ease of starting a business.¹

America needs to get moving again. We can unleash untold dynamism now buried under the weight of rulebooks by fixing our regulatory system. Nothing stimulates an economy more than the energy of real people, motivated to pursue their dreams in their own way. That has long been the secret of America’s success.

Fixing our regulatory system will promote growth and reduce consumer prices, while retaining the benefits of sensible rules to protect our health, our safety, and our environment. For American businesses, these programs will increase the ability to compete, both at home and abroad. These reforms are especially important for the many small firms and middle and low income Americans, who disproportionately bear the costs of regulation.²

By identifying areas that are more appropriately handed at the state level, regulatory reform will also drain the federal bureaucracy of some of its power. An America where states serve only in the shadow of the federal government restrains our energy and keeps bottled up the full power of state engines of innovation. Combined with a forthcoming initiative on federal-state relations, regulatory reform will restore the proper relationship between the federal government and the states.

Regulatory reform can bring America into the top 10 in ease of starting a business. It can increase productivity. It can finally give American workers a raise. Fully implemented, regulatory reform can boost GDP by 3 percent over the next 10 years. In conjunction with Governor Bush’s tax reform plan, the regulatory reforms outlined here will help increase average
compensation, so that by 2020 a typical family of four earning $50,000 will have an after-tax income that is approximately $3,100 higher than it would without these reforms.

To unleash the American spirit again and set the country on a path to achieve these results, Governor Bush is proposing reforms that will:

1. End the Washington-knows-best mentality by scaling back existing regulations and promoting smarter regulation going forward.
2. Make regulators accountable to Americans rather than special interests.
3. Reduce red tape and uncertainty to restore business dynamism.

**Reform Goal #1: Ending the Washington-knows-best mentality by scaling back existing regulations and promoting smarter regulation going forward.**

The Obama Administration has overseen an annual increase in the number of major rules (those that impose more than $100 million in costs on the economy) of 30 percent. In 2010, the Administration set a record for the number of major rules adopted. In 2012, it imposed a record $219 billion in costs on the economy. Were they to be paid directly, regulatory costs would average nearly $15,000 per household—more than 20 percent of the average household income of $64,000 and almost 30 percent of average household expenditures of $51,000. This exceeds every item in the average household budget except housing.

The costs of economic activity that regulation prevents or delays are even harder to measure. Ideas that could turn into innovative products and services never make it off the drawing board because regulatory obstacles promote the status quo. According to one recent report, bureaucratic delays in permitting infrastructure projects cost more than $3 trillion—nearly double the total cost of modernizing infrastructure through the end of the decade, and more than $10,000 for every American citizen.

 Regulation should be practical and focused on important public concerns: It should not be a source of paralysis or central planning. America’s businesses should be focused on innovation and expansion, not compliance with thousands of immaterial regulatory dictates or overcoming the next regulatory obstacle.

*Examples:*

- President Obama’s Carbon Rule forces states to switch some of their energy generation from coal to renewable sources, contrary to Supreme Court precedent that affords states ample authority to chose how they generate energy. The regulation is the EPA’s first foray “outside the fence,” requiring states to meet the rule’s requirements by taking action beyond the physical boundaries of electricity generation facilities. The regulation will likely result in substantial price increases—often of more than 10%—to many families’ energy bills without meaningfully affecting either global emissions or temperature.

- The Waters of the United States (WOTUS) rule subjects nearly all private land use to review by the Environmental Protection Agency. The rule, which is inconsistent with
Supreme Court precedent, requires farmers to cater to the EPA in order to obtain permission to build a fence, apply fertilizer, pull weeds, or spray for insects. The rule expands federal authority to virtually all wet areas (and temporarily wet areas)—ditches, drains, seasonal puddle-like depressions, and large “buffer areas” of land adjacent to waterways. For example, the rule subjects 99 percent of Pennsylvania’s acreage to federal jurisdiction. The WOTUS rule unnecessarily and arbitrarily increases the cost and uncertainty of many industrial, commercial, and farming operations. And those who fail to comply face stiff penalties of roughly $40,000 per violation.

- Five years of heavy-handed Dodd-Frank regulation has created a two-tiered banking system. A few huge financial institutions sit securely at the top, insulated from competition by regulations that impose heavy compliance burdens on their smaller rivals. Community banks, for example, have to comply with capital and liquidity requirements, undergo stress tests, and adhere to corporate governance rules that are tailored to neither their activities nor the risks they pose to the economy. As a result, it has become increasingly difficult for Americans with less than perfect credit to access capital to start, upgrade, or expand businesses and pursue their ambitions.

- The Consumer Financial Protection Bureau has imposed particularly heavy regulatory costs on smaller and community banks: 71% of small banks says that the CFPB affects their business activities, 64% report that Dodd-Frank has caused them to change their mortgage offerings, and 15% say that they have responded to Dodd-Frank by either exiting or considering an exit from the residential mortgage markets entirely.

- Regulators’ efforts to protect the Spotted Owl under the Endangered Species Act have done little to protect the owl and much to decimate the timber industry in the Northwest and the jobs and the towns it supported. That same overly restrictive approach applied to the sage grouse will likely have a similar effect on the energy and mining sectors.

- The Department of Interior’s onerous regulations governing fracking activities on federal lands prevent America from harnessing the full benefits of the energy revolution.

- Because of Food and Drug Administration rules, safe sunscreens available elsewhere in the world cannot be found in America’s stores.

- FDA regulations make food more expensive without materially improving health outcomes.

Policy Solutions:

- Regulatory Freeze: To the extent permissible under existing law, Governor Bush will prohibit publication of new proposed or final regulations or significant guidance until they are approved by an agency head he has nominated. He will also direct agencies to withdraw proposed and final regulations awaiting publication in the Federal Register. And he will delay the effective date of regulations that have not yet taken effect.
Presidential Task Force: Governor Bush will establish a presidential, cabinet-level taskforce, staffed primarily by the Office of Information and Regulatory Affairs (OIRA), that will drive his regulatory reform agenda. The task force will also signal to agencies and others that smart regulation is a top White House priority and work to ensure agencies adhere to OIRA’s regulatory determinations.

Supplement Executive Orders on Regulation: Governor Bush will promptly issue an Executive Order to compel agencies—including independent agencies—to strictly adhere to principles of smart regulation listed below. Governor Bush will seek to codify these principles and empower courts to enforce them. His regulatory Executive Order will require agencies to

- abstain from regulation where there is not identifiable market or major policy failure;
- prefer state-based solutions to federal solutions;
- favor regulations that incorporate “best practices” from the state laboratories of democracy rather than those that rely on untested approaches;
- ensure, to the extent possible, that each regulation’s benefits “outweigh” its costs, measured using an honest and transparent methodology, and has been crafted in accordance with the Information Quality Act;
- select the least costly regulatory alternative, unless there are compelling reasons to adopt a more burdensome option;
- favor simple and flexible regulations that enhance regulatory certainty, maximize competition, and minimize burdens on small actors;
- strictly adhere to the plain, ordinary meaning of constitutional and statutory limitations

Regulatory Budget: Governor Bush will establish a regulatory cost cap of zero in the first year of his presidency. As a result, new regulatory costs will be offset by regulatory savings elsewhere. This “regulatory budget” will force government to make explicit tradeoffs between regulatory priorities and to eliminate old regulations—just as it does now under the fiscal budget. The UK operates under a regulatory budget that requires regulators to eliminate two rules for every new rule they add. Since its inception in 2011, the initiative has reduced regulatory burdens by roughly $3.4 billion. In Canada, small business owners successfully pushed for a 1:1 regulatory budget that holds the regulatory burden constant at $37 billion per year. Governor Bush will work with Congress to build upon this regulatory budget framework in subsequent years of his administration.

Spring Cleaning of Existing Regulations: Governor Bush will create an independent commission to conduct a regulatory spring cleaning. The current process for reviewing existing regulations works poorly. Those who create the rules review them, and they
often ignore regulations’ cumulative and interactive effects. An independent commission—modeled along the lines of the military base closing commission or Australia’s regulatory review commission—will review regulations from the perspective of regulated entities. Governor Bush will encourage Congress to codify the commission’s mission and establish procedures for approving or rejecting its recommendations through a simple up-or-down vote. In its work, the commission will identify regulatory laws that need to be modified or repealed and areas of regulation that Congress should relinquish, in whole or in part, to state control. The commission will publish its recommendations within the first year of Governor Bush’s administration.

- **Retrospective Review of New Regulations:** Governor Bush will empower OIRA to review the costs and benefits of each new major regulation within eight years of its effective date. In addition to helping weed out ineffective regulations, these reviews will create strong incentives for agencies with vested interests in their regulations to track their real world impacts.

- **Regulatory Hippocratic Oath:** Governor Bush’s will require his nominees to regulatory agencies to commit to his regulatory reform agenda and take a regulatory “Hippocratic Oath.” Nominees will commit to “do no harm” through their regulatory initiatives and commit to working productively with OIRA to promote smart regulation. Personnel is policy and the oath will establish a leadership-level counterweight to the pro-regulation mentality and impulses toward perfection that regulators often exhibit. The oath will remind regulators to be humble about their ability to “solve” complex problems better than the American people.

**Reform Goal #2: Making regulators accountable to Americans rather than special interests.**

Agencies today make far more laws than legislators. But unlike courts and legislators, regulators conduct their deliberations in relative obscurity, often outside of the public’s view and effectively accountable to no one, not even the President. Ordinary Americans are accountable in their daily lives, and bureaucrats should be as well.

The regulatory thicket also protects the status quo and keeps less politically connected competitors on the sidelines. An ever-expanding and increasingly unaccountable regulatory state adopts and enforces complicated and highly technical regulations, without sufficient oversight or accountability. These rules inherently benefit powerful and politically connected entities, who are able to influence rulemakings to their advantage and deploy ample resources either to comply with or mitigate the effects of enforcement efforts. This makes it more difficult for smaller businesses to compete, creating a drag on the economy.

**Examples:**

- The Federal Communications Commission’s Net Neutrality rule classifies all Internet Service Providers (ISPs) as “public utilities,” subjecting them to antiquated “common carrier” regulation. Rather than enhancing consumer welfare, these rules prohibit one group of companies (Internet Service Providers) from charging another group of
companies (content companies) the full cost for using their services. Small broadband operators—like KWISP (475 customers in rural Illinois) and Wisper ISP (8,000 customers near St. Louis, Mo)—have declared under penalty of perjury that the Net Neutrality rule has caused them to cut back on investments to upgrade and expand their networks.

• The Consumer Financial Protection Bureau, created by Dodd-Frank, is controlled by a single individual who is effectively free of oversight from either the White House or Congress. Given the lack of accountability, it is not surprising that the agency aims build itself lavish headquarters, featuring a two-story waterfall and a four-story glass staircase and a budget that ballooned from $55 million to $216 million.

• The Financial Stability Oversight Council, also created by Dodd-Frank, has asserted the remarkable authority to declare entities to be “systemically important” behind closed doors without considering either the costs or the benefits of that determination.

• Today, 30% of the U.S. workforce must obtain permission from some level of government in order to do their job. That’s up from 5% in the 1950s. From hair braiders and masseurs to florists and travel agents, more than 1,100 jobs now require an occupational license in at least one state. Licensing regimes slow job growth, limit employment opportunities, and make it harder for workers to relocate across state lines. They stand in the way of millions of jobs, raise consumer costs by more than $100 billion, harm military spouses and inhibit re-integration of former criminals, generally without improving products or services.

Policy Solutions:

• End Sue and Settle: Governor Bush will end the abusive practice known as “sue and settle.” In sue and settle, agencies and special interest groups enter into collusive settlement agreements negotiated without input from all stakeholders or from the public. Because courts bless these agreements, special interests and agencies can use them to achieve regulatory outcomes, without public input, that undermine congressional and presidential priorities. The solutions are simple: Governor Bush will advance legislation to reform so-called citizen suit provisions, so that standing is limited to entities with tangible, particularized injuries. He will also advance legislation to ensure that parties with constitutional standing are not shutout of any settlement negotiations. He will also ensure that the public has a full and meaningful opportunity to comment before regulations are changed and require that covered settlements undergo OIRA review before they are submitted to the court.

• Court Reform: Governor Bush will nominate judges and justices who recognize and are committed to the judiciary’s critical role in enforcing statutory and constitutional limits on regulators’ authority. He will also promote legislation to limit the deference that courts give to agency interpretations of congressional enactments. For instance, absent explicit congressional directive, courts should reject regulations premised upon novel statutory interpretations that depart from ordinary, common-sense definitions.
• **Congressional Oversight:** Governor Bush will promote legislation to enable more robust congressional oversight of regulations. Consistent with the REINS Act, Congress will be required to approve, through an up-or-down vote, critical regulations that impose outsized burdens on the economy before they take effect.

• **Licensing Reform:** Governor Bush will work with state leaders to develop appropriate federal incentives to encourage increased licensing reciprocity between states and substitution of lesser forms of regulation (e.g., certification, registration, no regulation) for existing licensing regimes that do more to protect incumbents than the public.

**Reform Goal #3: Reducing red tape and uncertainty to restore business dynamism.**

The government has strangled itself with red tape, rendering decisionmaking on reasonable timetables nearly impossible—unduly hindering private initiative in the process. The United States ranks a dismal 41st in the world in “dealing with construction permits.”

The country’s infrastructure is growing obsolete and, in some cases, dangerous—roads, bridges, power generation and transmission facilities, water treatment and delivery systems, and ports all need repairs and upgrades. Yet it can take years to complete required environmental reviews and other permitting processes. Environmental reviews and permits are necessary to empower government to make informed tradeoffs between development and the environment. Project opponents, however, have increasingly abused the process to make projects costlier and to delay their implementation.

The stakes are very high. Delays burden both the economy and the environment. Wasted energy attributable to the country’s outdated power grid is equal to the output of 200 coal-burning power plants. Failure to build and upgrade roads, bridges, and railway projects prolong pollution-generating bottlenecks. Overall, delay may cost the economy nearly twice as much as simply giving American infrastructure the upgrades it needs. The upside of cutting this red tape is enormous: by one estimate, building all of the projects caught up in our permitting system could produce up to 1.9 million jobs and $1.1 trillion in economic activity during each year of construction.

**Examples:**

• Much of America’s infrastructure is between 50 and 100 years old and must be modernized. Accomplishing this task would stimulate the economy, create close to two million jobs, and improve environmental outcomes. But regulations and litigation bog projects down, sometimes for more than a decade.

• The Bayonne Bridge is not high enough to allow the next generation of cargo ships to access the Port of Newark, which processes 10% of shipping containers entering the United States and employs roughly 250,000 people. Incredibly, federal environmental review of the solution, which called for raising the bridge on its existing footprint, took five years. One of the EPA’s core concerns was that enabling the port’s continued vitality by raising the bridge could generate “too much” truck traffic in nearby neighborhoods.
• The Hempstead power plant in Arkansas filed for its first permit in 2006. It has been delayed by litigation that has deployed “virtually every statute and regulation” in the books to challenge “permits and approvals under the Clean Air Act, Clean Water Act, National Environmental Policy Act, and several others.” xxxv Regardless of the outcome of the review, we need a faster review system if we are going to create a favorable climate for business investment.

• Since 2005, Shell Oil has paid nearly $2.1 billion for federal leases in Alaska. It took years, however, to obtain the permits necessary to operate the drilling rig, diminishing other investors’ interest in energy exploration in Alaska.

Policy Solutions:

• Permit Streamlining: Governor Bush will reorganize and streamline the federal permitting process so that, absent extraordinary circumstances, infrastructure projects can be permitted or rejected within two years. He will promote early coordination with stakeholders, synchronize reviews (so that, for instance, EPA and Army Corps of Engineers reviews occur simultaneously), reduce the number of decisionmakers by ensuring that each project is managed by a lead agency with authority to conclusively move projects forward, empower agencies to rely on high-quality and up-to-date environmental reviews that are already on file, and establish clear lines of authority up to the White House to assist the lead agency in dispute resolution. A comprehensive dashboard will also keep interested parties up to date on the status of any project, and let the public know when agencies have fallen behind schedule.

• Environmental Litigation Reform: Governor Bush will advance legislation to reform environmental litigation so that it is not a tool of delay. Environmental litigation will be subject to strict standing rules—so that only parties who stand to suffer injury from the action can sue—and statutes of limitation. It will also be subject to fast track procedures. In addition, courts will be instructed to give economic growth and jobs creation at least as much weight in the analysis as other concerns.

Conclusion

Federal regulation is holding America back from its potential, stifling job creation, inhibiting growth and responding to the needs of special interests rather than Americans. Governor Bush believes that America can break free of the so-called new normal of two percent economic growth and set its sights on a high growth strategy that will lift people out of poverty and give every one a chance to achieve their dreams. These reforms are critical to that vision, fixing a broken regulatory system and unleashing the sprit and ingenu

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iii  http://americanactionforum.org/insights/500-major-regulations.
iv  Id.