October 29, 2009

Via Overnight Mail and Electronic Mail

Mr. Cass Sunstein
Administrator, Office of Information and Regulatory Affairs
White House Office of Management and Budget
725 17th Street, N.W., Room 5228
Washington, D.C. 20503

Dear Cass:

We want to thank you and Michael again for a most productive meeting on September 21. To follow up on what we hope becomes an ongoing dialogue about improving the regulatory system, we have enclosed three documents that the Center for Progressive Reform is releasing this week, each dealing with a distinct piece of a larger puzzle: how to reinvigorate federal agencies so that they effectively protect health, safety, and the environment.

The first publication, *Regulatory Dysfunction: How Insufficient Resources, Outdated Law, and Political Interference Cripple the "Protector Agencies,"* by CPR Member Scholar Sidney Shapiro, CPR Policy Analyst Matthew Shudtz, and me, steps back from the daily struggles over specific regulations to explore a much larger question: Are the regulatory agencies actually protecting Americans from health, safety, and environmental threats? In our estimation, while the agencies have, over their institutional lifetimes, made Americans significantly safer and took critical strides in protecting the environment, significant gaps remain – gaps that have grown worse during the last eight years, a period of deliberate neglect. Among the central causes of this failure are woefully inadequate budgets, outdated authorizing legislation, and political interference with the work of agency experts. Solutions we suggest include providing adequate resources – a process that begins not by adding incrementally to existing budgets but by asking what agencies need to accomplish their statutory missions; developing new accountability mechanisms at the agencies that gauge how well they are actually protecting Americans and the environment; and decentralizing regulatory decisionmaking.

The second publication, *The Hidden Human and Environmental Costs of Regulatory Delay*, by CPR Member Scholars Catherine O'Neill, Amy Sinden, and me, together with Policy Analysts James Goodwin and Ling-Yee Huang, explores an issue that has been long overlooked in much of the policy discourse regarding regulation. Regulatory agencies are in the habit of taking years, even decades, to study an issue and promulgate regulations, and when they do, legal challenges often delay things further.

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In the case of mercury regulation, for example, the Clinton EPA missed deadlines by as much as four years, in large measure because of industry challenges to scientific findings it found inconvenient. Then the Bush Administration delayed further, finally adopting an approach to regulation that was clearly out of step with the law, and that was eventually and predictably struck down – late in the Administration's second term. EPA is back at the drawing board now. But the cumulative impact is that we are not much closer today to meaningful regulation of mercury than we were in the early 1990s. Throughout these many years, as many as 94,000 babies were born annually in the United States with elevated blood mercury levels – levels high enough to leave them with irreversible brain damage. As many as 231 children develop mental retardation each year, all as a direct result of exposure to mercury emissions from U.S. power plants. These children are paying the cost of delay. We think more attention should be paid to such real world costs of foot-dragging and industry stalling tactics, so the paper calls on OMB to monitor the costs of such delays in the future, and to include an assessment of the cost of delay in its annual reports to Congress on the costs and benefits of regulation.

The third publication deals with a topic on which we've agreed to disagree: cost-benefit analysis. *A Return to Common Sense: Protecting Health, Safety, and the Environment Through "Pragmatic Regulatory Impact Analysis,"* by Amy Sinden, Sidney Shapiro, James Goodwin, and me, addresses a critical argument made in defense of cost-benefit analysis: What can replace it? Our answer is Pragmatic Regulatory Impact Analysis (PRIA), which would call on agencies to follow the standards for analysis specified in their authorizing statutes, rather than relying almost solely on cost-benefit analysis, which as you know was imposed by executive order. Our proposal calls for agencies to gather and rely on the best available science, to make evaluations based on the weight of the evidence, to solicit public comment from experts representing a broad range of disciplines, and to enhance the transparency of their processes. We are hopeful that the President's forthcoming executive order on the regulatory process will diminish reliance on cost-benefit analysis. But we understand that your convictions regarding the workability of cost-benefit carry great weight with him. Nevertheless, the authors of the paper believe that cost-benefit has proved unworkable, and so we offer PRIA as an alternative should the Administration, or some future Administration, reach that same conclusion.

We look forward to having an opportunity to work with you to explore these and other issues related to the regulatory process, and to facilitate conversations with our Member Scholars and others toward that end. I hope you'll find these papers of interest. Please be in touch if we can be of service. Thanks very much.

Sincerely,

Rena Steinzor

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President, Center for Progressive Reform
University of Maryland School of Law