

**Edits to Transcript Hearing from William L. Kovacs, U.S. Chamber of Commerce
“Examining the Federal Regulatory System to Improve Accountability, Transparency and
Integrity”
U.S. Senate Committee on the Judiciary
Wednesday, June 10, 2015**

(See attachment for edits on actual transcript)

Page 16, Line 13-14: Strike “amount of”

Page 17, Line 24: Strike “does” replace with “provides”

Page 17, Line 25: Replace the line with “permissible. Then when you add court deference to agency action, you”

Page 18, Line 10: Strike “highly” replace with “strongly”

Page 18, Line 12: Replace the line with “House of Representatives. It skillfully addresses the”

Page 18, Line 17: Strike “what we would” replace call to past tense “called”

Page 18, Line 21: Strike “regulatory” add “Clean” in front of “Power Plan”

Page 18, Line 22: Strike “ones” and replace with “regulations” and strike “it is” and replace with “are”; and make rulemaking plural “rulemakings”

Page 18, Line 24: Strike “And it” replace with “The Regulatory Accountability Act”

Page 19, Line 8: Replace the line with “committee by a vote of 12-1. It provides timelines for”

Page 19, Line 14: Strike “And” and capitalize “We”

Page 19, Line 16: Replace the line with “codify them in Title 28. The purpose of codifying them”

Page 19, Line 17: Replace “there” with “in Title 28” and replace “have” with “undertake”

Page 19, Line 18: Replace “citizenship” with “citizen suits”

Page 40, Line 4: Strike “not only with that but”; and add “and” in “with the agencies, **and** that”

Page 40, Line 6: Strike “it does not” and replace with “is more than”

Page 40, Line 6: Change “affect” to “affecting”

Page 40, Line 7: Strike “in” and replace with “and the”

Page 40, Line 8: Strike “if an agency”

Page 40, Line 9: Strike “it” and replace with “the private party”

Page 40, Line 11: Strike “statute” and replace with “regulation”

Page 40, Line 15: Strike “once you come into that” and strike comma after agreement

Page 40, Line 15: Strike “you” and change “take” plural to “takes”

Page 40, Line 17: Strike “you” and change “put” plural to “puts”

Page 40, Line 18: Strike “because they are new”

Page 40, Line 21-22: Strike “it has got a lot of duties from Congress and it has to” replace with “how to”

Page 40, Line 22: Strike “those” replace with “many”

Page 40, Line 23: Add comma after “duties,” and strike “in what it thinks important. Now”

Page 40, Line 25: Strike “it” replace with “specific regulations”

Page 53, Line 18: Strike “, and over the last 12--”

Page 53, Line 19: Add period after 2013, capitalize “There” and strike “through” replace with “from”

Page 53, Line 20: Add period after agencies.

Page 53, Line 22: Add “agenda” after “agency”

Page 58, Line 1: Strike “get the” and replace with “have”

Page 58, Line 2: Strike “set up” and replace with “enacted”

Page 58, Line 3-4: Strike “for the agencies to-- for SBA to empanel businesses and”

Page 58, Line 5: Add period after agency, strike “and” and capitalize F on “For”

Page 58, Line 8: Strike “you have set up the -- you passed” replace with “Congress has enacted”

Page 58, Line 9: Replace the line with “Unfunded Mandates Reform Act. Any regulation over \$100 million”

Page 58, Line 18: Strike “do this for you” and replace with “perform these mandates.”

Page 58, Line 24: Strike “This is some kind of” replace with “There is an agency”

Page 58, Line 25: Strike “where” replace with “of Congress,”

Page 59, Line 1: Replace the line with “them to do. They do not get all the facts as part of the”

Page 76, Line 9: Strike “in” replace with “under”

Page 76, Line 12: Strike “we are” replace with “the business community was”

Page 76, Line 13: Strike “you are, than”

Page 76, Line 14: Insert “advocacy” in “public advocacy side”

Page 79, Line 6: Add period after “deference.” Strike “and”; and capitalize “I”

Page 79, Line 8: Strike “they have of implementing” and replace with “the agency has to ignoring”

Page 82, Line 5: Strike “Act” replace with “Plan”

Page 82, Line 12: Strike “you know,”

Page 82, Line 17: Strike “with” replace with “was”

Page 82, Line 18: Strike “Congress-” and replace with “Democrats and Republicans-”

Page 82, Line 20: Strike “it” replace with “Congress”

Page 82, Line 21: Strike “You” replace with “Congress”

Page 82, Line 22: Strike “You” replace with “Congress”

Page 83, Line 4: Replace with the line with ““partial economic analysis.” Partial economic analysis only”

Page 83, Line 9: Replace “translate” with “cost travel through the economy?”

Page 83, Line 10: Strike “society”

Page 83, Line 11: Strike “map” replace with “MACT”

Page 83, Line 16: Strike “modeling” replace with “model”

Page 83, Line 19: Add comma after “that,” and strike “I think it was”

1 STATEMENT OF WILLIAM L. KOVACS, SENIOR VICE
2 PRESIDENT, ENVIRONMENT, TECHNOLOGY & REGULATORY
3 AFFAIRS, U.S. CHAMBER OF COMMERCE, WASHINGTON,
4 D.C.

5 Mr. Kovacs. Senator Grassley and members of the
6 Committee, thank you for inviting me to testify today on
7 examining the Federal regulatory system to improve
8 accountability, transparency, and integrity. These are
9 perhaps the three most essential characteristics for the
10 proper functioning of the regulatory process.

11 While we have interest groups and, frankly, Members of
12 Congress fighting every day over the benefits and costs of
13 specific regulation, there is an unfortunately little ~~amount~~
14 of attention paid to how the process works and how
15 regulations are developed.

16 The rule book, as Senator Grassley stated, was written
17 in 1946 by Congress when it enacted the Administrative
18 Procedure Act. At that time, there were very few agencies
19 and far less complexity.

20 How rules are developed should be the absolute top
21 priority of Congress since how regulations are developed is
22 essential to ensuring that the powers Congress delegates to
23 agencies are used to achieve congressional intent.

24 The regulatory process is massive with almost 200,000
25 regulations that impact every sector of society. However,

1 when the Chamber did an analysis of all of what we would
 2 call the regular rules, the major impact rules, and the high
 3 impact rules, we came to the conclusion that the rulemaking
 4 process works reasonably well for what we would call routine
 5 matters. However, there are deficiencies in the process
 6 that allow agencies to enact very broad and costly
 7 regulations that are not based on the words of a statute but
 8 are considered by the courts to be "permissible" in the
 9 reading of a statute. These regulatory laws, such as net -
 10 neutrality or Waters of the U.S., are far broader than
 11 Congress could ever enact in this present political
 12 environment. Yet they are imposed upon us by heads of
 13 agencies with little effort.

14 Our Founders intended the lawmaking process to be
 15 difficult for Congress, but with Congress passing these
 16 broad and vague laws that delegate great discretion to
 17 agencies to enact wide-ranging laws through regulation,
 18 lawmaking has become extraordinarily easy.

19 Adding to the ease of lawmaking through regulations,
 20 the courts have extended deference to agency action, thereby
 21 insulating agency decisions from stringent judicial review
 22 needed as a check on the abuse of power. So it has been
 23 recognized that Congress can delegate, and that when it
 24 delegates, whatever interpretation the agency ^{provides} does is
 25 permissible ^{and} ~~then~~ ^{when} you add ^{court} deference to ^{Agency action,} ~~the court~~, you

1 have completely taken the checks out of the system.

2 The challenge, therefore, is for Congress to preserve
3 the efficiency of the informal rulemaking structure for the
4 vast bulk of the 4,000 regulations issued every year while
5 ensuring that when agencies engage in broad-based lawmaking,
6 the agencies establish that rule in a way in which Congress
7 intended.

8 Several suggestions for achieving the accountability,
9 transparency, and integrity of the regulatory process.

10 First, we ~~highly~~ ^{strongly} support and urge you to support the
11 Regulatory Accountability Act, which has already passed the
12 House of Representatives, ~~but~~ ^{it} skillfully addresses the
13 few regulations a year costing over \$1 billion and having
14 nationwide impact. And I say a few, because out of the
15 4,000, when you analyze it, you have about 3,700 that are
16 what we would call run-of-the-mill, standard-setting, and
17 routine. You have about 300 that are ~~what we would~~ ^{called}
18 major and significant in the sense that they cost over \$100
19 million or more. And then you have literally three or four
20 that are what we call the high impact. These are Waters of
21 the U.S., ~~regulatory~~ net neutrality, the ^{clean} Power Plan. These
22 are the ~~ones~~ ^{regulations} that ~~it~~ ^{are} nationwide rulemaking, and they need
23 different attention. And over the last 15 years, there have
24 only been 30 of these. ^{The Regulatory Accountability Act} ~~And it~~ accomplishes this goal by
25 requiring more disclosure up front, integrating the

1 Information Quality Act as part of the rulemaking process,
 2 and imposing the same requirements on independent agencies
 3 as executive agencies. It also establishes requirements for
 4 a more stringent administrative record and sets a higher
 5 standard for court review.

6 We would also recommend passage of the Federal
 7 Permitting Improvement Act of 2015, which was passed out of
 8 committee by a vote of 12-1, ~~and~~ **I** it provides timelines for
 9 agencies for reviewing permits and reduces the statute of
 10 limitations for bringing a lawsuit from 6 years to 2 years.

11 We also strongly support S. 378, Senator Grassley's
 12 Sunshine for Regulatory Decrees, which addresses the sue-
 13 and-settle issue, which I am sure I will have questions on.

14 ~~And~~ **W** we would also recommend that you take the citizen
 15 suits which are scattered throughout the entire code and
 16 codify them in Title 28, ~~and~~ **T** the purpose of codifying them
 17 ~~there is so you can~~ **in title 28** ~~have~~ **undertake** the kind of oversight that you
 18 really need on ~~citizenship~~ **citizen suits** because they have greatly changed
 19 who has access to the courts and who has standing to be in
 20 court.

21 Thank you very much.

22 [The prepared statement of Mr. Kovacs follows:]

1 fought out in Congress for almost 18 years, really was an
 2 attempt to have the agencies for the first time become
 3 transparent and to put the regulated industries on an equal
 4 footing, ~~not only with that but~~ with the agencies, ^{and} that
 5 information was to be disclosed.

6 What sue and settle does ^{is more than} ~~it does not~~ just affect, ^{ing} the
 7 agencies ^{and the} ~~in~~ APA. It literally affects all of federalism.
 8 For example, ~~if an agency~~ when sue and settle occurs, you
 9 have a private party dealing with an agency, and ^{the private party} ~~it~~ says you
 10 have missed a deadline, or we think you ought to do this
 11 particular ^{regulation} ~~statute~~.

12 What happens in that situation is when you have an
 13 agency like EPA, which Mr. Weissman says--and he quotes our
 14 testimony--"misses the deadline 98 percent of the time," the
 15 sue and settle, ~~once you come into that agreement,~~ you take ^s
 16 one of the 400 rules that EPA may issue in a year, one of
 17 the 400 or two of the 400, five of the 400, and you put ^s
 18 them, ~~because they are now~~ under court supervision with a
 19 consent decree, at the top of the list. So what you are
 20 doing at that point is, rather than having the agency acting
 21 as an independent neutral party, deciding ^{how} ~~it has got a lot~~
 22 ~~of duties from Congress and it has to prioritize those~~ ^{many}
 23 duties, ~~in what it thinks important.~~ Now with sue and
 24 settle, you have interest groups coming in and getting the
 25 court to sign off the consent decree and prioritize ^{specific regulations.} ~~it~~.

1 on the front end of the cost and the impact of new
2 regulations, it is frightening, and it is disheartening, and
3 it is disillusioning. And, no, I have never seen anything
4 like it before.

5 Senator Perdue. Well, thank you.

6 Mr. Kovacs, I would like to go back to sue and settle.
7 This is a question that I think bears a lot of comment and
8 thought. I would like to address how litigants are able to
9 game the regulatory system by using citizen suits and, as
10 has recently been the case, work with sympathetic agency
11 officials, sometimes past co-workers, who are not interested
12 in normal notice-and-comment procedures. Do we have any
13 idea what the overall impact of these types of sue-and-
14 settle cases is on the regulatory framework?

15 Mr. Kovacs. Well, certainly, just--and this sort of
16 dovetails nice with Ellen's comments. We went back and did
17 an analysis of all the--what we call the high-impact rules,
18 those over \$1 billion, ~~and over the last 12~~ between 2000
19 and 2013. ^{From} There were 30 of them ~~through~~ all of the Federal
20 agencies, 17 of them came out of EPA, and most of them were
21 related to sue and settle. So that is the impact. They are
22 able to begin prioritizing the agency ^{agenda} and that I think is a
23 much bigger problem than anything else, because they
24 literally not only own the agency and their priorities, but
25 they also have a court that is supervising the agency, and

1 the only party that can actually intervene into the court
2 proceeding is either the environmental group or the agency.
3 We are locked out because we do not have standing.

4 Senator Perdue. Thank you.

5 Mr. Chairman, I am over my time, but I just want to
6 make one last comment. I really applaud the Chairman for
7 conducting this hearing. I think we need to have further
8 hearings on this. I will submit other questions, but I
9 would love to talk about not just the EPA but what the NLRB
10 is doing, the CFPB, and other regulators out there. This is
11 having a dramatic impact on our ability to drive a recovery
12 and get people back to work again.

13 [The questions of Senator Perdue follow:]

14 / COMMITTEE INSERT

See insert

1 Congress has really tried to ~~get the~~ ^{have} input. If you go
 2 through--for example, you ~~set up~~ ^{enacted} the Regulatory Flexibility
 3 Act, which was specifically to empanel businesses ~~for the~~
 4 ~~agencies to--for SBA to empanel businesses and to have them~~
 5 talk to the agency, ~~and f~~ for both Waters of the U.S. as well
 6 as the others, the agency refused to go through this panel
 7 process.

8 To involve States, ~~you have set up the~~ ^{Congress has enacted} you passed the
 9 Unfunded Mandates Reform Act. ~~Anything~~ ^{regulation} over \$100 million
 10 ~~they have~~ ^{The agency has} to determine whether it is an unfunded mandate on
 11 the State. The agencies have refused to undertake this
 12 process. Thirty-five years ago, Congress was so concerned
 13 about the regulatory impact on jobs that it mandated that
 14 EPA do a continuing evaluation of the impact on employment,
 15 and it has never done one in 35 years.

16 So you have got a process where the agencies have
 17 completely separated themselves from Congress, and they
 18 really do not feel as though they have to ~~do this for you~~ ^{perform these mandates.}
 19 And because the courts, unlike with NEPA where the courts
 20 have actually grafted on a private right of action, the
 21 courts have not grafted on a private right of action for
 22 UMRA or Regulatory Flexibility or for the employment
 23 impacts.

24 So it is much deeper. ~~This is some kind of~~ ^{There is an agency} a disregard ^{of Congress}
 25 ~~when~~ they do not even attempt to do what you have asked

1 them to do, ~~so that~~ ^{do not} they get all the facts as part of the
2 process.

3 Senator Tillis. Thank you. And thank you, Mr. Chair.
4 I have several questions that I am going to submit, and
5 hopefully we can get your feedback. One that I find
6 particularly disturbing or offensive as a non-lawyer is the
7 sue-and-settle practice and some ideas on how we may be able
8 to get more active involvement and other third parties or
9 the courts in that. But I will submit those for the record
10 and look forward to all of your feedback. We submit it to
11 each and every one of you for your feedback.

12 [The questions of Senator Tillis follow:]

13 / COMMITTEE INSERT

1 happens when you have a sue and settle and you have a court
 2 order ordering the agency to do a certain thing, those rules
 3 actually then become the priority. So what happens is the
 4 agency itself, instead of being this independent actor
 5 deciding what the priorities are based on what you in
 6 Congress give them as a budget and what they think you are
 7 directing them to do, are now pigeonholed into dealing with
 8 a certain group of cases because they have a court order.

9 And ^{under} ~~in~~ the Administrative Procedure Act, we all should have
 10 an equal access to both the agency as well as to the court.

11 And the second point there is a law review article
 12 where they did a statistical analysis, and ~~we are~~ ^{the business community was} denied
 13 standing 50 percent more of the time than ~~you are,~~ ^{the environmental comm,} than the
 14 public ^{advocacy} side.

15 Senator Blumenthal. Any other comments in response to
 16 that questions?

17 [No response.]

18 Senator Blumenthal. Thank you, Mr. Chairman.

19 Senator Hatch. Thank you, Senator--did you want to say
 20 something?

21 Mr. Weissman. I would like to say something, if I
 22 might, Mr. Chair. It is not the case that the agency has
 23 discretion to choose to follow congressional orders. There
 24 is no discretion in these cases. The agency does not get to
 25 choose its priorities. The agencies are supposed to do what

1 psychology of the agency. There is no check in the system.
2 And some courts do not always apply deference but most do.
3 But what happens is the agency knows that they can push the
4 limits of their rulemaking and there is really not going to
5 be a check because the agency knows that the court is
6 generally going to apply the deference, and I think that is
7 the bigger problem that is driving this. It just unlocks
8 any inhibitions ~~they have of implementing~~ ^{the agency has to ignoring} congressional
9 intent.

10 Senator Hatch. Could you list a few unreasonable
11 cases?

12 Mr. Kovacs. I will send you a response to that in
13 writing, and we will give you three or four of them.

14 Senator Hatch. That would be fine.

15 [The information follows:]

16 / COMMITTEE INSERT

1 Small Business Advocacy Group to meet with the agencies on
 2 regulations that have a substantial impact on a large number
 3 of small businesses, and, for example, in the WOTUS rule,
 4 EPA refused to meet with any of the panels. They did the
 5 same thing in the Clean Power ^{Plan} Act, and they did the same
 6 thing with ozone. They took the position that there was
 7 absolutely no cost on small business.

8 So, again, going back to Chevron and the psychology,
 9 you have an agency that says, "We just do not have to
 10 comply," and that is a little bit different than saying that
 11 they should care.

12 And the second part is, ~~you know~~, 35 years ago Congress
 13 in all of the environmental statutes put in this requirement
 14 on EPA to do this continuous evaluation on employment and
 15 job impacts. And for 35 years, the agency has refused. And
 16 so what happens is when you go back to the 1970s and you
 17 look at what really the structure of the deal ^{was} ~~with~~ between
 18 ~~Congress~~ ^{Democrats and Republicans} Congress recognized that regulations would have an
 19 impact on jobs, and it would have an impact on industry
 20 because they were going to be expensive. But in return, ^{Congress} it
 21 asked for this continuing evaluation. ^{was Congress} You got the
 22 regulations. ^{Congress} You never got the evaluation. So to some
 23 extent, you are dealing without the information you have
 24 asked for 35 years to have.

25 And the second thing in terms of the modeling, we did a

1 very extensive study on how EPA uses modeling, and out of
 2 the 56 rules that would have had to be modeled just because
 3 of their cost, 54 of the rules used what they call the
 4 "partial economic analysis," ~~and that~~ ^{economic} partial analysis only
 5 estimates how many new jobs you would put into a facility
 6 just to comply with the regulation. They did not use the
 7 whole economy modeling, which would have actually looked at,
 8 well, what is the cost of the new jobs, what is the cost of
 9 the new product, and how does that ~~translate~~ ^{cost FROM TRAVEL} through ~~the economy.~~ ^{the economy.}
 10 ~~society?~~

11 And one quick example. On the utility ~~map~~ ^{MAPET}, for
 12 example, EPA estimated, I believe, that there were going to
 13 be 8,000 jobs created by the regulation; they would be the
 14 consultants. When we did the whole economy modeling and we
 15 actually took EPA's numbers and just ran it with the whole
 16 economy modeling, it came out to, I think, about 85,000 lost
 17 jobs.

18 So even in the model--and the Senate has taken care of
 19 a lot of that, ~~I think it was~~ you and Senator Vitter have
 20 got the SAB doing now this whole economy modeling to find
 21 out why the agency is not using it more.

22 Senator Hatch. Thank you.

23 Mr. Cooper, just another question to you. Would you
 24 discuss your views on the Skidmore decision? Compare it to
 25 the Chevron deference. Is Skidmore an improvement over