Statement of Sally Katzen

before the
Subcommittee on Courts, Commercial and Administrative Law
of the
House Committee on the Judiciary

on
"The REINS Act – Promoting Jobs and Expanding Freedom by Reducing Needless Regulations"

January 24, 2011

Chairman Coble, Ranking Member Cohen, Members of the Subcommittee. Thank you for inviting me to testify today. I have been privileged to appear before this Committee on a number of occasions, both as a government official and as a private citizen.

As you know, I served as the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) for the first five years of the Clinton Administration, then as the Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council, and then as the Deputy Director for Management of OMB. After leaving government service in January 2001, I taught administrative law courses at the University of Michigan Law School, George Washington University Law School, George Mason University Law School, and the University of Pennsylvania Law School, and I also taught American Government courses to undergraduates at Smith College, Johns Hopkins University, and the University of Michigan in Washington Program; this semester, I am teaching a seminar in advanced administrative law at NYU Law School and am a Senior Adviser at the Podesta Group. Before entering government service, I was the Chair of the ABA Section on Administrative Law and Regulatory Practice (1988-89), and during my government service, I was the Vice Chair (and Acting Chair) of the Administrative Conference of the United States (ACUS). I have written articles for scholarly publications and have frequently been asked to speak on administrative law in general and rulemaking in particular.

The subject of today's hearing is the H.R. 10 (similar to H.R. 3765 as introduced in the 111th Congress), known as the REINS Act. This bill, which is modeled on the Congressional Review Act (CRA), 5 U.S.C. 801 et seq., would dramatically change the way our laws are implemented by requiring virtually all new major regulations (e.g., those with an annual impact on the economy of $100 million or more) to be affirmatively approved by both Houses of Congress and the President before taking effect. In other words, major regulations would not be effective unless and until they were enacted into law. While the bill is presented as a response to what its supporters see as an out-of-control regulatory process at federal agencies, I believe this proposal is subject to some of the same criticisms that they make of agency regulations -- namely, it is not well considered, it is not tailored to the problem it is attempting to solve, and it will inevitably have unintended but nonetheless significant adverse effects on the economy and society at large, including fundamentally changing the constitutional structure of our government.

H.R. 10 is prompted, at least in part, by concerns about the costs imposed by regulations; one of the early findings in H.R. 3765 was that "such rules can have substantial compliance or other financial costs on American families, businesses, and local governments." Estimates of the cost of regulation cover a wide range, with supporters of the bill frequently citing the figure $1.75 trillion a year. However, the source(s) of the numbers they rely on are not impartial parties, and reputable scholars and economists have filled pages of print criticizing both the assumptions and the methodologies used to produce these cost estimates.

Under a Congressional mandate, OMB has estimated the costs of regulations, and it calculated substantially lower estimates. In its 2010 Report to Congress, OMB found that the cost of major rules issued by executive branch agencies over the most recent ten-year period (FY 1999-2009) was between $43 and $55 billion. These are also very large numbers, but what is missing so far – and what does not ever appear in any of the supporters' discussion of H.R. 10 or the text of H.R. 3765 --- are any estimates of the benefits from such regulations.

OMB's Report to Congress does include data on benefits, and the numbers are striking: according to OMB, the benefits from the regulations issued during the ten-year period ranged from $128 billion to $616 billion. Therefore, even if one uses OMB's highest estimate of costs and its lowest estimate of benefits, the regulations issued over the past ten years have produced net benefits of $73 billion to our society. This cannot be dismissed as a partisan report by the current administration, because OMB issued reports with similar results (benefits greatly exceeding costs) throughout the George W. Bush Administration (e.g., for FY 1998-2008, major regulations cost between $51 and $60 billion, with benefits estimated to be $126 to $663 billion dollars). Given that the benefits of regulations consistently exceed the costs, the need for any legislation that would make the issuance of regulations more difficult or time consuming is certainly in question.

In evaluating H.R. 10 (and debating whether additional restraints on the agencies are necessary or desirable), it is important to understand the many existing constraints (or checks) on federal agencies in developing and issuing regulations. First (and critically important), federal agencies are not free agents; they can only do what Congress has authorized them to do. Stated another way, federal regulatory agencies are not at liberty to do whatever they think might be a good idea – they can only issue regulations that implement existing law -- that is, laws that are duly enacted (passed by both Houses of Congress and signed by the President).

In addition, the process (as opposed to the substance) of rulemaking is already subject to several prescriptive federal statutes. The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., generally requires that agencies give notice of what they intend to do, along with their supporting data and analysis; that there be a meaningful opportunity for those affected by the proposal to comment (and to critique the data/methodology/details of the proposal/estimates of anticipated benefits and costs, etc.); and that the agencies respond to significant comments, explaining whether (and why) they agree or disagree with the comments received. Further, in the mid-1990's, Congress enacted the Unfunded Mandates Reform Act, 2 U.S.C. 1501 et seq., and it amended the Regulatory Flexibility Act with the Small Business Regulatory Enforcement Fairness

Act, 5 U.S.C. 601, et seq., to name only two of several such statutes that require agencies to consult with entities that might be affected by proposed regulations and to do specific analyses regarding the impact of their proposals on those entities.

Regulatory agencies in the executive branch are also subject to Executive Order 12866, 58 Fed.Reg. 51735 (1993), which provides procedural and decisional criteria for developing major regulations. Among other things, agencies are to specify the legal authority under which they are proceeding, the problem(s) they are seeking to rectify, the estimated benefits and costs (both quantifiable and those that cannot be quantified), any less burdensome or costly alternatives to achieving the objectives, and ensure that the benefits of the proposal(s) justify the costs or explain why that cannot be achieved. E.O. 12866 and its salient principles, including centralized regulatory review, were explicitly reaffirmed by President Obama last week. The office that conducts the review of draft proposed and final regulations to ensure that they are consistent with the President's policies and preferences and the principles of E.O. 12866 is OIRA, which not only conducts its own review but also presides over an inter-agency process so that the input and perspectives of other federal agencies (often with conflicting mandates) can be taken into account. Similarly, interested or affected non-governmental entities can meet with officials at OIRA to present their views to an adviser to the President, who is ultimately the one accountable to the electorate for the actions of the federal regulatory agencies.

After the agencies have completed their work on a regulation (and there is final agency action within the meaning of the APA), the Congressional Review Act, another statute that originated with the Contract with America, kicks in. If the agency has gone beyond what Congress intended and there is agreement (simple majority vote) in both Houses of Congress (with expedited procedures in the Senate) and the concurrence of the President, that rule will be disapproved and be of no effect. A number of commentators have argued that the CRA has not been as effective as its proponents had hoped, and the findings in H.R. 3765 recited the fact that it "has only been exercised by Congress once since its enactment in 1996 to reject a rule." The number of disapprovals may not be indicative of the effect of the Act (especially because the original concept was to catch only the most egregious overreaching). At the same time, I do not doubt that its

effectiveness could be enhanced by, for example, limiting its scope to major rules (from 50-100 a year) as opposed to the Congress' being inundated by all rules (several thousand a year), and/or by limiting the distribution of copies of each rule to only one committee of jurisdiction in each House rather than all committees of jurisdiction, so that attention could more easily be focused on the rules that warrant such attention.

Federal regulatory agencies are also subject to check by the courts. I need not belabor this point before this Committee, but any *ultra vires* action would not withstand judicial challenge, nor would any rule that is procedurally defective or substantively unsupported. We are a very litigious nation, and experience shows that those affected by new regulations are not the least bit reticent to seek judicial relief from what they perceive to be onerous rules issued by federal agencies. Indeed, virtually all controversial rules are challenged in court because there is little downside risk to mounting such an effort and hope seems to spring eternal even in the face of a robust supportive record.

While many major rules are controversial, there are other important rules that are not but that nonetheless would be captured by H.R. 10. Perhaps the best example of non-controversial rules which are actually eagerly awaited each year by the regulated entities are those issued by the Department of Interior setting an annual quota for migratory bird hunting under the Migratory Bird Treaty; absent an implementing rule, no one could shoot game birds as they fly to or from Canada. Having been identified as a favored activity during the debate on the CRA, rules that affect a "regulatory program for commercial, recreational, or subsistence activity related to hunting, fishing, or camping" achieved the unique status of being exempt from many of the federal statutes enacted in the 1990s, and the drafters of H.R.10 have in like fashion carved out an exception specifically for these rules.

Although "hunting, fishing, or camping" rules are exempt from H.R. 10 (as are rules relating to monetary policy), many other types of rules favored by regulated entities are not exempt. It may be counter-intuitive to some, but it is not unusual for regulated entities to support or even champion certain rules – such as those that provide needed

guidance or provide certainty or regularity for operations for the foreseeable future. For example, the automobile companies supported the Environmental Protection Agency (EPA)/Department of Transportation (DOT) joint rules for "Passenger Car and Light Truck Corporate Average Fuel Economy Standards for MY 2012-2016;" industry stakeholders supported the Department of Labor rule updating the Occupational Health and Safety Administration's "Cranes and Derricks" rule; the same for the Department of Energy's rule on "Weatherization Assistance for Program for Low Income Persons," which, among other things, reduced procedural burdens on evaluating certain housing applications.

There are also rules that specify the structure or eligibility for government programs, such as the Department of Education's rule on "Investing in Innovation Fund," and the Department of Defense (DOD) rule relating to the "Homeowners Assistance Program;" these rules enable the programs authorized and funded by Congress to begin to operate as they were envisioned or modified by Congress, and they are often eagerly awaited by the potential participants in the program. In a similar vein, there are multiple so-called transfer rules (which primarily cause transfers from taxpayers to program beneficiaries as specified by Congress), such as the Department of Agriculture's rules on the "Sugar Program," the "Emergency Loss Assistance and Livestock Forage Disaster Programs," and the "Biomass Crop Assistance Program," as well as the Department of Veterans Affairs' rule on the "Post 9/11 GI Bill." Delay in issuing the rules means delay in starting up or carrying on the programs.

Regulated entities may have been less enthusiastic about other rules issued during the Obama Administration, but the hands of the regulatory agencies are sometimes tied by the authorizing legislation. Examples of recent instances where the agency has scrupulously followed the provisions of the authorizing act – virtually no discretion was provided for, or exercised by, the agency -- include the DOT rule on "Positive Train Control," and the DOD rule on "Retroactive Stop Loss Special Pay Compensation." These rules simply carried out the law as passed by Congress, but if H.R. 10 is enacted, similar rules in the future would still need to be approved by both House of Congress and the President before they become effective.

Another category of rules worth considering are those that are important to public health and safety, which may be controversial with some, but highly desired by the vast majority. Examples include the Food and Drug Administration's "Shell Egg" rule dealing with salmonella; the DOT rules on "Reduced Stopping Distances for Truck Tractors" and "Standards for Increasing the Maximum Allowable Operating Pressure for Gas Transmission Pipelines;" and, in terms of equities, the Department of Justice (DOJ) rules on non-discrimination on the basis of disabilities.

In addition, in the foreseeable future, it is likely that several agencies would review exiting rules (the retrospective look-back called for by President Obama last week) and propose to eliminate currently effective major rules; their attempt to do so, which would clearly be supported by the regulated entities, would nonetheless get caught in the H.R. 10 net, along with any deregulatory rules issued by this or a subsequent administration. (See Motor Vehicle Manufacturer Assn. v State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983))

The proponents of H.R. 10 may argue that those rules that are acceptable (accordingly to a majority of then-current Members of Congress) will be approved, and only the objectionable ones will be stopped. Consider that the total number of major rules issued in CY 2010 was 94. Assuming that the Senate does not use its constitutional right (acknowledged in H.R. 10) to change the rules relating to the procedures of the Senate, and that the full time authorized in the bill -- for debate in the Senate on all debatable motions and appeals, the single quorum call, and the vote on the joint resolution itself (easily over four hours) --will be used for each rule considered, it is inconceivable that the Senate, with its other constitutional responsibilities (such as consideration of presidential nominations, work on appropriations bills from the House, etc.), could possibly find 90 blocks of time, or 50 or 25 or even 10 blocks of time sufficient for this process. Experience during the 111th Congress compels the conclusion that there will not be time to consider and approve even the most worthy rules. The "cost" to the economy and to society as a whole in terms of delay, uncertainty, and actual harm as a result of highly beneficial rules being held up or abandoned could be substantial, whereas the marginal "benefit" of having another significant procedural step

before a major rule becomes effective -- as opposed to relying on the CRA process for a joint resolution of disapproval -- is likely to be minuscule.

Finally, but importantly, if most or even some final major regulations issued by federal agencies are barred from taking effect because one or both Houses of Congress do not – because of time constraints or philosophical or practical objections – explicitly approve the issuance of the regulations, then this bill would change dramatically the constitutional structure of our government. At the beginning of the 112th Congress, Members of this Chamber read aloud the Constitution, which assigns various responsibilities to the different branches of the federal government. The drafters of H.R.10 cite Section 1 of Article 1, which grants all legislative powers to the Congress. But equally important is Section 1 of Article II, which grants the executive power to the President. While the legislative branch is to make the laws, the executive branch is to "take care that the laws be faithfully executed."

Constitutional objections to this bill can be cast in at least two ways. First, assume that the Senate passes a joint resolution under H.R. 10 approving a major rule from a federal agency. The bill then goes to the House for a vote and the joint resolution is defeated. Can this easily be distinguished from INS v. Chadha, 462 U.S. 919 (1983), where the Supreme Court held that a determination by the Attorney General to suspend deportation that was disapproved by a one-House veto was unconstitutional, notwithstanding that the act authorizing the Attorney General's determination had specifically reserved a one-House veto in the event either House of Congress disagreed with the Attorney General's determination? It may not be enough to say that H.R. 10 incorporates bi-cameral and presentment (the requirements for constitutionality in Chadha) because in the case described above, one House alone would stop final agency action from becoming effective. Conceivably the supporters of H.R. 10 would argue that the agency action is not final (that is, the rule has no force or effect) because the intent and effect of H.R. 10 is to amend the underlying delegation of rulemaking authority to require explicit approval of any major rules by the Congress and the President. If this is their argument, then truth in legislating would call for being very clear – that these few pages of text in H.R. 10 are amending literally hundreds, in not thousands, of duly

enacted laws – however long they have been on the books (i.e., for days or decades) – that delegated rulemaking authority (whether permitting or directing rulemakings) of every kind (eligibility criteria, standard setting, reporting requirements, articulation of enforcement policy) to every regulatory agency (executive branch or independent regulatory commissions).

Such an assertion leads to a somewhat more nuanced argument that H.R. 10 on its face may run afoul of the separation of powers principles our founding fathers embodied in the Constitution. In Morrison v Olson, 487 U.S. 654 (1988), Chief Justice Rehnquist set forth several tests for evaluating a statutory scheme under the separation of powers doctrine. One is that a statute is suspect if it "involves an attempt by Congress to increase its own powers at the expense of the executive branch." Much of the discussion surrounding H.R. 10 suggests that that may be an apt characterization of the sponsors' intent. Another test is whether an act of Congress "impermissibly interferes with the President's exercise of his constitutionally appointed function," which clearly includes the obligation to "take care that the laws be faithfully executed." For over a century, the executive branch has taken care to faithfully execute the laws by, among other things, developing and issuing regulations implementing legislation. Justice Scalia, who of all the Justices most aggressively guards the President's authority, relied in both Morrison v Olson and in Mistretta v. United States, 488 US 361 (1989), on the fact that the activities at issue in those cases were ones in which the executive had traditionally engaged. That characterization is clearly applicable here as well.

It is beyond dispute that if Congress were to require that the initiation of any prosecution by a U.S. Attorney or the Department of Justice would have to be approved by Congress before the prosecution could begin, such an act would be inconsistent with separation of powers. Does the same analysis hold for an act requiring prior approval of major regulations implementing duly enacted laws? Would such a requirement be viewed as an attempt by one branch to aggrandize itself at the expense of another? Would it be viewed as an attempt by one branch to impermissibly interfere with the ability of another branch to carry out its constitutional powers? Would it be viewed as an action that, again quoting from Morrison v. Olson, "unduly trammels on executive

authority"? These questions, I believe, are not easily answered, nor are the concerns easily dismissed.

Thank you again for the opportunity to testify today. I look forward to answering any questions you may have.