Mr. Chairman, Senator Collins and Members of the Committee,

Thank you for inviting me to testify today and for setting up a balanced review of the many bills pending before you on regulation.

It seems to me that the question before the Committee today is not whether regulatory agencies sometimes make mistakes or issue controversial rules. The question, rather, is two-fold: 1) Is there something fundamentally amiss with the regulatory system, and 2) Would the pending legislation make things better or worse?

In other words, the Committee ought to be asking itself the very questions the existing Executive Orders and some of the pending bills put forward for the agencies: What problems are you trying to solve, and is this the best way to solve them? Would the benefits outweigh the costs?

It seems to me that no one has identified a fundamental problem with the regulatory system for which the pending bills would be a remedy.

The regulatory system has regularly been shown to yield benefits that significantly outstrip its costs, and studies have found the system to have, at worst, a neutral effect on employment.
Moreover, the system produces benefits that the public has rightly come to expect: cleaner air and water, safer food and so on. When banks lend money with abandon, or an oil platform collapses in the Gulf of Mexico, or salmonella sickens consumers, no one responds by praising the restraint of regulators.

And I must say, the complaints about the specific rules that are sometimes held up as examples of why these bills are necessary seem almost entirely unrelated to the legislative texts. The offending rules, whatever their merits, have undergone cost-benefit analysis and public comment and are subject to judicial review. It’s often not clear how the proposed measures would have changed anything except by making the process more time consuming, expensive and cumbersome for all concerned.

It seems at times that these bills are not an effort to craft targeted solutions to specified problems but rather to use any tool at hand to run a war of attrition against already over-burdened agencies that are trying to follow the laws Congress has passed. Surely, inducing exhaustion is not the proper way to “reform” the regulatory system, whatever its failings.

Which brings me to my second question: Would these bills make the system better or worse?

In general, I fear, the bills would make the system less able to provide the protections the public expects. First, the additional, often ill-defined analyses required by some of these bills would provide little reliable or needed information, but would impose additional costs on the agencies. Especially at a time when agencies may see their budgets cut substantially, these additional requirements seem like the wrong priority. In effect, the bills themselves would end up imposing “unfunded mandates” on the agencies.
Allowing judicial review before a rule is final would needlessly burden courts and agencies and short-circuit the regulatory process. It would fly in the face of elementary principles – how can one sue over something that, by definition, is not affecting anyone? That seems like a particularly odd approach for conservatives, who have not been enamored with recourse to the courts. And early judicial review seems to contradict other goals of these bills – such as more open discussion of alternatives. How open will agencies be if they can be hauled into court simply for broaching an idea someone doesn’t like?

The worst and by far the most radical bill before the Committee is the REINS Act, which sets out to destroy the regulatory system as it has existed for well over a century. Congress rightly decided long ago that it was not the right venue to decide every scientific, technical and quasi-judicial issue that a modern economy poses for the government. The REINS Act rejects that hard-earned wisdom in a way that legislators, businesses and the general public would all quickly come to regret if this destructive measure were ever enacted.

If Congress truly believes the regulatory system needs reform, the proper approach would be to review the underlying statutes that direct the regulatory agencies, not to impose one-size-fits-all work-arounds. Agencies are carrying out their legislative mandates. If there are problems with those mandates, the solution is not monkeying with the regulatory process or, in the case of the REINS Act, trying to overthrow it.

No doubt, one reason Congress is reluctant to address its purported concerns more directly is the level of public support for these underlying statutes, which have been and continue to accomplish their goals. Indeed, it’s interesting that lists of offending rules are almost always prospective – once rules are in effect, they generally are viewed as successful and far less expensive than anyone had claimed in advance.
I urge the Committee not to further complicate a system that is fundamentally protecting the public without unduly burdening the economy. Thank you.

Written Testimony

Mr. Chairman, Senator Collins and Members of the Committee,

Thank you for inviting me to appear before you today. This hearing concerns a range of bills, but all of them would have a similar impact – they would all further complicate the regulatory process, with an eye toward making it harder for agencies to carry out their legal mandate to protect the public.

With that in mind, I’d like to start by asking everyone to remember why we need public safeguards to begin with. As experience has repeatedly shown, the marketplace alone cannot produce clean air or clean water, guarantee the safety of our food or medicines, or of consumer products, cannot improve worker safety, or ensure the integrity and stability of our financial system. The market is not designed to accomplish these vital public goals. They can be achieved only through public action, which is to say through safeguards enforced by the government. Such “rules of the road” not only protect the public, but they provide certainty and a fair playing field for industry. These rules are no more a violation of the notion of “free enterprise” than having a police force is a violation of the notion of a “free country.”

That’s why once rules have been in place for a time, they tend either to be taken for granted, or celebrated as “progress” that was made by society as a whole. Companies tout how much cleaner and safer their products are; everyone appreciates how much cleaner the nation’s air and water are compared to the mid-twentieth century.
But pretty much each step of the progress that is now so universally acclaimed was fraught with controversy. The same kind of fears that we hear expressed today – about job losses, about high costs, about burdens on small business, about cures that are worse than the disease – those same fears were raised about all the safeguards that we now take for granted. And there is no more reason to excessively credit such fears now than there was then. Whenever industry is asked what safeguards pose the greatest threat to their interests, they seem to answer “the next one.” But this is a perverse kind of future orientation that merely confirms that experience has not borne out past claims.

Regulatory agencies, like all human institutions, are imperfect, but it’s not clear what fundamental problem the bills before this Committee are trying to solve. The public is unlikely to gain from the duplicative analyses, additional lawsuits, creative accounting and elaborate procedures contemplated in these bills; it’s not even clear business would gain from adding potentially costly new loops in an already highly elaborated process. But it is clear that there will be opportunity costs if agencies need to focus all their resources on additional process rather than on protecting the public.

The closest anyone ever seems to come to describing the problem that these bills are intended to solve is a general lament that the nation is “over-regulated.” But the appropriate response to that claim is, “Compared to what?” We are certainly over-regulated compared to some kind of Messianic state in which everyone would have complete liberty with the knowledge that it would never be abused. We are over-regulated compared to what would be needed in an 18th century society of small towns and farms.

It’s not so apparent that we are over-regulated given the actual world we live in today, with its global corporations and industrial pollutants, and problems that individuals have little capability to counter and that corporations have limited incentive to address. That said, even Adam Smith
recognized in 1776 that markets have their limits and that the visible hand of government was
sometimes needed to keep the market system afloat.

We certainly have ample experience of late seeing what can happen in a world that is under-
regulated. In that world, banks can blithely decide that housing prices can never fall, bringing
the economy to its knees; eggs can spread salmonella to households throughout the country; and
oil wells can spew massive amounts of petroleum into fertile seas with companies not having so
much as a workable response plan.

The problems that pending regulations are designed to address are every bit as real as the ones
we casually and catastrophically ignored not so long ago. And many of them are coming
forward now not because of some paroxysm of regulatory fervor on the part of the Obama
Administration, but because of the continuous working of underlying statutes and court rulings
enforcing them.

In many ways, the bills before the Committee are really “work-arounds,” efforts to monkey with
regulatory procedure rather than debating whether the statutes underlying regulation are doing
their jobs. Perhaps this is because the public would be far more alarmed by efforts to undermine
fundamental protections for clean air, clean water and the like, than they are by seemingly
benign and arcane changes in regulatory process.

The bill that takes this approach to its logical extreme is the REINS Act (S. 299), which would
block any major safeguard from moving forward unless Congress approved it within 70
legislative days. All an industry would have to do to derail a safeguard is to convince a bare
majority in one House of Congress to vote against it. There is then nothing the other body could
do to resurrect the safeguard. And the Administration’s role – under any President – would be
limited, in effect, to advising the Congress on what a detailed regulation should say.
The REINS Act is a summary rejection of the hard-earned knowledge that led to the creation of agencies and of a century of bipartisan experience. The Act radically repositions Congress, the most political branch of government, as the place to make ultimate decisions that involve detailed technical matters. Congress should, through law, be making the basic political and policy decisions about what kinds of activities need to be regulated – those that affect air and water quality, for example – and on the criteria for regulating them. And Congress already has the authority and processes to review agency decisions. But the REINS Act goes far beyond that to make Congress the arbiter of each and every regulatory call in an effort to shut down the system.

The other bills before the Committee are not as radical as the REINS Act – that would be hard to achieve – but they share its purpose of making it harder for agencies to carry out their legislative mandates in an attempt to advantage corporate interests.

These bills presume a broken regulatory system when study after study has found the benefits of regulation to far outstrip the costs (and it is the proponents of these bills who want to elevate the significance of cost-benefit analysis). Studies have also found repeatedly, and unsurprisingly, that in most cases the expected costs of regulation are greater than what the actual costs turn out to be, often by a large margin. Moreover, studies have found the impact of regulation on jobs to be neutral to positive.

So, instead of tearing down a system that has repeatedly provided proven benefits to the public – cleaner air and water, better health, safer food – we ought to be talking about how to strengthen it. We ought to be sure that agencies have the staff and resources they need to continue to protect the public as well in the future as they have in the past. That has been a path not only to better health and safety, but to greater prosperity. Thank you.