



Source: Daily Environment Report: All Issues > 2009 > January > 01/27/2009 > News > Regulatory Policy:  
Regulatory Affairs Pick Sunstein Draws Fire In Report by Center for Progressive Reform

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## **Regulatory Policy**

### **Regulatory Affairs Pick Sunstein Draws Fire In Report by Center for Progressive Reform**

Cass R. Sunstein, President Obama's pick to head the Office of Information and Regulatory Affairs at the White House Office of Management and Budget, was criticized Jan. 26 by legal scholars from the Center for Progressive Reform who said his views reflected those of the outgoing Bush administration.

Saying his expected nomination "surprised" most observers, the Center for Progressive Reform (CPR) asserted "Professor Sunstein's long track record on regulatory issues is decidedly conservative" and "would seem to represent 'more of the same,'" likening his views to "the controversial approaches deployed by the George W. Bush administration."

CPR's critique is contained in a 19-page report titled *Reinvigorating Protection of Health, Safety, and the Environment: The Choices Facing Cass Sunstein*. CPR is a research and educational group of national legal scholars who support protecting health, safety and the environment through analysis and commentary, according to the group's website.

Sunstein—a prolific author on constitutional, administrative, and environmental law—is expected to be nominated as administrator of the Office of Information and Regulatory Affairs, where he would replace Susan Dudley, who left the post Jan. 20 (5 DEN A-8, 1/9/09).

"Cass Sunstein is a progressive on many issues and is well-respected for his scholarship," said CPR President Rena Steinzor, an environmental law professor at the University of Maryland Law School. "But the hard truth is that he's a committed advocate of the very methods that the Bush administration and some of its predecessors have used to bottle up much-needed regulatory protections for health, safety and the environment."

#### **Views on Costs-Benefits Analysis Faulted.**

In particular, the CPR report takes issue with Sunstein's endorsement of cost-benefit analysis as a key part of OMB's review of agency regulations, as well as his support for centralizing regulatory review within OIRA.

Currently a professor at Harvard Law School, Sunstein directs the law school's program on risk regulation. From 1981 until early 2008, when he left to teach at Harvard, Sunstein was a professor at the University of Chicago Law School, where he became a friend of Obama, who also was on the faculty.

The CPR report observes that Sunstein "contends that cost-benefit analysis holds out the promise of rationalizing government decision-making and reducing undue influence by interest groups that exploit the irrationality of the public's assessment of risks."

Moreover, the report notes that Sunstein has proposed extending the use of cost-benefit analysis beyond executive branch agencies and departments to include independent regulatory agencies such as the Federal Trade Commission, which have traditionally operated with little interference from the White House.

Taking issue with Sunstein's views, the CPR report argues that cost-benefit analysis should be abolished as a form of regulatory review because it "applies a patina of mathematical precision to an inherently distorted process" that opens up government decision-making to manipulation by interest groups.

#### **Stronger Office Could Undercut Experts.**

In addition, the report states, "The expansion of OIRA's influence allows a small group of economists in OIRA to displace the expertise of agency personnel on a wide variety of complex regulatory issues, ranging from air pollution to workplace safety."

The report also discusses several of Sunstein's positions that might be sources of controversy if Sunstein were confirmed, including:

- support for such cost-benefit approaches as the “senior discount” method which assigns a lesser value to the lives of seniors that could be extended by a regulation;
- rejection of the “precautionary principle”—which states essentially it is “better to be safe than sorry”—and has been used as a rationale for regulation in controversial, hard to quantify areas such as climate change; and
- the suggestion that the Occupational Safety and Health Administration might be unconstitutional because it has too much delegated authority from Congress.

*By Ralph Lindeman*

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*The Center for Progressive Reform report, Reinvigorating Protection of Health, Safety, and the Environment: The Choices Facing Cass Sunstein, is available at <http://www.progressivereform.org/articles/SunsteinOIRA901.pdf>.*

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