

REDUCING RED TAPE: THE NEW OIRA ADMINISTRATOR'S PERSPECTIVE

HEARING BEFORE THE COMMITTEE ON SMALL BUSINESS UNITED STATES HOUSE OF REPRESENTATIVES ONE HUNDRED THIRTEENTH CONGRESS FIRST SESSION

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WEDNESDAY, JULY 24, 2013

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 1:00 p.m., in Room 2360, Rayburn House Office Building. Hon. Sam Graves [chairman of the Committee] presiding.

Present: Representatives Graves, Chabot, Luetkemeyer, Hanna, Huelskamp, Schweikert, Collins, Rice, Velázquez, Chu, Hahn, Meng, Schneider, and Barber.

Chairman GRAVES. Good afternoon, everybody. We will call this hearing to order.

I am very pleased today to welcome Howard Shelanski, who is the new administrator of the Office of Information and Regulatory Affairs. The Office of Information and Regulatory Affairs is charged with the critical role of reviewing significant regulations and overseeing agencies' review of existing regulations.

Over the last four years, regulatory burdens have increased at an astonishing rate, and major rules alone have added nearly 70 billion in new regulatory costs. In fiscal year 2012, more than 3,800 final rules were issued. While expanding the regulatory state in an unprecedented way, President Obama has also directed federal agencies to review their existing regulations. He issued two executive orders—one in 2011 that required agencies to draft and finalize retrospective review plans, and another in 2012 that requires federal agencies to produce retrospective review progress reports. Agencies were ordered to give special consideration to initiatives that would reduce regulatory burdens on small businesses. This makes sense because small businesses are disproportionately burdened by regulatory costs. Furthermore, in survey after survey, small businesses regularly cite concerns about the complexity and burden of red tape. The need to reevaluate our regulatory structure is clear.

Last week in *The Washington Post*, there was a story that ran on the front page about a magician from my home state of Missouri. This magician uses a Netherland dwarf rabbit in his magic shows for kids and the Department of Agriculture has determined that the magician must carry a license for his rabbit, pay an annual fee, and submit to surprise inspections of his home. In addition, under a new rule finalized just last year, he is required to have a written plan detailing how he will take care of the rabbit in the event of an emergency or disaster. This rabbit disaster plan,

which is being prepared with professional assistance, is 28 pages long so far.

If this story was not on the front page of the newspaper I would have thought it was a joke, but this is no laughing matter. This kind of story about regulatory overreach is unfortunately all too common today. Congress gives regulators an inch and a lot of times they do take a mile and the result is poorly thought out, unnecessary regulations that unduly burden small businesses.

Today, Administrator Shelanski has joined us to discuss agency retrospective review efforts, and I look forward to hearing whether the agencies' efforts are resulting in meaningful reductions in regulatory burdens, particularly for small businesses. And I also look forward to hearing how Mr. Shelanski plans to scrutinize new regulatory proposals to ensure that any negative impacts on small businesses are minimized.

And with that I turn to Ranking Member Velázquez for her opening statement.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Small businesses are critical to the economy, creating nearly 70 percent of net new jobs and generating more than 50 percent of GDP. While their contributions are essential to putting a real dent in the nation's unemployment rate, regulatory costs threaten to undermine this important role. While credible estimates of these costs are hard to come by, over the last seven years this committee has extensively examined the impact of regulations on small firms. During this time, it has become clear that although these rules provide significant benefits to the public, they are, in fact, creating very real challenges for a wide range of smaller companies.

President Obama addressed this matter head-on by issuing Executive Orders 13563 and 13610. Together, these mandates have the potential to bring real relief to small businesses across the country. They call for the careful reassessment—a retrospective analysis—of regulations that are in place. After this evaluation has been undertaken, agencies will be in a position to streamline, modify, or eliminate rules that do not make sense in their current form or under existing circumstances. Specifically, agencies are directed to prioritize initiatives that will produce significant cost savings and reductions in paperwork burdens. As a result, small businesses will face fewer headaches in dealing with federal regulations.

In May, this committee heard from agencies on their progress in implementing these orders. We learned for the most part that agencies are taking these requirements more seriously than they have in the past, particularly when it comes to the section 610 requirements in the Regulatory Flexibility Act. Several agencies, from Treasury to Labor to DOT, have already issued final rules that will reduce burdens on businesses. Other changes, like those to the FAR, will help small businesses directly by reducing government bureaucracy.

During today's proceedings, I am particularly interested in hearing whether these moves indicate a long overdue change to agency behavior. All too often, similar efforts have been just a flash in the pan as agencies' compliance with previous calls for regulatory reduction faded quickly.

While the president's initiatives are welcome, we cannot overlook the importance of the Regulatory Flexibility Act as well. It has provided an overarching structure for agencies to work within, limiting the impact of their rules on small businesses. With efforts currently underway in the Judiciary Committee to revise this important statute, we must ensure that any changes do not undermine its effectiveness. This means not heaping on the SBA's Office of Advocacy—who implements the RFA—with responsibilities beyond its capacity. As a result of the sequester, this office is already struggling to make due with less and adding more duties makes little sense. The truth is that taxpayers will be stuck with another bill or more likely no additional funding will be provided and the office will be unable to carry out these obligations effectively.

Instead, we should be considering changes to the RFA in the area that are most glaring, rather than rewriting the entire act. This includes ensuring periodic reviews become a regular part of the regulatory process and that agencies cannot evade their responsibility under the act. It also means broadening the panel process, but in a way that makes sense in the current fiscal environment.

With Administrator Shelanski here today, I am eager to not only hear about agency implementation of the retrospective review plans, but also what step, if any, should be taken to improve the RFA. Reducing regulatory burden is a laudable, if elusive, goal. It is something that Congress, the administration, and the private sector must work towards and constantly improve as the regulatory environment evolves. With this in mind, I am hopeful that these most recent executive orders will be a break from past efforts. Reversing these trends are essential, not only to small business, but to the economy overall.

I yield back the balance of my time. Thank you.

Chairman GRAVES. Thank you.

The Honorable Howard Shelanski was confirmed as the administrator of the Office of Information and Regulatory Affairs on June 27, 2013. Mr. Shelanski has both a Ph.D. in Economics and a law degree from the University of California at Berkeley. He served in several positions at the Federal Trade Commission, most recently as the director of the Bureau of Economics. Mr. Shelanski has worked for the Federal Communications Commission and the Council of Economic Advisors at the White House, and he has also taught and practiced law and clerked for several notable jurists, including Supreme Court Justice Scalia.

Mr. Shelanski, thank you for taking the time to be here. Your written testimony will be entered into the record in its entirety, and I look forward to hearing your oral testimony.

STATEMENT OF HOWARD SHELANSKI, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. SHELANSKI. Thank you very much, Mr. Chairman, Ranking Member Velázquez, and members of the Committee. Thank you for the opportunity to appear before you today.

As Chairman Graves just mentioned, I was recently confirmed as the administrator of the Office of Information and Regulatory Affairs, known as OIRA, at the Office of Management and Budget,

and I am honored to be serving in this role. And I look forward to speaking with you today about the topic of retrospective regulatory review, and in particular, its benefits for small businesses.

Retrospective review is critical to ensuring that our regulatory system is modern, streamlined, and does not impose unnecessary burdens on the American public. Even regulations that were well crafted when first promulgated can become unnecessary over time as conditions change. Retrospective review of regulations helps to ensure that those regulations are continuing to promote health, safety, welfare, and well-being of Americans without imposing unnecessary costs.

Recognizing the importance of this effort, in January 2011, the president issued executive order 13563, called “Improving Regulation and Regulatory Review.” Among other things, that executive order asks executive departments and agencies to review existing regulations and to streamline, modify, or repeal regulations and reduce unnecessary burdens and costs. As a result of that executive order, executive departments and agencies produced more than two dozen plans with over 500 regulatory reform initiatives. Just a small fraction of the rules already finalized will produce billions of dollars of savings in the near term. In subsequent executive orders, the president took the additional steps of directing agencies to emphasize reforms that produce significant, quantifiable savings, and of asking the independent regulatory agencies to develop their own regulatory review plans.

The administration’s retrospective review efforts are already producing significant results. For example, the Department of Health and Human Services (HHS) finalized rules to remove unnecessary regulatory and reporting requirements on hospitals and other health care providers, saving more than \$5 billion over the next five years. The Department of Labor finalized a rule to simplify and to improve hazard warnings for workers, producing net benefits of more than \$2.5 billion in savings over the next five years while increasing safety. The Department of Labor also finalized a rule that will remove approximately \$1.9 million annual hours of redundant reporting burdens on employers, and save more than \$200 million in costs over five years. The Environmental Protection Agency finalized a rule to eliminate the obligation for many states to require air pollution vapor recovery systems at local gas stations since modern vehicles already have effective air pollution control technologies. The anticipated five-year savings are over \$400 million.

Our retrospective review efforts have focused especially on benefiting small businesses. The Department of Transportation retrospective review plan alone identifies over two dozen initiatives to save money for small businesses and local governments. For example, one of DOT’s initiatives would codify regulations to prevent duplicative requirements for air carrier drug and alcohol testing programs, which would be particularly helpful for small carriers. The Department of Defense issued a new rule to accelerate payments on contracts to as many as 60,000 small businesses, improving their cash flow. And the Small Business Administration is changing its rules to adopt a single electronic application to reduce the

paperwork required of certain lenders, which will in turn benefit small business borrowers.

This past winter, agencies focused their retrospective review updates on paperwork burden reduction. Many of the initiatives stemming from this effort will save substantial money for small businesses. For example, the Internal Revenue Service announced a simplified method for claiming the home office deduction, which will save taxpayers, particularly those with home-based small businesses, over 1.6 million hours and several million dollars in out-of-pocket costs per year.

In July 2013, agencies submitted to OIRA their latest updates of their retrospective review plans pursuant to executive orders 13563 and 13610. Although OIRA is still reviewing the plans and the full updates are not yet public, I can report that many of the initiatives highlighted in the updated plans benefit small businesses. For example, the Department of Housing and Urban Development is drafting a final rule that would create alternative, more streamlined financial statement reporting requirements for small supervised lenders. The rule would also eliminate duplicative reporting requirements for lenders who already report to federal agencies. In addition, the Federal Aviation Administration is proposing a rule to update, simplify, and streamline rules of practice and procedure for filing and adjudicating complaints against federally assisted airports. Small businesses would particularly benefit from this rule which would decrease the time spent on processing complaints by allowing parties to file electronically.

Retrospective review is crucial to ensuring that we have a well-functioning regulatory system, and moving forward I will look for further ways to institutionalize retrospective review of regulations and to ensure that retrospective review continues to produce significant cost savings for small businesses and for the American people.

Thank you for your time. I would be happy to answer any questions.

Chairman GRAVES. Thank you very much, Administrator.

We are going to start with Representative Luetkemeyer. You can start with questions.

Mr. LUETKEMEYER. Okay. Thank you, Mr. Chairman. And thank you, Mr. Shelanski, for being here today.

I have a few questions here with regards to the Department of Labor is coming out with some rules and has been coming out with some rules and I am going to kind of use those as perhaps a template for how you go about your rulemaking process here.

In 2010, they came out with a rule with regards to broker-dealers and investment advisors and they withdrew the rule again in 2011. I do not know if you are familiar with it or not but it had to do with the liability exposure, that they could be exposed to as a result of this rule with regards to the broker-dealers and investment advisors, how they advised their clients. And now it is DOL's intent to repropose the rule. In fact, you may have the rule already to review because they were going to try to deal with it in 90 days. You have to have it within 90 days of the rule being implemented and they are trying to get it by the first of October. So you may have it already, I am not sure. But regardless, I guess my concern

is, number one, since they pulled the rule back and they are now going to repropose it, I assume you will get it before they do come out with a final ruling. Is that correct?

Mr. SHELANSKI. Yes, sir. That is correct.

Mr. LUETKEMEYER. Okay. And they have to go through the entire process of showing a cost-benefit analysis, what kind of problem is there to solve, what their solution is. That is all part of the regular process of going about this; is that correct?

Mr. SHELANSKI. Yes. So the review process at OIRA is very much exactly what you just described. When the regulation comes to OIRA for review, one of the jobs of the office is to make sure that the prescriptions of the relevant executive orders have been followed. And one of the, I think, centerpieces of the executive orders under which OIRA operates is cost-benefit analysis. And so any rule that comes to OIRA, whether it will be the reproposed fiduciary or any other regulation, where allowable by law will be subject to this kind of cost benefit.

Mr. LUETKEMEYER. Okay. Whenever they give you the cost-benefit analysis, do you look at it and ever tell them, "Hey, this is a bunch of bunk. You guys are all blowing smoke at us. This does not work. I want you to go back and actually do an analysis that makes sense?"

Mr. SHELANSKI. This is, in fact, very much at the heart of what OIRA does. OIRA does not in the first instance do original cost-benefit analysis. It reviews what the agencies have done, but it reviews it rigorously and critically so information can emerge during the OIRA review process that suggests either that the cost-benefit analysis was inadequate or should be done in a different way, or as in many cases, that it was, in fact, done very well. But OIRA does adopt a very critical analysis of that.

Mr. LUETKEMEYER. Okay. In this situation there also is a situation here where the SEC is trying to also make a rule under a different structure, under different guidelines, different authority, and the two rules could be in conflict and there needs to be some collaboration here. Do you force them to collaborate? What happens when they are in conflict with each other?

Mr. SHELANSKI. Mr. Luetkemeyer, thank you very much for that question because I think that gets to a very important issue. I absolutely share your concern and OMB shares your concern with duplicative or conflicting regulations. And one of the very important roles of OIRA, in addition to reviewing what the agency analysis is, is where appropriate to convene other agencies that might have duplicative or conflicting rules.

Mr. LUETKEMEYER. So do you get them in a room and say, okay, you guys knock it out? Or do you reject both rules and tell them to do it over? How do you get to some sort of resolution here?

Mr. SHELANSKI. Well, there are different processes depending on the circumstance. The Securities and Exchange Commission is an independent agency and not subject to OIRA review. But of course, the Department of Labor is.

Mr. LUETKEMEYER. What rules are going to have an impact on what you review.

Mr. SHELANSKI. Precisely. I agree with you completely.

And so the job of OIRA, and my job as administrator in that case, would be to make sure that the Department of Labor, which is subject to OIRA review, is fully taking account the extent to which its rules will overlap or interoperate with the Securities and Exchange Commission's rules.

Mr. LUETKEMEYER. Okay. With regards to looking at the promulgation of rules, do you ever look at the letters and the testimony, the comment period, all the stuff that comes in to, in this case, DOL or whomever, and say this is an unintended consequence of what you are trying to do. This is what is going to happen if you do this. And to follow up because I am running out of time here, do you also look at, in a case of promulgating rules from a law, do you ever look at the intent of Congress and what we are trying to get done with this law and the hearings that we have here and the testimony and the discussions held on the floor as an indication of where we want to go with this law so that when they make the rules they do not take a turn somewhere and go off on a tangent and make sure they stay within the case I call it, or where they need to be to make these rules?

Mr. SHELANSKI. So let me answer your questions, starting with the one you just asked because I think it is a very important question.

The interpretation of an agency statute and the choice of policy to the extent there is discretion under that statute is in the first instance in the province of the department or agency that is issuing the regulation. OIRA does not set policy priorities or do the initial legal interpretations for the agencies; they do that. Now, of course, should there be a regulation that is not in compliance with the law, that would be something that we would be very concerned with.

In terms of the comments and the public information that comes into the rulemaking process itself, that is very much the kind of information that OIRA looks at and depends on for parts of its review. Just to give you a hypothetical example, were it the case that a comment had brought interesting or credible data to the rulemaking process and that data were not accounted for in the agency's analysis, that would lead to a question from OIRA to the agency about why not, and what would the effect of accounting for that data be? So we are very concerned that the best available information—technical data, science, economics—all factor into the rulemaking process, and public notice and comment is a very important source of that information.

Mr. LUETKEMEYER. I see my time is up. I appreciate the Chairman's indulgence. Thank you very much.

Chairman GRAVES. Ranking Member Velázquez.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Administrator Shelanski, OIRA's guidance dated October 26, 2011, entitled "Implementation of Retrospective Review Plans" stated that the agency's plan should cover existing significant regulations. That is the case; correct?

Mr. SHELANSKI. Yes, that is correct.

Ms. VELAZQUEZ. However, several agencies have included new rules unrelated to existing regulations, as well as initiatives outside of the rulemaking process. So I would like to know what is

your position on that? And do you believe that these in any way will undermine the intent of the executive order?

Mr. SHELANSKI. Thank you. Thank you very much, Congresswoman Velázquez.

Let me start by saying that retrospective review in my view, and I think in the view of the president's executive orders, should undertake all agency actions that might save money for the American public and particularly for small businesses. That could include things that are not rules. For example, methods of reducing paperwork and things that might fall outside of reforming or repealing an existing regulation. And those can be extremely beneficial for small businesses. So to the extent that it is part of the retrospective review plans or things working under the retrospective review executive orders, I do think that it can be appropriate for agencies to expand their focus beyond—

Ms. VELAZQUEZ. Okay. So let us say that, yes, it could be appropriate, but do you not believe that the focus of the review should be on emphasizing those rules, those existing rules to relieve the burden?

Mr. SHELANSKI. Yes. Yes, I do. That certainly is the focus of retrospective review. Now, what can be a little bit complicated in looking at the plans that the agency has put forward is that often the vehicle for changing a pre-existing rule is a new rule. And so one might look at them and say, well, this is supposed to be a retrospective review plan and instead of seeing the words "repeal, repeal, repeal," we see new rules. But the effect of those new rules is to modify or change in some way pre-existing regulations.

Ms. VELAZQUEZ. Thank you.

Administrator, every week that we hold hearings regarding an issue related to small business growth, people raise the regulatory environment and how this hinders small businesses. My question to you is agencies have been reporting for over a year now on retrospective reviews. And we want them to do their work because it is going to show cost savings for small businesses. What is the role that sequestration plays on that effort?

Mr. SHELANSKI. Well, I think that is a very important question. I can speak from OIRA's standpoint. I think the role of sequestration in general is one that constrains the ability of agencies to have as much person power as they would like to have in their various functions, and to the extent one of those functions is retrospective review, one might imagine that sequestration is having a negative effect on their ability to devote resources to that activity. But as for the specific effects on any given agency, I cannot speak to that.

I can, however, speak to OIRA's role in encouraging and working with the agencies and reviewing their retrospective review plans. All of OMB, OIRA included, is really at sort of a bare bones level of staffing at this point, and under sequestration we are not in a position, never mind to add staff, but not even to backfill vacancies that are occurring. And with this extremely hardworking and dedicated staff that we have, and I really wish to say that to a person they are outstanding and they work extremely hard, we lose some of their effort due to furlough days. And we are subject to furlough. Just, for example, my staff has furlough day this coming Monday.

They have a furlough day the Monday afterwards. They have had furlough days since sequestration. And that, of course, is person power that we do not have to devote to this effort.

Ms. VELAZQUEZ. Thank you.

It has been two years since agencies issued their final plans and began implementing them. Are you satisfied that agencies are taking this seriously?

Mr. SHELANSKI. Thank you very much for that question. I am satisfied that they are taking it seriously, but I want to be careful with the word "satisfied." I am very encouraged by the signs that I have seen. You know, the president's executive order is only a couple of years old on retrospective review, and I think that what I have seen is an increasing engagement by the agencies in this process. So I am satisfied that it is getting traction, but I want to see more.

Ms. VELÁZQUEZ. Okay. So my final question is we have seen executive orders before and they come and they go. Do you believe that this time agencies are more committed than they have been in the past? Are we breaking that culture?

Mr. SHELANSKI. Well, I think that is a very important question. I do think that there is a culture of retrospective review and of look back that is taking hold in the agencies. Certainly, none of us want to see regulations that are getting in the way of small business, that are deterring small businesses, or that are imposing unjustified costs. We do not want to see those persisting.

Ms. VELAZQUEZ. Okay. So my next question, what type of oversight do you have in place to make sure that agencies will be held accountable?

Mr. SHELANSKI. Well, what OIRA does as part of this process is first of all, we make sure that the agencies are engaging in the processes that are mandated under the president's executive orders related to retrospective review, and we have provided guidance on how to implement those executive orders. But we also require the agencies to file their reports with OIRA. In fact, in early July, all executive departments and agencies did file their reports with OIRA showing a very serious engagement with the retrospective review process. There are a large number of initiatives that are listed on each agency's report. We are in the process of reviewing them, and those will very shortly be public on the agency's websites.

Ms. VELAZQUEZ. Will you be grading them?

Mr. SHELANSKI. You know, we do not grade them per se but we provide them feedback and we try to improve their efforts.

Ms. VELAZQUEZ. Well, the public wants to know that they are really doing the work that they are supposed to be doing.

Mr. SHELANSKI. Right. And really the proof of that is not just the lists that they very openly will post on their websites, but it is the real dollar savings that we have seen in the past two years from these retrospective review efforts which in terms of finalized rules that are retrospective and that change preexisting regulations, we can already find \$10 billion of savings to the American public, much of that savings enjoyed by small businesses. But I can also say that looking forward there are very important rules, such as one that the Department of Transportation is going to release that is going to reduce reporting obligations of truck drivers for ve-

hicle inspection reports and reduce daily burdens on truck drivers. And perhaps I will talk more about that rule later. But that will have \$1.7 billion in savings, not to mention all of the hassle and annoyance that truckers have to face until now in filing those reports.

These are the kinds of efforts that we see on an ongoing basis. And I think the way for the public to evaluate the retrospective review efforts is to look at those savings and to see the ongoing efforts to find them.

Ms. VELAZQUEZ. Thank you, Administrator. I yield back.

Chairman GRAVES. Mr. Hanna.

Mr. HANNA. You mentioned in your testimony the president's Quick Pay initiative, which you know, this Committee has supported. But the Department of Defense has, which is over 70 percent of subcontractors, about \$51.8 billion has decided to do away with that. And yet earlier in your conversation you mentioned that they were committed to paying people more quickly. Can you respond to that?

Mr. SHELANSKI. Thank you very much for the question, Mr. Hanna. I would have to go back and look at what the current status of the Department of Defense's implementation is. I am not aware of that.

Mr. HANNA. One other thing I want to ask you. The idea of a cost-benefit analysis is by definition subjective. What does it mean to you? And what does it mean in your department? And is it really money or is it subjective and more nuanced than that? At what point do you decide a regulation is or is not worth doing? What does that mean in real terms?

Mr. SHELANSKI. Well, I think what it means in real terms is this. What cost-benefit analysis should do is, to the extent possible, quantify the costs that a regulation will bring to the American public, but also the benefits in dollar terms that will be created. And in many cases, those benefits can be quantified. For example, when we talk about the forthcoming Department of Transportation DVIR rule, that is the retrospective rule that is going to lift certain inspection report requirements that truckers have to comply with every day. We can actually count the amount of time it takes a trucker to file that report every day, and you can quantify what the value of that is by knowing what the average hourly rate of a trucker is and how many truckers are out there on the road.

Mr. HANNA. Who decides when a rule is more expensive than the benefits derived?

Mr. SHELANSKI. To the extent benefits can be quantified, we can look and see what the costs are and measure them against the benefits. But to your point that there are often values that go beyond things that are easily quantifiable, that is a harder question. Certainly, there are values that are beyond those that are quantifiable that do come into the evaluation of a regulation, and those might be in some cases hard to put a dollar value on. But I would note that those are also often values that are dictated by the underlying statute.

Mr. HANNA. On another note getting back to Quick Pay and the president's directive, do you have the ability to go to the Department of Defense and ask them to follow the directive rather than

abandon it to over 70 percent of their contracts? What would you say if you found out what I am saying to you today is true, which we believe that it is?

Mr. SHELANSKI. OIRA does not have jurisdiction to go and enforce the law on executive departments. We review regulations as they come in to us. Once the regulations are finalized and they are out there on the books, we are not an enforcement agency, so it would not be within our jurisdiction to go out and call them into account.

Mr. HANNA. But let us say you looked at that, which you will when you get back I hope, and you discovered that it was a big expense to the small businesses that they are paying them but not paying in a timely fashion. What would you do? Would you just put it back in the drawer or would you call this Committee?

Mr. SHELANSKI. Well, you know, it is not in our drawer. What we would hope is that small businesses would be making clear that the regulation is not working as they had hoped and that the entities with the appropriate jurisdiction would investigate what was happening. What we would do is if there was a regulation that was submitted to us by the Department of Defense that was changing their practices, we would review that regulation under our normal processes.

Mr. HANNA. So 70 percent of these contracts by small businesses that are out there that the Department of Defense has decided not to follow the Quick Pay rules, really what you are saying is that they can do that and there is no recourse?

Mr. SHELANSKI. Well, no, that is not what I am saying at all, sir. Just to be—

Ms. VELAZQUEZ. Will the gentleman yield? I would suggest that the small businesses, the contractors, reach out to the Office of the IG. They have the jurisdiction to investigate whether or not the agency is complying with the rules.

Mr. HANNA. Thank you. My time is expired.

Chairman GRAVES. Ms. Hahn.

Ms. HAHN. Thank you, Mr. Chairman, Ranking Member Velázquez.

So we are 13 years into the 21st century and yet we are only just beginning to develop the streamlined and modern government that the American people expect and deserve from the nation that invented the Internet. An important part of that is judicious and thorough reviews of our regulations, ensuring that our regulations have not grown outdated or duplicative and making sure that we are cutting down on paperwork wherever we can. Since last Congress, I have actually had some legislation to make the Small Business Administration's pilot Small Loan Advantage Program permanent. That pilot has streamlined applications for small loans up to \$350,000, cutting down their paperwork to only two pages. And I think that is the sort of thing that we should be doing across government. In particular, I think we need to do more to shift more of our compliance and regulatory infrastructure online and to improve our electronic filing.

Last week, in this Committee, we had the head of the IRS talk about how severe budget cuts have been endured by the IRS, and that has meant that they have had to prioritize which tax forms

they have moved to e-filing, and that means that some more exotic forms are getting pushed down the waiting line for next year or the year after. And the commissioner noted that the people and the small businesses that still have to paper file these less common forms make a lot of noise about how especially burdensome and complicated they are and how much they would benefit from e-filing, but his budget limits him from helping them now.

So I am going to ask you, what do you think Congress needs to do to accelerate and support the shift towards e-filing and technology-based reporting across government? And what do you think are the greatest obstacles to moving towards e-filing and technology-based reporting? And are some of the agencies farther along or lagging behind than others in that respect?

Mr. SHELANSKI. Thank you very much for your questions, Congresswoman Hahn, because you have raised an issue that I think is very important to me as administrator and is very important to OIRA and OMB, which is paperwork reduction but also making the government more accessible and easier to use for American citizens. E-filing, electronic access to information are all part of that picture. To be sure, part of OIRA, part of the acronym is information. And so a lot of what we are concerned about is implementation of the Privacy Act, paperwork reduction. All kinds of online initiatives, of course, have to be balanced against concerns about privacy and data security, and I think those are things that the agencies are working together on very well. OMB is part of a broader interagency process that looks at all of these kinds of issues on an ongoing basis. And so consistent with the obligations of ensuring privacy, data security, it is a major priority to make this government simpler, more accessible.

In terms of the particular priorities that an agency might have in moving towards electronic filing or electronic data availability, I cannot speak to the particular agencies' priorities. They have to set those consistent with their statutes, with their policy mandates, and with their resources. And so I think one of the things that I hope going forward is that the agencies will have the resources to fully continue their work on making government as user friendly and as accessible as possible.

Ms. HAHN. Yeah, I appreciate that, but I think one of the things I think we really, I mean, it is one thing to review these regulations and see where we might do a better job, but it is another thing if we are asking businesses to comply and we are making it really difficult or burdensome of them to fill out forms to show that they are in compliance. I mean, I just really feel like that is another part of what I would like to see you also include as part of your reviews.

Mr. SHELANSKI. Thank you. And I agree entirely. One of the things that we do look at in all of our reviews is to see what the paperwork burdens are and to see that the agencies have done what is possible to reduce those burdens. And particularly, pursuant to our particular concern for small businesses, to see what can be done to reduce the cost of small businesses that may not have the ability to hire somebody to be a paperwork person. We are very concerned about the way that this could actually become more cost-

ly for small businesses. So we do review agencies' efforts to try to reduce those burdens.

Ms. HAHN. And make suggestions?

Mr. SHELANSKI. We make suggestions. We ask questions about why things might not be done other ways, but sometimes there are limits to the resources, to the technology, legal questions. But I can assure you that the agencies and certainly my office are very concerned with these issues.

Ms. HAHN. Thank you. I yield back the balance of my time.

Chairman GRAVES. Mr. Schweikert.

Mr. SCHWEIKERT. Thank you, Mr. Chairman.

Mr. Director, help me understand some of your process. Agency is working on a reg set, rule set. What do you do methodology in your office? What are your steps you go through to review?

Mr. SHELANSKI. Well, at the point that the agency is actually engaged in the rulemaking process, the rulemaking process is at the agency, and so in most cases it is a notice and comment rule process. It is there at the agency, not with my office.

Mr. SCHWEIKERT. In your shop, what are your steps? What do you do?

Mr. SHELANSKI. After the agency feels that it has its rule, whether it is a proposed rule or a final rule or some kind of advanced notice of a rule, when they feel they have that document ready, they notify my office and say we would like to transmit this or we are going to transmit this rule to you. They then upload the rule in our system and it becomes public at that point what the rule is and that it is with OIRA. And this is following a public notice and comment period at the agencies.

Mr. SCHWEIKERT. Okay. So at this point you are a bulletin board. What do you do next?

Mr. SHELANSKI. We then take the rule—and we are much more than a bulletin board. I have got—

Mr. SCHWEIKERT. What do you do next?

Mr. SHELANSKI. It will go to the relevant branch, and an analyst will sit down with the rule and start working through. What is this rule designed to accomplish? What other rules might be doing what this rule is doing? What other agencies might have an interest?

Mr. SCHWEIKERT. Okay. At that point, so you have a researcher and an analyst—

Mr. SHELANSKI. Yes.

Mr. SCHWEIKERT.—going over the rule. What tools is that researcher to go over and say a version of this rule already is in the reg sets here? This is duplicative. So when they are doing their—I am trying to understand the mechanics of how do you actually do your analysis and find either things that are wonderful or things that are ultimately bad acts?

Mr. SHELANSKI. So there are several components of the analysis. One would be the question of is this a rule that relates to other rules that might already exist or rules that other agencies are either promulgating or have promulgated. And that is where we convene the interagency process to make sure that this is not duplicative or conflicting.

Mr. SCHWEIKERT. Okay. So at that moment you are telling me the analyst is not doing the research themselves but they are bringing together representatives who cover other agencies to provide the input?

Mr. SHELANSKI. If there is something in the rule that might implicate the activities of another agency, the most efficient course of action is to say to those other agencies—because they know much more what they are up to and they will know much better what rules they are enforcing—how does this rule interact with what you do?

Mr. SCHWEIKERT. So your analyst does not first do a search, a public document search on that subject area, that specialty area or common regulatory literature and first builds the box around it?

Mr. SHELANSKI. No. The rule comes to the analyst with explanations of why the rule is being promulgated, what other rules are out there, and the analyst is researching this.

Mr. SCHWEIKERT. Okay. You are saying two different things, and maybe I am not understanding, so work with me here.

The analyst is given this information from the agency; right?

Mr. SHELANSKI. The analyst is given a draft rule.

Mr. SCHWEIKERT. Okay. And is the analyst actually doing the research or is the analyst reading someone else's research?

Mr. SHELANSKI. The analyst is doing both. It is not an either/or. The analyst will be doing research. The analyst will be reviewing the cost analysis and the benefit analysis. And the analyst will be looking primarily for two things. And the two things that the analyst will be looking at primarily are why is this rule being done? And what other rules might be implicated? The analyst can do the analyst's own research, but also draw on other research that is submitted, comments that are submitted, the preamble to the rule. They are both there.

Mr. SCHWEIKERT. Okay. Well, one of the things I wanted to get to and we are only down to about 40-some seconds now, okay, so analysts now have done the research or read someone else's and finds out parts of the rules are duplicative. Do you have the authority area to reach out and say, hey, this rule is more modern? We need to find a way to eliminate the previous? Or what happens in those sorts of cases?

Mr. SHELANSKI. Well, the question that is asked there is why are there benefits to this rule given what is already out there? And this is where the very rigorous analysis comes into play.

Mr. SCHWEIKERT. Okay. Now, in our last 10 seconds, how often does that happen and how often is the rule basically, the path of it, ended because of that type of analysis?

Mr. SHELANSKI. The back and forth, the finding of questions, hard questions, happens on a daily basis at OIRA.

Mr. SCHWEIKERT. How often does a rule not move forward because of this analysis?

Mr. SHELANSKI. Well, it would depend what you mean by "not move forward." If what you mean—

Mr. SCHWEIKERT. It means it does because it is duplicative or some other research you created.

Mr. SHELANSKI. What happens is there is a back and forth between OIRA and the agency. And rules can change. They can be

pulled back, like the fiduciary rule, and be repromulgated. The rule can be changed in response to comments and the review process.

Mr. SCHWEIKERT. Forgive me. I am way over time.

Thank you for your patience, Mr. Chairman.

Chairman GRAVES. I am trying to figure out—we are going to have a long series of votes. I know we have got several members that are left to ask questions. Does anybody have anything that they need pressing asked? If so, speak now.

Mr. BARBER. I will try to be brief, Mr. Chairman. I just wanted to have an opportunity since I probably cannot come back when we reconvene, thank you for your testimony and thank you, Mr. Chairman, and ranking member for convening this hearing.

As a small business owner, I know from our experience—my wife and I's experience 22 years as small business owners—that we just have to make every effort to get direct input from small business owners and feedback of what is working and what is not working. That is why I meet regularly with small businesses. It is the only way I can do this job effectively. Part of the retrospective review process that federal agencies are already implementing on an ongoing basis to review regulations requires that they solicit input from the public, from the general public, and I believe the most crucial component of any regulatory review process is that kind of direct feedback.

But it seems to me that each agency is pretty much interpreting the standards as they see fit and differently. While some are going to communities in a very open way and talking to people who are really interested in the issues, others print their review process on their website in such fine print you have to take a magnifying glass to read it. It seems to me that so many agencies are closed to public input and closed to members of the public who have an interest in their regulations.

Can you tell the Committee what guidance your office is providing to federal agencies regarding public input and what it should look like and how we can better ensure that we do not just have a process that is in name only but a real process that gets input from the public?

Mr. SHELANSKI. Thank you, Mr. Barber. You have raised the critical issue of transparency and the openness of the regulatory process to the public. And I agree, and OIRA agrees, that it is absolutely critical that rulemaking be as open and accessible as possible to all members of the public. And that would mean especially for the reasons that you provided the small business community.

As a general matter, the rulemakings that come to us have been through a very open notice and comment period. Now, it may well be the case that different agencies have different levels of resources or different institutionalized practices for reach out specifically for small businesses and therefore can get more input. I think it is of vital importance for small businesses to encourage such efforts to get their associations or to get their coalitions to focus on the agency actions. I applaud the actions of this Committee to apprise small businesses of specific regulatory actions that are pending that small businesses might want to pay attention to. I could not agree with you more that making sure that the process is open and acces-

sible is paramount. And the guidance that we at OIRA give to agencies is precisely that.

Mr. BARBER. Can you say what more you think you can do in your new position to really make sure that they get it? That it is not just some kind of a process that really does not mean anything, you know, in name only that kind of generally follows the law but really does not get at the heart of what the public wants to say?

Mr. SHELANSKI. Well, I think what we can do since our experience is that most agencies really do follow the notice and comment period, or notice and comment process, indeed, their regulations are quite vulnerable if they do not follow that process, and I think they understand that. So it is very much in their interest to ensure that the requirements of the Administrative Procedure Act are followed. What we can do is to encourage and to ask what small business input was received? What efforts were made to respond to that? How did that factor into your analysis? These are the kinds of questions that we at OIRA can ask and will ask, and I believe that those can help to focus attention on precisely the issues you raise.

Mr. BARBER. Well, I encourage you to be even more vigilant. And I thank you, Mr. Chairman. I yield back.

Chairman GRAVES. I would ask that any other members that have questions to please submit them, and I would hope that Mr. Shelanski, you would answer them in a very timely manner and get back to us on that since we do have a series of votes and we will not keep you through that series of votes.

Mr. SHELANSKI. Thank you, Chairman Graves. And I would be pleased to respond in a timely manner.

Chairman GRAVES. Well, I want to thank you for testifying today. You know, reducing unnecessary regulations or regulatory burdens, I guess, is critically important to small businesses when they are trying to compete and trying to create jobs in a competitively global economy. And these retrospective reviews can yield results but only if it is taken seriously, and I hope you use your office and your position to ensure that the agencies are taking it seriously and trying to do just that. And I hope you will update us, too, periodically, if you would, on the progress of this and how it is obviously affecting small businesses.

With that, again, I want to thank you for coming in.

Mr. SHELANSKI. Thank you, Chairman Graves. This is just to end on the note by ensuring you that small businesses are very much at the heart of this administration's concern with growing the economy, creating jobs, and it is very much a focus of my office.

Chairman GRAVES. Well, with that I would ask unanimous consent that all members have five legislative days to submit statements and supportive materials for the record. Without objection that is so ordered. And with that the hearing is adjourned. Thank you.

[Whereupon, at 1:56 p.m., the Committee was adjourned.]

A P P E N D I X

[EMBARGOED UNTIL 1:00 PM, JULY 24]

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

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TESTIMONY OF HOWARD SHELANSKI

**ADMINISTRATOR FOR THE OFFICE OF INFORMATION
AND REGULATORY AFFAIRS**

OFFICE OF MANAGEMENT AND BUDGET

BEFORE THE HOUSE SMALL BUSINESS COMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

July 24, 2013

Mr. Chairman, Ranking Member Velázquez, and Members of the Committee, thank you for the opportunity to appear before you today. I was recently confirmed as the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB), and am honored to be serving in this role. I look forward to speaking with you today about the topic of retrospective regulatory review and its benefits for small business.

Retrospective review is critical to ensuring that our regulatory system is modern, streamlined, and does not impose unnecessary burdens on the American public. Even regulations that were well crafted when first promulgated can become unnecessary over time as conditions change. Retrospective review of regulations helps to ensure that those regulations are continuing to promote the safety, health, welfare, and well-being of Americans without imposing unnecessary costs.

Recognizing the importance of this effort, in January 2011, the President issued Executive Order 13563, "Improving Regulation and Regulatory Review." Among other things, that Executive Order asks executive departments and agencies to review existing Federal regulations to streamline, modify, or repeal regulations and reduce unnecessary burdens and costs. As a result of that Executive Order, executive departments and agencies produced more than two dozen plans, with over 500 regulatory reform initiatives. Just

a small fraction of the rules already finalized will produce billions of dollars of savings in the near term.

Since issuing Executive Order 13563, the President has taken several other important actions relevant to retrospective review. In July 2011, the President issued Executive Order 13579, “Regulation and Independent Regulatory Agencies,” which asked the independent regulatory agencies to follow the principles of Executive Order 13563 and to develop their own retrospective review plans. Almost twenty independent agencies issued plans for public comment, and many have implemented substantial initiatives. For example, in May 2013, the Federal Communications Commission announced that it was lifting over 120 outdated or unnecessary regulatory requirements on phone companies.

In order to further institutionalize retrospective review, President Obama issued Executive Order 13610, “Identifying and Reducing Regulatory Burdens” in May 2012. To promote priority-setting, the Executive Order directs agencies to emphasize reforms that produce significant, quantifiable savings. To promote accountability, the Executive order requires agencies to provide the public with regular reports on their past efforts and their future plans. These reports are available on agency websites.

The Administration’s retrospective review efforts are already producing significant results. For example:

- The Department of Health and Human Services (HHS) finalized rules to remove unnecessary regulatory and reporting requirements on hospitals and other healthcare providers, saving more than \$5 billion over the next five years.
- The Department of Labor (DOL) finalized a rule to simplify and to improve hazard warnings for workers, producing net benefits of more than \$2.5 billion over the next five years while increasing safety.
- HHS finalized a rule to allow greater flexibility for providers that rely on telemedicine services, making services more readily available in remote rural areas and saving providers millions of dollars in the process.
- DOL finalized a rule that will remove approximately 1.9 million annual hours of redundant reporting burdens on employers and save more than \$200 million in costs over five years.
- The Environmental Protection Agency finalized a rule to eliminate the obligation for many states to require air pollution vapor recovery systems at local gas stations, since modern vehicles already have effective air pollution control technologies. The anticipated five-year savings are over \$400 million, a number that takes into account the costs associated with the removal of vapor recovery equipment and the use of less expensive conventional equipment on the gasoline dispensers, as well as reductions in record-keeping requirements and other operating costs.
- The Department of Transportation (DOT) finalized a rule to eliminate or extend most compliance dates on traffic control

requirements (which would, among other things, require states and localities to change street name signs), saving millions of dollars in the process.

Our retrospective review efforts have focused especially on benefiting small businesses. Some examples include:

- The DOT retrospective review plan alone identifies over two dozen initiatives to save money for small businesses and local governments. For example, one of DOT's initiatives would codify regulations to prevent duplicative requirements for air carrier drug and alcohol testing programs, which would be particularly helpful for small carriers.
- The Department of Defense issued a new rule to accelerate payments on contracts to as many as 60,000 small businesses, improving their cash flow.
- The Small Business Administration is adopting a single electronic application to reduce the paperwork required of certain lenders, which will in turn benefit small business borrowers who seek relatively small amounts of capital to grow and succeed.

DOT has proposed a rule that would harmonize hazardous material standards with international requirements and update, clarify, correct, or provide relief from certain regulatory requirements for the transportation of radioactive materials. DOT expects the rule to result in cost savings for small businesses by easing the regulatory compliance costs for shippers and carriers engaged in international commerce, including trans-border shipments within North America. This past winter, agencies focused their retrospective review updates on paperwork burden reduction. Many of the initiatives stemming from this effort will save substantial money for small businesses. For example, the Internal Revenue Service announced a simplified method for claiming the home office deduction, which will save taxpayers (particularly those with home-based small businesses) over 1.6 million hours and \$7 million in out-of-pocket costs per year. Similarly, DOT is working on a proposed rule that would rescind the requirement that commercial motor vehicle drivers submit (and motor carriers retain) driver-vehicle inspection reports when the driver has neither found nor been made aware of any vehicle defects or deficiencies. This rulemaking would save tens of millions of hours in paperwork burden per year, for approximately \$1.5 billion in annual paperwork time savings.

In July 2013, agencies submitted to OIRA their latest updates of their retrospective review plans, pursuant to Executive Orders 13563 and 13610. Although OIRA is still reviewing the plans and the full updates are not yet public. I am happy to report that many of the initiatives highlighted in the updated plans benefit small businesses. For example, the Department of Housing and Urban Development is drafting a final rule that would create alternative, more streamlined financial statement reporting requirements for small supervised lenders and mortgagees. The rule would also eliminate duplicative reporting requirements for lenders who already report to other Federal agencies. In addition, the Federal Aviation Administration is proposing a rule to update, simplify,

and streamline rules of practice and procedure for filing and adjudicating complaints against federally-assisted airports. Small businesses would particularly benefit from this rule, which would decrease the time spent on processing complaints by allowing parties to file electronically.

Retrospective review is crucial to ensuring that we have a well-functioning regulatory system, and moving forward I will look for further ways to institutionalize retrospective review of regulations and ensure that it continues to produce significant cost-savings for small businesses and for the American people.

Thank you for your time. I would be happy to answer any questions.

Chairman Sam Graves:

1. How much is it costing agencies to conduct retrospective reviews?

I would refer you to the agencies, which are best suited to answer this question.

2. How are agencies doing their existing work while conducting retrospective reviews?

Agencies prioritize their regulatory work based on their respective agency goals and priorities, as well as guidance provided by the President's Executive Orders. Executive Order 13610 states that "agencies shall give priority [in doing retrospective review], consistent with law, to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens while protecting public health, welfare, safety, and our environment." It further states that "agencies shall give consideration to the cumulative effects of their own regulations, including cumulative burdens."

3. How are agencies documenting their outreach to outside or regulated entities in doing these reviews?

Executive Order 13610 states that "agencies shall invite, on a regular basis, public suggestions about regulations in need of retrospective review and about appropriate modifications to such regulations." Agencies use a variety of approaches for soliciting and documenting outreach, ranging from Federal Register notices to public meetings to websites focusing on retrospective review.

4. Some agencies are reviewing guidance documents as part of their retrospective review process. Should that be a requirement for all agencies under the terms of Executive Order 13,563?

OIRA has encouraged agencies to consider not just rulemakings, but paperwork burden reduction initiatives as well as guidance documents.

5. In your testimony you noted that agencies are required to provide the public with regular reports on their retrospective review efforts and that those reports are available on agency websites. However, not all the agencies have posted all their reports on their websites and some of the agencies' reports provide very little detail. Furthermore, on the White House website, only the preliminary and final retrospective review plans and January and May 2012 progress reports are available.

a. Have all executive agencies submitted the five required progress reports to your office so far? If not, please provide the names of the agencies that have not provided all the required reports.

b. What will the Office of Information and Regulatory Affairs (OIRA) do to ensure that agencies make their reports available on their websites within three weeks of submission of the draft reports to OIRA, as directed by

Executive Order 13,610, and provide complete and detailed information on their activities to the public?

Executive Order 13610 requires agencies to make final reports available to the public within a reasonable period (not to exceed three weeks from the date of submission of draft reports to OIRA). All executive agencies are required to submit progress reports and post them on their respective Open Gov (www.agencyname.gov/open) websites. Agencies posted the most recent reports on their Open Gov websites on July 29, 2013, three weeks after submitting them to OIRA. All executive agencies have submitted the five required progress reports to date.

6. Some agencies appear to have done little more than incorporate their regular, planned rulemaking activities into their retrospective review reports. Agencies also are making changes to new rules that have not yet been implemented and claiming that the changes are part of retrospective review. Other agencies are claiming that certain actions will reduce burdens significantly, but the regulated entities have indicated that the burden reduction estimates are significantly overstated or fail to account for significant burden increases associated with the same regulatory action. All of this indicates that agencies are not taking the retrospective review effort seriously and are not making genuine efforts to review existing regulations.

a. Is OIRA scrutinizing agency progress reports and asking agencies to remove items from the report that are not truly retrospective review activities?

b. Is your office scrutinizing agencies' burden reduction estimates to ensure that they are accurate?

c. If OIRA finds that an agency's burden reduction estimates are inaccurate, what actions does OIRA take?

d. What will OIRA do to ensure that agencies are actually reviewing existing significant regulations?

Agencies understand that they are expected to devote significant resources to examine whether existing rules should be modified or streamlined in order to remove unjustified regulatory and paperwork burdens. OIRA works with agencies to stress the importance of appropriately prioritizing and thinking comprehensively about retrospective review.

OIRA reviews agency submissions of information collection requests covered under the Paperwork Reduction Act, including submissions that are submitted as part of a retrospective review rulemaking. Consistent with the Paperwork Reduction Act, agencies are required to provide a justification and itemization of all estimates in their information collection requests. Agencies also issue a 60-day Federal Register notice as well as a 30-day Federal Register notice to seek comment on the agency estimates. OIRA reviews the evidence provided by the agency as well as any public feedback received during the public comment periods to ensure that any information collections meet applicable standards.

7. A December 2012 Governmental Accountability Office report found that agencies did not publish a notice of proposed rulemaking for about 35 percent of major rules and about 44 percent of non-major rules published between 2003 through 2010. Agencies frequently cited the “good cause” exception and other statutory exceptions as reasons to bypass notice and comment rulemaking. This is particularly problematic for small businesses because the Regulatory Flexibility Act (RFA) is triggered by notice and comment rulemaking. What will you do to ensure that exceptions are not inappropriately used to avoid analytical requirements like the RFA and public input to the rulemaking process?

I believe firmly in the value of a rulemaking agency obtaining public comment during its development of a rule, because public comment can improve agency’s decision-making process. Public comments can provide new information, different perspectives, and ideas for alternative solutions. However, as Congress recognized when it enacted the “good cause” exception in 1946, as a part of the original Administrative Procedure Act (APA), there are situations in which it would be “impracticable, unnecessary, or contrary to the public interest” for a rulemaking agency to seek public comment before acting. In such a situation, an agency is required to include an explanation for its use of the good cause exemption in the preamble of the rule issued. That explanation is included in any such rule that may be reviewed by OIRA under EO 12866. In addition, in cases where agencies use interim final rules under the “good cause” exception, the public is afforded an opportunity to assess the agency’s use of interim final procedures once the rule is published. With regard to how the use of the “good cause” exception impacts agency compliance with the Regulatory Flexibility Act, I defer to the Small Business Administration’s Office of Advocacy, which oversees the implementation of that statute.

8. Agencies are avoiding the notice and comment rulemaking process and imposing new burdens through guidance, memos and other documents.

a. At your June 12, 2013 confirmation hearing before the Senate Homeland Security and Government Affairs Committee, you said, “It is my view that substance rather than labels should dictate OIRA’s review.” Could you elaborate on this statement? Will you direct agencies to utilize the notice and comment rulemaking process instead of issuing guidance, memos and other documents when those issuances impose significant burdens?

b. Are you concerned about agencies inappropriately avoiding notice and comment rulemakings and thereby the responsibility to give full consideration of impacts on small businesses, among other protections?

c. There are concerns about the effort of the Inter-agency Working Group (IWG), of which the Office of Management and Budget is a participant, on the Social Cost of Carbon (SCC). The expressed purpose of the IWG effort is “to incorporate the social benefit of reducing

CO2 emissions into cost-benefit analyses of regulatory actions that impact global emissions.”

I. Is OIRA concerned that the calculated SCC, which is now as much as \$129 per ton of CO2, may be used to justify the benefits of new rules that impact small entities, yet the SCC was established without a formal rulemaking, review under the Data Quality Act, the RFA and review or approval by Congress? If so, have those concerns been expressed in any formal way?

In your June 18, 2013 testimony before the House Committee on Oversight and Government Reform Subcommittee on Energy Policy, Health Care and Entitlements you stated that the current SCC estimates will be used in future rulemakings. You went on to state that the public will have an opportunity to comment on the SCC when it is used in a rulemaking. Instead of forcing the public, including small businesses with limited resources, to go through the inefficient and duplicative process of commenting on the SCC in multiple rules, why wasn't the updated SCC published as a separate, stand-alone document in the Federal Register for notice and public comment?

My statement was intended to express that the label on the policy document is not the key factor determining whether Executive Orders 12866 or 13563 apply. Executive Order 12866 defines a “rule” as “an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency.” There are instances when guidance and other non-binding statements are useful to members of the public, because they provide information about the agency’s priorities or other discretionary aspects of their mission. Therefore, OIRA does not direct agencies to avoid these types of documents entirely. However, we firmly support the lines established by both the Administrative Procedure Act, which governs the legal process for promulgating rules, and Executive Orders 12866 and 13563, which govern regulatory planning and review.

As to your question about the Social Cost of Carbon, in 2009, an interagency working group developed recommendations for agencies to use in estimating benefits from carbon emissions reductions in agency rule making. These estimates were based on the leading peer-reviewed academic models (DICE, FUND, and PAGE) developed by researchers at Yale University, Cambridge University, the University of Sussex and the University of Michigan. These estimates were used by several agencies in subsequent rules, with multiple opportunities provided for public comment. At the time the 2010 recommendations were issued, the interagency group also committed to periodically update the estimates to reflect improvements in the underlying models over time. Commenters on the initial use of these values also stressed the importance of keeping them up-to-date. Since the original estimates were developed, all

three models have undergone significant revisions which have been incorporated into their subsequent use in the peer-reviewed literature. In early 2013, the interagency group decided that it was appropriate to issue a technical update to the estimates to reflect these changes to the models. No changes were made to any of the assumptions used to derive the estimates from the models, such as the appropriate discount rates. The interagency group recommended that agencies use a range of values, representing different assumptions about discount rates and other factors. The values also vary based on the year in which the emissions reductions occur. For emissions reductions in 2015, the group recommended that agencies use a range from \$12 to \$109 per ton, with a central tendency estimate of \$38 per ton. The purpose of the recommendations is to improve the quality and consistency of agency regulatory analyses. The recommendations are not rules. Rather, they help ensure that future rulemaking affecting carbon emissions is based on the best available scientific, economic, and technical information.

As noted above, the revised estimates reflected technical updates to the earlier estimates, based on changes to the underlying models on which they were based that have been incorporated into their subsequent use in the peer-reviewed literature. The 2010 estimates were updated, as commenters suggested and also as the IWG had committed to do on a periodic basis when the recommendations were first issued. We expect and welcome comments on the SCC values in the context of proposed rules that are out for comment now and future proposed rules.

9. The RFA requires agencies to assess the impacts of proposed and final regulations on small businesses and consider alternatives that lessen burdens. Unfortunately, agencies still do not fully comply with the law. President Obama recognized this by issuing a January 18, 2011 memorandum on the Act. What will you do to ensure that agencies comply with the RFA?

As you mentioned, on January 18, 2011, President Obama issued a Presidential Memorandum entitled “Regulatory Flexibility, Small Business, and Job Creation.” The memorandum reminds Federal agencies of their responsibilities under the Regulatory Flexibility Act and directs executive departments and agencies to “give serious consideration to whether and how it is appropriate, consistent with law and regulatory objectives, to reduce regulatory burdens on small businesses, through increased flexibility.” The memorandum goes on to highlight specific forms of flexibility that agencies should consider, including extended compliance dates that take into account the resources available to small entities, performance standards rather than design standards, simplification of reporting and compliance requirements (as, for example, through streamlined forms and electronic filing options), different requirements for large and small firms, and partial or total exemptions.

During OIRA review of proposed and final rules pursuant to Executive Orders 12866 and 13563, OIRA works with agencies to ensure that they fully comply with the requirements of the RFA, and that they consider, and adopt where appropriate, the flexibilities

highlighted in the Presidential Memorandum. For rules issued by the Environmental Protection Agency, Occupational Health and Safety Administration, and Consumer Financial Protection Bureau, OIRA also participates with the Small Business Administration's (SBA) Office of Advocacy and these rule writing agencies in Small Business Advocacy Review Panels to solicit input and advice from affected small entity representatives and provide recommendations to the rule writing agency on alternatives for minimizing the burden of the rule on small entities. OIRA also ensures that the SBA Office of Advocacy is a full participant in the interagency review of all rules that may have a significant impact on a substantial number of small entities.

10. Section 602 of the RFA requires agencies to publish regulatory flexibility agendas in the Federal Register each April and October. The agendas provide small businesses notice of regulatory actions agencies plan to take. The Spring 2012 regulatory agendas were never published. The Fall 2012 and Spring 2013 regulatory agendas were published very late. Will you commit to ensuring that the Obama Administration complies with the law and publishes the agendas on time?

I will continue to work to publish the regulatory flexibility agendas consistent with applicable law.

Rep. Chris Collins:

1. The FDA's menu-labeling proposal would require, for example, pizza-delivery restaurants to label in-store menu boards with calorie information forcing small businesses to spend thousands of dollars for menu boards. In fact, your agency estimated that the menu-labeling regulation would be the third-most-onerous regulation proposed, requiring more than 14.5 million hours of compliance. If this single regulation exceeds 14 million hours, what will be the expected compliance impact of Obamacare, which even by conservative estimates has 10,000 pages of regulations?

When judging the merits of any regulation or piece of legislation, it is important to look at net benefits (benefits minus costs), not just costs. While OIRA does not typically report on the aggregate costs of regulations associated with particular pieces of legislation, we do issue a report to Congress on the costs and benefits of each individual regulation reviewed by our office. The most recent on these reports was issued in April 2013 and is available on the OIRA website. (http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf).

Rep. Richard Hanna:

1. In your testimony, you discussed the President's Quick Pay Initiative, which we've been very supportive of as a Committee. However, I'm concerned that despite all the fanfare with which Quick Pay was announced, some might have missed the Department of Defense's (DoD) February announcement (see attachment) that it was going to stop

participating in the part of Quick Pay that helps small sub-contractors be paid faster. Since over 70 percent of federal contract are awarded by DoD, that is a pretty important omission. In fact, in FY 2010, DoD had subcontracts of more than \$51.8 billion with small businesses. What is being done by OIRA and OMB to encourage DoD to follow the President's direction on Quick Pay?

OMB remains firmly committed to improving cash flow for small businesses and increasing small business participation in all levels of federal contracting—i.e., for prime contractors and subcontractors. On July 11, 2013, OMB extended its 2012 policy pursuant to which agencies temporarily accelerate payment to all prime contractors—with a goal of paying them within 15 days of receipt of proper invoices—in order to allow prime contractors to provide prompt payments to small business contractors (see <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-15.pdf>). Unfortunately, due to the negative impacts of sequestration on DOD's fiscal situation, the Department was forced to temporarily suspend the QuickPay policy for small business subcontractors. OMB has directed the Federal Acquisition Regulatory Council to solicit public input on alternative strategies that might be used over the longer term to help maintain effective cash flow and prompt payment to small business subcontractors, such as considering a prime contractor's commitment to paying small business subcontractors in a prompt manner as part of a contract award determination.

Rep. Tim Huelskamp:

1. According to the May 2013 Technical Support Document, "Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis," the Office of Management and Budget (OMB) participated in the Interagency Working Group (IWG) on the Social Cost of Carbon (SCC).

- a. Did a staff member of OIRA serve as an OMB participant in the IWG? If yes, who was the participant? Please provide a name and title. If not, who represented OMB in the IWG? Please provide a name, title and office.**
- b. Please provide a complete list of the names and titles of all federal agency participants in the IWG.**
- c. When the SCC is used in any rulemaking or other guidance documents that OIRA reviews, does OIRA evaluate it in accordance with the Data Quality Act?**
- d. Please provide any and all documentation including emails, correspondence, memoranda or meeting notes describing OIRA's review(s) of the SCC.**

OIRA staff participated in the IWG, along with the Council on Economic Advisers, the Council on Environmental Quality, the Department of Agriculture, the Department of Commerce, the Department of Energy, the Department of Transportation, the Environmental Protection Agency, the National Economic Council, the Domestic Policy Council Office of Energy and Climate Change, the Office of Management and Budget, the Office of Science and Tech-

nology Policy, and the Department of Treasury. The Technical Support Document explaining the work of the IWG and the technical basis for the revised estimates is available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/social_cost_of_carbon_for_ria_2013_update.pdf.

Pursuant to the Data Quality Act (section 515(a) of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554; H.R. 5658), OMB published Government-wide Information Quality Guidelines (September 2001 (66 FR 49718), and February 2002 (67 FR 8452)). Those guidelines, in turn, set the template for each agency's own Information Quality Guidelines. It is the agency's responsibility to ensure that they have conducted pre-dissemination review. The more important the information, the higher the quality standards to which the information should be held. During the process of reviewing any regulation or guidance document under applicable Executive Orders, OIRA engages agencies in discussions to ensure that they have met their obligations under their Information Quality Guidelines. That discussion focuses on whether the quality, utility, objectivity, and integrity of the information upon which policy decisions and supporting regulatory analysis are based is commensurate with its use.

2. Is the Clean Water Protection Guidance currently under 12866 review by OIRA a review of the definition of navigable waters by the EPA? If so, will OIRA take into consideration decreased agricultural production if farmers are no longer able to treat their fields because of this guidance? Specifically, would OIRA take into account lower yields and higher food prices? With regards to this or any other guidance under review by OIRA, are impacted entities required under the Administrative Procedures Act to treat guidance as having the force and effect of law before OIRA completes its review? Please provide any and all documentation including emails, correspondence, memoranda or meeting notes regarding this review.

The proposed Clean Water Protection Guidance would provide guidance to field staff at EPA and the US Army Corps of Engineers on making case-by-case determinations regarding whether specific water bodies are "navigable waters" and thus subject to Clean Water Act requirements. By definition, guidance does not have the force and effect of law, whether issued in final or draft form and regardless of review by OIRA or any other entity. The draft final guidance currently under review includes an analysis of its potential economic impacts and OIRA is carefully considering these impacts in reviewing the draft guidance.

3. OIRA is currently reviewing the following proposed rule—Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units. According to the proposed rule as published in the Federal Register, EPA notes that it will have no cost before 2030 essentially because no new plants would be built that could comply with the rule before 2030. Under this rationale, the federal government could pass a series of rules

that stop the expansion of every sector of the economy and say that it has no cost.

a. Explain how a 17-year delay in the ability of the economy to comply with this proposed rule would comport with President Obama's directive to "protect public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness, and job creation" in Executive Order 13563.

b. Explain how EPA may use a "transitional" designation on generation units that have already acquired a preconstruction permit and begin construction within 12 months. Will the 12 months begin from submission by EPA in 2013 or the original notice in 2012 (in which case the 12 months would be passed)? What standards would "transitional" facilities fall under? Does any action by another agency or court toll the 12-month time period to begin construction?

c. Did OIRA or EPA estimate the cost of constructing new generation units with new technology after 2030 with the understanding that the technology could come online sooner? Why or why not?

d. Does OIRA or EPA take into consideration higher costs to the economy of higher energy prices resulting from reduced supply when no new generation units are constructed for the next 17 years? Why or why not?

e. Does OIRA or EPA take into consideration higher costs to the economy that may result from rolling brownouts or blackouts that might occur from a reduced supply when no new generation units are constructed for the next 17 years? Why or why not?

f. Does OIRA or EPA take into consideration higher costs to the economy that may result from fewer jobs being created in the construction or ongoing energy production industries when no new generation units are constructed for the next 17 years? Why or why not?

g. Please provide any and all documentation including emails, correspondence, memoranda or meeting notes regarding this review.

Information regarding EPA's analysis of the costs and benefits of its June 2012 proposed rule can be found in the publicly available rulemaking docket at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2011-0660-0001>.

The Clean Air Act requires that documents associated with OMB review be disclosed to the public when a rule is published. Those documents associated with the review of the original proposal are available in the EPA rulemaking docket at <http://www.epa.gov/dockets/> and when EPA publishes the re-proposal, the documents associated with OMB review of the re-proposal will be available here as well. In addition, information provided to OMB during public meetings is available on our website at http://www.whitehouse.gov/omb/oira_meetings/.

Rep. Donald Payne:

1. I understand that retrospective regulatory reviews are not new and are certainly needed, particularly to address outdated mandates that become burdens. However, the length of the review process for new rules from the OIRA can be burdensome as well. Just as regulatory reviews are important, many new rules offered by agencies address new dangers and important updates in areas such as food safety, minimum wage and worker safety- all areas that have a real time impact on the life of Americans. Just before you were confirmed, 70 of the more than 120 rules submitted to OIRA had been under review longer than 90 days. What are you doing to address this burdensome delay?

It is one of my top priorities to make sure OIRA reviews regulations in a timely fashion. Notably, since earlier this year, OIRA has cut in half the number of rules that were under review for more than 200 days, and continues to make steady progress on bringing that number down. That said, more work is necessary. I will continue to work with staff on completing the review of rules that have been at OIRA for a substantial length of time, while ensuring that reviews continue to be thoughtful and careful.

2. A December 2012 GAO report found that agencies, though not required, often requested comments on major final rules issued without a Notice of Proposed Rule Making, but they did not always respond to the comments received. However, when agencies responded to public comments they often made changes to improve the rules. Many of these rules have an impact of a billion dollars a year or more. Further, courts have recognized that the opportunity to comment is meaningless unless the agency responds to significant points raised by the public. How are you working with agencies to ensure that the public is truly engaged in the rule making process?

Please see my answer to Question 7 from Chairman Graves. As a general matter, OIRA encourages agencies to issue final rules that demonstrate the agency's consideration of the comments received during the comment period, and Executive Order 13563 emphasizes the importance of adopting regulations "through a process that involves public participation."

3. Several retrospective reviews and subsequent proposals focus on relieving paper burdens and transitioning to or strengthening the use of technology. How have the proposals to increase the use of technology taken into account small businesses owners who may not be tech-savvy?

Consistent with the Paperwork Reduction Act, agencies issue a 60-day Federal Register Notice as well as a 30-day Federal Register Notice seeking comment on all information collection requests (ICRs). OIRA will review these ICRs to ensure practical utility and to make sure proposals to increase the use of technology take into account small business owners who may not be tech-savvy.



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ACQUISITION,
TECHNOLOGY
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In reply refer to:
DARS Tracking Number: 2012-00014

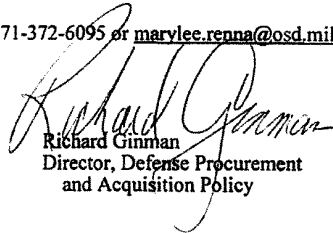
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Rescission of Class Deviation--Providing Accelerated Payment to Small Business
Subcontractors

Effective immediately, Class Deviation 2012-00014--Providing Accelerated Payment to Small Business Subcontractors, is rescinded. DoD has discontinued the temporary practice of providing accelerated payments to all prime contractors. Class Deviation 2012-00014 required DoD contracting officers to use the clause at 52.232-99 (DEVIATION) (August 2012), which required contractors, upon receipt of accelerated payments from the Government, to make accelerated payments to small business subcontractors. Use of this clause is no longer authorized.

DoD plans to continue phased implementation of the policy at DFARS 232.903 and 232.906 to assist small business prime contractors by paying them as quickly as possible after receipt of an invoice and all proper documentation, while also maintaining necessary DoD internal controls.

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Richard Ginman
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and Acquisition Policy