ASSESSING THE OBAMA YEARS: OIRA AND REGULATORY IMPACTS ON JOBS, WAGES AND ECONOMIC RECOVERY

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

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HOUSE OF REPRESENTATIVES

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CONTENTS

JULY 6, 2016

OFFICIAL HEARING RECORD

UNPRINTED MATERIAL SUBMITTED FOR THE HEARING RECORD

Supplemental material submitted by David M. Driesen, Esq., Professor of Law Syracuse University College of Law. This material is available at the Subcommittee and can also be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=105157

ASSESSING THE OBAMA YEARS: OIRA AND REGULATORY IMPACTS ON JOBS, WAGES AND ECONOMIC RECOVERY

WEDNESDAY, JULY 6, 2016

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 3:03 p.m., in Room 2226, Rayburn House Office Building, the Honorable Tom Marino (Chairman of the Subcommittee) presiding.

Present: Representatives Marino, Goodlatte, Collins, Ratcliffe, Trott, Bishop, Johnson, Conyers, and DelBene.

Staff Present: (Majority) Daniel Huff, Counsel; Andrea Lindsey, Clerk; (Minority) Slade Bond, Chief Counsel.

Mr. MARINO. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will come to order. Without objection, the Chair is authorized to declare a recess of the Committee at any time, and that is going to take place in about 30 minutes, 30 to 40 minutes because we will be voting.

Welcome to this hearing entitled "Assessing the Obama Years: OIRA and Regulatory Impacts on Jobs, Wages, and Economic Recovery." This topic is of the highest importance to working Americans. The last recession ended in 2009, but the economy has been limping along ever since. Job growth has been weak. Households' incomes have stayed put. The economy has not grown by more than 3 percent in any of the one of these years. One clear contributor is the growing Federal regulatory burden.

Under the Obama administration, the number of major regulations promulgated per year has increased dramatically. In 2015, Federal regulations imposed an estimated cost of $1.89 trillion. To put this in perspective, U.S. regulatory costs now exceed the gross domestic product of both Australia and Canada. Numerous studies and the agencies themselves concede that on an industry-specific level, regulations lead to job losses. At a minimum, the data also establishes probable cause for concern that regulations decrease employment in the aggregate. Data shows that even where workers in regulated industries find new jobs, the displacement triggers a lifetime of physical and economic problems.

Accordingly, as President Obama's former OIRA Administrator Cass Sunstein said, "Regulators must take that possibility seriously." Unfortunately, regulators are not following this prudent path.

A recent study of agencies' Regulatory Impact Analyses found that only approximately 20 percent qualified employment effects. Since 2009, the Obama administration has imposed 229 major regulations at a cost, by its own estimate, of $108 billion annually. Merely administrating regulations in 2015 was estimated to cost taxpayers over $57 billion, an 83 percent increase over 2001. The effects are dire.

A September 2015 study by a Princeton Nobel laureate shows "shocking" rising mortality among blue collar segments of society. According to the study's author, "those are the people who have really been hammered by the economic malaise. Their wages in real terms have been going down." The economic stress is leading to drug and alcohol dependency and death, mental health problems, and even suicide. The Administration is dismissive. It circumvents reasonable procedures designed to limit burdensome regulations. It uses technical gimmicks to claim speculative benefits outweigh regulatory cost.

Delegations of power are read broadly, while limitations are read narrowly. Half of the Administration's vetoes have been used to block congressional objections to controversial regulations.

OIRA is supposed to be the gatekeeper, the entity that helps fight overregulation and protect small businesses and the American worker.

Unfortunately, on some of the most costly and controversial regulations of the last 8 years, OIRA has not proven an effective check. For example, it never insisted upon the required small business impact analysis for EPA's Waters of the United States regulation, despite its obvious sweeping reach. Nor has it questioned agencies' excessive reliance on co-benefits and performing required cost-benefit analyses. In fact, one of the reasons agencies have to inflate the claimed benefit of their rules is to outweigh skyrocketing cost because they are regulating well into the region of diminishing marginal returns where one must spend increasingly more to achieve increasingly less. This track record makes me concerned about "Midnight Rules" at the end of this Administration.

Midnight Regulations impose the ongoing Administration's agenda on the country before an incoming Administration can stop it. So today, it is important to ask what serious steps will OIRA take to prevent this final abuse? The legacy of this Administration will be severe damage to hardworking Americans, our economy, and the rule of law.

Discretion afforded administrative agencies by Congress has been abused. Major decisions were made not by the people's Representatives in Congress, but by unelected bureaucrats. This cannot stand. I hope Administrator Shelanski can offer ideas on making OIRA more effective. I also hope to hear from our second panel of witnesses about needed reforms.

The Chair now recognizes the Ranking Member of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, the gentleman from Georgia, Congressman Johnson, for his opening statement.

Mr. JOHNSON. I thank the Chairman. Established by the Paperwork Reduction Act of 1980 and empowered with centralized regulatory review responsibilities under President Reagan, the Office of Information and Regulatory Affairs, also known as OIRA, functions as the gatekeeper of the regulatory system for the most important Federal rules.

In 1993, President Clinton issued Executive Order 12866 to require that OIRA review all "significant" regulatory actions between 500 and 700 a year. It additionally requires that Federal agencies prepare a cost-benefit analysis for economically significant rules.

In January 2011, President Obama issued Executive Order 13563, which reaffirmed the principles of Executive Order 12866 but also requires that agencies develop plans for retrospective review of existing regulations to determine whether any should be modified, streamlined, expanded, or repealed. And finally, the Obama administration issued Executive Order 13610 in May 2012 to further increase public participation in retrospective reviews.

According to Mr. Shelanski's predecessor, Cass Sunstein, these orders have energized agencies to identify hundreds of outdated rules for elimination, and many agencies have already finalized or proposed, or formally proposed, over 100 of these reforms. For instance, the Department of Health and Human Services has finalized several rules to remove hospital and healthcare reporting requirements, saving $5 billion over 5 years. These efforts have continued under Administrator Shelanski, and thus far, appear to be working.

Combined, it's clear that these initiatives have already resulted in hundreds of formal proposals to eliminate rules representing billions of dollars in savings over the next several years and substantially more in eventual savings. I look forward to learning about the continuing efforts, to date, of the President's push to have agencies improve and modernize the existing regulatory system.

In addition to conducting oversight of OIRA, witnesses on our second panel will also discuss larger concerns with our Nation's regulatory system. I would note that the most pressing issue facing our regulatory system today is the timely response to public health and safety crises through the expeditious promulgation of Federal rules. But sadly, it has become common for my colleagues to assert that the same regulations that protect our health, safety, environment, and our financial system have undermined the Nation's economic recovery and job growth.

This could not be further from the truth and is simply not borne out by any serious research. Perhaps that is why conservatives also acknowledge that in light of improvements in the economy and the unemployment rate, it is becoming increasingly difficult to argue that the current regulatory environment has any effect on jobs or growth. Douglas Holtz-Eakin, one of the majority's witnesses in today's hearing, commented last year that, "with low employment and rising wages, the Republican's job gets a lot harder," while also referring to recent employment growth as promising.

I think 20-some million new jobs created over in the private sector since, President Obama took office. First, it's a loss of a couple of million jobs during the previous Administration. And, with respect to those figures about rising mortality rates among the blue collar working group demographic, it's not just because wages have gone down and they're dying because of alcohol, drugs, and mental health.

Certainly, wages have gone down, and they are dying of alcohol, drugs, and mental health disease, but also, liver and heart disease are taking out our fellow man, and this can all be attributable somewhat to the globalization of our economy, the movement of jobs offshore, production jobs, blue collar jobs, those jobs—many of those jobs have left under trade deals that have not worked for the American worker, and people, unfortunately, when they become—when they—there's a sense of hopelessness that starts to pervade their thinking, then they turn to alcohol and drugs, and they then develop liver disease, heart disease. But fortunately, there's treatment available for the millions, tens of millions who have been able to gain access to the healthcare system due to the passage and implementation of the Affordable Care Act, which my colleagues on the other side have tried more than 60 times to abolish with no plan in place to replace it.

And, of course, we have had some regulations that have ensued as a result of implementation of the Affordable Care Act, a major piece of legislation, and also the Dodd-Frank financial reform bill that has attempted—or has been effective thus far at creating another—or enabling another too big to fail situation to take out the retirement earnings of our working people and to keep our economy moving forward.

So I would like to say that once you set aside anti-regulatory rhetoric, it's clear that regulated industries exhibit more entrepreneurship, competition, and innovation given the fact that Alex Tabarrok, an economics Chair at the Mercatus Center at George Mason, found, in a 2015 study, that "industries with greater regulatory stringency," and I am quoting him, "have higher start-up rates as well as similarly high job creation rates."

So in closing, I would like to thank Administrator Shelanski for taking the time to appear before us today, and I'd like to thank the other witnesses for being here today, and with that, I yield back.

Mr. MARINO. The Chair now recognizes the gentleman of the full Judiciary Committee, Mr. Bob Goodlatte of Virginia, for his opening statement.

Mr. GOODLATTE. Thank you very much, Mr. Chairman. I want to thank you for holding this hearing, which is very timely. Overregulation is not a new issue, and the reason why this hearing is timely is it comes right after Independence Day. Among the grievances that the signers of the Declaration of Independence lodged against King George was overregulation: "He has erected a multitude of New Offices and sent hither swarms of officers to harass our people and eat out their substance."

Unfortunately, the problem has resurfaced. Last year, employment at regulatory agencies hit an all-time high of 277,000. In 2014, rules from the administrative agencies outnumbered laws passed by Congress 16 to 1. There has been a dramatic power shift in these United States from elected officials to unaccountable bureaucrats at Federal regulatory agencies.

In theory, agencies are governed by legislation, like the Administrative Procedure Act, as well as executive orders, designed to ensure transparent, quality rulemaking that is responsive to the people, balances costs and benefits, and is faithful to the intent of Congress. In practice though, too many Administrations have not adhered to these procedures in good faith.

The Obama administration, in particular, has taken advantage of the system to ram through radical, controversial, and sweeping policy changes contrary to the will of Congress, and of views of large segments of the voting public. Serious reforms are needed to curve these abuses.

At key stages in the rulemaking process, the Administration has ignored, or subverted, commonsense rulemaking procedures that stood in the way of their policy goals. For example, instead of using required regulatory impact analysis to determine whether regulation is necessary, agencies produce them in a perfunctory way, after the decision to regulate has already been made. A Mercatus Center study found that in essentially 87 percent of cases, agencies embarked on costly regulations without significant evidence that there was a problem or a precise idea of what they needed to fix. Similarly, agencies make questionable certifications that rules will not have a significant economic impact on a substantial number of small entities in order to avoid requirements designed to help rein in impacts on small businesses.

While the Obama administration pays lip service to the virtues of cost-benefit analysis, it routinely uses technical gimmicks like non-standard discount rates and excessive reliance on co-benefits to ensure its preferred outcomes. The Administration is also exploiting the Administrative Procedures Act's interpretive rules exception to impose dramatic and controversial policy changes without notice-and-comment or public participation. These include an unprecedented 30 guidance documents from the Department of Education straining the application of Civil Rights laws into controversial areas well beyond their intended scope.

Unfortunately, whether with regard to highly controversial rules, like EPA's Waters of the United States rule, Clean Power Plan rules, or Utility MACT rule, the Office of Information and Regulatory Affairs (OIRA), has proven ineffective at preventing regulatory abuses, particularly when the costs are highest and it matters most.

To be sure, in some cases, OIRA has improved the quality of rulemaking. However, that just underscores the need for fundamental regulatory reform in the face of executive branch abuses in the most high-profile cases.

This hearing is an opportunity to lay before the American public precisely how the President's "I have got a pen" approach has exploited the weaknesses in the regulatory system. That is the legacy of the Obama administration. For 8 years, it has abused discretion that Congress delegated in good faith. Serious and comprehensive reform is needed, and I look forward to exploring with the witnesses both the problem and its solutions. Thank you, Mr. Chairman.

Mr. MARINO. The Chair recognizes the full Judiciary Committee Ranking Member, the gentleman from Michigan, Congressman Conyers for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman, Members of the Committee, and especially to our first witness, the head of the Office of Information and Regulatory Affairs. It's been 3 years since Administrator Shelanski was appointed to head OIRA, and I'd appreciate hearing his thoughts on the current state of affairs with respect to Federal rulemaking and whether legislative fixes are needed in his view.

And, I'm also—I don't know how you can get all this into 5 minutes, but I wanted to get a sense of what it was like before you got—before you took over so we can empathize with what it is you've been working on and how you've—how you've approached it.

Some think the regulatory system, as you heard, is broken. But to that end—excuse me. They also support a series of anti-regulatory measures, many of which would impose numerous procedural burdens on Federal agencies.

Now, that's a curious difference of views that are being pushed by some of the same important personalities in the Congress. Other anti-regulatory measures would up-end the rulemaking process through unnecessary and costly litigation changes. For example, one bill, 4768, Separation Powers Restoration Act, is likely to be considered on the floor later this month, and would require Federal courts to review all agency rulemaking and interpretations of statutes on a de novo basis, resulting, of course, in a paralysis that would be out of sight, probably impossible, from my point of view.

And so, there's a sort of an opportunity to press down on OIRA and its leadership, which I've had some indication that they are small and understaffed, and with this enormous responsibility, and I would like to get from this hearing, not only from the Administrator, but the panels that follow, an idea of how we in the Congress can make the process more efficient and how the Administration can make it more efficient without Congress intervening, if that is possible. That's why the hearing is important.

The government has the obligation to protect health, welfare, and safety of all our citizens with the need to foster economic growth. And so, it's in that spirit that I come to this hearing to hear our Administrator describe how things work inside OIRA, and what the challenges are that you are faced with. We know that the time—that the time—period of time for regulation is getting pretty long, and we want you to candidly tell us what you can do about it, and what we should do about it. And so, I thank Chairman Marino for holding this hearing. And, like my colleague, Mr. Johnson, I look forward to the work product of this important coming together. Thank you, Mr. Chairman.

Mr. MARINO. Without objection, other Members' opening statements will be made part of the record. Before we break for voting, I would like to swear you in, sir, if you don't mind, so would you please stand and raise your right hand.

Administrator Shelanski, do you swear that the testimony you're about to give before this Committee is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SHELANSKI. I do so swear.

Mr. MARINO. Let the record reflect that the witness has responded in the affirmative, and thank you. Please be seated. We're going to head to vote now. We have five votes. They're beginning now with a 15-minute vote and then four 5-minute votes, so it looks like we're looking at pretty close to at least a half hour, and I apologize for that, but we will get back as soon as possible, sir.

[Recess.]

Mr. MARINO. The hearing will now come to order and resume.

I will now introduce our esteemed witness. And, thank you. I apologize again for making you wait. Dr. Howard Shelanski was confirmed by the United States Senate in June 2013 as the administrator of the Office of Information and Regulatory Affairs, otherwise known as OIRA. Prior to his confirmation, Administrator Shelanski served as the director of the FTC's Bureau of Economics, and as chief economist for the Federal Communications Commission. Administrator Shelanski also served as senior economist for the President's Council for Economic Advisers.

Prior to working for the government, Administrator Shelanski practiced law and taught at both Georgetown University and the University of California at Berkeley. He received his BA from Haverford College and his J.D. and Ph.D. in economics from the University of California at Berkeley. Following law school, he clerked first at the District and the Appellate Courts levels and then for Justice Antonin Scalia on the U.S. Supreme Court.

The witness' written statements will be entered into the record in its entirety. And, I ask, sir, that—you have been here before. You know how it works. Now, because we're not in the original room, we have no lights. We don't even have a timer. Somebody's going to sit beside me and tap me on the shoulders. And, when you get at about 4½ minutes, I will just diplomatically hold the hammer up. I will not hit anything or anyone, and just try to wrap up then in the next 30 seconds to a minute.

So Administrator Shelanski, please.

TESTIMONY OF THE HONORABLE HOWARD SHELANSKI, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. SHELANSKI. Thank you very much, Chairman Marino, Ranking Member Johnson, and Members of the Committee, for the invitation to appear before you today. I am pleased to have this opportunity to discuss recent developments at the Office of Information and Regulatory Affairs, OIRA, and report on the progress OIRA has made on the key priorities I outlined when I first appeared before this Committee in July of 2013.

OIRA has a broad portfolio, but one of our main duties is to coordinate the review of significant regulations. The basic principles of regulatory development and centralized review have evolved in a bipartisan way over the course of the last few decades.

The structure of regulatory review that we follow today was established by Executive Order 12866, which is quite simple and straightforward: Regulations should be based on a sound analysis of their impacts. They should be developed with public input and subjected to public scrutiny before they are finalized, and they should be reviewed by a central office to ensure consistency with sound regulatory practice and Administration priorities.

OIRA does not review all executive branch regulations, nor would it be efficient for the office to do so. We review only significant regulatory actions. The most fundamental category of significant regulations are those that are economically significant, the threshold for which under the executive order is an annual effective on the economy of $100 million or more.

Typically, an agency sends a draft of a significant proposed or final rule to OIRA, after which OIRA coordinates an interagency review process. Typically, the agency will agree with some but not all of the comments that it receives from OIRA and the other reviewing agencies. Through discussion and deliberation with interagency reviewers, the rulemaking agency ultimately produces a proposed or final regulation to be published in the Federal Register.

OIRA works to ensure that the costs of new regulations that come to the Office of Review are justified by the benefits. To date, the net benefits of regulations issued through the sixth fiscal year of the Obama administration are about $215 billion. The benefits of these rules are not mere abstractions. They help American families every day by saving lives, preventing illness and injury, and protecting consumers.

As this Administration comes to a close, we intend to maintain the strong regulatory review standards that have guided OIRA's review of regulations throughout the Administration. In December of 2015, I issued a memorandum to deputy secretaries outlining these expectations. The memo asked agencies to adhere to dates established in their fall 2015 regulatory plan and agenda, and to update OIRA about any necessary changes.

The memo acknowledged that agencies will issue many needed regulations through 2016, but requested that agencies strive to complete their highest priority rulemakings by this summer, because OIRA needs sufficient time to thoroughly review all regulations for compliance with applicable statutes, governing executive orders, and OMB circulars.

When I became OIRA administrator in 2013, one of my goals was to increase the predictability of the regulatory review process by improving the timeliness and transparency of OIRA's key functions. Toward that end, and as I committed to do the first time I appeared before this Committee, we have published the regulatory plan and agenda each fall and spring, most recently on November 16, 2015, and May 18, 2016.

OIRA is committed to putting out another regulatory plan and agenda in a timely fashion this fall. OIRA has also worked to improve the transparency of regulatory review. When an agency submits a rule to OIRA for review, the submission appears publicly the next day on OIRA's Web site. This posting provides stakeholders with notice that OIRA is initiating review of a regulation and is available to meet with any party interested in providing input on a rule under review.

The entities with which OIRA typically meets include Members of Congress and their staffs, State and local governments, businesses, trade associations, unions, and advocates from a variety of organizations. OIRA posts a log of all such meetings on its Web site detailing the participants in each meeting, the organizational affiliation of the participant, and post any materials prior to OIRA at the meeting.

One hallmark of this Administration's regulatory policy is our retrospective review effort. Retrospective review, which the President has advanced through Executive Order 13563 and 13610, is a crucial way to ensure that our regulatory system remains modern and streamlined and does not impose unnecessary burdens on the American public. The essential idea is to scrutinize existing rules and assess whether in practice they are achieving their objectives without imposing unnecessary costs.

Agencies release their most recent reports on March 4, 2016, and will submit their next reports to OIRA this month. To date, this Administration's retrospective review efforts are expected to yield an estimated net 5-year savings of $28 billion.

In conclusion, regulations can and do bring great benefits to Americans, but they also carry costs. OIRA works every day to achieve the goals outlined in Executive Order 13563 to protect public health, welfare, safety, and our environment, while promoting economic growth, innovation, competitiveness, and job creation.

It is critical to ensure that Federal agencies base their regulatory actions on high-quality evidence and sound analysis. It is also crucial that a culture of retrospective review is sustained at the agencies as any healthy organization should scrutinize its current approaches to see if they are still relevant and effective in a rapidly evolving economy.

We look forward to continuing our efforts to meet these challenges. Thank you for your time and attention. I would be happy to answer any questions.

[The prepared statement of Mr. Shelanski follows:]

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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 COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
UNITED STATES HOUSE OF REPRESENTATIVES

July 6, 2016

Chairman Marino, Ranking Member Johnson, and members of the Subcommittee:

Thank you for the invitation to appear before you today. I am pleased to have this opportunity to discuss recent developments at the Office of Information and Regulatory Affairs (OIRA) and report on the progress OIRA has made on the key priorities I outlined when I first appeared before this Committee shortly after my confirmation in July 2013.

OIRA has a broad portfolio, but one of our main areas of focus is coordinating the review of significant regulations. The basic principles of regulatory development and centralized review have evolved in a bipartisan way over the course of the last few decades. The structure of regulatory review that we follow today was established by Executive Order 12866, which is quite simple and straightforward: regulations should be based on a sound analysis of their impacts, they should be developed with public input and subjected to public scrutiny before they are finalized, and they should be reviewed by a central office to ensure consistency with sound regulatory practice and Administration priorities.

OIRA does not review all Executive Branch regulations, nor would it be efficient for the office to do so. Each year, agencies issue a substantial number of new rules and update hundreds of existing rules. Many of these actions are minor or technical. OIRA review applies only to "significant" regulatory actions. The most fundamental category of significant regulations are those that are "economically significant," the threshold for which under E.O. 12866 is "an annual effect on the economy of $100 million or more." Congress uses a similar threshold to define rules as "major" under the Congressional Review Act.

Typically, an agency sends a draft of a significant proposed or final rule to OIRA, after which OIRA coordinates an interagency review process. OIRA sends the draft rule to other OMB offices, to components of the Executive Office of the President, and to relevant agencies and departments, which in turn offer comments and suggestions on the draft rule. The usual practice is for OIRA to summarize those comments, together with our own, and to transmit them back to the rulemaking agency. Typically, the agency will agree with some, but not all, of the comments that it receives. Often, the focus of a regulatory review is to help the agency hone and sharpen the rule's rationale and to identify areas where more evidence or discussion will strengthen or clarify a regulation. Discussion and deliberation ultimately produce a proposed or final rule to be published in the Federal Register. If it is a proposed rule, the regulation is published for public comment.

OIRA works to ensure that the costs of new regulations that come to the office for review are justified by the benefits. To date, the net benefits of regulations issued through the sixth fiscal year of the Obama Administration are about $215 billion. The benefits of these rules are not mere abstractions. They are helping American families every day by saving lives, preventing illness and injury, and protecting consumers.

As this Administration comes to a close, we intend to maintain the strong regulatory review principles that have guided OIRA's review of regulations throughout the Administration. In December of 2015, I issued a memorandum to Deputy Secretaries outlining these expectations. The memo asked agencies to adhere to dates established in their fall 2015 Regulatory Plan and Agenda, and update OIRA about necessary changes. The memo acknowledged that agencies will issue many needed regulations throughout 2016, but requested that agencies strive to complete their highest-priority rulemakings by this summer to avoid an end-of-the-year rush. Furthermore, throughout the year, we have continued to remind agencies that OIRA remains committed to thoroughly reviewing all regulations in compliance with applicable statutes, governing Executive

Orders, and OMB Circulars, and have advised agencies to submit draft regulations in a manner that gives OIRA time to circulate them for interagency review accordingly.

When I became OIRA Administrator in 2013, one of my goals was to increase the predictability of the regulatory review process by improving the timeliness and transparency of OIRA's key functions. Toward that end, and as I committed to the first time I appeared before this committee, during my term as OIRA Administrator we have published the regulatory plan every year, most recently on November 16, 2015, and the agenda in a timely manner twice a year, most recently on May 18, 2016. We are committed to putting out another regulatory plan and agenda this fall.

OIRA has also worked to improve the transparency of regulatory review. Under OIRA's existing process, when an agency formally submits a rule to OIRA for review, the submission appears publicly the next day on OIRA's website, reginfo.gov. This posting provides stakeholders with notice that OIRA is initiating review of a regulation. This type of notice is important because, pursuant to E.O. 12866, OIRA meets with any party interested in providing input on a regulation under review. The entities with which OIRA typically meets include Members of Congress and their staff, State and local governments, businesses, trade associations, unions, and advocates from environmental, health, and safety organizations. OIRA posts a log of all such meetings on its website detailing the participants in each meeting, the organizational affiliation of the participant, and posting any materials provided to OIRA at the meeting. In April 2014, OIRA updated its website to make its database of E.O. 12866 meetings publicly searchable. We also recently expanded our disclosure policy to 1) post on our website not only meetings that have already taken place, but also upcoming meetings, and 2) collect more up-front and detailed information about parties requesting a meeting, including any client or other entity that organization represents, if applicable. Since I have become Administrator, OIRA has conducted over 1,000 such meetings at the request of various stakeholders.

Finally, a hallmark of this Administration's commitment to transparency and accountability is our retrospective review effort. Retrospective review, which the President has advanced through E.O. 13563 and E.O. 13610, is a crucial way to ensure that our regulatory system remains modern and streamlined, and does not impose unnecessary burdens on the American public. The essential idea is to scrutinize existing rules and assess whether in practice they are achieving their objectives without imposing unnecessary costs. E.O. 13610 directs agencies to submit reports on the status of their retrospective review efforts to OIRA every six months. Agencies released their most recent reports on March 4, 2016, and will submit their next set to OIRA this July. To date, this Administration's retrospective review efforts are expected to yield an estimated net five-year savings of $28 billion.

During my time as Administrator, OIRA has worked to make the retrospective review process more open and accountable. Over the past three years, in addition to the ongoing agency efforts, OMB has conducted numerous meetings with stakeholders—including State and local government officials, community groups, and representatives from numerous industries—to get ideas for retrospective review. We are trying to work with the public to identify areas where cumulative regulatory burden can be reduced or streamlined, and whether we have the optimal regulatory structure to encourage emerging industries to expand, mature, and generate benefits for the American people. Through these meetings, OMB has become better able to understand what approaches, themes, and specific areas of regulation should be part of agencies' retrospective reviews. OMB has shared input from those meetings with agencies, which also engage in their own, ongoing stakeholder outreach on retrospective review. Even regulations that were well crafted when first promulgated can become unnecessary or excessively burdensome over time and with changing conditions. Retrospective review of regulations on the books helps to ensure that those regulations are continuing to help promote the safety, health, welfare, and well-being of Americans without imposing unnecessary costs.

In conclusion, regulations can and do bring great benefits to Americans, but they also carry costs. OIRA works every day to achieve the goals outlined in Executive Order 13563, to "protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It is critical to ensure that Federal agencies base their regulatory actions on high-quality evidence and sound analysis. Beneficial regulation must remain consistent with the overarching goals of job creation, economic growth, and public safety. It is also crucial that a culture of retrospective review is sustained at the agencies, as any healthy organization should scrutinize its current approaches to see if they are still relevant and effective in a rapidly evolving economy. All of this must be done in an environment of transparency so that the American people can have confidence in the process used to develop these rules. We look forward to continuing our efforts to meet these challenges.

Thank you for your time and attention. I would be happy to answer any questions you may have.

Mr. MARINO. Thank you. Now we will begin the 5 minutes of questioning from each of the Members. And, we will try to do just as well as you did, to do it within around 5 minutes.

First thing I would like to bring to your attention and ask your response to, sir, is the Committee—the Subcommittee, which I've Chaired for the last couple of years now, asked in writing for a list of all proposed, or final rules reviewed by OMB since January of 2009 where the cost-benefit analysis, by one or more methods of calculation would be negative if co-benefits were excluded. OIRA offered a generic reply that co-benefits are discussed in an annual report.

Would you be so kind as to commit to providing the list that I just asked for by July 20 of this month?

Mr. SHELANSKI. Thank you, Mr. Chairman.

I would like to take that request back and to see what it would take for us to compile that list, and we will get back to your office as quickly as possible with when we can reply.

Mr. MARINO. Do you think you will be able to get back to us as to when you can complete that list before July 20?

Mr. SHELANSKI. Yes. I will get back to you before July 20 with an answer as to what kind of work I think will be involved with that and when we can do that.

Mr. MARINO. Thank you.

Your written testimony outlines steps you took "to avoid an end-of-the-year rush," which we have seen concerning regulations with all Administrations. Essentially, you requested that agencies act promptly. Supposing they refuse your request, what consequences would they face—not could they face, but would they face—with you if that information is not put together?

Mr. SHELANSKI. The memorandum that I issued in December makes clear that we at OIRA need time to make sure that we have done a thorough review. And, we will uphold the standards of the executive order. The consequence that agencies will face if they come to us too late with rules is that we may not have time to do that kind of thorough review, in which case their rule would not be completed by the end of the Administration.

Mr. MARINO. Let's expand a little bit on that question and your statement. You said you do not have—you may not have time because of what the agency has not done or fulfilled their request. But as the Administrator, how do you respond to that? It's like, you know, I ask my kids to have something done, and it's not done, there are consequences. Maybe we should start running the government a little more like we, parents, supervise our children.

Mr. SHELANSKI. It's hard to know in advance of any rule being submitted what kind of shape the rule is in, or what the review time will be. Some rules can be reviewed thoroughly and completely in a relatively short period of time; others will take a lot more back and forth, will implicate a lot more of the equities of other agencies.

So it's hard to know in advance what the consequence of a particular late submission will be, but—so the operative principle that we're using is to tell them that if you submit us a rule late and it's a rule that will take more time to do a good job on, it won't be able to be concluded on. I can't tell in advance before I see a rule how long it will take to review or what the process will be, but they are on notice that, you know, we can't shortcut our process and we can't rush rules through at the end.

Mr. MARINO. Don't you think there should be some type of—I don't want to use the word "sanction," but some type of notice or warning, public notice or warning to that agency, to that department, that we requested this information, the time has lapsed, we have had no response? Or is it even a situation where you have requested an extension?

I mean, the American people have to understand what is not taking place. And, elected officials and those that are appointed to office can simply just not ignore because this is what gets us into the problems that we're in with the debt and a whole litany of other issues. But there are responsibilities. I came from industry. You're an officer of the court. You know when a judge says I want this done by this date; if it's not done, there are sanctions. So why are the bureaucrats, why would the elected officials be immune from this?

I think part of your responsibility and other Administrators' responsibility is to make it publicly known that your request wasn't fulfilled, and the agency is lacking in getting American people information. What say you?

Mr. SHELANSKI. If an agency chooses not to send a rule to OIRA, that's something that's very much in their discretion. If it's not a rule that has a court order or a statutory deadline, I don't have any authority to issue a sanction because an agency doesn't send a rule over. But what I can do, and the authority that I do have is to make sure that my office operates in a way that it lives up to its authorizing executive orders.

And so, what I can tell agencies—and again, it's not my—you know, I can tell agencies, look, you are working on this rule and you say you want it done, we're running out of time. And, that's the kind of thing that I can tell them, and then they have to make a decision and be answerable to the public about whether or not they are going to continue with that particular rulemaking.

Mr. MARINO. I agree with you. I'm way over my time and I apologize. But what would help is probably you giving them a little nudge and saying, if this isn't done by a certain time, I'm going to send notice over to the Committee that's responsible for oversight or budgeting you, and explain to them that you're not cooperating. Maybe that's what we need.

But with that, my time has expired. I thank you, and I now yield to the Ranking Member of the Subcommittee, Mr. Johnson, for his questioning.

Mr. JOHNSON. Thank you, Mr. Shelanski.

I have serious concerns that the cost-benefit analysis requirement for significant rules comes at the expense of Americans' public health safety and environment. How can we possibly quantify the benefit clean drinking water will have on a neighborhood when new solid waste regulations protect that neighborhood from coal ash dumping? How can we possibly quantify the benefits that clean drinking water would have, based on a newly promulgated rule that protects that neighborhood from coal ash dumping?

How can we accurately quantify the cost of exposure to dangerous chemicals and toxic materials on the long-term development of children in low-income and minority communities? Repeatedly, critical public health rules are called too burdensome for corporations to comply with, but what about the communities at stake, communities who find the cost to their health, safety, and well-being not factored in because it does not have an easily quantifiable dollar figure? What about the burdens that those folks face?

Regulations should act as a floor, not a ceiling. Rather than weakening rules to lower the cost they have on big business, we should be strengthening rules so the burden on the American public is not too costly. In light of these concerns, should we reform OIRA's review process so it is more reflective of the cost and benefits that rules have on the health and well-being of everyday people?

Mr. SHELANSKI. Thank you very much, Mr. Johnson. That's a very important question.

I do think it's very important to quantify as much as possible the costs and benefits of a regulation. I think it's important for the American public to understand what regulation is costing them. I think it's extremely important for the business stakeholders to have notice of what their compliance costs might be. It is important that our regulation remain consistent with economic growth and job creation.

On the other hand, we well recognize, and indeed, our executive orders well recognize that there can be limits in our ability to quantify benefits. So there is not a rigid requirement that quantified benefits exceed quantified costs, because there is a recognition that in some places, there are benefits, benefits that can be proven to exist but, as you say, are hard to put a dollar figure on.

So what we ask agencies to do is to quantify as much as available scientific evidence and health evidence will permit, what the reduced illness incidents will be, what the reduced death and injury incidents will be of a rule, and to quantify those by some very well-established techniques.

But we also recognize that in some cases, there will be—the evidence will be difficult to come by. And, there we look for a strong case that the rule will achieve its intended goal of, for example, clean drinking water or cleaner air, and that there is good evidence that those changes will be reflected in public health gains.

So I do not—I would not be in favor of reforming the executive orders and the cost justification principles that underlie them. I think they are very healthy, and I think that they are consistent with providing the kinds of benefits that you articulated, sir.

Mr. JOHNSON. Thank you.

Anti-regulatory measures, such as H.R. 185, the Regulatory Accountability Act, and H.R. 4768, the Separation of Powers Restoration Act, have been proposed to heighten judicial review of agency rulemaking. You previously testified that you have grave concerns with conducting judicial review at a granular level because it could grind to a halt the deliberative process and good policy development.

What are some examples of rulemakings that would be particularly sensitive to heightened review?

Mr. SHELANSKI. Thank you, sir.

My concern about judicial review is of the kind that has been suggested in some proposed legislation, is that it would put judges in the position of reviewing very detailed kinds of factual decisions that expert agencies typically make, and would really overturn decades of precedent about the appropriate scope of deference to fact-finding and decision-making in the agencies. And, the result would be that it would be very hard to move forward in rulemaking if at every given stage, every determination of the agency could be second-guessed, no matter how material on judicial review.

So I do have some concerns about judicial review of OIRA determinations, or a very granular kind of agency determinations for the reasons that you set forth.

Mr. JOHNSON. Are you concerned that heightened judicial review may empower courts to make substantive determinations?

Mr. SHELANSKI. Yes, sir, that is one of the concerns. I think that the system of judicial review that is in place over decades of Supreme Court precedent is designed to have courts take one step back from those kinds of very detailed, substantive determinations. And, my concern would be that agencies would find it very difficult to make progress on necessary regulations, regulations that respond to pressing public needs, if they would face that kind of judicial review.

Mr. JOHNSON. Thank you, sir. I yield back.

Mr. MARINO. The Chair recognizes the gentleman from Texas, Congressman Ratcliffe.

Mr. RATCLIFFE. Thanks, Mr. Chairman. Sorry, I was deep in thought there.

Mr. Chairman, I appreciate you holding this hearing, and I will tell you that I think the work that this Subcommittee does is some of the most important work that we do here in Congress. I can tell you from the constituents that I have in Texas, the issues that we're talking about here, including what the gentleman from Georgia just referenced, are very personal to my constituents.

I'm afraid that sometimes here in the Halls of Congress, the statistics and the numbers and the clinical terms that we use in these hearings desensitize all of us to the real impact that the policy decisions have, whereas I can tell you the folks back in northeast Texas aren't. They see these issues in very clear terms, terms like jobs and the uncertainty of their jobs and the stagnancy of their wages with respect to jobs and not getting pay raises for decades, how it impacts their families and their futures.

And, from the conversations I've had with constituents, it's painfully clear to me that so many of the burdensome regulations are inflicting real harm on individuals and families. Making matters worse at times is the attitude of indifference, at best, and condescension, at worst, from Federal regulators. Sometimes when I ask about the consultation process and whether or not there has been any meaningful consultation with stakeholders in a respective area or industry, the response is too often laughter. I think that this concept at times isn't taken seriously by some of the regulators.

The regulations—listen, I'm not against regulations. They certainly serve a purpose when they are done correctly. They can enhance consumer safety, they can promote responsible stewardship of resources, and they can improve the lives of everyday Americans. But when regulations go wrong, which is what we see so often today, they can be impossible to comply with, and impossible to rectify or to reconcile with plain-old common sense.

And so, I think a great example of that is what some of the unelected bureaucrats are doing at some agencies impacting millions of Americans with misguided, misinformed approach to the regulatory process. Let's take the Internet. Every day Americans use the Internet for communication, for commerce, for Internet, for daily operations of their lives. And, I think that any regulation that is so far reaching should be done with extreme caution and undergo an intensive review process. Unfortunately, that's not what's happening.

So last year, the FCC voted 3-2 along party lines to approve the Commission's net neutrality rule, or as my friend from Texas in the Senate calls it, ObamaCare for the Internet. But let's, for a second, set the policy debate about this new rule aside and talk just about the process.

And, you know, the FCC is using the Communications Act of 1934 to justify its regulation of the Internet. Bureaucrats at the FCC have said that it was the intention of this body of Congress to see that broadband Internet service was regulated like a telephone utility back in 1934.

Now, I can't remember the exact year that Al Gore invented the Internet, but I'm pretty sure it was after 1934. I think it underscores the issue that we're talking about here. And, you know, with all due respect to the gentleman from Georgia and his comments about some of the legislation, admittedly, some of that legislation, the Separation of Powers Restoration Act, is my legislation, and it's aimed at exactly this problem.

And, you know, your response, Mr. Shelanski, about judges not having the expertise that some of these agencies have to make these decisions, I would point you to the one that I just said to highlight the fact that unelected bureaucrats at agencies are not always experts on issues.

To correct another point, my legislation does not go to factual findings; it goes to legal interpretations, which is what judges are trained, vetted, and ultimately confirmed to do.

So let me ask you on this, while we're on the topic of the FCC, is because it's an independent agency, this enormously consequential rule is exempt from the cost-benefit framework and OIRA review. And, as a result, OIRA is not able to promote adherence to the review measures which are designed to ensure, I think, that rules that govern the lives of the American people have undergone a thorough cost-benefit analysis and determined to be the least burdensome alternative.

As you probably know, in 2012, the President's Council on Jobs and Competitiveness recommended that independent agencies, like the FCC, be required to perform cost-benefit analysis and subject their regulations to OIRA review. I know that you previously worked at the FCC, correct?

Mr. SHELANSKI. [No verbal response.]

Mr. RATCLIFFE. Do you, first of all, agree with the recommendations made by the President's council, and if so, how would this, in your opinion, change the benefit or the quality of independent agencies' rulemaking?

Mr. SHELANSKI. Thank you very much, Mr. Ratcliffe. This touches on a very important issue. President Obama, in some of the executive orders that he has issued that govern OIRA, has actually very strongly encouraged the independent agencies to use some of the rigorous cost-benefit analysis that is—that executive branch agencies are subject to during OIRA review.

I do have some concerns, separation of power concerns and other concerns, about subjecting independent agency rulemaking formally to OIRA scrutiny. I do agree, however, that the principles of cost-benefit analysis are ones that are good for any agency, whether it's executive branch or independent; and that encouragement of those agencies to use those kinds of mechanisms would benefit the quality of their rulemaking and the American public.

Mr. RATCLIFFE. Thank you. I see my time has expired. I will yield back.

Mr. MARINO. Thank you.

The Chair now recognizes the gentleman from Michigan, Congressman Trott.

Mr. TROTT. Thank you, Chairman, and also, Ranking Member, for organizing this hearing.

And, Mr. Shelanski, thank you for appearing today and for your work on behalf of our country. You have a very impressive background, so there's no question. A Ph.D. in economics from Berkeley, and clerking for Scalia, of Counsel to Davis Polk, and many great accomplishments. Have you ever run a business though?

Mr. SHELANSKI. I have not run my own business, sir.

Mr. TROTT. You spent 2 years in private practice, right?

Mr. SHELANSKI. That's correct, sir.

Mr. TROTT. So never signed a paycheck. Never managed to a bottom line or a budget?

Mr. SHELANSKI. Just the household, sir.

Mr. TROTT. Okay. So I took a family business with six people, grow it into companies with about 2,000 people. We couldn't have done it today. Couldn't have done it. Even if we could've done it and made a profit, wouldn't have wanted—their heavily regulated businesses wouldn't have wanted to take the risk.

So let me share with you—at a high level, do you think that—you know, you cited in your opening statement that over the last 6 years, all the benefits to the economy with President Obama's regulatory efforts. Do you think, with respect to small businesses in our country today, over the past 6 years, that the regulatory environment is supportive, or is it too onerous or just about right? Kind of the Goldilocks question for you.

Mr. SHELANSKI. Thank you. I think that that's a hard question. I will say this: Small businesses face unique challenges, and we have a system of regulatory review that is set up to try to take specific note of those. And, we do work closely with the Office of Small Business Advocacy to try to understand the specific effects that will occur on small businesses. So we certainly work to try to make it just about right.

Mr. TROTT. Well, so that's a good segue. So last weekend in the district, I met with some independent party store and gas station owners. And, I was impressed with their knowledge. I thought only people in Washington understood all of our acronyms, but they had all the acronyms down. And, during the course of the meeting, they said to me, We cannot continue, Would never open another party store or gas station in today's environment—these are independent business owners in my district—because of the following acronyms: EPA, FDA, ACA, and of course, the Department of Labor and some of their rules and regulations coming at them.

So when I go home, I hear three questions: Why can't you get anything done in Congress? Why can't you stop President Obama? So I'm not going to ask you to opine on the first two questions. But if you give me some insight into the third question I get asked, which is, Can't you get Washington out of the way? I can't run my business in today's environment. What should I say to those folks about the future of small business in America and free enterprise, which I believe is the reason why we're the greatest country in the world?

Mr. SHELANSKI. I think that the problem you allude to is a problem of cumulative burdens of regulation——

Mr. TROTT. No doubt.

Mr. SHELANSKI [continuing]. That each regulation in itself may have a justification and may look fine, but by time you're a business starting up and you have got multiple regulations that you need to address, it becomes a very difficult enterprise. I think that to deny that this is a critically important challenge for regulatory review and for agency rulemaking would not be candid.

We do strive at OIRA, when we meet with stakeholders and when we work with agencies, to try to get agencies to look more broadly outside of their rule to understand what this rule does to add to the effects on profit margins in a particular sector.

So it is within our mandate, and it is something that we have worked very hard to do. The best answer I can give you is, this is an area in which we continue to work with agencies. I will agree with you that more attention needs to be paid to how we can account for cumulative burdens.

Mr. TROTT. Okay. So let's talk about major impact and rules that have major impact, which is the focus of your office. And, in connection with that, let's talk about the REINS Act. You're familiar with the REINS Act?

Mr. SHELANSKI. Yes, sir.

Mr. TROTT. So tell me why that's a bad idea.

Mr. SHELANSKI. The Administration has issued its view on the REINS Act, and I think that what underlies that view is a concern that Congress has the authority already to disapprove any major regulation under the Congressional Review Act.

Mr. TROTT. That hasn't gone so well because half of the President's vetoes have been of resolutions that we passed under the CRA, right?

Mr. SHELANSKI. Yep. So one of the concerns is, under the REINS Act, an agency would issue a major rule, and then there would have to be a majority of Congress to ratify that rule. I think my concern is that this could really make it very difficult for important major rules to get done because they would—they could be done very well. They could meet a very specific need, and then still not marshal the necessary majority.

Mr. TROTT. But you would concede, if we had the REINS Act in place, it would give me a better answer when I go home, and I have to explain to small businesses why we haven't been able—we, the elected representatives of the people—haven't been able to weigh in on regulations that have an impact of over $100 million on our economy? I mean, that's a disconnect for me, because all I can point to is the fourth branch of government, that growing bureaucracy—which is, again, one of the questions I get hit with a lot, why has Washington gotten so big.

And, then the other—and I run out of time—but the other question I get when people come visit here, tourists and come to see our Capitol and the White House, is they comment on all the cranes that are in Washington. They have never seen so many cranes. We all know Washington didn't have a recession like Detroit did, and we all know that Washington continues to grow because government just grows and grows beyond—but I thank you again for being here, sir, and I yield back my time.

Mr. SHELANSKI. Thank you.

Mr. MARINO. Seeing no other Members on the dais, this concludes today's first panel.

Administrator, I want to thank you so very much for being here. And, once again, I apologize for the delay. I want to thank you for agreeing to get that information to me before the 20th. I really appreciate that. You are excused, sir.

Mr. SHELANSKI. Thank you, sir.

Mr. MARINO. And, would the second panel please come up to the hearing table.

We are missing one of the witnesses, but we're going to get started in the interest of time.

I would ask the gentlemen at the table, would you please stand and raise your right hand to be sworn in. Do you swear that the testimony you're about to give before this Committee is the truth, the whole truth, and nothing but the truth so help you God? Thank you. Please be seated and let the record reflect that the witnesses have acknowledged in the affirmative.

Mr. Crews, if you would just continue standing and raise your right hand. We just swore the other witnesses in. Do you swear that the testimony you're about to give before this Committee is the truth, the whole truth, and nothing but the truth so help you God? I do. Let the record reflect that the witness has acknowledged that he does affirm in the positive.

The four distinguished members of this area of expertise to testify before us today, and I will begin with introducing Dr. William Beach.

Mr. BEACH. That's correct.

William Beach is the Vice President for Policy Research at their Mercatus Center at George Mason University. Dr. Beach previously served as the chief economist for the Senate Budget Committee Republican staff. Prior to that position, he was the Lazof Family Fellow in Economics at the Heritage Foundation, and director of the Center for Data Analysis.

Prior to joining Heritage in 1995, Dr. Beach served as a senior economist in the corporate headquarters of Sprint United, Incorporated, and from 1991 to 1995, as the president of the Institute for Humane Studies at George Mason University. Dr. Beach received his bachelor's degree from the Washburn University in Topeka, Kansas; his master's degree in the history of economics from the University of Missouri-Columbia; and a Ph.D. in economics from Buckingham University in Great Britain.

Welcome, Doctor.

Mr. BEACH. Thank you very much.

Chairman Marino, Ranking Member——

Mr. MARINO. Sir, I'm going to just go through everybody's.

Mr. BEACH. Is that held against my time?

Mr. MARINO. It's not. We will start from ground zero.

Our next invitee is Mr. Clyde Wayne Crews, Jr. Mr. Wayne Crews is vice president for policy and director of technology studies at the Competitive Enterprise Institute, a former Cato Institute scholar as well as a Senate and FDA staffer. He is widely published and a frequent speaker on a range of policy issues at venues, including the National Academies, European Commission-sponsored conferences, and the Spanish Ministry of Justice.

Mr. Crews is co-editor of the books "Who Rules the Net?: Internet Governance and Jurisdiction," and "Copy Fights: The Future of Intellectual Property in the Information Age." His other works are cited in dozens of law reviews and journals. Mr. Crews is a father of five, received his B.S. From Lander College and his MBA from William & Mary.

Welcome, sir.

The next witness is Professor David M. Driesen. Is that correct, sir?

Mr. DRIESEN. Driesen, that's correct.

Mr. MARINO. Driesen. Thank you, sir.

David M. Driesen is a university professor at Syracuse University, the 13th person in the history of the university to receive this honor, and a member scholar of the Center for Progressive Reform. He teaches environmental law, and his scholarship focuses primarily on law and economics and environmental law, including a substantial body of work on OIRA, or otherwise known as OIRA, review, and cost-benefit analysis.

His books include "The Economic Dynamics of Environmental Law" and "Economic Thought in U.S. Climate Change Policy." He sits on the editorial board of the various international and environmental law journals. Professor Driesen holds a bachelor's degree in music from Oberlin College, a master's degree in music from the Yale School of Music, and earned his J.D. At the Yale Law School.

Welcome, Professor.

Mr. DRIESEN. Thank you.

Mr. MARINO. Our final witness is Dr. Holtz-Eakin, built an international reputation as a scholar doing research in areas of applied economics policy, econometrics methods, and entrepreneurship. He began his career at Columbia University in 1985, and moved to Syracuse University from 1990 to 2001. During 2001 to 2002, he was a chief economist of the President's Council of Economic Advisers. From 2003 to 2005, he was the sixth director of the nonpartisan Congressional Budget Office, which provides budgetary and policy analysis to the U.S. Congress.

Currently, he is the president of the American Action Forum, and recently was a commissioner on the congressionally-chartered Financial Crisis Inquiry Commission. Dr. Holtz-Eakin received his B.A. From Denison University and his Ph.D. from Princeton University.

Welcome, Doctor. Thank you, all, for being here.

Now, Dr. Beach, you're up.

TESTIMONY OF WILLIAM W. BEACH, Ph.D., VICE PRESIDENT FOR POLICY RESEARCH, MERCATUS CENTER AT GEORGE MASON UNIVERSITY

Mr. BEACH. Thank you very much. Chairman Marino, Ranking Member Johnson, Congressman Trott, it is really a great pleasure to be here with you today. I'm going to testify about OIRA and cumulative cost and what we can do in terms of asserting Congress' authority in these areas, particularly in regulatory budget. But I would like to start with just a statement about the economy.

The economic role changes most and for the good in economies where rivalrous economic behavior is allowed most to flourish, that is in economies devoted to free enterprise. Congress has no end of the number of things it has to do. I should know; I was once working, not so long ago, in the Senate. But near the top of the list of to-dos is the protection of this amazing process of value creation through innovation, discovery, and competition.

We depend utterly on the private sector to produce nearly all of the material things we value. While the public sector is necessary as a partner in the production of these, by providing public goods, courts, highways, and so forth and so on, you wouldn't want it any other way, the betterment of the American people since 1900 is almost wholly the accomplishment of competition between entrepreneurs trying to obtain the consumer's attention for their products and services.

Given the vital place of the competitive economic world in bettering the general public, Congress must be especially vigilant of the regulatory burden it imposes on the economy. In this vain, I am particularly eager to draw the Committee's attention to three areas of regulatory policy where I have some concerns: One, the decay of regulatory impact analysis; two, the economic effects of regulation, the cumulative costs of regulation; and three, the growing absence of Congress in directing the future developments of the administrative state.

And, let me briefly mention all of these in turn on the regulatory impact analysis. Policymakers in Congress would largely be in the dark, Mr. Chairman, about the expected effects of regulatory policy changes were it not for the development of regulatory impact analysis, cost-benefit analysis it's also called.

The Administration's oversight of RIA's is lodged, as we heard, in OIRA. Under normal circumstances, this small office would have trouble enough monitoring the adequacy of these many rules. But I would like to point out to you that it has some difficulty doing it because its staffing has been halved. It started off in 1981 with 90 people. It now has exactly 50 percent of that at 45. So one of the things we can do to stop the hollowing out of our cost-benefit analysis is to adequately staff OIRA.

So what should we do to improve the quality of regulatory impact analysis, cost-benefit analysis? You asked that, Congressman Johnson, in your opening remarks. First, improve OIRA's resources. Without adequate staffing and other resources, the Office's capacity to improve RIA quality, cost-benefit analysis will be substantially compromised.

Two, implement the process reform described in the recently passed House bill, the Administrative Procedures Act, that requires agencies to produce preliminary regulatory impact analysis and submit that to public comment before sending in its final RIA cost-benefit analysis to OIRA. Our research indicates that preliminary analysis with public comment yields much better final results.

And three, Congress should require all agencies to perform cost-benefit analysis when proposing major regulations.

Let me go to my second point: The increasing effect of regulations on the economy. I'm with everyone who has, so far, spoken today in being a fan of regulations. You can look at one regulation in one area, one regulation of another, and always make a good case. But there is a mounting likelihood that the cumulative effect of regulation is slowing the economy.

We have just finished some research in this area: How much declining growth have we experienced because of the cumulative rapid rise of regulation? My colleague, Patrick McLaughlin, who couldn't be here today, and his coauthors, recently used a growth model of the U.S. economy in a peer-reviewed piece of research and data from the Code of Federal Regulations to estimate is that there's a $4 trillion loss in GDP in the base year of 2012.

Now, what does that mean? That is, had regulations remained the same as they were in the heavily regulated year of 1980, the economy in 2012 would be $4 trillion higher than it actually was. Now, that's a decrease of 25 percent from what it potentially could have had. There were 135 million employees working in 2012. That means, if you do the math, 25 percent more employees. We are missing 34 million jobs.

Finally, I would like to say a quick word about regulatory budgeting. At issue in my two previous points, importance of RIA work and the mounting case for regulations are, in net, harmful to economic growth, is the need for congressional policymakers to attend to the more regulations than they have in the past.

So what I'm advocating here is that Congress be a little more assertive in terms of what it does to authorize the spending of agencies that are pushing more regulations on us. A regulatory budget is an idea whose time maybe has come. It was first proposed by Lloyd Bentsen, and there are a number of Members who are very interested in regulatory budgeting as a way to contain and control the growth of regulations.

I've got a good deal more in my written testimony which has been submitted for the record. Thank you very much.

[The prepared statement of Mr. Beach follows:]

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TESTIMONY

THE NEED FOR A GREATER CONGRESSIONAL PRESENCE IN REGULATION POLICY AND OVERSIGHT

WILLIAM W. BEACH, PHD
Vice President for Policy Research, Mercatus Center at George Mason University

House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing: Assessing the Obama Years: OIRA and Regulatory Impacts on Jobs, Wages and Economic Recovery

July 6, 2016

OVERVIEW

The economic world changes most and for the good in economies where rivalrous economic behavior is allowed most to flourish, that is, in economies devoted to free enterprise. The flood of new economic knowledge that these swiftly changing economies produce generally results in higher-quality products for consumers at lower prices on average, as businesses compete with each other for the consumer's dollars and strive to better serve consumer needs.

Congress has no end to the number of things it has to do, as I experienced not long ago as a staffer. Near the top of its list of "to-dos" is the protection of this amazing process of value creation through innovation, discovery, and competition. We depend utterly on the private sector to produce nearly all of the material things we value. While the public sector is a necessary partner in this production through its provision of public goods (courts of justice, defense of the country, highways, and so forth), the betterment of the American people since 1900 is almost wholly the accomplishment of competition between entrepreneurs trying to obtain the consumer's attention for their products or services.

It always is worthwhile to recall what a valuable asset for ordinary Americans is this free-enterprise system. Competitive, free-enterprise economies grow more rapidly over the long run than economies burdened by inadequate protection for private property, high taxes, and rapidly growing levels of regulation. Economies with a long-term growth rate of 1.5 percent will double in the size of per-person GDP in two generations, or in 47 years. However, a 3 percent growth rate results in a doubling of per capita GDP in only 23.5 years, or in one generation.[1] Thus, policy

1. Calculations by the author.

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changes that increase the growth rate from 1.5 to 3 percent can double economic well-being in half the time. That is a huge economic dividend for ordinary Americans.

Given the vital place of the competitive economic world in bettering the general public, Congress must be especially vigilant about the regulatory burden it imposes on the economy. Regulations can do great good for the free-enterprise system when they work to assure a level playing field and extend the vital protections of the rule of law. But regulations also can do great harm, particularly when they work to reduce competition, innovation, and the growth of economic knowledge. When regulations act in this latter fashion, they reduce the rate of economic growth, which directly reduces the growth in well-being among ordinary Americans.

In this vein, I am particularly eager to draw the committee's attention to three areas of regulatory policy where my concerns are growing: 1) the decay of regulatory impact analysis, which tells policymakers about the benefits and costs of proposed regulations, 2) the economic effects of regulations on vulnerable populations and the cumulative economic effects on the economy generally, and 3) the growing absence of Congress in directing the future development of the administrative state. Let me address each of these items in turn.

THE DECAY OF REGULATORY IMPACT ANALYSIS

Policymakers in Congress would largely be in the dark about the expected effects of regulatory policy changes were it not for the development of regulatory impact analyses (RIAs). Policymakers look at this analysis for estimates of a proposed regulation's costs and likely benefits. When well-prepared, the RIAs are highly valuable policy tools, particularly for the public affected by the proposed regulations. When poorly prepared, they can create inadequate and sometimes false information about a regulation's likely effects. In the worst case, Washington's policy leadership will think something should be producing benefits when, in fact, it may be doing just the opposite.[2]

The administration's oversight of RIAs is lodged in the Office of Information and Regulatory Analysis (OIRA). Under normal circumstances, this small office would have trouble enough monitoring the adequacy of agency RIA submissions, but it has been steadily reduced in size since its creation in 1981, and today it reviews hundreds of proposed regulations with a staff exactly half as large as when it was created: staffing has dropped from 90 in 1981 to 45 today.

This hollowing out of OIRA may partially explain the stunning and growing inadequacy of impact analysis for recent major proposed rules. My Mercatus colleague, Dr. Jerry Ellig, recently published a major retrospective evaluation of RIAs, which we call the Regulatory Report Card. His work reviewed 130 major proposed regulations from the period 2008 through 2013. He found (and I quote):

> Regulatory Report Card evaluations show that RIAs often lack thorough analysis of key issues they are supposed to cover. This means that regulatory agencies often adopt regulations that affect several hundred million people and impose hundreds of millions of dollars in costs without knowing whether a given regulation will really solve a significant problem, whether a more effective alternative solution exists, or whether a more targeted solution could achieve the same result at lower cost.[3]

Ellig and his colleagues evaluated these major regulations using the standards laid out in Executive Order 12866 and OMB *Circular A-4*, both of which agencies must follow when preparing their impact analyses. Even with such required guidance, agencies fell woefully short of the mark. In recently published research, Ellig summarizes his findings:

2. An interesting example of inadequate attention to potential economic consequences of a proposed rule is the recently implemented overtime pay rule from the Department of Labor. For an analysis of how poorly the Department performed its impact work, see Donald Boudreaux and Liya Palagashvili, "An Economic Analysis of Overtime Pay Regulations" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, April 2016).
3. Jerry Ellig, "Evaluating the Quality and Use of Regulatory Impact Analysis: The Mercatus Center's Regulatory Report Card, 2008–2013" (Mercatus Working Paper, Mercatus Center at George Mason University, July 2016), 2.

- Scores were consistently low for the analysis of the systemic problem. Only 13 percent of the regulations had significant evidence demonstrating the existence and cause of the problem.
- Less than one in five regulations, just 19 percent, were accompanied by analysis that considers a wide range of different solutions or levels of stringency.
- Just 24 percent of RIAs contained reasonably thorough assessments of price effects, and just 12 percent (about one in eight) contained reasonably thorough analysis of costs due to behavioral changes.
- Of the 130 regulations analyzed, *only one* included a reasonably complete framework for retrospective analysis.[4]

What can be done to improve the overall quality of RIAs?

- First, improve OIRA's resources. Without adequate staffing and other resources, the office's capacity to improve RIA quality will be substantially compromised.
- Second, implement process reforms that require agencies to produce a preliminary regulatory impact analysis and submit that to public comment before sending its final RIA work to OIRA. Research indicates that preliminary analysis with public comment yields much better final impact analysis.
- Third, Congress should require all agencies to perform regulatory impact analyses when proposing regulations. Moreover, Congress should specify the broad factors that the RIAs should contain when enacting new regulatory authority. Agencies pay close attention to what Congress requires in impact analysis out of fear that courts might vacate implemented regulations that run counter to Congress's explicit requirements.

THE ECONOMIC EFFECTS OF REGULATION

Academics and policy researchers in disparate parts of the research world are increasingly concerned about the rapid increase in economic regulation. Indeed, a recent spate of research puts this surge in regulation at the front line of suspects when explaining the slowdown in growth among the most advanced economies. These researchers argue that regulations can yield benefits for the general public but also can reduce incentives to take economic risk, raise the cost of investment, and reduce profitability by boosting the costs of labor and other inputs.

The mounting likelihood that such harmful effects are occurring should concern Congress. As I mentioned earlier in my testimony, Congress holds a core responsibility to encourage a growing economy by encouraging competition among firms and innovation in products and services. If excessive regulation is reducing the overall growth rate, then the primary victims are the children and grandchildren of today's citizens, who will experience less prosperity during their productive years.

How much decline in growth have we experienced? My colleague Patrick A. McLaughlin and his coauthors recently used a growth model of the US economy and data from the *Code of Federal Regulations* to estimate a $4 trillion loss in GDP in their base year 2012. That is, had regulations remained the same as they were in the very heavily regulated year of 1980, then the economy would have been 25 percent larger ($4 trillion) in 2012 than it otherwise was.[5] This 2012 economy employed 135 million workers in December of that year. If a 25 percent greater GDP would employ a proportional number of workers, then the economy was missing not only output but also 34 million jobs.

4. For a detailed discussion of the evaluation criteria and results of the Regulatory Report Card project, see Ellig, "Evaluating the Quality and Use of Regulatory Impact Analysis."
5. McLaughlin's research and that of the others described in this section is summarized in a recent Mercatus publication. See Patrick A. McLaughlin, Nita Ghei, and Michael Wilt, "Regulatory Accumulation and Its Costs," Economic Perspectives, Mercatus Center at George Mason University, May 4, 2016.

This significant loss of GDP and likely jobs has been estimated by other researchers, as well. John Dawson and John Seater published research in the *Journal of Economic Growth* (June, 2013) showing that GDP had been reduced by a surprising $39 trillion over the period 1949 through 2005 due to regulation. They estimated that this loss amounted to $129,300 per person by 2005.[6] This finding was echoed by researchers at the World Bank who estimated that a 10 percent increase in regulatory burden is associated with a loss of .5 percentage points in the overall economic growth rate. That loss translates into thousands of dollars in lower income per person.[7]

In addition to this growing body of research on the harm to the overall growth rate, there also is evidence that rapidly growing regulations harm vulnerable populations, distort labor markets, and increase income inequality.

- Because regulations often increase the price of necessities like food, housing, and electricity, low-income populations shoulder a higher regulatory burden proportional to their income than higher-income populations while sharing no more than higher-income Americans in the benefits of the regulations.[8]
- Regulations can adversely affect labor markets as well. They can raise the cost of labor and other inputs, thus reducing production and the demand for labor. Regulations also can divert workers from the production of goods and services to jobs that involve little more than filling out compliance forms.[9]
- Finally, regulations that require laborers to acquire extensive education or training certifications can discourage people from taking higher-paying jobs, thus exacerbating the widening distribution of income. Likewise, regulations that make it more difficult for entrepreneurs to open businesses widen the distribution of income, since self-employment is one of the keys for upward mobility among low- and moderate-income individuals.[10]

THE NEED FOR A REGULATORY BUDGET

At issue in my two previous points (the importance of better RIA work and the mounting case that regulations are, on net, harmful to economic growth) is the need for congressional policymakers to attend more to regulations than they have in the past. Policymakers in 1980 might have assumed that the grant of specific regulatory authority to the administration would be implemented in the most cost-effective, least intrusive way possible. That grant and regular oversight probably appeared to many as enough involvement by Congress in regulation.

Those happy days are long gone. Today, regulatory agencies consume a rapidly growing portion of the total federal budget and cost the economy trillions annually in compliance costs and lost output and jobs. Congress can no longer sit on the sidelines while the administrative state reduces the American economy to a long, slow period of growth. It is time for a regulatory budget.

6. John W. Dawson and John J. Seater, "Federal Regulation and Aggregate Economic Growth," *Journal of Economic Growth* 18, no. 2 (2013): 137–177.
7. Norman V. Loayza, Ana María Oviedo, and Luis Servén, "The Impact of Regulation on Growth and Informality: Cross Country Evidence," World Bank Policy Research Working Paper No. 3623, June 2005.
8. See Diana Thomas, "Regressive Effects of Regulation" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, November 2012); and Dustin Chambers and Courtney A. Collins, "How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, February 2016).
9. See Keith Hall, "The Employment Costs of Regulation" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, March 2013).
10. Steven Horowitz, "Breaking Down the Barriers: Three Ways State and Local Governments Can Improve the Lives of the Poor" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, July 2015); and Patrick A. McLaughlin and Laura Stanley, "Regulations and Income Inequality: The Regressive Effects of Entry Regulations" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, January 2016).

The concept of a budget for regulations was first introduced in 1978 by Senator Lloyd Bentsen, who held hearings on regulatory budgeting legislation when he chaired the Joint Economic Committee. It has since then found many champions in both political parties.[11] Indeed, a number of countries use a form of regulatory budgeting that caps regulations (either in quantity or in value), thus instituting a form of regulatory pay-go. That is, a legislative body can enact new regulations only if it can eliminate an equal amount of existing regulations.

My colleagues at Mercatus have designed a new process for assessing the costs of federal policies, including regulations, that involves significantly new and powerful policy evaluation and oversight by Congress. The key to overseeing the growth of regulations is the institution of new processes for assessing how well existing regulations are working and the likelihood that new ones will achieve their stated goals. Surprisingly, Congress currently must rely almost entirely on administrative agencies to inform them on the effectiveness of regulations. Worse, Congress lacks nearly any capacity to determine if these agencies are telling them the truth.[12]

Many in the current Congress are backing some form of regulatory budgeting. Hearings have been held in the budget committees of the House and Senate. Legislation has been introduced by Senator Mike Lee and Representative Mark Walker to institute this oversight capacity as part of the annual budget process,[13] and Senator Amy Klobuchar has floated legislation to significantly increase staffing inside the Congressional Budget Office to evaluate regulatory impact assessments of proposed major regulations.

CONCLUSION

These happy developments on regulatory budgeting evidence a new stirring of interest in Congress on regulatory matters generally, and it is about time. There is no dispute, certainly not from me, that regulations in some areas of economic life currently pay benefits that outweigh their costs. That said, the last 20 years has seen such an explosion in regulations that Congress now has a duty to ascertain whether some of the experts are right about the harmful cumulative effects of regulatory burden.

Executing that duty must start by improving the information that policymakers receive from the administration, but better information is not enough. Congress needs now to put itself in the middle of the administrative state's evolution and guide it more than it has heretofore dared. The Constitution lodges in the Congress the primary duty to see that the property of the citizens, once taken by government, is well spent and supports the common good. That responsibility now must extend beyond taxes to include the reshaping of private resource use by public regulation.

11. For a history of the concept, see Jeffrey A. Rosen and Brian Callanan, "The Regulatory Budget Revisited," *Administrative Law Review* 66, no. 4 (2014).
12. See Jason Fichtner and Patrick A. McLaughlin, "Legislative Impact Accounting: Rethinking How to Account for Policies' Economic Costs in the Federal Budget Process" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, June 2015).
13. See coverage of the Regulatory Assessment Act in Lydia Wheeler, "Senator Pushes Budget for Regulations," *The Hill*, March 15, 2016. Senator Lee was joined by several House members in this legislation.

APPENDIX I

Donald Boudreaux and Liya Palagashvili, "An Economic Analysis of Overtime Pay Regulations" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, April 2016), http://mercatus.org/publication/economic-analysis-overtime-pay-regulations.

Jerry Ellig, "Evaluating the Quality and Use of Regulatory Impact Analysis: The Mercatus Center's Regulatory Report Card, 2008–2013" (Mercatus Working Paper, Mercatus Center at George Mason University, July 2016), 2, http://mercatus.org/publication/evaluating-regulatory-impact-analysis-regulatory-report-card.

Patrick A. McLaughlin, Nita Ghei, and Michael Wilt, "Regulatory Accumulation and Its Costs," Economic Perspectives, Mercatus Center at George Mason University, May 4, 2016, http://mercatus.org/publication/regulatory-accumulation-and-its-costs.

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Dustin Chambers and Courtney A. Collins, "How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, February 2016), http://mercatus.org/publication/how-do-federal-regulations-affect-consumer-prices-analysis-regressive-effects-regulation.

Keith Hall, "The Employment Costs of Regulation" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, March 2013), http://mercatus.org/publication/how-do-federal-regulations-affect-consumer-prices-analysis-regressive-effects-regulation.

Steven Horowitz, "Breaking Down the Barriers: Three Ways State and Local Governments Can Improve the Lives of the Poor" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, July 2015), http://mercatus.org/publication/breaking-down-barriers-three-ways-state-and-local-governments-can-improve-lives-poor.

Patrick A. McLaughlin and Laura Stanley, "Regulations and Income Inequality: The Regressive Effects of Entry Regulations" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, January 2016), http://mercatus.org/publication/regulation-and-income-inequality-regressive-effects-entry-regulations-0.

Jason Fichtner and Patrick A. McLaughlin, "Legislative Impact Accounting: Rethinking How to Account for Policies' Economic Costs in the Federal Budget Process" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, June 2015), http://mercatus.org/publication/legislative-impact-accounting-rethinking-how-account-policies-economic-costs-federal.

Mr. MARINO. And, let me remind everyone—and thank you for the reasonable time—there are timing lights in front of you. I think those of you who have testified here before, if there is someone here that hasn't, I'm just going to say you have three lights. By the time that gets to the last red light, that means your time is up. The light before that gives you 1 minute. Please try to stay within that period of time, and if you need to express anything, we can give you some time during the question-and-answer session.

So Mr. Crews.

TESTIMONY OF CLYDE WAYNE CREWS, JR., VICE PRESIDENT FOR POLICY/DIRECTOR OF TECHNOLOGY STUDIES, COMPETITIVE ENTERPRISE INSTITUTE

Mr. CREWS. Thank you. I'm Wayne Crews, Vice President for Policy at the Competitive Enterprise Institute, a libertarian policy and advocacy group. I thank the Committee for the invitation to address regulatory oversight.

$19 trillion Federal debt notwithstanding, when policymakers neglect regulation, they ignore, arguably, government's greatest influence in the economy. Both spending and regulation reorients societal resources and priorities. Yet, members may have noticed there's still no sign of the 2016 OIRA report to Congress, so what reviewed regulatory cost figures we have are nearly 2 years old.

Last year's report was the latest ever. Congress confessed to over-delegation last month in last month's Article I task force report, so code law is here to stay for the moment. OIRA should help lawmakers create a regulatory transparency supernova to spur economic liberalization.

I was struck by a businessman writing in the Financial Times. He said, when I am 100 percent utterly and completely certain that it is an absolute certainty that it is an absolute necessity that I need to recruit a new employee, I go to bed, sleep well, and hope the feeling is passed by morning.

While those doing the regulating see no problems, exasperation is rampant. Home Depot co-founder Bernie Marcus said the company couldn't succeed if started today. Other polls say businessmen wouldn't do it again, and startup rates and part-time employment rates affirm this.

Unemployment, like poverty, doesn't have causes. Both are the default state of mankind. Only wealth and production have causes, and regulatory zeal can derail enterprise. Problem is, legislatures rarely control spending, let alone the regulatory enterprise, and OIRA's central review machinery can't overcome presidents who deprioritize oversight or a regulatory system that frontally benefits rent-seeking special interests.

Over 3,000 rules are finalized annually, but only 13 rules in the 2015 OIRA report reviewed cost and benefits. The proportion of all rules with OIRA-reviewed cost-benefit analysis is less than 1 percent. On the rest, we don't have cost-benefit analysis; we have agency selfies. The 800-pound gorilla independent agencies get no OIRA scrutiny, nor do the thousands of guidance documents and memoranda that I've taken to calling regulatory dark matter.

Such chasms weaken the OIRA report's authority as a comprehensive survey of regulatory impact, especially since unmeasured categories of regulation propel cost as well, such as antitrust, the locking up of western lands, or the reluctance since the 1890's to move spectrums and other commons into market disciplines.

When government steers cross-sectorally, as it does today, it creates mounting costs, even if no future rules are issued, such as Congress' delivery of the Internet and, as of 2 weeks ago, drones into century-old public utility models. Also new is EPA's central planning of electric charging and hydrogen fueling stations in the wake of the Volkswagen settlement. Alas, much is beyond OIRA's scope.

Businessmen want to create jobs, but everything has limits. Jobs are a cost, they are a liability, and policymakers should recognize that. While a Vanguard study blamed hundreds of billions in cost on regulatory uncertainty, it said that sometimes the certainty of regulation is worse.

My optimism stems from knowing there will always be an America, even if it's not here, but I do not believe members wish to go to the mat maintaining regulatory overreach, and I hope members will jointly think through some North Star goals to enhance OIRA.

Ronald Reagan's Executive Order 12291 that energized OIRA in the first place showed the so-called pen and phone can also expand liberty by reducing Federal Register page counts and numbers of rules. Members can work with OIRA to enforce and codify the regulatory review executive orders, address independent agency costs, and illuminate regulatory dark matter.

Other steps noted in my written testimony include boosting OIRA resources and free market law and economics staff at agencies, pausing regulation, and implementing the bipartisan Regulatory Improvement Commission.

I highlight also the former regulatory program of the U.S. Government, a model by which OIRA could compile an annual regulatory transparency report to parallel the historical tables in the Federal budget. Optimally, reporting separately on economic, health, and safety, paperwork, and environmental and other costs.

So while central review hasn't worked, just possibly it could. When it comes to economic expansion, you don't have to tell the grass to grow, but you do have to take the big rocks off of it. So why not use OIRA as a lever?

Thank you very much.

[The prepared statement of Mr. Crews follows:]

COMPETITIVE ENTERPRISE INSTITUTE

Testimony of
Clyde Wayne Crews Jr.
Vice President for Policy/Director of Technology Studies
Competitive Enterprise Institute

Before the:
House of Representatives Judiciary Committee
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
2226 Rayburn House Office Building.
Washington, D.C. 20510-0250

Assessing the Obama Years:
OIRA and Regulatory Impacts on Jobs, Wages and Economic Recovery
Wednesday July 6, 2016, 3:00 p.m.

CONTENTS:

The Competitive Enterprise Institute (CEI) is a non-profit public policy research organization dedicated to advancing individual liberty and free enterprise with an emphasis on regulatory policy. I appreciate the opportunity to discuss issues surrounding agency guidance, and I thank the Chairman, Ranking Member and Members of the Subcommittee.[1]

Introduction:
Improving OIRA's Important Role in Managing the Federal Regulatory Enterprise

When policymakers neglect federal regulation, they ignore arguably the greatest element of governmental influence in the United States' economy and perhaps in society itself. As a policy concern, regulation merits attention like the $18 trillion national debt receives, since both spending and regulation redirect societal resources.

In that context, this testimony looks at OIRA's (the Office of Management and Budget's Office of Information and Regulatory Affairs) recent role in regulatory oversight in a positive light, but urges enhancement. Many may have noticed there's still no sign of the 2016 White House *Report to Congress* on regulatory costs and benefits.[2] But the concern is not solely with OIRA or the administration; Congressional Republicans have acknowledged neglecting their own role in regulatory oversight, as June's House Task Forces addressing Article I and delegation issues made clear.[3]

A current ethos of extending regulatory agency and executive branch power became epitomized in President Barack Obama's February 2013 State of the Union Address. Capping weeks of the White House's touting of a "pen and phone" (Rucker 2014) strategy to further expand federal economic, environmental and social regulation and intervention (White House, 25 February 2014), the president promised that, "[I]if Congress won't act soon…, I will. I will direct my cabinet to come up with executive actions we can take, now and in the future (Marks 2013)."

While the 114th Congress objected to such aspirations, it faced "the year of the veto (Sink and Wong 2015)." The president promised vetoes on regulatory reforms like the REINS Act and Regulatory Accountability Act, and followed through on a veto of the Keystone XL pipeline (White House, 2 February 2015) in contrast to America's onetime ethos of rapid, churning infrastructure growth (Gordon 2004). Still, policymakers and OIRA could use the limited tools at their disposal to create a body of information that can make economic liberalization possible in more favorable circumstances.

While the Constitution has not come to the rescue, we are not without options. In light of Congress' over-delegation of power to federal agencies, this testimony briefly reviews the formal oversight procedures that ostensibly exist for the thousands of regulations issuing annually. Next we not that central oversight of regulation sports theoretical inconsistencies and gaps and presents the data demonstrating that federal regulatory review has fallen short and is far from comprehensive. While central review hasn't worked, we posit why, just possibly, it could. Given the reality that code or administrative agency law is here to stay for the time being—this testimony offers disclosure-based "low-hanging fruit" reform proposals for an administration and/or OIRA, while remaining cognizant of central review's shortcomings. The aim of these proposals is to (1) help legitimize Congress' case for regulatory liberalization and enable a revival of some semblance of constitutional order in the spirit of the task force reports; and to (2) facilitate future liberty-minded executive branches' deployment of the "pen and phone" in *defense* of liberty. An alternate take on "Energy in the Executive" (*Federalist Papers* No. 70, 1788) would be a welcome contrast to its usage in undermining institutions of limited government and destabilizing core values of classical liberal society.

Regulatory Overreach?

> *I think that is really where the thrill comes from. And it is a thrill; it's a high.... I was born to regulate. I don't know why, but that's very true. So long as I am regulating, I'm happy (Quoted in Olson 2001).*
>
> —OSHA safety standards program director Marthe Kent in 2001.

Seemingly no corner of life escapes the modern state's purview, and much emanates not from an elected Congress but from the president and from unelected bureau personnel. Concern over executive branch ambition ranges across the policy spectrum—from a House Republican lawsuit against President Obama's unilateral actions (Walsh and Bash 2014), to Georgetown law professor Jonathan Turley's 2014 House Judiciary Committee testimony that, "We are in the midst of a constitutional crisis with sweeping implications for our system of government (Turley 2014)."

One doesn't have to dig to find exasperation. Home Depot co-founder Bernie Marcus told *Investor's Business Daily* that (Merline 2011):

> *Having built a small business into a big one, I can tell you that today the impediments that the government imposes are impossible to deal with. Home Depot would never have succeeded if we'd tried to start it today. Every day you see rules and regulations from a group of Washington bureaucrats who know nothing about running a business. And I mean every day. It's become stifling.*

What sorts of impediments? Here's a short list of recent ones.

- The Department of Health and Human Services and the Internal Revenue Service are transforming America's traditional medical system via the Patient Protection and Affordable Care Act;
- Financial regulations such as the Sarbanes-Oxley and Dodd-Frank laws foster the very "too big to fail" entities cited as the reason to intervene in the first place, create instability and damage the poor's access to banking services;
- Communications regulation such as the Federal Communications Commission (FCC) aggressive "net neutrality" rules (U.S. FCC 2015) threatens free speech and network infrastructure investment even though the rationales for establishing an FCC no longer exist (Cox and Crews 2005).
- Energy regulation and green extremism disrupt access to land and resources, aggravating energy poverty and even food shortages (Action Aid and Competitive Enterprise Institute 2011);
- The homeland security culture has wrought a cabinet department, invasive airport

security, general surveillance and an as yet incalculable impact on civil liberties;
- Antitrust agencies disrupt competition in the name of protecting it despite the modern technological era's rapid pace of "creative destruction" compared to the "smokestack monopoly" era that allegedly justified antitrust regulation;
- The Department of Justice's "Operation Chokepoint" threatens to harass small entities out of business in pursuit of federal control over a financial industry segment—without congressional approval or even the normal public comment process (Murray 2014).
- The expansion of federal agency "guidance documents."[4]

Such examples scale down to the Consumer Product Safety Commission's proposed window blinds regulation (U.S. CPSC, 2013) to FDA's regulation of a serving size of breath mints (U.S. FDA, 2014) and its recent inquiry into hand sanitizers.

What is the impact of all this? Those doing the regulating see no problem whatsoever, and groups like Public Citizen deny any impact of regulation on the economy and jobs,[5] and other pundits deny any linkage.[6] Previewing his 2014 State of the Union Address, President Obama said … "2014 was the fastest year for job growth since the 1990s. Unemployment fell faster than any year since 1984 (Cited in Davis 2015)." Then, referring to the economy and well-being, Obama asserted in his 2015 State of the Union Address that "tonight, we turn the page" (White House, 20 January 2015).

Others continue seeing things differently. Growth emerging from a painfully low baseline is hardly turning over a new leaf. Unemployment is "down" in part because statistics omit those who've given up the job hunt. Job growth that did occur has been attributed to an end to unemployment benefits (Brennan 2015). An astounding 92 million Americans are not working (CBS/Associated Press 2014), positioning labor force participation at a 36 year low, with nearly 12 million having dropped out during the Obama administration (Meyer 2014). New banks aren't opening.[7] Data point to high debt per capita, and to the highest part-time and temporary-job creation rates in contrast to full time career positions.[8] A popular blog laments the "slow death of American entrepreneurship" (Casselman 2014) Headlines tell painful tales, like *Investor's Business Daily* in 2015 reporting on businesses dying faster than they're being created, a circumstance the *Washington Post* had noted in 2014 (Ingraham). Likewise a Brookings study on small business formation noted declining rates, as did a *Wall Street Journal* report on reduced business ownership rates among the young (Simon and Barr 2015). One recruiter detailed to the *Wall Street Journal* how regulations undermine employment (Moore 2013), while other commenters point to an inverse correlation between regulation and innovation (Kritikos 2014). Industry anecdotes parallel the general statistics; In food service, regulations are driving restaurants out of business and even sending them abroad (Little 2013).

One can recognize that small business may not be the hyped "backbone" of the entire economy (rather, new businesses appear to be: Dearie and Geduldig 2013). Still, regulations are a "hidden tax" for them and their larger brethren. While obscured in prices for most of us, if you're a businessperson, you've found them. It's an awakening mirroring the college graduate encountering his first docked paycheck, wondering, "Who's this guy FICA?"

Congress has blamed overreach and its consequences on the president and agencies, but as noted the recent House Task Forces on regulatory and Article I issues, Congress has acknowledged it delegated that power inappropriately. The over-delegation phenomenon of unelected and unaccountable agency personnel doing the lawmaking was detailed in David Schoenbrod's *Power Without Responsibility* (1993). In *Is Administrative Law Unlawful?* Philip Hamburger sees the modern administration state as a reemergence of the absolute power practiced by pre-modern kings (2014). In *Imprimis*, Hamburger describes the return of monarchical prerogative—the very condition our Constitution was drafted to eliminate (November 2014):

> *[T]he United States Constitution expressly bars the delegation of legislative power. This may sound odd, given that the opposite is so commonly asserted by scholars and so routinely accepted by the courts. ...The Constitution's very first substantive words are, "All legislative Powers herein granted shall be vested in a Congress of the United States." The word "all" was not placed there by accident.*

It is in *this* environment in which OIRA operates, one in which courts also tend to defer to agencies' "expertise" (R. J. May 2010), and Ivy League scholar in the *Washington Post* ponders dispensing with Congress altogether in favor of a president that both makes and executes laws.[9] Justice Clarence Thomas questioned the roots of this deference (*Perez v. Mortgage Bankers Association*, 2015. 19):

> *Many decisions of this Court invoke agency expertise as a justification for deference. This argument has its root in the support for administrative agencies that developed during the Progressive Era in this country. The Era was marked by a move from the individualism that had long characterized American society to the concept of a society organized for collective action.*

The combination of that progressive victory, delegation, inertia, and a ratchet effect that expands and never unwinds government power (Higgs 1987) dictates that the Constitution is not coming to the rescue in the short term. For all intents and purposes, code law has won, and is here to stay for the time being, until reinstatement of congressional accountability to voters for what the bureaucracy does becomes palatable (Crews 2013). Congress enabled this bureaucratic and presidential hubris, and only Congress can fully reverse "regulation without representation" (Schoenbrod and Taylor 2003).

Here, however, we shall be optimistic and shall look at the (limited) good OIRA's administrative oversight can do, with an eye toward building a foundation for future liberalization and re-establishment of democratic accountability. There is no silver bullet by which OIRA can come to the rescue. As William A. Niskanen made clear in *Market Liberalism* (1992, 114):

> *More promising than any identifiable change in the regulatory process would be a revival of the constitutional doctrines limiting restraints on interstate commerce, restrictions on private contracts, the uncompensated taking of property rights, and the undue delegation of policy decisions to regulatory agencies.*

So while OIRA process reforms are not enough, it can help us assure that the regulatory state endures at minimum the disclosure, transparency and accountability demanded of taxing and spending.

Now that we've gotten "what the Constitution says" off our chest, given the likely limitations of this hearing, we can next confront the regulated nation we live in and address constraints that prevent America's traditional tools from doing much about it. But this is not a pessimistic survey; we will highlighting incremental reforms addressing regulatory overreach that an energized OIRA could implement, if not unilaterally, then with an engaged president.

> *Joyfully to the breeze royal Odysseus spread his sail, and with his rudder skillfully he steered.*
>
> —Homer
> *The Odyssey*

What Constraints Apply to the Administrative/Regulatory State?

Legislatures rarely control spending, let alone the tentacles of the regulatory enterprises they endorsed over decades through both design and apathy. As lawmaking disengaged from the legislature and perched at unelected, unaccountable bureaucracies, economic, environmental and social interventions escalated. In terms of output level, there were 114 public laws passed by Congress and signed by the president in 2015 (U.S. GPO); meanwhile agencies, implementing laws passed earlier and by earlier Congresses, issued 3,410 rules and regulations—a multiple of 30 rules for every law I like to call the "Unconstitutionality Index."

On those occasions when Congress gets traction on regulatory liberalization and is able to mobilize for reform, the inspiration is often smaller business burdens and job concerns. Since 1980, the Regulatory Flexibility Act has directed federal agencies to assess their rules' effects on small businesses and describe regulatory actions under development "that may have a significant economic impact on a substantial number of small entities (*Federal Register*, Vol. 74, No. 233, December 7, 2009, pp. 64131–32)." It has (imperfectly) recognized the importance of vitality in small business and the need to scale federal actions to the size of those expected to comply, and occasional attempts to update it occur but have not been implemented. Another mobilization driven regulatory reform was the Unfunded Mandates Reform Act of 1995 (P.L. 104-4.), driven largely by governors mobilized against Washington's rules for which compliance was disrupting states' own budgetary priorities (Dilger and Beth 2014). So popular was the Senate version of the legislation it was dubbed "S. 1."

The 1996 Congressional Review Act (CRA) requires agencies to submit reports to Congress on their major—roughly $100 million—rules. Maintained in a Government Accountability Office database, these reports allow one to more readily observe which of thousands of final rules issued each year are major and which agencies are producing the rules (U.S. GAO).

The CRA gives Congress a window of 60 legislative days in which to review a major rule and, if desired, pass a "resolution of disapproval" rejecting the rule. The CRA, in spirit, is one of the more important recent affirmations of the separation of powers. But despite the issuance of thousands of rules since passage, including many dozens of major ones, only one rule has been rejected: a Labor Department rule on workplace repetitive-motion injuries in early 2001.

Such concerns were recognized early, and upgrades to CRA to require an affirmative approval of major agency regulations before they are effective are required. Congress did not do this with Republican control of both Houses and the presidency, and now Obama promises a veto should they pass such legislation. Meanwhile the CRA itself is further undermined now given that final rules are no longer properly submitted to the Government Accountability Office and to Congress as required under the law (Copeland 2014). That is an indispensable step since Congress needs the reports to introduce a formal disapproval resolution.

So the Constitution has not come to the rescue, and alas, nor has Congress, so for the moment, we are largely "stuck" with what the executive branch review of regulations embodied at OIRA. The basis of the modern regulatory process is the post-New Deal Administrative Procedure Act (APA) of 1946 (P.L. 79-404) which set up the process of public advance notice of rulemakings and provided the opportunity for the public to provide input and comment before a final rule is published in the *Federal Register* subject to a 30-day period before it becomes effective. The *Federal Register* is the daily depository of all these proposed and final federal rules and regulations, such as the 3,410 rules of 2015. While the APA established formal rulemaking processes with quasi-judicial proceedings for significant regulations, these are rarely used. Instead, APA's "informal rulemaking" procedure of notice and comment ("Section 553" rulemaking) is most common (Carey 2014, 2). But there is wiggle room even for that. As noted in at 2014 survey from the Congressional Research Service, "The APA specifically authorizes any federal agency to dispense with its requirements for notice and comment if the agency for good cause finds that the use of traditional procedures would be 'impracticable, unnecessary, or contrary to the public interest' (Carey 2014, 2)."

During the late 1970s and early 1980s, concern over regulations' economic impacts bred inquiries and reforms meant to reinvigorate the economy while stemming that era's inflationary pressures (Hopkins 1976). The mood was rethinking government regulations, in contrast to today's compulsion to expand them. Alongside cost concerns, agency tendencies to overstate or selectively express benefits was recognized. Prominent regulatory liberalizations began in the 1970s, and included certain trucking, rail, and airline deregulatory moves, partial financial services reforms, relaxed antitrust enforcement and paperwork reduction (Firey 2011). The regulatory review story began with President Nixon, was elaborated extensively by President Ford, and embraced more fully by President Carter. This involved the White House Office of Management and Budget (OMB) acting as central reviewer of important agency regulations.

A significant advance was the Reagan Administration's formalization of more activist central regulatory review at the OIRA within OMB.

Created by the Paperwork Reduction Act of 1980, OIRA first concentrated on reducing the private sector's federal paperwork burdens. Later, OIRA's authority was expanded by President Reagan's February 17, 1981 Executive Order 12291 to encompass (theoretically) a larger portion of the regulatory process by requiring that any new major executive agency regulation's benefits outweigh costs where not prohibited by statute (independent agencies were exempt), and to review agencies rules and analyses. Earlier administrations' regulatory review efforts such as ones conducted by the Council on Wage and Price Stability, the Council of Economic Advisers and the interagency Regulatory Analysis Review Group, lacked extensive enforcement powers (DeMuth 1980). These earlier bodies could seek regulatory cost analysis if not statutorily prohibited, but could not enforce net-benefit requirements; agencies could still reject reviewers' counsel and appeals to the president were possible, but rare (DeMuth 1980). Net benefit analysis has insurmountable problems of its own in this writer's view ("The Costs of Benefits" in Crews 2013; and Crews, *Forbes* 7 July 2013), but the *intent* was significant in the prevailing context of consciously addressing regulation. The early and mid-1980s saw declining costs and flows in regulation particularly economic regulation in contrast to social and environmental (Hopkins 1992).

Over the years, OIRA review—and that at the first President Bush's Council on Competitiveness tasked to screen regulations (Bloomberg Business 1991)—faced political opposition, narrow scope of authority (Bolton, Potter and Thrower 2014) and limited resources (Dudley 2011). On September 30, 1993, President Bill Clinton's replacement of Reagan's E.O. 12291 with his own E.O. 12866 "Regulatory Planning and Review" reduced OIRA's authority. The Clinton approach retained the central regulatory review structure but "reaffirm[ed] the primacy of Federal agencies in the regulatory decision-making process" (*Federal Register*, Vol. 58, No. 190, October 4, 1993), weakening the "central" in central review. The new order also changed the Reagan criterion that benefits "outweigh" costs to a weaker stipulation that benefits "justify" costs. But the order did retain requirements for agencies to assess costs and benefits of "significant" proposed and final actions, conduct cost benefit analysis of "economically significant" ($100 million plus), and to assess "reasonably feasible alternatives," and for OIRA to review those. As with E.O. 12291, independent agencies remained exempt.

President Obama's own January 18, 2011 E.O. 13565 on review and reform ("Improving Regulation and Regulatory Review") carried on the Clinton order and articulated a pledge to address unwarranted regulation (*Federal Register*, Vol. 76, No. 14, January 21, 2011). The president achieved a few billion dollars in savings, even wisecracking in the 2013 State of the Union Address about a rule that had categorized spilled milk as an "oil" (White House 2012). Suffice it to say that such trivialities are not the source of the regulatory excess and economic stagnation that concern many; the few billion dollars cut via executive order have been swamped by rules otherwise issued.

Independent agencies, while they are subject to APA notice-and-comment are not subject to enforceable regulatory review. Still President Obama addressed them in his July 11, 2011 E.O. 13579 ("Regulation and Independent Regulatory Agencies") with a call to fall into line on disclosure (*Federal Register*, Vol. 76, No. 135, July 14, 2011). A president cannot change congressional directives with respect to independent agencies, but can use the pen and phone bully pulpit to, if not to restrain agencies, *to not encourage their excesses*.

In all, four of President Obama's executive orders address over-regulation and rollbacks and the role of central reviewers at OIRA (All available on OMB's "Regulatory Matters" site, https://www.whitehouse.gov/omb/inforeg_regmatters#eo13610). Yet expansion of government into economic, social and environmental realms has been the administration's emphasis, not review-generated cutbacks. Quite the contrary; the situation today is that expansions in which many agencies engage are supported and encouraged by the administration such as President

Obama's call on FCC "to take up the strongest possible rules to protect net neutrality" (White House, 10 November 2014).

So despite Obama's executive orders ostensibly shining a light on regulatory overreach and encouraging a tough OIRA, that's not what has transpired.

Formal executive branch regulatory review processes cannot possibly work when the executive's philosophy is that government, not private individuals and interactions, should dominate finance, health care, energy policy, manufacturing and other spheres of human action. Barack Obama's repeated pledges to go around Congress attest to this while every instance from net neutrality to breath-mint serving size rules to school lunch mandates underscores a federal government disinclined to leave the public alone. Like the original E.O. 12291, the *potential* for executive orders to boost oversight and review is high when the motivation exists.

The Limits of OIRA's Central Regulatory Review

The central review we just described doesn't work well enough.

Rent-seeking

For one thing, it is not quite accurate, as OMB has proclaimed, that "businesses generally are not in favor of regulation" (U.S. OMB 1997)." Business not only generally favors regulation, but often sought regulation in the first place (Stigler 1971), so a sliver of the premise of OIRA regulatory reviews may be suspect terrain at the very outset. Taxes obviously transfer wealth and affect profits, but, regulations do likewise; pollution controls, accounting requirements, privacy mandates and the like do not impact every firm equally. They create artificial entry barriers and hobble competition, they benefit some producers while punishing others. This aggravates cronyism and fosters attempts at regulatory capture. Consumers enjoying falling prices and growing output were not up on their hind legs demanding the Interstate Commerce Commission, or the state regulation of utilities (Geddes 1992), or the antitrust laws, or regulation of Uber: these were and are sought by political elites and producers protecting profits and eliminating competition. And what were once small businesses, when they get big, may look more favorably upon rent-seeking and score-settling (Tollison 1982).

Regulation benefits regulatory advocates and pressure groups and, obviously, the regulator. Thus, regulations have a constituency that favors command-and-control rules over market processes, quite distinct from the social welfare rationales that dominate the rhetoric of the entire policy realm and central review itself. This creates legislation and derivative rules for "review" that shouldn't exist in the first place.

Also important: Just as *economic* regulatory agencies are captured by special interests, much of what is considered *social* or *health/safety* or environmental regulation may be bad for consumers as well (Crandall 1992). Even when regulation "works," the overall or societal benefits of can be outweighed by costs; also the social calculus approach to net benefits can ignore wealth transfers, regulatory takings and due process.

Executive review presumably recognizes institutionally that agencies and departments do not benefit from *curtailing* operations, from *not* regulating. Conversely, they gain immensely—in budget allocation, staffing, and political and career status—the more extensive the regulatory empires they oversee. Turf-building assures agencies will sometimes not care all that much about anything more than cosmetic benefit-cost concerns, enough to create the appearance of a need to regulate (mints, blinds, menus, energy choices). However, unlike private actors, bureaus suffer no repercussions when their interventions prove scientifically, socially or economically wasteful and harmful. Output for bureaus is not directly measurable, but must be inferred from the level of activity, creating a slippage in the ability to closely monitor agency effectiveness (Niskanen 1971). Unlike profit-making firms, unaccountable bureaus can disregard minimizing the costs of their "product" (regulations) since others (private sector entities and their customers) bear the impact of their actions.

The executive branch regulatory review regime now in place was intended to be a step toward regulating regulation. However, if one presumes rent seekers capture the regulatory process, then it's no leap to suspect they also captured or capture the regulatory review process. There may be rent-seeking and rent-avoidance motivations at play. The more cynical view is that presidents established regulatory review for the purpose of monitoring their appointees to make certain that promises of public or private goods made to "essentials" and "influentials" are satisfied and are delivered with lower cost burdens (Bueno de Mesquita, Smith, Siverson and Morrow 2003). There may be something to the argument.

"Regulatory Dark Matter" that OIRA misses

Even if APA notice and comment were to excel, and OIRA review of rules to be well functioning, it only a partially adequate safeguard since the already incomplete discipline of rulemaking—which provides OIRA the subject matter to review in the first place—downplays agency guidance documents ("non-legislative" rules), memoranda, notices and bulletins with legal effect that I've taken to calling "regulatory dark matter."[10] These and other "non-rules" can be ways of avoiding not just the constitutional lawmaking process, but may skirt the publication notice-and-comment requirements of the Administrative Procedure Act and federal Office of Management and Budget (OMB) review (Mercatus Institute symposium, 2014).

Guidance documents are a way of getting around central control, since the APA's requirement of publishing a notice of proposed rulemaking doesn't apply to "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," in addition to the "good cause" exemption for legislative rules noted earlier (P.L. 79-404. Section 553). Like agency notice-and-comment rules, sometimes guidance is upheld by courts, sometimes not, when it does more than merely interpret (Whisner 2013). My partial inventory finds 580 pieces of acknowledged "significant guidance" in play, but there are many tens of thousands of guidances in existence[11]

President Obama's waivers of Patient Protection and Affordable Care Act elements were among the most prominent recently. Alongside these notable executive and independent agency guidance documents include:

- ***Housing and Urban Development*** guidance decreeing landlord and home seller denial of those with criminal records a potential violation of the Fair Housing Act;[12]

- The ***Environmental Protection Agency's*** (EPA's) Clean Water Act interpretive guidance on "Waters of the United States."[13] This directive took the step of soliciting notice and comment per the APA, though with significant controversy over manufactured endorsement;[14]

- The ***Securities and Exchange Commission's*** interpretive "Commission Guidance Regarding Disclosure Related to Climate Change," on disclosing potential disruption from "significant physical effects of climate change" on "a registrant's operations and results," and disclosing international community actions that "can have a material impact on companies that report with the Commission."[15] The guidance observes that "Many companies are providing information to their peers and to the public about their carbon footprints and their efforts to reduce them" that hints at where matters are headed as likely emphasis moves from actions affecting a company to how a company allegedly affects others.

- ***Commodity Futures Trading Commission*** "Staff Advisory" guidance on international financial transactions between overseas party "arranged, negotiated or executed" by a U.S. based individual,[16] that was delayed several times (indicating it perhaps should be a commented-upon rule, instead) and said to jeopardize thousands of jobs by potentially sending them offshore.[17]

- A flow of ***Education Department*** guidance, at the rate of one issuance per business day, imposing new mandates on colleges and schools without going through the notice-and-comment process required by the APA.[18] According to the bipartisan Senate-appointed Task Force on Federal Regulation of Higher Education, "In 2012 alone, the [Education] Department released approximately 270 'Dear Colleague' letters and other electronic announcements."[19] "Recalibrating regulation of colleges and universities. Exceedingly high-profile, controversial recent guidance has included:

    - Guidance (a 2011 "Dear Colleague") to colleges and universities on sexual assault and harassment.[20] Noteworthy is that the civil rights laws' applicability to the institutions, not the students, but altered by guidance.[21]
    - Guidance letter (a 2010 "Dear Colleague") on bullying and harassment.[22]
    - Guidance (a 2016 "Dear Colleague") co-produced with the ***Department of Justice's Civil Rights Division*** requiring inclusion of "gender identity" in the definition of "sex" and requiring schools to allow transgender students to choose which bathroom or locker room to use.[23]
    - 2016 Policy Statement from the Education Department and the ***Department of Health and Human Services*** "preventing and severely limiting expulsion and suspension practices in early childhood settings"[24] without basis in law or notice and comment.[25]

- The ***U.S. Department of Agriculture's Forest Service's*** "Notice of Final Directive" permanent Ecosystem Restoration policy to replace Interim Directive, "Ecological Restoration and Resilience Policy," in Forest Service Manual (FSM) 2020, providing broad guidance for restoring ecosystems.[26]

- ***Department of Homeland Security*** guidance to retailers on spotting home-grown terrorists.[27] As DHS Secretary Jeh Johnson put it, "To address the home-grown terrorist who may be lurking in our midst, we must also emphasize the need for help from the public. 'If You See Something, Say Something' is more than a slogan. For example, last week we sent a private sector advisory identifying for retail businesses a long list of materials that could be used as explosive precursors, and the types of suspicious behavior that a retailer should look for from someone who buys a lot of these materials."[28]

- The ***Department of Labor Wage and Hour Division's*** blog post and "Administrative Interpretation No. 2015-1" informing the public that most independent contractors are now employees.[29]

- The ***Department of Labor Wage and Hour Division's*** "Administrative Interpretation No. 2016-1" asserting a WHD-defined possibility of "joint employment" under the Fair Labor Standards Act on case-by-case basis in horizontal and vertical contracting situations "to ensure that all responsible employers are aware of their obligations."[30] With this interpretation, the DoL "will hold more employers liable for wage violations against employees they do not directly employ. The enforcement effort will focus on the construction, hospitality, janitorial, staffing agencies, and warehousing and logistics"[31] and potentially "penalize any industry that utilizes contractors and labor suppliers."[32]

- Three ***Department of Labor*** guidance documents regarding the Process Safety Management (PSM) standards for hazardous chemicals have been highlighted by Sen. James Lankford (R-Oklahoma) as bringing a range of manufacturers and retailers within the scope of regulation without the opportunity for public comment.[33] A letter to the Labor Department noted: "These three guidance documents are expected to dramatically expand the universe of regulated parties, create extreme logistical and financial burdens on regulated parties, and convert flexible recommended practices into mandatory requirements—all without the opportunity for public comment. We therefore ask that OSHA immediately withdraw these memoranda." Subject matter of the three guidance documents concerned engineering practices, retail exemptions, and chemical concentrations subject to PSM.

- In addition to Department of Labor guidance, greater use by the ***National Labor Relations Board*** of memoranda that affect non-union employers.[34]

- The ***Equal Employment Opportunity Commission*** has issued a series of guidance documents on pregnancy discrimination and accommodation in the workplace, credit checks on potential employees, and criminal background checks.[35]

- Guidance from the ***Consumer Financial Protection Bureau*** in the form of a "Bulletin" on "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act" limits the ability of automobile dealers to offer discounts to customers allegedly in the name of credit fairness and eliminating racial bias ("When such disparities exist within an indirect auto lender's portfolio, lenders may be liable under the legal doctrines of both disparate treatment and disparate impact").[36] Given the size of the auto lending marketplace this is clearly an economically significant measure that at the very least required a rulemaking rather than guidance, as well as concerns that even the CFPB recognized internally that it was overestimating bias[37] led to bipartisan House of Representatives passage of H.R. 1737 the "Reforming CFPB Indirect Auto Financing Guidance Act" (a Senate version S. 2663 awaits action) to revoke the guidance.[38] The bill would force CFPB "to withdraw the flawed guidance that attempts to eliminate a dealer's ability to discount auto financing for consumers. The bill also requires the minimal safeguards the agency failed to follow, such as public participation and transparency."[39]

- A claim in the German press, repeated by Reuters, that the ***Environmental Protection Agency***, in response to automaker Volkswagen's deploying "defeat device" software to circumvent EPA emissions standards for nitrogen oxides,[40] is influencing that company to build electric cars and electric car charging stations in the United States.[41] One concern for policymakers is to decide how to talk about and treat judgments as regulatory matters, and to recognize when such decrees, penalties aside, will have the effect of improperly influencing the market trajectory of an entire sector.

- The ***Council on Environmental Quality's*** Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts[42] that makes the National Environmental Policy Act a global warming instrument, particularly through federal land management decisions. The guidance is under seemingly perpetual review, but "describes how Federal departments and agencies should consider the effects of greenhouse gas emissions and climate change in their NEPA reviews," holding that "agencies should consider both the potential effects of a proposed action on climate change, as indicated by its estimated greenhouse gas emissions, and the implications of climate change for the environmental effects of a proposed action," and expanding upon 2010 draft guidance, "applies to all proposed Federal agency actions, including land and resource management actions." Elizabeth Lake on the site Law360 assets that the new draft "appears to push federal agencies to use NEPA to take a more activist stance in reducing GHG emissions":[43]

  > [W]hile courts have held that NEPA is a procedural statute, requiring only a "hard look" at environmental impacts (NRDC v. Morton, 458 F.2d 827, 838 (D.C.Cir., 1972)), this CEQ proposed guidance goes well-beyond this doctrine by instructing agencies to use the NEPA process to force the substantive reduction of GHG emissions.

- The ***Department of Transportation's Federal Aviation Administration*** June 2016 final rule on drones, "Operation and Certification of Small Unmanned Aircraft Systems,"[44] is highly restrictive,[45] requiring line-of-sight and no night-time operations among much else, ignoring the ability of technological and contractual solutions to address risk, and refusing to stand down to local law enforcement solutions. But it also contains declarations from the agency regarding case-by-case waivers, as well as a large quantity of forthcoming guidance, much of which would seem to be economically significant, on issues like: industry best practices; risk assessment; potential guidance on external load operations; guidance associated with not dropping objects in ways that damage persons or property; advisories on training and direction to air traffic control facilities; preflight checks for safe operation; vehicle conditions for safe operations; and guidance "on topics such as aeromedical factors and visual scanning techniques."

- Prior to the guidance-heralding final rule, there had been a ***Federal Aviation Administration*** rule interpretation on drones via a "Notice of Policy"[46] that temporarily outlawed commercial activity in violation of the APA, before a reversal by the National Transportation Safety Board.[47]

Something must be done; it would be advisable for OIRA to take on a greater role, since it does already review some indeterminate number of "Notices" via indeterminate standards.[48] No one has done systematic study of the total quantity of agency guidance but guidance document volume dwarfs that of rulemaking, which is not surprising when no one can even say with authority how many agencies exist.[49] A 1992 *Duke Law Journal* article noted that "Federal Aviation Administration rules are two inches thick while corresponding guidance totals forty feet; similarly, IRS rules consume a foot of space while supporting guidance documents total over twenty feet" (Strauss 1992) It is hard to argue against the proposition that "the body of guidance documents (or nonlegislative rules) is growing, both in volume and in importance" (Whisner 2013, 394).

"Sub rosa" regulation has been an issue for decades. In *Regulation and the Reagan Era*, Robert A Rogowski (1989) was clear:

> *Regulatory bureaucracies are able to accomplish their goals outside the realm of formal rulemaking....An impressive underground regulatory infrastructure thrives on investigations, inquiries, threatened legal actions, and negotiated settlements. ... Many of the most questionable regulatory actions are imposed in this way, most of which escape the scrutiny of the public, Congress, and even the regulatory watchdogs in the executive branch.*

One must appreciate that attempts to force more of this informal regulatory dark matter into the notice and comment stream might induce agencies to become even more creative in skirting review, such as with informal provision of information regarding agency expectations (Shapiro 2014), doubtless of the "Nice business you got there, shame if something were to happen to it" variety at times. New constraints could lead to other unforeseen measures by agencies to escape oversight, effectiveness of which could depend "significantly on how easy it is for OIRA to detect avoidance, and for OIRA, the courts, and others to respond" (Mendelson, Nina A. and Wiener 2014). Agencies can also raise the costs of presidential review of what they do, "self-insulating" their decisions with "variations in policymaking form, cost-benefit analysis quality, timing strategies, and institutional coalition-building (Nou 2013)."

But on the other hand…

Data we shall cover next support those skeptical of central review's effectiveness and bear out that just a small part of regulatory output is reviewed and that escaping scrutiny is, if not easy, not difficult either. It will seem that the review process has not been driven by a public interest theory, and that it has not fared well. An as yet unarticulated theory of rent seeking, the reality that independent agency rules are not reviewed, and that it is easy to escape review are enough to explain the botched process we'll see next.

Yet there might be something salvageable in a "public interest" theory of regulatory review. Here, I will note that officials of limited government persuasion have headed OIRA, many of them well-acquainted with the special interest theory of regulation. There are grave problems with central review; perhaps the institution can be changed so that the "public interest" is better served; additionally, we might influence the kind of information agencies create until such time as reforms instituting congressional accountability ripen.

Tough centralized review of regulations has been argued to help empower consumers and citizens, relative to the rent-seeking and capture that typically prevails. Without central regulatory review, costs of influencing laws are high since policy formation is dispersed among numerous agencies and lawmakers. Producer groups whose members are often more concentrated (crony types, not infrequently), hold a relative advantage in securing favorable policy since lower organization costs enable them to prevail at the expense of those less favorably positioned. For scattered consumers, political organization costs are higher and tendencies to free-ride on the efforts of others can dominate even when ire is raised, derailing the ability to push back on over-regulation or to even recognize it (The seminal discussion on free-riding and group behavior is Olson 1965). Regulation therefore grows over time because it costs consumers more to organize and prevent having a dollar taken away than it costs for them to simply accept the loss. Consumers become the put-upon "suppliers" in the equation of "demanders and suppliers of wealth transfers" (McCormick and Tollson 1982).

Centralized regulatory review may come to the "rescue" by helping level the playing field for the usual losers in the rent-seeking game. Theoretically again, centralization of review in one spot can increase the "rate of return" to lobbying for dispersed groups (like consumers) relative to that of concentrated interests because they need influence only one entity rather than many (Miller, Shughart and Tollison 1984). Meanwhile, expected benefits for concentrated groups are likely to be little influenced or even reduced (since they would have taken most of the pie anyway without central review). If that holds, "commissions (i.e., the reviewing entities) that are responsible for regulating several industries are less likely to be captured by a single industry, and thus are more likely to be responsive to the diverse interests of consumers and consumer advocates" (Mueller 1989).

But central review mechanisms can block neither legislators nor presidents who act to circumvent such oversight. To the extent Congress passes onerous laws, requires unnecessarily rapid statutory deadlines for new regulations, prohibits cost analysis of rules, creates loopholes that prevent or enable avoidance of review, or frontally acts to benefit special interests, aggressive regulatory review remains improbable.

In many ways, we needs get better at measuring the unmeasured. So let's look where OIRA central review stands now.

What the Numbers Say about OIRA's Central Review of Regulation

The central review process is incomplete In March 2016, the White House Office of Management and Budget finally released the *2015 Draft Report to Congress on the Benefits and Costs of Federal Regulations*.[50] The Draft 2016 report is overdue. These annual reports show the results of OMB's reviews of a subset of the thousands of proposed and final rules issued annually by executive agencies (not independent agencies, some of which are highly influential). Notices, guidance documents, memoranda and bulletins get no scrutiny here and rarely anywhere else.

When they draw attention to these reports at all, administrations stress "net-benefits" of the regulatory enterprise as a whole (Sunstein 2012). So in the new report, the administration says its fiscal year 2014 (October 1, 2013– September 30, 2014; so note that we are coming up on two years of absent information about rule costs and benefits), executive agency major rules generated benefits of up to $23 billion annually, while costing only $3 billion to $4.4 billion annually in 2010 dollars. For the decade 2004 to 2014, costs were pegged at between $38 billion and $45 billion, in 2010 dollars.

Today's official narrative maintains that this OMB-reviewed subset of major or "economically significant" executive branch rules (those anticipated to have a $100 million economic impact) account for the bulk of regulatory costs. The OMB (2014, 22)holds that:

> *[T]he benefits and costs of major rules, which have the largest economic effects, account for the majority of the total benefits and costs of all rules subject to OMB review.*

But OMB's breakdowns incorporate benefits and costs of only the few "major" executive agency rules that agencies or OMB have expressed in quantitative, monetary terms.

Only 13 rules in the 2015 Draft had both cost *and* benefit analysis performed, out of 54 executive agency major rules that OMB reviewed. OMB listed another 3 rules with dollar costs assigned, without accompanying benefit estimates. There were a few hundred non-quantified "significant" rules OMB looked at, and hundreds more it did not review (indeed over 3,000 rules and regulations are finalized each calendar year).

The "subject to OMB review" clause in the italicized quote above is a critical qualifier. Plenty gets left out, like non-major rule impacts, as well as the aforementioned guidance documents, memoranda and other notices. Ominously, independent agencies' thousands of rules get no OMB review, not even the many rules stemming from high-impact laws like the Dodd–Frank Wall Street Reform and Consumer Protection Act. Indeed, the non-reviewed character of most rules small and large, such as controversial independent agency rules like the Federal Communications Commission's ongoing net neutrality proposals to impose utility-style regulation on the Internet detract from the annual report's authority as a comprehensive survey of the compliance burdens and economic impact.

In instances like the independent Consumer Financial Protection Bureau created by Dodd-Frank, the concern goes well beyond lack of regulatory review (Murray 2014): There exists a fundamental lack of accountability, either executive or legislative or judicial, since the President cannot remove the director, and since Congress does not fund the self-financing agency. Congress lacks even the necessary "power of the purse" to ensure even an appearance of accountability to voters (Murray 2014).

Thirty-five other major rules implemented transfer programs; such "budget rules" are officially considered transfers rather than regulations. Paying little regard to these may be appropriate in a limited government context, but not anymore as the federal government dominates ever more economic and social activity like retirement and medical insurance.

Over the years, some 10 percent of all rules have been reviewed whether or not costs and benefits enter into the picture. In the 2015 *Benefits and Costs* report, OMB (U.S. OMB 2015, 7) tells us that:

> *From fiscal year 2004 through FY 2013, Federal agencies published 37,022 final rules in the Federal Register. OMB reviewed 3,040 of these final rules under Executive Orders 12866 and 13563.*
> *From fiscal year 2005 (FY 2005) through FY 2014, Federal agencies published 36,457 final rules in the Federal Register. OMB reviewed 2,851 of these final rules under Executive Orders 12866 and 13563. Of these OMB-reviewed rules, 549 are considered major rules, primarily as a result of their anticipated impact on the economy.*

As noted, for FY 2014, OMB reviewed 54 major rules and a few hundred significant ones, 16 of which had a cost estimate. For context, 3,554 rules were finalized by 60 federal departments, agencies and commissions during the calendar year.

OMB's once-common recognition that costs "could easily be a factor of ten or more larger than the sum of the costs...reported," (U.S. OMB 2002, 37) was a more helpful stance, since, as the nearby chart "Major Executive Agency Rules Reviewed by OMB, 2001-Present" shows, of several thousand agency rules issued, and the several hundred reviewed annually by OMB, only a handful of executive agency rules (and no independent agency rules) feature cost analysis alone, let alone the cost-benefit analysis that could justify common administration claims of net-benefits for the entire regulatory enterprise. Cost-benefit analysis may be something of a myth.

Major Executive Agency Rules Reviewed by OMB

Year	Rules with both costs and benefits	Rules with costs only	Grand total, rules with costs	Federal Register final rules
2001	14	13	27	4,132
2002	3	0	3	4,167
2003	6	4	10	4,148
2004	11	7	18	4,101
2005	13	2	15	3,943
2006	7	1	8	3,718
2007	12	4	16	3,995
2008	13	6	19	3,830
2009	16	12	28	3,503
2010	18	8	26	3,573
2011	13	6	19	3,807
2012	14	9	23	3,708
2013	7	11	18	3,659
2014	**13**	**3**	**16**	**3,554**
2015	**Absent**			
TOTALS	**160**	**86**	**246**	**53,838**

Sources: Costed rule counts, OMB, *2015 Report to Congress* on regulatory costs, Federal Register Final Rules: author search on FederalRegister.gov advanced search function

As a percentage of the annual flow of final rules in the *Federal Register*, the proportion of costed rules averaged around 35 percent of the few hundred designated "major" over the decade; but the proportion of *all* rules with any cost analysis at all has averaged less than a percent (0.46 percent). The percentage of all rules with a cost assessment has never reached one percent (the highest was .8 percent in 2009). Benefits, which the federal government declares justifies the modern regulatory state, fare even worse.

A Reform Agenda: Can an OIRA "Pen and Phone" Advance Liberty?

"If you ever get annoyed, look at me, I'm self-employed; I love to work at nothin' all day.
—Bachman-Turner Overdrive
"Takin' Care of Business"

To the extent ill-founded, overlapping and unclear regulations (and tax policy) dominate, businesses cannot plan, hiring becomes an insupportable risk (businesses will not hire if they know they cannot fire thanks to labor law) and citizens suffer. In the competitive marketplace, it takes a lot of bad ideas to generate a winner; overregulation and its close ally *uncertainty* cut down on breakthroughs, slowing growth. A Vanguard study on the uncertainty created by regulations and fiscal, trade and debt policy matters estimated $261 billion in such costs just since 2011 (McNabb 2013). On the other side of the coin, uncertainty can sometimes be better than the certainty of bad regulation.[51]

Moreover, policymakers and regulators fail to recognize that, while businesses want to "create jobs" as a matter of good citizenship, that goodwill does not change the reality that jobs are a cost, a *liability*. The modern environment makes business more risk averse (Casselman 2013). One British businessman addressing French employment regulations allegedly observed:

> *... [W]hen I am 100 percent utterly and completely certain that it is an absolute certainty that it is an absolute necessity that I need to recruit a new employee, I go to bed, sleep well and hope that the feeling has gone away by the morning.*

If businesses are "punished" for hiring, or cannot predict regulations coming their way, it is little wonder that they don't expand. We've already noted consequences, such as business startups hitting a record low (Reuters 2012). Like poverty, unemployment doesn't have causes; both are the default state of mankind: only *wealth* has causes (Noted in Crews 2011). The threat of regulation can induce companies to behave in reactive ways, distorting markets and creating economic inefficiency, compounding stagnation. Perhaps most ominous is that over half of existing firms wouldn't do it again given today's anti-business climate of uncertainty (Gehrke 2012).

Wynn Resorts CEO Steve Wynn called Washington (Seeking Alpha Transcripts 2011):

> *...the greatest wet blanket to business, and progress and job creation in my lifetime. And I can prove it and I could spend the next 3 hours giving you examples of all of us in this market place that are frightened to death about all the new regulations, our healthcare costs escalate, regulations coming from left and right.*

People like Wynn and our British businessman are hardly alone. *The Atlantic* conducted a Silicon Valley poll finding government to be a key innovation barrier (Gillespie 2014), while Gallup polling found record numbers pointing a finger at big government (Jones 2013). Regulatory liberalization that reduces uncertainty that increases the returns to risk-taking is the yet-to-be-deployed stimulus package. The problem, at this particular moment, is that Congress can get no traction with a liberalization agenda in the "year of the veto."

The president has already promised to veto Regulatory Accountability Act (Executive Office of the President 2015), the 114th Congress' signature regulatory reform bill that passed the second week of the new session in January 2015. The Regulatory Accountability Act of 2015 (H.R. 185) would codify some provisions contained in the executive orders we have discussed so far, making them enforceable, as well as allow formal semi-judicial proceedings for major rules and address guidance documents.

Similarly, the prior 113th Congress' passage of the ALERRT Act of 2014 (Achieving Less Excess in Regulation and Requiring Transparency, H.R. 2804), which also would in part codify existing executive orders, was met with presidential disregard (elements of this disclosure-oriented legislation will be described later). In both the 112th and 113th Congresses, the House passed the REINS Act (Regulations from the Executive In Need of Scrutiny, H.E. 367) to require an expedited congressional vote on all major or significant rules before they are effective (See Adler 2013). Note that this would change the presumption we saw in the Congressional

Accountability Act. That act's "resolution of disapproval" would become a positive affirmation—a major advance in accountability for regulations. REINS passed the 114th Congress, but the president had promised to veto it in the prior session.

Congress needs to broaden the REINS objection to any controversial rule, whether or not tied to a cost estimate that deems it a major rule. Furthermore, in the era of regulatory dark matter, the requirement for congressional approval should extend further to guidance documents and other agency decrees. At the moment the point is moot since an Obama veto is assured, but the debate needs to occur.

Another important congressional reforms in the "wish list" category would include changing statutory language that induces some agencies to disregard economic concerns in evaluating their regulations (See Manheim 2009). Ultimately only Congress can compare questionable rules to the benefits that could be gained if the compliance costs went elsewhere. Therefore, Congress should also explore allocating regulatory cost authority among agencies in a "regulatory budget," while distinguishing between categories like economic, health/safety, and environmental regulations (Crews 1998). A "budget" would create incentives promoting other supervisory mechanisms like central review, cost analysis and sunsets, and inspire agencies to "compete" with one another in terms of lives they save or some other regulatory benefit rather than think within their own box.

Unfortunately, all the legislative accountability reforms just covered are unlikely to become law. Perhaps the most promising option for bipartisan, cross-branch, and bicameral cooperation is a "regulatory improvement commission" contained in the Regulatory Improvement Act of 2013 (Stemberg 2013). This body would initiate review, similar to the military base closure and realignment commission, of the entire existing regulatory apparatus as distinct from the one-by-one appraisal that characterizes OMB review. The commission would select a bundle of rules for rollback with expedited congressional vote.

Certainly, today's policy climate is quite different from the 1990s, when Republicans proposed outright elimination of agencies like the Department of Energy (Competitive Enterprise Institute 1994). While major actions may not happen in the 114th Congress, it may have been possible to develop "veto-override-proof" steps that lay important groundwork for a more favorable future reform environment. Congress can at least begin making regulatory realities more apparent, even in the current atmosphere that precludes fundamental reforms.

Meanwhile, as the presidential elections approach, policy scholars may ponder what the executive's "pen and phone" can do to reduce rather than increase government influence in the economy. If the answer is some good things can be done within the rule of law, then OIRA will likely play a part. We knew from our Constitution's framers and we know now from the modern pen and phone era that, for better or worse, an energetic executive's hands are far from tied. Alexander Hamilton sought a king (Papers of Alexander Hamilton 1962), but settled for vigorously defending "Energy in the Executive." And to be sure, an "energetic" liberalization attitude prevailed in the executive branch during past presidencies and resulted in the creation of the executive branch review and oversight process itself. Given that such "pen and phone" power exists, it can be used to reduce government's scope and expand the private sphere (especially if Congress codifies the reforms).

The optimistic spirit of the following recommendations hopes that areas of bipartisan agreement between the executive and legislative branches in divided government can be found. We know from reforms in the 1990's that not everyone wants to go to the mat maintaining a regulatory state that harms their constituents. Recommendations below, which could be carried out by a president through OIRA if not by OIRA itself, will produce information about the state of regulation that can help enable legislative reform in a more favorable climate.

Enforce, strengthen and codify existing executive orders on regulation

Earlier we noted the series of executive orders over recent decades meant to address the flow of regulation. For starters, Congress should insist that existing executive orders on cost analysis and review—to limit government—should be strictly applied (perhaps through appropriations), strengthened, and ultimately codified (as would be done via the aforementioned House-passed ALERRT Act), and further, extended to independent agency rules, guidance documents and other agency proclamations. OIRA would play a major role.

Implement a regulatory moratorium

It's lost to the mists, but upon entering office, President Obama's chief of staff announced a regulatory freeze as part of a first 100 days initiative (Associated Press 2009). The march of rulemaking wasn't appreciably reduced, but no permanent reduction followed a 90-day moratorium implemented by President George H. W. Bush either, who had directed agencies to look for rules to waive. Each generated just a few billions in savings (Sunstein 2011). Moreover, many rules implement statutory requirements and are exempt from executive waiver, although recently with respect to the Patient Protection and Affordable Care Act, waivers applied via bulletin, memo and press release by the Internal Revenue Service (Graham and Broughel 2014). With the Bush moratorium, agencies were being asked to describe what they did badly—a task at odds with self-interest and bureaucratic turf building. Furthermore, Bush's three-month campaign was considerably less time than needed to examine the fruits generated by an intense, thorough audit.

Obama's unilateral waivers notwithstanding, getting regulations off the books requires the same laborious public notice and comment procedures of a new rule. "Going back and reviewing stuff is as hard as drafting regulations," said one Environmental Protection Agency representative during the Bush effort (Quoted in Davis 1992).

Still, a new effort should build upon the best of the Bush and Obama moratoria, and lawfully freeze regulation for a lengthier, more thorough audit, publish reports on the data generated, seek public comment on which rules should go and so forth. Creativity will produce useful information to support more substantive reforms—such as stipulating that for every new rule, one within or outside the agency should be eliminated. This latter would amount to a status quo "regulatory budget" or freeze for the duration of the review.

Boost Office of Information and Regulatory Affairs resources and free market law and economics staff at agencies

More money and staff could enhance OIRA's executive order review function, or that of some subsequent body (See Dudley 2011 on expanding OIRA resources). Where political circumstances prevent that, the administration and Congress might shift personnel and funds to concentrate on key agencies (or some subset). However, since OIRA already grants special attention to major rules, and since a handful of agencies usually account for most major rules, OIRA already concentrates its resources for the most part, so this is a limited, even naïve, option. Additional analytical help can and does come from employees borrowed from federal agencies and departments. A moratorium could help the process of regrouping.

Alternatively, economists and/or divisions at agencies whose job is benefit and cost assessment and Regulatory Impact Analysis preparation could be moved out of less active agencies. The president or OIRA chief or Congress could give these economists "Bureau of No" marching orders, to look for reasons not to regulate, to challenge conventional RIAs that somehow always find net benefits rather than net costs, and to underscore the role of competitive discipline and other factors that "regulate" economic efficiency and health and safety apart from Washington bureaus. Agency economists, deployed where objectively more useful in blocking the ceaseless regulatory flow, could provide greater assurance that more complete analyses were being carried out even without changes at OIRA.

It must be emphasized that *it is not enough for economists reviewing agency output to focus on Regulatory Impact Analyses*. Only a few get prepared and reviewed. The flow, the rising costs and the limited scrutiny that even major rules get indicates that the ignored costs of "minor" rules may actually be very large. Recall that non-major rules and independent agency rules make up the regulatory bulk. Still a rough 80/20 rule should apply such that, while costs can be masked behind the number of rules, a relative handful account for the bulk of impending regulatory burdens. Economists can get better at concentrating efforts on that few if there is presidential encouragement, and bipartisan support, of their role and acknowledgement of their importance.

Systematize review, sunsetting, revision and repeal of regulations

Short of the moratorium advocated above, and in keeping with the spirit of executive orders and retrospective reviews that agencies allegedly conduct already,[52] more aggressive periodic rule review by OMB and agencies would be valuable. Congress occasionally considers regulatory sunsetting; the president too could, in pen and phone fashion, require agency-generated regulatory requirements to expire or sunset within a given period of time unless they are re-proposed with public notice and comment.

This task requires an executive who agrees with the observation that regulations sometimes go too far, who recognizes that allowing even good rules to mount inappropriately is counterproductive (Mandel and Carew 2013). While sunsets or rule phase-outs may be disregarded without legislative backup, formal reporting on deadlines and extensions and non-extensions and disclosing ratios of what gets contained and what gets discarded helps quantify whether streamlining or supervision really happens. If the answer turns out to be no, we have automatically generated the record capable of prompting Congress to do so. Here are a few criteria by which agencies should routinely evaluate outstanding rules:

- Which rules can be eliminated or relaxed without becoming bogged down in scientific disputes over risk assessment? Which rules are just silly? Which are paternalistic?
- Are the data that regulated entities are required to report being used at all?
- Does the rule create unfavorable health costs (such as health costs of advertising restrictions on some needed drug)?

Such questions can help isolate burdensome or counterproductive rules. The president has already encouraged retrospective review with E. O. 13563's call for agencies to develop and execute plans to:

> *[P]periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome.*

OMB Reports to Congress do make several worthwhile recommendations for regulatory improvement, including (U.S. OMB 2013, 5):

> *[F]acilitating public participation and fostering transparency by using plain language; making objective, evidence-based assessment of costs and benefits an integral part of the regulatory decision-making process; using retrospective review to inform decisions about specific rules and, more broadly, about the appropriate interpretation of impact analyses that feature incomplete quantification; and, finally, aligning agency priorities across all levels of internal hierarchy.*

These are useful steps. However, besides reviewing the limited implementation of certain parts of E.O. 13563, including "regulatory look back, reducing paperwork burdens, simplifying government communications, and promoting long-run economic growth and job creation via international regulatory cooperation" (U.S. OMB 2013), little about aggressively reducing existing regulation appears in OIRA reports. Agency RIAs and the entire executive branch review process should reflect a higher burden of proof regarding rules' value. Where agency analyses under the various executive orders appear not to justify a rule, OIRA should be more forthright about saying so, and it should challenge non-major rules as well.

OIRA could recommend modifications to entire regulatory programs based on plain common sense, regardless of executive orders. OIRA might note costs of presumably beneficial regulations, and compare those benefits to superior advantages available elsewhere (hiring policemen or firemen, dividing or painting highways).

In other words, OIRA has the experience and know-how to create a benefit "yardstick" to objectively critique high cost, low benefit rules (which can help inform the "Transparency Report Card" we will cover shortly). The president can continue pressing agencies about rule reductions, and demand that they rank regulations and show that their least effective rules are superior to another agency's rules. Findings should be published.

Again, the president's leadership role can legitimize the task of eliminating rules, of rolling government back from the places it should not be.

Reduce dollar thresholds that trigger Regulatory Impact Analyses and/or OIRA review

Non-major rule costs get disregarded since analysis is often not required. Review is accordingly non-existent and burdens unheeded. The Federal Communications Commission's open Internet (net neutrality) order was not regarded as significant, only a "prophylactic" rule, for example (Federal Communications Commission 2011), despite huge economically significant, industry-altering effects.

During the Carter-era regulatory review programs, when the $100 million major-rule threshold originated, there were a "suspiciously large number of regulations…projected to cost $90-95 million" (DeMuth 1980, 21). Rules may have exceeded the threshold but were ignored or understated just enough by agencies to evade scrutiny. Along with reinstating moratoria, devising criteria for a periodic review and stressing executive order-driven review, the president (or of course Congress) may also reduce the flow of rules that escape analysis simply by lowering the threshold at which written Regulatory Impact Analyses are asked to be prepared.

The current $100 million threshold translates into written, quantified and reviewed analysis for a handful of rules. More rules would be brought within that umbrella simply by lowering the bar to $50 million or $25 million. Doing so will not automatically improve how RIA cost and (especially) benefit tallies are performed. In fact, if net benefit analysis rather than cost analysis persists, RIA exploitation for dubious net benefits will continue. Further, some agencies may strategically adapt behavior to the likelihood of review, and present major rules larger than truly intended in order to negotiate and give the appearance of compromise (DeMuth 1980, 21), but expanding their sphere of influence.

Such behaviors can be confronted; President Reagan's E.O. 12291 permitted the Director of OMB to order rules to be treated as major even when at first blush they do not appear to be, thereby activating the RIA requirement. Far fewer rules should escape cost analysis and subsequent reconsideration and review.

Scrutinize all agency decrees that affect the public, not just "rules"

To what extent to agency guidance documents get review? With tens of thousands of agency proclamations annually, it does not suffice for executive agency "significant" or "major" rules to receive OMB review. Nor is it enough any longer to include independent agencies. "Regulatory dark matter" is gaining ground on the readily observable.

Today, non-legislative rules and proclamations like presidential and agency memos, guidance documents, bulletins and press releases may enact policy directly or indirectly, or even by veiled threat (Brito 2014). Interpretations may be articulated by agencies, and regulated parties pressured to comply without an actual formal regulation or understanding of costs. The EPA Clean Water Act jurisdictional guidance on "Waters of the United States" is a prominent example we noted earlier. To address this loophole, former OIRA director John Graham and

James Broughel propose options such as reinstating a George W. Bush requirement to prepare analysis for significant guidance documents, explicitly labeling guidance documents as nonbinding, and requiring notice and comment for significant guidance documents (Graham and Broughel 2014). There are a range of other reforms that should be applied as well.[53]

As a July 2012 U.S. House of Representatives Committee on Oversight and Government Reform report expressed it (2011, 7):

> *Guidance documents, while not legally binding or technically enforceable, are supposed to be issued only to clarify regulations already on the books. However ... they are increasingly used to effect policy changes, and they often are as effective as regulations in changing behavior due to the weight agencies and the courts give them. Accordingly, job creators feel forced to comply.*

Policymaking ought not to have descended to this level. All potentially significant decrees by agencies need scrutiny, not just "rules." It is the case that agencies will attempt to strategically adapt to the new scrutiny (Shapiro 2014). But a highly engaged executive, and Congress, can draw attention to and definitively address quasi- or semi-regulatory activity. OIRA does conduct some indeterminate amount of review of "notices." It could do more.

Require rule publication in the Unified Agenda of Federal Regulations

There are rules, and then there are rules. Agencies are supposed to alert the public to their priorities in the semi-annual "Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions" (the Agenda). It normally appears in the *Federal Register* each fall and, minus the Regulatory Plan, each spring. The Agenda is intended to give researchers a sense of the flow in the regulatory pipeline as it details rules recently completed, plus those anticipated within the upcoming 12 months by federal departments, agencies, and commissions. But there is a whopper of a disclaimer, as the *Federal Register* has noted (7 December 2009, 64133):

> *The Regulatory Plan and the Unified Agenda do not create a legal obligation on agencies to adhere to schedules in this publication or to confine their regulatory activities to those regulations that appear within it.*

An executive order, and legislation, should command that agencies *do* confine their regulatory activities to those appearing in the Agenda. OIRA could indicate for rules whether or not the agency had prioritized them before.

Tally federal regulations that accumulate as business sectors grow

The observation that there's no free lunch may hold particularly for the small businessperson. The "Small Business Anthem," heard on the *Small Business Advocate* radio program, goes in part (SmallBusinessAdvocate.com):

> *Even though you make payroll every Friday,*
> *You don't have a guaranteed paycheck.*

You're a small business owner, and you eat what you kill.

For perspective on the small-business regulatory climate, the nearby list of "Federal Workplace Regulation Affecting Growing Businesses" shows basic, non-sector-specific laws and regulations that affect small businesses as they grow. This list, however, assumes nonunion, nongovernment contractor firms with interstate operations and a basic employee benefits package. Only general workforce-related regulation is included: omitted are categories such as environmental and consumer product safety regulations and regulations applying to specific types of businesses, such as mining, farming, trucking, or financial firms. For those enterprises, numerous other laws and regulations would apply (For one industry-specific roundup, see National Association of Automobile Dealers 2014).

Federal Workplace Regulation Affecting Growing Businesses

1 EMPLOYEE

- Fair Labor Standards Act (overtime and minimum wage [27 percent minimum wage increase since 1990])
- Social Security matching and deposits
- Medicare, Federal Insurance Contributions Act (FICA)
- Military Selective Service Act (allowing 90 days leave for reservists, rehiring of discharged veterans)
- Equal Pay Act (no sex discrimination in wages)
- Immigration Reform Act (eligibility that must be documented)
- Federal Unemployment Tax Act (unemployment compensation)
- Employee Retirement Income Security Act (standards for pension and benefit plans)
- Occupational Safety and Health Act
- Polygraph Protection Act

4 EMPLOYEES: ALL THE ABOVE, PLUS

- Immigration Reform Act (no discrimination with regard to national origin, citizenship, or intention to obtain citizenship)

15 EMPLOYEES: ALL THE ABOVE, PLUS

- Civil Rights Act Title VII (no discrimination with regard to race, color, national origin, religion, or sex; pregnancy-related protections; record keeping)
- Americans with Disabilities Act (no discrimination, reasonable accommodations)

20 EMPLOYEES: ALL THE ABOVE, PLUS

- Age Discrimination Act (no discrimination on the basis of age against those 40 and older)
- Older Worker Benefit Protection Act (benefits for older workers to be commensurate with younger workers)
- Consolidation Omnibus Budget Reconciliation Act (COBRA) (continuation of medical benefits for up to 18 months upon termination)

25 EMPLOYEES: ALL THE ABOVE, PLUS
- Health Maintenance Organization Act (HMO option required)
- Veterans' Reemployment Act (reemployment for persons returning from active, reserve, or National Guard duty)

50 EMPLOYEES: ALL THE ABOVE, PLUS
- Family and Medical Leave Act (12 weeks unpaid leave or care for newborn or ill family member)

100 EMPLOYEES: ALL THE ABOVE, PLUS
- Worker Adjustment and Retraining Notification (WARN) Act (60-day written notice of plant closing)—Civil Rights Act (annual EEO-1 form)

By executive order or statute, or merely OIRA initiative, the federal government should build upon this by revealing how federal regulations (not just laws) now accumulate *in specific sectors*, supplementing the thick Code of Federal Regulations. This will give some idea of impacts in particular industries and economic subdivisions, which can help guide reforms and liberalization.

OIRA should compile an annual Regulatory Transparency Report Card

> *Measure what is measurable, and make measurable what is not so.*
> —Quote frequently attributed to Galileo, that, alas, probably was not his.

Improving annual public disclosure for regulatory output and trends is one realm in which the president can unambiguously undertake initiatives on his own without statutory regulatory reform or congressionally stipulated transparency reporting.

An annual Regulatory Transparency Report Card detailing agency regulatory output in digest form, incorporating the current year's data plus historical tables could be encapsulated and published as a chapter in the Federal Budget, the *Economic Report of the President*, the OMB *Benefits and Costs* report or some other format. Before 1994, information such as numbers of proposed and final rules, and major and minor rules was collected and published in the annual *Regulatory Program of the United States Government*, in an appendix called "Annual Report on Executive Order 12291." This report identified what actions OMB took on proposed and final rules it reviewed per that order, and the preceding 10 years' data, with information on specific regulations that were sent back to agencies for reconsideration. The *Regulatory Program* ceased when the Clinton administration's E.O. 12866 replaced E.O. 12291 with the aforementioned reaffirmation of agency primacy.

Significant but valuable *non-cost* information should also be published. Agencies and OMB could assemble quantitative and non-quantitative data into charts and historical tables, enabling cross-agency comparisons. Presenting ratios of rules with, *and without*, benefit calculations helps reveal whether or not the regulatory enterprise can be deemed as doing the good it claims. The "Funnel of Gov" presented earlier in part aims at this conceptualization.

What follows is a sample of what should be officially summarized and published annually by program, agency and grand total, and with historical tables (Crews, "The Other National Debt Crisis," 2011).

Annual Regulatory Transparency Report Card:
Recommended Official Summary Data by Program, Agency & Grand Total
(with Five-Year Historical Tables)

- Tallies of economically significant, major, and non-major rules by department, agency, and commission.
- Numbers and percentages of rules impacting small business.
- Depictions of sectoral regulatory accumulation.
- Numbers and percentages of regulations that contain numerical cost estimates.
- Tallies of existing cost estimates, including subtotals by agency and grand total.
- Numbers and percentages *lacking* cost estimates, with explanations for absence of cost estimates.
- *Federal Register* analysis, including numbers of pages and proposed and final rule breakdowns by agency.
- Number of major rules reported on by the GAO in its database of reports on regulations.
- Rankings of most active executive and independent rule-making agencies.
- Identification of rules that are deregulatory rather than regulatory.
- Allegedly "non-regulatory" rules that affect internal agency procedures alone (important as federal government expansion into new realms of activity displaces the private sector).
- Number of rules new to the Unified Agenda; number that are carry-overs from previous years.
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch options to address them.
- Rules for which weighing costs and benefits is statutorily prohibited.
- Percentages of rules reviewed by the OMB and action taken. (echoing the "Funnel of Gov" presented earlier).

Some elements shown here were incorporated H.R. 2804, the ALERRT Act (Achieving Less Excess in Regulation and Requiring Transparency), which, as noted, passed the House in 2014 (but not the Senate), and before that into S. 3572, the "Restoring Tax and Regulatory Certainty to Small Businesses Act" introduced by Sen. Olympia Snowe (R-Maine) in the 112th Congress, but never passed.

Regular highlight reporting accompanied by the affirmation of a presidential cheerleader would reaffirm the importance of disclosure and, in the process, expose to what extent Congress itself causes regulatory excess. Congress over-delegated power to agencies, and Congress imposed the statutory deadlines that can undermine regulatory analysis. Disclosure from OIRA will help shift the narrative back to congressional accountability for what agencies do, which is a proper stance.

<u>Designate multiple classes of major rules in transparency reporting</u>

Above, we advocated lowering cost thresholds for regulatory review. For decades, regulations have been loosely divided into those that are major or economically significant (over $100 million in annual impacts) and those that are not. But this gives only a rough idea of minimum costs. For example, given the definition an economically significant rule, we can infer that the 200 major rules in the 2014 year-end *Unified Agenda*, when fully implemented someday, will have economic impacts of around $20 billion annually (100 million times 200 rules), minus any rules among that 200 that reduce costs (Crews, "Big Sexy," 24 November 2014).

A Regulatory Transparency Report like that described above should obviously include the number of economically significant (or major) rules, but this designation could be expanded to disclose more than a minimum level of costs. OMB could develop guidelines recommending that agencies separate economically significant rules into categories representing increasing costs and present them in the Regulatory Transparency Report. Here is one suggested breakdown:

One Proposed Breakdown of "Economically Significant" Rules	
Category 1	> $100 million, <$500 million
Category 2	> $500 million, < $1 billion
Category 3	> $1 billion
Category 4	> $5 billion
Category 5	>$10 billion

This particular itemization is merely one option for presenting numbers within each category, and was incorporated in the "Restoring Tax and Regulatory Certainty to Small Businesses Act" (S. 3572) and the ALERRT Act (H.R. 2804), but the executive branch could facilitate such reporting on its own. For example, some cost estimates of the EPA New Source Performance Standards rule figure about $738 million annually (U.S. EPA 2001). Appreciating when EPA is imposing "Category 2" rules and the like would be more helpful shorthand than knowing about economically significance. This could be especially useful as Congress explores formal hearing requirements for mega rules, such as the House passed in January 2015 as part of the Regulatory Accountability Act.

<u>Report separately On Economic, Health & Safety, and Environmental regulations</u>

While economic regulation had lost favor in the 1980s compared to environmental or health and safety rules, there has been a resurgence of it in banking, energy, telecommunications and other realms. Alas, these are often the domain of independent agencies not subject to central OIRA review.

This is ironic since the origins of executive branch regulatory review were driven in part by the recognition that economic regulation worked against the public interest. Such views were sustained by OMB's onetime willingness to adopt the premise that some economic regulation "produces negligible benefits (U.S. OMB 1997)."

Indeed, whether the proposition is "fine-tuning" of the macro economy, or direct government management of an specific industry's output and prices (such as agricultural quotas or electricity generation prices) or entry into an industry (such as trucking), coercive economic interference lacks legitimacy. The reality of governmental failure and acknowledgement of cronyism in economic concerns is more evolved now, as is (among some, but too few) an appreciation of the impossibility of central economic planning and calculation (von Mises 1920). Economic regulations can no longer be presumed rooted in the public interest; the more defensible default assumption is that they serve the regulated and their captured bureaus.

However today, an engaged executive's and even Congress' ability to address economic regulation as opposed to health and safety rules is undermined by that lack of oversight of independent agency rules that increasingly govern. In presenting itself as authoritative on aggregate regulatory net benefits, the annual OIRA *Report to Congress* conceals more than it reveals in this regard.

Since the role of health and safety regulation differ so from economic regulation, separate presentation everywhere—in the *Report to Congress*, in any Regulatory Transparency Report or elsewhere—are important from the standpoint of comparing relative merits of regulations. Conceptual differences render meaningless any comparison of, for example, purported economic benefits from an energy regulation with lives saved by a safety regulation, so such categories of costs should be presented and analyzed separately and congressional accountability for outcomes established.
With executive buy-in, to the extent that analyses such as the OIRA *Report to Congress* and other investigations help in delegitimizing economic regulation, such realms can be freed from government purview altogether (a utopian thought, as aggressions as recent as net neutrality clearly attest). But with that new rationality we would leave Congress and OIRA with the "lesser" task of documenting and controlling costs of environmental, health, and safety regulations. Then where health and safety rules reveal that they too have private interest underpinnings or are detrimental to the public, a motivated executive can urge their rollback as well. Isolating categories for analysis is a first step toward enabling this greater oversight.

Improve "transfer" cost assessments

Paralleling the distinction between "economic" and "social" regulation, process rulings like leasing requirements for federal lands and revenue collection standards and service-oriented administrative paperwork—such as that for business loans, passports and obtaining government benefits already appear separately in OIRA reports, and in some cases the federal *Information Collection Budget*.

Certain of these administrative costs represent not regulation as such, but "services" secured from government by the public. But that does not make it appropriate not to actively disclose and question them, or to fail to anticipate their entailing future costs or having displacement or deadweight effects. Similarly, it is important not to lump service-related paperwork in the same category with the tax compliance burden and other involuntary, non-service-related process costs such as workplace reporting requirements. All these are hardly minimal and should be tallied and reduced where possible.

OIRA has begun recognizing that these transfers "may impose real costs on society," may "cause people to change behavior" and result in "deadweight losses"; OIRA expressed that it "will consider incorporating any such (cost-benefit) estimates into future Reports" (U.S. OMB 2013, 22). More needs to be done to analyze the costs of these transfers and their impacts on individual rights and economic growth.

As more of the economy—such as health care—succumbs to federal supervision, there is less inclination for subsequent generations of Americans to recognize what government does as regulation or interference; it just "is." This becomes more of a concern as quasi-regulation grows; addressing it all is an increasingly important task of the executive branch and Congress.

Acknowledge and minimize indirect costs of regulations

In its *Report to Congress*, OIRA allows that "many regulations affect economic growth indirectly through their effects on intermediate factors" (U.S. OMB 2013, 48), but is non-committal on whether the net effects are positive or negative. If indirect costs of regulation are too difficult or policymakers themselves to compute, then government cannot credibly argue that compliance is feasible or fair or affordable.

Compliance-focused regulatory cost estimates may inadvertently or purposely omit indirect costs. That uncertainty requires that indirect costs be guarded against and minimized, since some have argued that indirect costs of regulation could even exceed the magnitude of direct costs (Laffer and Bord 1992, 18), and since OIRA itself occasionally has acknowledged that regulatory costs could be many times the amount it presents annually attaching to major rules (U.S. OMB 2002, 37).

Fairness and accountability in government require acknowledging indirect costs. Without addressing indirect effects, officials will systematically underestimate and downplay regulatory impacts and thus overregulate. Taxing and spending are substitutes for regulation, and if regulation is perceived as an artificially cheap alternative means of achieving governmental ends, policymakers will exploit it and it will increase. Allowing regulators to disregard entire categories of indirect costs (such as bans or disapprovals of pipelines or antitrust regulation or product bans) could inspire more regulations of that very type. Imagine acknowledging only direct costs of regulations—such as the engineering costs of controlling an emission, while ignoring outright input or product bans as indirect costs. Under such scenarios, many regulations could be expected to feature bans or disapprovals so that regulators could appear to avoid imposing high regulatory costs.

Recognizing and levelheadedly incorporating indirect cost presents serious challenges, but if the executive branch and Congress emphasize cost over net-benefit assessments, manpower and resources are freed to better assess indirect regulatory costs.

Dealing with indirect costs, and all costs for that matter, will ultimately require congressional approval of final agency rules, because complete cost assessments and quantification are impossible for third parties who are mere mortals (Buchanan 1969, 42-43), no matter which government agency they work for. This points to an important principle; the aim of annual regulatory accounting cannot be not solely accuracy, but to make Congress more accountable to voters for regulatory impacts, and to induce agencies to minimize indirect costs by ensuring that they "compete" before Congress for the "right" to regulate. Even imperfect recognition of indirect cost magnitudes by OIRA can provide a basis for allocating scarce resources in loose correspondence with where a (perhaps one day) more accountable Congress believes benefits to lie. The presidential pen and phone can raise the profile of this important concern.

Formalize "Do Not Regulate" reporting and offices

Some have called for an independent congressional office of regulatory analysis resembling the Congressional Budget Office (U.S. House of Representatives Report 105-441, 1998). This would go beyond more resources for OIRA or agency economics. There are scenarios in which the independent office could be a good idea, such as if the entity were formally chartered with an anti-regulatory "bias" to offset the pro-regulatory bias prevailing in the entire rest of the federal government including its independent agencies. Some formal entity could highlight the desirability of market-oriented alternatives over command options for every regulation, and continually present the case for eliminating existing rules and create plans for elimination of regulatory agencies themselves. A much stronger version of OIRA or a body that replaces it, in conjunction with agency law and economics personnel of laissez-faire persuasion, could bolster this "Bureau of No" role.

Conclusion: OIRA and regulatory liberalization

The modern conceit is that untethered regulation and rulemaking always work. They do not; bureaucracy and administrative state overreach may not only impede economic efficiency but also undermine health, safety and environmental progress. Healthy government requires recognizing downsides to coercive intervention; it requires vigilant legislative and executive institutions and mindsets that seek reasons *not* to add yet another rule or decree to the existing tens of thousands. Meanwhile the public has a right to know the ways federal agencies have harmed and harm that which they oversee, and how those negatives may propagate beyond the agency throughout the economy and society.

Despite semi-formal central review by OIRA of economic, environmental, and health and safety regulations and their accompanying paperwork since the late 1970's and the 1980s, a significant and escalating regulatory burden is apparent.

- Costs of regulation and realms subject to regulation have grown, while benefits remain ambiguous.
- Entire sectors of society experience regulation from independent agencies that get little scrutiny.
- *Federal Register* page counts occupy record heights.

- Economically significant and major rules reviewed annually have increased notably over the past decade.
- "Regulatory dark matter" outside the normal notice and comment procedure lacks adequate scrutiny.

It is no longer enough just to cut federal spending and balance the budget. This testimony has stressed the need to offset the march of bureaucracy and regulation and proposed ideas for doing that through OIRA, particularly since the current reality assures us that the Constitution isn't coming to the rescue in the near term. There is much about which to be optimistic; the ideas that created the American experiment in the first place remain "discovered," available in the public domain. One might say, there'll always be an America—somewhere. To keep it here, we need merely the rocks off of America's economic lawn. Given today's economy, there should be bipartisan momentum for economic and regulatory reform, some animated new constituency for limited government.

The regulatory process, therefore, itself needs more regulation. The executive and legislative branches may not agree on congressional reassertion of its authority with respect to making of law and regulation. While it would be preferable for Congress engage by implementing the Regulatory Improvement Act, the REINS Act and other measures that directly limit agency authority, those face veto threat and must await change. Still, many recommendations presented here can be implemented by executive action or by OIRA, by the same pens and phones now used to expand the state. However it happens, the new normal needs to be one that ensures that, if an expensive or burdensome regulation is enacted, elected representatives are on record for or against, and accountable to voters.

The federal regulatory enterprise increasingly affects many, and changes are likely one way or another. With conventional options to restore liberties and elevate the rule of law exhausted or ignored, the states themselves may address federal government expansion by taking rightful powers back from Congress and the executive branch. The Constitution's Article V does provide for the states to call a convention to amend the Constitution and restore balance of power, and several states are pursuing that option (For example Brown 2014). One proposal with respect to over-regulation specifically is the "Regulation Freedom Amendment" that would empower two-thirds of the states to force Congress to propose said amendment. The amendment would stipulate that in any given instance, a quarter of the members of either the House or the Senate could require Congress to vote on a significant federal regulation, very much like the REINS Act legislation would do (Buhler 2013). Such as step can be avoided by reconsidering the regulatory state via recommendations presented here. The modern statesman's primary task is to double GDP, rather than to double spending or regulatory burdens, no matter the political party.

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Mr. MARINO. Thank you.
Professor Driesen.

TESTIMONY OF DAVID M. DRIESEN, ESQ., PROFESSOR OF LAW, SYRACUSE UNIVERSITY COLLEGE OF LAW

Mr. DRIESEN. Chairman Marino, Ranking Member Johnson, Members of the Committee, thank you for inviting me to testify.

I think a key question we need to ask is whether OIRA helps us confront the major challenges that government standards address, such as global terrorism and climate disruption. I'm going to suggest today that OIRA has not helped us confront those challenges, and propose some reforms that would make the process more efficient.

OIRA has not helped us confront these and other key challenges because it always delays standards, usually needlessly, while doing nothing, and never speeds them up. And, because when it does recommend changes, in almost every case the changes proposed weaken the standards.

Now, government agencies already face substantial pressures to inadequately protect public health, the environment, and our safety, because regulated companies file voluminous comments, meet with agency officials, get concessions from them, sue them anyway, and then the courts make them do this all over again if they did not respond adequately to any of these comments. And, these are very well-funded interests, and we don't need yet further gauntlets to interfere with these vital protections.

The primary justification for OIRA reviewers, I think you've heard today, is the idea that an office of economist should help government agencies use cost-benefit analysis to improve the most expensive standards. OIRA, however, focuses mostly on standards where no cost-benefit analysis can be completed, because none of the benefits are quantifiable. And, it overwhelmingly focuses on rules that are not economically significant, that generate costs less than the $100 million threshold in the law.

So I have the following recommendations to streamline the process and make it much more efficient: First, OIRA should be permitted only to review standards that generate cost of $100 million or more. This would force the agency to prioritize, and allow its small staff to review rules in a timely manner.

Second, we should exempt rules that address terrorism and global climate disruption from the review process. These are cases where cost-benefit analysis cannot be helpful because it is radically incomplete on the benefits side, in both of these cases. And, these are areas where it cannot afford the delays that are routine in the OIRA process because there are risks of catastrophes that—and we don't know when they might occur. So in these cases, there should be no OIRA review.

We also should demand that OIRA not review agency risk assessments. This is an office of economists. Risk assessment requires scientific expertise that the agencies possess, but OIRA does not. And risk assessment, by the way, is the way that we come up with a number of lives saved, a number of illnesses avoided, and so on. Monetization, economists know about that, but risk assessment they don't.

Fourth, when a cost-benefit analysis shows that the monetized benefits exceed the monetized cost, OIRA should be pushing for stricter standards because those maximize net benefits. They do not follow economic theory in this respect, never have, except on one occasion I can think of.

The other thing we need to do is instruct the agency to ignore—the agencies to ignore OIRA's input if the review process lasts more than 90 days. The current executive order has sought to limit the time of review. OIRA has evaded these limits. So we need a simple rule, and we need an enforcement mechanism.

So my conclusion is that OIRA review has not helped us address key challenges that government standards address, including climate disruption and global terrorism, and that we need a much more efficient streamlined processes so that OIRA's resources will be used properly and not produce inordinate delays.

Thank you very much for your attention, and I welcome your questions.

[The prepared statement of Mr. Dreisen follows:]*

***Note:** Supplemental material submitted by this witness is not printed in this hearing record but is on file with the Subcommittee, and can also be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=105157

TESTIMONY OF
DAVID M. DRIESEN

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SYRACUSE UNIVERSITY

MEMBER SCHOLAR
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HEARING BEFORE
BEFORE THE JUDICIARY COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON
REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

ASSESSING THE OBAMA YEARS:
OIRA AND REGULATORY IMPACTS ON JOBS,
WAGES, AND ECONOMIC RECOVERY

JULY 6, 2016

Chairman Marino, Ranking Member Johnson, and members of the Subcommittee, I appreciate the opportunity to testify today. My name is David Driesen. I am a University Professor at Syracuse University, teaching environmental law and climate disruption law. My publications focus on law and economics and environmental law, including a substantial body of work on cost-benefit analysis (CBA) and OIRA review, some of which I include with this testimony.

A recent trip to Beijing reminded me of how fortunate we are to have environmental standards. On my second day in the Chinese capital a thick haze descended, forcing me to wear a facemask and endure a sore throat for the remainder of my stay while making the surrounding hills vanish. Air pollution has more serious consequences for residents, killing more than a million Chinese citizens annually. China wisely relies on market forces to power its economy, but faces potential social unrest because it has not required market actors to meet adequate environmental standards.

We were well on our way to Beijing-like conditions when Congress passed the Clean Air Act Amendments of 1970 with only one dissenting vote. Those amendments aimed to achieve the goal of protecting public health and the environment. Republican President Richard Nixon, anxious to make sure that ambitious environmental statutes protected Americans from pollution's harms, established an independent EPA. When we have acted vigorously, we fully protected public health, sometimes without any social cost.[1] Even where we have not fully achieved that goal, we have made enormous progress even as economic growth continued.

In spite of significant progress under an independent EPA, beginning in the 1980s, American presidents ended government agency autonomy by issuing executive orders creating White House oversight over government agencies. These executive orders require government agencies to carry out cost-benefit analysis (CBA) of significant proposed new standards, defined primarily as those having an impact of $100 million or more a year on the economy. They direct the Office of Information and Regulatory Affairs in the Office of Management and Budget (OIRA) to oversee implementation of these orders. Congress initially opposed these executive orders, but endorsed CBA in the Unfunded Mandates Reform Act of 1995 with respect to standards costing $100 million or more.

In some ways, we now face greater challenges than we have ever faced. Greenhouse gases have raised global average mean surface temperature. The major scientific reports tell us that this warming triggers larger and more frequent wildfires, increased flooding, drought, more violent weather events, and the spread of infectious diseases.[2] These consequences have begun and scientists tell us that these and other

[1] *See* OZONE PROTECTION IN THE UNITED STATES: ELEMENTS OF SUCCESS 31, 33 (Elizabeth Cook, ed. 1996); EDWARD A. PARSONS, PROTECTING THE OZONE: SCIENCE AND STRATEGY 4 (2003).
[2] *See* U.S. GLOBAL CLIMATE CHANGE RESEARCH PROGRAM, U.S. NATIONAL CLIMATE ASSESSMENT 20, 38 (2014) [hereinafter, NATIONAL CLIMATE ASSESSMENT].

consequences will become much more extreme absent rapid phase-out of greenhouse gases. At the same time, as the Flint lead crisis illustrates, the infrastructure we built to deliver clean water in the 1970s has begun to crumble and needs replacement. And we face the challenges of combating international terrorism, sometimes through rulemaking. While we have made progress, the need for federal standards has hardly gone away. Tax-paying Americans expect the government they fund to ensure that our citizens have clean water, healthful air quality, a livable climate, and a good measure of safety and security. If we fail to deliver these essentials, Americans may suspect that "the game is rigged" and vote for extremist demagogues.

My testimony today focuses on the question of whether the OIRA process contributes to our ability to sensibly meet the major challenges government standards address. And if not, how might we improve the process, so that our government efficiently carries out its responsibilities.

PHILOSOPHY

President Reagan established OIRA review to reduce the burdens standards impose on regulated firms.[3] Because of this, corporate interests seeking to avoid meeting reasonably stringent standards have long supported strong OIRA review. Unfortunately, almost all measures reducing industries' burdens do so by relaxing standards and increasing the burdens on a public hoping for clean air and water, safety, and a stable financial system. In spite of this, many analysts endorse OIRA review, because they find comprehensive analysis of costs and benefits attractive. They see CBA as a rationalizing reform, ensuring that we do not make huge expenditures to address trivial risks.

CBA has at its heart a very different normative vision than the vision that Congress endorsed in many statutes. The major environmental statutes, for example, see the role of government as securing citizens' rights to breathe clean air and drink clean water. Nevertheless, these statutes do contain balancing elements, mainly in the form of requirements to maximize "feasible" reductions. The feasibility requirement creates a presumption against standards so costly as to cause widespread plant shutdowns. But Congress expected that these statutes would ultimately force technological development as necessary to protect the public from significant environmental harms.

This emphasis on feasibility may explain why environmental law has generated a small net increase in jobs.[4] In 2012, the last year for which we have statistics, environmental regulation accounted for about .2% of mass layoffs, a number consistent with previous Bureau of Labor Standards reports.[5] Financial *deregulation*, by contrast,

[3] *See* Exec. Order No. 12,291 (preamble).
[4] DOES REGULATION KILL JOBS? (Cary Coglianese, Adam M Finkel, and Christopher Carrigan eds., 2013); EBAN GOODSTEIN, THE TRADEOFF MYTH: FACT AND FICTION ABOUT JOBS AND THE ENVIRONMENT (1999).
[5] United States Bureau of Labor Statistics, Extended Mass Layoffs in 2012. (2013) (retrieved March 24, 2015, from www.bls.gov/mls/mlsreport1043.pdf).

was an essential prerequisite to the financial crisis, which produced massive unemployment.[6]

CBA supporters, however, do not view laws as efforts to prevent unacceptable harms, but instead view standard setting as the purchase of a public benefit in the form of an incremental improvement in air, water quality, or safety analogous to purchasing a car, an apple, or a dishwasher. And they want to make sure that the public does not pay more than the benefit is worth. This philosophy leads to an effort to translate the harms standards avoid, such as death and illness, into benefits measured in dollar terms to be compared with the compliance costs. The executive orders recognize this tension in normative philosophy by only requiring that benefits justify cost "to the extent permitted by law."[7] And the Supreme Court has told us that under some standard setting provisions, the law does not permit cost-benefit balancing.[8] Public opinion polls, interestingly enough, show that the vast majority of the public believes we should do "whatever it takes" to protect the environment.[9]

Climate disruption and terrorism should lead to some questions about the normative vision justifying OIRA review. Should we view protection from terrorism, a stable climate, clean water, and healthful air quality as just other goods that we might purchase if they do not cost too much? Or is health a prerequisite for enjoying other the other goods we might purchase? Are a stable climate and safety from terrorist attack prerequisites for a productive economy and a good life?

UNDERSTANDING CBA

Analysts cannot reliably and objectively quantify the costs and benefits of most government standards, because of data gaps and huge uncertainties. Because of these uncertainties, CBA's results depend heavily on the assumptions analysts use in preparing or evaluating the CBA.

Environmental standards' costs, for example, depend on the cost of implementing technological changes to meet environmental standards. While good data usually exist to estimate future costs, we have less data about the actual costs after implementation. The data we have, however, indicate that EPA and OSHA frequently overestimate cost.[10] This

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[6] *See* David M. Driesen, *Legal Theory Lessons from the Financial Crisis,* 40 J. CORP. L. 55, 63-71 (2014).
[7] Exec. Order No. 12,866 §1(b).
[8] *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457, 471 (2001) (forbidding consideration of cost in setting National Ambient Air Quality Standards); American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 510-512 (1981) (OSHA need not consider cost in regulating toxic substances in the workplace); *cf.* Entergy Corp. v. Riverkeeper, 556 U.S. 208, 226 (2009) (allowing use of CBA for water intake standards).
[9] *See, e.g.,* Monica Anderson, For Earthday, How Americans View Environmental Issues (April 22, 2016), http://www.pewresearch.org/fact-tank/2016/04/22/for-earth-day-heres-how-americans-viewenvironmental-issues/.
[10] *See* HART HODGES, ECON. POL'Y INST., FALLING PRICES: COST OF COMPLYING WITH ENVIRONMENTAL REGULATIONS ALMOST ALWAYS LESS THAN ADVERTISED (1997); OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG. OTA-ENV-635, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS ON OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH (1995); RUTH

overestimation occurs because of unanticipated innovation in response to federal standards and because firms use competitive bidding to drive down prices of known technologies once they face a compliance obligation.

Benefits estimates prove much more problematic. Quantification requires two steps, quantitative risk assessment and monetization.

Quantitative risk assessment seeks to estimate the amount of death, illness, and ecosystem destruction a given proposed standard will prevent. As a rule, we lack sufficient data to make these predictions reliably.

Because of the difficulties of benefit estimation, government agencies often cannot provide a dollar estimate of their standards' benefits. For example, when the Office of Homeland Security reported the costs and benefits of its standard requiring the airlines to help the federal government to check passenger lists against terrorism watch lists and respond to the search results, it quantified the costs at about $300 to $400 million a year, but did not quantify the rules' benefits.[11] Instead, it simply stated that assigning the checking of passenger lists to the federal government rather than the airlines would improve the accuracy of these checks and "may" increase "aviation security."[12] The Office of Homeland Security could not quantify the benefits from this very expensive standard, because it could not know how many terrorist attacks this marginally improved passenger checking would thwart (if any) or how many people a prevented terrorist attack would otherwise have killed.[13]

When agencies can provide an estimate of the benefits, that estimate is always very incomplete, because only some of the benefits can be quantified. Often, the benefits that resist reliable quantification are the most important benefits generated by the rule. For example, scientists warn us that various feedback loops have the potential to create rapid warming in a very short amount of time, producing a catastrophe. Integrated assessment models used to estimate the benefits of reducing greenhouse gas emissions fail to adequately take this possibility into account, because the magnitude and probability of such run away warming is unknown. Some prominent economists find this

RUTTENBERG, NOT TOO COSTLY AFTER ALL: AN EXAMINATION OF INFLATED COST ESTIMATES OF HEALTH, SAFETY, AND ENVIRONMENTAL PROTECTIONS (2004); Winston Harrington et al., *On the Accuracy of Regulatory Cost Estimates,* 19 J. POL'Y ANALYSIS & MGMT. 297 (2000); Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation,* 80 TEX. L. REV 1997, 2042-44 (2002).

[11] Report Under 5 U.S.C. § 801(A)(2)(A) on a Major Rule Issued by the Department Of Homeland Security, Transportation Security Administration Entitled "Secure Flight Program" (Rin: 1652-Aa45).

[12] Id.

[13] *See* TRANSPORTATION SECURITY ADMINISTRATION DEPARTMENT OF HOMELAND SECURITY, REGULATORY FLEXIBILITY ANALYSIS, TRADE IMPACT ASSESSMENT, AND UNFUNDED MANDATES DETERMINATION NOTICE OF PROPOSED RULEMAKING, LARGE AIRCRAFT SECURITY PROGRAM 38 (July 31, 2008).

omission so disturbing that they characterize CBA of climate disruption as nearly useless.[14]

For benefits that can be estimated, the magnitude of a benefit estimate depends heavily on contestable assumptions. For example, often we have data about a carcinogen's effects on a small population of laboratory mice exposed to high doses of a chemical, but no data on that chemical's effects on humans. In order to predict how many human cancer deaths or illnesses low dose exposure of a large human population will produce based on these data, risk assessors must use a model seeking to extrapolate from the animal data. But we do not know enough about cancer to know how to construct a reliable model, so these predictions depend on contestable and uncertain science policy judgments about how to do this extrapolation.[15] Because different extrapolation models usually lead to radically different results, the National Academy of Sciences recommends expressing benefits as a range rather than a point estimate.[16] An honest estimate of the range of potential benefit estimates usually proves quite wide.

The second step, monetization, involves assigning a dollar value to the consequences predicted by the risk assessment. The idea of assigning a dollar value to lost human life and illness raises difficult moral issues and the methodologies used have proven deeply problematic and incomplete.[17]

OIRA'S ROLE

OIRA consists primarily of economists with general training in economic principles but little or no training in the sciences underlying risk assessment. Given its limited expertise, one might expect OIRA to confine itself primarily to making sure that monetization in CBA in economically significant standards conforms to the best economic practices. In fact, it has assumed a far broader role.

OIRA often approves standards it reviews without modification especially outside the environmental area. But when it uses its review authority to press government agencies to change their standards, it almost invariably favors laxer standards or no standard at all.[18] This has been true under all administrations, Democratic or Republican. As a result, many government agencies self-censor, not daring to propose standards that would meet statutory objectives well, because of fear that OIRA will delay or stop the standard setting process.[19]

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[14] Robert Pindyck, *Climate Change Policy: What do the Models Tell Us?*, 51 J. ECON. LIT. 860 (2013); Martin L. Weitzman, *On Modeling and Interpreting the Economics of Catastrophic Climate Change*, 91 REV. OF ECON. & STAT. 1 (2009)

[15] *See* Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1619-1622-27 (1995).

[16] *See id.* at 1637-38.

[17] *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004),

[18] *See* David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLORADO L. REV. 335, 352-85 (2006).

[19] *See* GENERAL ACCOUNTING OFFICE (GAO), RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 130 (2003).

These interventions rarely have much to do with CBA. OIRA regularly intervenes in rulemaking where data limitations have made CBA impossible.

Even when agencies carry out CBA, CBA's results almost never influence the direction of OIRA's intervention. Even when the CBA shows that the limited set of monetized benefits outweigh the costs and OIRA does not appear to contest this conclusion, OIRA has pressed government agencies to weaken their proposed standards.[20]

OIRA's interventions usually have little to do with sound economics. For example, OIRA pressed EPA to weaken limits on motorcycle air emissions on the ground that the catalytic converter reducing emissions poses a safety threat.[21] It backed off this amateur engineering judgment only after motorcycle manufacturers convinced OIRA that its concerns were baseless.[22] Sometimes, OIRA's idiosyncratic grounds for opposing standards push agencies into making illegal decisions. For example, OIRA urged EPA to interpret a Clean Water Act mandate to use the best available technology to reduce water intake harming fish near power plants to substitute restoration of damaged fish habitat for prevention of harm.[23] The Second Circuit held that EPA's decision to acquiesce to this demand violated the Clean Water Act.[24]

These random pressures coming from general OIRA bureaucrats with much less relevant expertise than the employees of the specialized agencies they oversee add to already formidable pressures that agencies face to inadequately address global climate disruption and other daunting challenges. Most EPA rulemaking, for example, excites significant well-funded opposition from regulated polluters, who are well equipped to raise any valid concerns that might exist. They file voluminous comments, meet with EPA officials often, and then sue EPA in almost all cases, even though the agency regularly makes numerous adjustments to address their concerns.[25] Furthermore, the courts will reverse EPA's decisions if it fails to adequately address industry's thousands of pages of comments and produce a reasonable decision. These combined pressures have slowed standard setting to a crawl even for the most urgent problems and frequently produce timid decisions that fail to adequately address the concerns that motivated the standards. OIRA review changes our system of checks and balances into a veritable obstacle course of checks with precious little balance.

[20] *See, e.g.*, Driesen, *supra* note 18 at 369-70.
[21] *See* Responses to OMB Questions/Issues Highway Motorcycles Final Rule, item 13 in Docket A-2000-02, IV-H-7 (Oct. 21, 2003).
[22] *See* Memorandum from Karl Simon, OTAG to Air Docket A-2000-02, IV-E-26 (Dec. 1, 2003).
[23] GAO, *supra* note 19, at 195-96.
[24] *See* Riverkeeper, Inc. v. U.S.E.P.A., 358 F.3d 174, 189 (2nd Cir. 2004), *reversed in part on other grounds sub. nom.*, Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009).
[25] *See, e.g.*, Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 108-09, 123-36 (2011).

OIRA does not confine its review to economically significant standards—those generating $100 million of compliance cost or more. Indeed, OIRA reviews economically insignificant standards much more often than economically significant ones.[26]

OIRA, however, sometimes does base its review on completed CBA and seeks changes that it views as improving the quality of the CBA. Often, however, its disputes with government agencies involve its economists second-guessing agency science policy judgments that OIRA is ill-equipped to evaluate.

I have, however, found no standards where OIRA review performs the function its most thoughtful supporters envision for it: weeding out standards that involve huge expenditures for very little benefit. Rather, OIRA review functions as a one-way ratchet, almost always seeking to weaken standards whenever OIRA seeks changes, regardless of CBA's results.[27]

OIRA review functions as a one-way ratchet in another sense as well. OIRA review always delays standard setting, never speeding it up, thus making the standard setting process extremely inefficient. This problem has grown much worse in recent years. The average review time over the last few years exceeds the default review period provided for in the executive order of 90 days.[28] In recent years, a significant number of OIRA reviews have lasted more than a year.[29] In many contexts, delayed standards translate into more avoidable deaths, injuries and illnesses.[30] Furthermore, agencies withdrew 22 proposed public safeguards in 2013 and 2014 that had been subject to reviews for more than a year. The Obama administration seems to have substituted a non-transparent pocket veto for return letters that might explain why OIRA has not approved a standard.

RECOMMENDATIONS

OIRA review does not perform the rationalizing function that CBA supporters have envisioned for it. Even without passing fresh legislation, we could improve this process' efficiency. Some recommendations along these lines follow:

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[26] *See, e.g.*, GAO, FEDERAL RULEMAKING AGENCIES INCLUDED KEY ELEMENTS OF COST- BENEFIT ANALYSIS, BUT EXPLANATIONS OF REGULATIONS' SIGNIFICANCE COULD BE MORE TRANSPARENT 36 (2014).
[27] *See* Driesen, *supra* note 18, at 352-85.
[28] The executive order allows extension of this default review period, but OIRA has abused this authority and it should be withdrawn.
[29] Historically, about two reviews per year have undergone OIRA review lasting more than a year. The number or reviews lasting more than a year reached a peak of 47 in 2013, declining to 8 in 2015, about four times the historical average. In 2015, 47 additional rules were delays by periods exceeding six months, almost 5 times the historical average.
[30] *See, e.g.*, Nell Greenfieldboyce, *Silica Rule Changes Delayed While Workers Face Health Risks* (February 7, 2013), http://www.npr.org/sections/health-shots/2013/02/07/171182464/silica-rule-changes-delayed-while-workers-face-health-risks.

1. *Exempt Standards Addressing Global Climate Disruption and International Terrorism from OIRA Review.*

Efforts to monetize the value of greenhouse gas reductions are radically incomplete and will remain so. Greenhouse gases accumulate in the atmosphere every year and remain there for decades or even centuries.[31] Avoiding dangerous climate disruption requires a vigorous and rapid response because delay causes irreversible damages and may prove catastrophic.[32] Similarly, we cannot reliably estimate the benefits of antiterrorism measures, which also address potential catastrophes on unpredictable probability and magnitude. In these contexts, OIRA review's costs far outweigh any conceivable benefit.

2. *Confine OIRA Review to Standards Costing $100 Million a Year or More.*

OIRA has a small staff, which struggles to understand the intricacies of many different types of standards. Its anti-regulatory activism has led it to cast a wide net instead of having focused priorities. Since the primary justification for OIRA review stems from anxiety about costly standards, OIRA should focus its efforts on the most costly standards. This focus should help OIRA eliminate the problem of inordinate delay in the review process by reducing OIRA's workload.

3. *End OIRA Review of Risk Assessment.*

OIRA review of CBA should focus on matters within the expertise of economists, such as monetization methods. OIRA's efforts to second-guess agency science/policy determinations in risk assessment are unlikely to add value and can lead to resource intensive disputes. Government needs to be reasonably effective and efficient. If we need review of risk assessment assumptions, objective scientific review panels should provide it from time to time, not ad hoc debates during multiple rule-making proceedings with economists lacking the needed scientific expertise.

4. *Direct OIRA to Seek Stricter Standards when Benefits Significantly Outweigh Costs.*

Economic theory defines optimal environmental regulation as regulation that balances costs and benefits. This means that when benefits clearly outweigh costs, optimization requires making standards stricter in order to maximize net benefits. OIRA has almost never challenged agencies to adopt stricter standards than they have proposed, even when CBA shows that stricter standards would conform better to economic theory. It should do so to the extent permitted by law.

[31] *See* NATIONAL RESEARCH COUNCIL (NRC), INFORMING AN EFFECTIVE RESPONSE TO CLIMATE CHANGE 185 (2010).
[32] *See* NRC, AMERICA'S CLIMATE CHOICES 25 (2011).

5. *Give Non-Quantifiable Benefits Their Due.*

Government agencies should list the benefits its rule provides in order of importance in their regulatory impact analysis, whether they can be quantified or not. When important benefits cannot be quantified, conclusions that monetized costs outweigh monetized benefits should be given little weight.

6. *Direct Agencies to Disregard OIRA Comments When OIRA Review Lasts More than 90 Days and When Necessary to Meet a Statutory Deadline*

OIRA review has contributed to regular violations of statutory deadlines and other unacceptable delays.[33] It has also politicized the administrative process by giving the White House too much control over expert agencies, which should be free to implement statutory directives appropriately regardless of OIRA's political proclivities. A focused OIRA with useful insights should be able to influence the agency appropriately within a 90-day window, without the capacity to delay standards excessively. The current executive order purports to limit review time, but has not succeeded because OIRA's review is not subject to discipline.

Conclusion

OIRA review has not contributed to our efforts to sensibly address critical problems. OIRA needs to narrow its review tasks so as to permit its small staff to review proposed standards in a timely manner in contexts where its economic expertise seems most relevant. Thank you very much for the opportunity to testify. I welcome your questions.

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[33] *See generally Stuck in Purgatory*, NEW YORK TIMES (June 30, 2013).

Mr. MARINO. Thank you. Dr. Holtz-Eakin.

TESTIMONY OF DOUGLAS HOLTZ-EAKIN, PRESIDENT, AMERICAN ACTION FORUM

Mr. HOLTZ-EAKIN. Thank you, Chairman Marino, Ranking Member Johnson, Congressman Trott, for the privilege of being here today. You have my written statement. Let me make three brief points:

Point Number 1 is there has been a clear explosion of regulatory burdens in the Obama administration. OIRA reports that it has issued 453 economically significant regulations. That's 38 percent more than the Bush administration. That's 41 percent more than the Clinton administration. It's above historic norms by a large margin.

At the American Action Forum, my colleague, Sam Batkins and his staff, do a comprehensive review of regulatory issuance, they read every single final regulation, and the agency self-reported compliance cost. Over the 7½ years of the Obama administration, the total is $800 billion in new regulatory burdens. That's about $250 for every house, every person in the United States, and given the concerns that have been expressed by the Chairman and others about the pace of midnight rulemaking, that total is certainly going to go up perhaps dramatically.

The second point is that these burdens do not disappear. They have economic consequences. The regulatory burden has to show up in the form of higher consumer prices, or has to show up in the form of lower wages in employment, or reduce profits and the ability of firms to survive, or even desirability to enter.

American Action Forum looked at 36 major regulations, as I indicated in my testimony, and found that they raised consumer prices by a cumulative $11,000. These are significant impacts on prices. This isn't AAF alone thinking this. When the Department of Labor issued a silica rule that had a $9 billion cost, it pointed out that for some of the smaller firms, those costs would represent 90 percent of their profits, but that it was not to worry. That would simply be passed on to consumers.

If it doesn't go to consumers, it's got to go somewhere else, so in work, we looked at the impact of the 2008 ozone rule, and if you look at nonattainment counties compared to those in attainment, the impact is about $56.5billion in wages, or about $700 per worker, and a loss of something like 240,000 jobs.

So you're going to see these burdens in prices or wages and employment, or just in general economic growth. I mean, if you look at $800 billion, that's $100 billion a year and 60 million paperwork hours a year. You have to believe that if we had $100 billion tax increase every year, everyone in America would know it, it wouldn't be a hidden cost, and a lot of people would be saying, Gee, I'm not so sure that's a good idea. This has been a terrible recovery by historical standards.

And, I think it is no coincidence that for the past 3 years, for the first time, the rate of birth of new firms in the U.S. economy has dropped below the rate at which firms fail. We are not seeing the traditional American entrepreneurs who show up in the data, and the regulatory burden, I think, is contributing to that.

Final point is that the retrospective review process is not taking away existing regulations, so this is just new layers of burden on top of the old. The President signed, as has been mentioned, Executive Orders 13563 and 13610. If you look at our analysis of the impacts of those EOs, they raise the cost of the regulatory state by $16 billion. It went the wrong direction from a retrospective review point of view.

And, one of reasons is new regulations, things like the gainful employment rule or new greenhouse gas controls are being classified as retrospective, when, in fact, they're new regulations, and all of this suggests that the EO process, not just with President Obama, with previous presidents, is not a powerful enough tool for retrospective review, and that Congress should think about an alternative mechanism, whether it be the SCRUB Act or other legislation I know the Committee has considered. I thank you for the chance to be here today, and I look forward to your questions.

[The prepared statement of Dr. Holtz-Eakin follows:]

Assessing the Obama Years: OIRA and Regulatory Impacts on Jobs, Wages and Economic Recovery

United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Douglas Holtz-Eakin, President*
American Action Forum

July 6, 2016

*The views expressed here are my own and not those of the American Action Forum. I thank Sam Batkins for his assistance.

Chairman Marino, Ranking Member Johnson, and Members of the Committee thank you for the opportunity to appear today. In this testimony, I wish to highlight:

- The cumulative regulatory burden of this administration is staggering by recent historical standards. During the past seven and one-half years, the Office of Information and Regulatory Affairs (OIRA) has concluded review of 453 "economically significant" rules. This figure is 38 percent more than the Bush Administration and 41 percent more than the Clinton Administration. These measures have had a profound impact on economic growth, wages, and prices for almost every consumer good imaginable.

- Under Executive Orders 13,563 and 13,610, the administration endeavored to "modify, streamline, expand, or repeal" burdensome regulations. Unfortunately, a review of the administration's reports finds that there has been more expansion than repeal. The administration's latest report added $16 billion in net costs and 6.5 million paperwork hours. Affordable Care Act regulations and expensive Environmental Protection Agency (EPA) measures are often categorized as "retrospective."

- Although OIRA Administrator Howard Shelanski has pledged to curtail the "midnight" rush of regulation, the trends through the first half of 2016 reveal a surge of pre-midnight rules. Compared to similar periods during President Clinton and President Bush's tenure, the Obama Administration has approved 38 percent more economically significant regulation than any time since 1996.

Let me provide additional detail on each in turn.

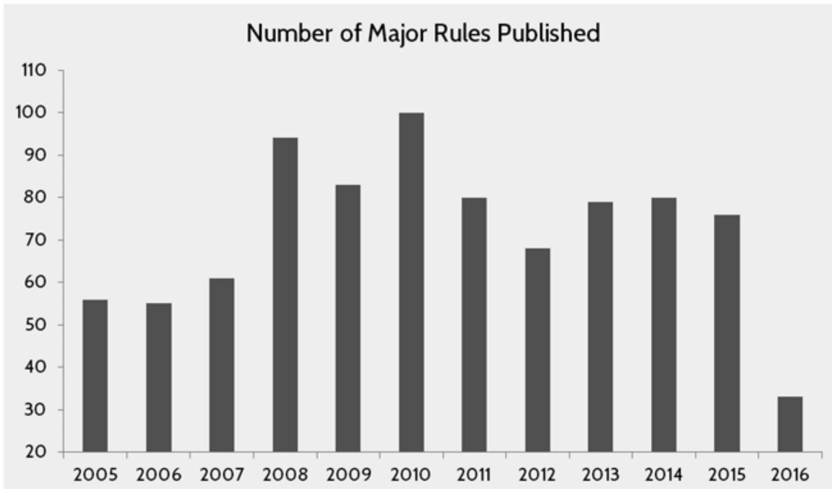
OIRA Since 2009

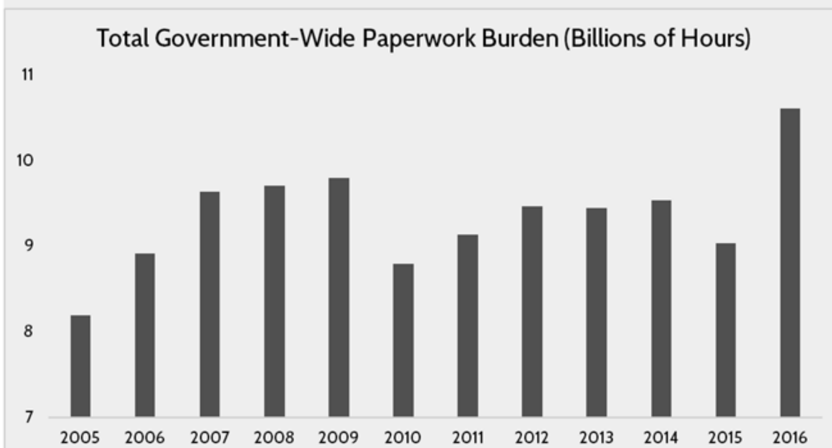
By virtually any metric, output at OIRA, measured by major regulation, paperwork, and costs, has been at historically high levels. This reality should not surprise Congress. The president signed two massive overhauls of the financial services and health care industries and has implemented an expansive inter-agency regulatory approach to greenhouse gas emissions. These reforms will take the shape of major regulation and they will impose costs on the economy. This reality should not be in dispute.

With that in mind, here are a few facts on regulation taken from government sources: since FY 2000, the paperwork burden has increased from 7.3 billion hours to more than 10.6 billion hours, a 45 percent increase.[1] OIRA has concluded review of 453 "economically significant" rules. This figure is 38 percent more than the Bush Administration and 41 percent more than the Clinton Administration. Currently, Americans must manage more than 20,000 government forms, mostly from the Departments of Health and Human Services, Agriculture, and Treasury.[2] In 2010, federal agencies published 100 "major" rules, more than any other year in the history of the

[1] Office of Management and Budget, "Information Collection Budget of the United States Government 2014," available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb_2014.pdf; http://www.reginfo.gov/public/do/PRAReport?operation=11.
[2] American Action Forum, "How Many Federal Forms are There?" available at https://www.americanactionforum.org/insight/many-federal-forms/.

Congressional Review Act. OIRA data make plain that FY 2012 was one of the costliest years for regulation in at least a generation.[3] See below.





[3] Office of Information and Regulatory Affairs (OIRA), "2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/2013_cost_benefit_report-updated.pdf.

The American Action Forum, in an effort to track 100 percent of federal rulemakings, has tallied the cumulative burden in every year since 2006. Looking to document the impact beyond "economically significant" rules, AAF has tracked thousands of regulations during this period. All of the figures listed below are merely data recorded directly from the Federal Register, the "Daily Journal of the United States Government." There is no re-estimation of agency figures. If an agency states that a rule will impose $3 billion in costs, or save $3 billion, we record the data as listed each day.

From 2009 to present, the federal government has published nearly $800 billion in long-term regulatory burdens from final rules alone.[4] To put this into perspective, it's $2,460 for every person in the U.S. During the past eight years, regulators have consistently published $100 billion in regulation and added more than 60 million paperwork burden hours each year.

What are the implications from such astronomical figures? Someone must bear the costs of regulation. Typically, it's some combination of three parties: 1) owners of a firm through lower profits, 2) employees of a firm through lower wages or fewer jobs, and 3) consumers when these costs are passed on through higher prices. It is often thought that companies alone bear the burden of regulation, but even regulators frequently admit that cost increases are inevitable.

In previous work, the American Action Forum surveyed just 36 major regulations from the administration. Combined, these rules were estimated to increase consumer prices by more than $11,000 – everything from a more expensive car ($3,100), mortgage ($362), microwave ($14), and air conditioner ($320).[5] Annually, regulators also estimate food is at least $14 more expensive and energy $135 pricier because of rules. On the energy efficiency front, a typical consumer purchasing a new furnace fan, refrigerator, and water heater would face an additional "regulatory tax" of more than $620, according to agency calculations.[6]

Take the Department of Labor's recent Silica rule, which will impose more than $9 billion in net present value costs. Some of the small industries affected could bear a cost-to-profit percentage exceeding 90 percent. This was considered a "significant economic impact" on small entities, but the administration predicted these expenditures would simply be passed to the consumer. They wrote, "In OSHA's view, however, affected industries would generally be able to pass on most or all of the costs of the rule in the form of higher prices rather than bear the costs of the rule in reduced profits."[7] This is a brutally honest assessment from regulators that ordinary Americans routinely bear the burdens of federal rules.

Strident proponents of the current regulatory environment respond by noting the estimated benefits of federal rules exceed the costs. True, federal regulations also generate billions of dollars in benefits, but for many rules, those benefits figures are suspect. For example, the 2006 efficiency standards for air conditioners predicted 3.7 million new shipments of air conditioners in 2005. Instead, the year before the standards went into effect, there was a surge in orders, nearly 5.9 million. After the standards took effect, the agency predicted a slight drop in

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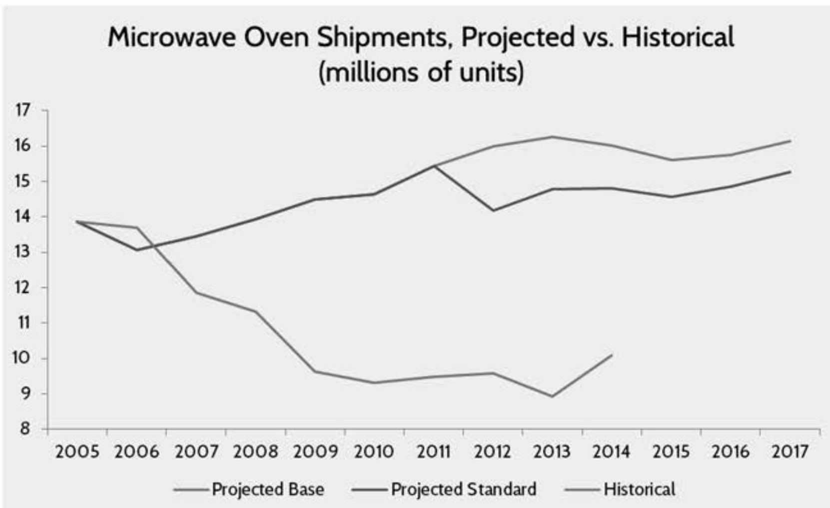
[4] American Action Forum, "Regulation Rodeo," available at http://bit.ly/293w2F0.
[5] American Action Forum, "The Consumer Price of Regulation," available at http://bit.ly/29oNzbl.
[6] American Action Forum, "DOE: Under-the-Radar, Overly Burdensome," available at http://bit.ly/295LRP1.
[7] American Action Forum, "Final OSHA Silica Standards," available at http://bit.ly/29cbq1Q.

shipments, in part because of higher prices. The projected drop was 2.1 percent; the actual decline was 26.1 percent, at a time when unemployment hovered around 4.4 to 4.8 percent. For the benefits of this rule, projected shipments have exceeded actual shipments. This suggests the agency likely overestimated the benefits of the rule.

Likewise, for another efficiency standards rule for microwaves, the actual shipments (in green) compared to projected shipments (in red and blue) demonstrate that regulatory prognostication on benefits is often subject to error.



In some competitive markets, firms won't be able to pass costs onto consumers. Frequently, employees must pay through reduced wages or layoffs. During the Obama Administration, we have seen both. The American Action Forum's research found that the Affordable Care Act has reduced small business pay (20 to 99 workers) by at least $22 billion annually. In addition, regulations and rising premiums have reduced small business employment by 350,000 jobs nationwide.[8]

Although not an Obama-era regulation, the 2008 ozone standards have resulted in similar effects. The American Action Forum compared non-attainment and attainment counties and found the following: non-attainment counties lost $56.5 billion in total wages, $690 per worker, and 242,000 jobs between 2008 and 2013.[9] Rather than wait until full implementation of past

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[8] American Action Forum, "ACA's Impact on Small Business Wages and Employment," available at http://bit.ly/295M7NR.

[9] American Action Forum, "County-Level Effects of EPA's 2008 Ozone Standards on Employment and Pay," available at http://bit.ly/29oNUec.

standards, OIRA and the administration released another round of standards last year, which will cost $1.4 billion and add more than 330,000 paperwork hours onto states and private industry.[10]

These projections might appear mundane, or extreme, depending on one's perspective, but even regulators routinely admit that regulation can reduce employment. Based on a review of rules from 2012 to 2015, the American Action Forum found regulators have projected more than 85,700 lost jobs from regulation, or roughly the population of Asheville, NC.[11] This figure is also based on a just a fraction of overall major regulation; many agencies decline to estimate the impact of regulation on employment. However, in 2015 alone, the Department of Energy projected that its seven significant regulations could cut 8,000 manufacturing jobs.

OIRA's perspective on the regulatory landscape is decidedly different from what has been outlined here. The agency often portrays regulatory costs as just fraction of regulatory benefits. Yet, by OIRA's own admission, its Report to Congress omits scores of significant rulemakings from its total. By failing to quantify the ever-growing burden from independent agencies, the report often undercounts regulatory costs. The Volcker Rule alone will impose $4.3 billion in burdens, but that figure wasn't tallied in OIRA's FY 2014 report.[12] Furthermore, large burdens emanating from Dodd-Frank are also uncounted: Resource Extraction, Conflict Minerals, and the Volcker Rule. In 2012 and 2013 alone, independent agencies published eight rulemakings with at least $100 million in annual costs, for a total burden of more than $4 billion annually. Cabinet agency rules that fall just under the economically significant threshold are also omitted from OIRA's main tabulation.

The original purpose of the Regulatory Right to Know Act was to provide an accounting of all regulatory costs and benefits from "Federal rules," not just cabinet agency rules, in an effort to mirror the fiscal budget. Although the OIRA Report to Congress does provide a detailed accounting, excluding all independent agencies from its yearly tally severely skews the data. Monetizing the benefits from actions by financial regulators, who tend to be independent from the executive, might be difficult, but recent case law suggests it might soon be an imperative.

In addition, the role of OIRA and agencies in using discount rates can sometimes turn a regulation with net benefits into one with net costs. Often misunderstood or unknown by the general public, discount rates are simply an acknowledgement that costs and benefits do not take place during the same time horizon. To correct for this asymmetry, regulators discount the costs and benefits that may accrue immediately or in the distant future.

For example, using agency math for efficiency standards for refrigerators, a five percent discount rate yields modest net savings for consumers: $24. However, employing a discount rate that actually represents middle-class consumer preferences (11 percent) results in net costs of $30 for

[10] American Action Forum, "Regulation Rodeo," available at http://bit.ly/1UwmvqL.
[11] American Action Forum, "Regulators Admit Rules Could Eliminate 85,000 Jobs," available at http://bit.ly/292u4DU.
[12] Office of the Comptroller of the Currency, "Analysis of 12 CFR Part 44," available at http://www.occ.gov/topics/laws-regulations/legislation-of-interest/volcker-analysis.pdf.

consumers.[13] For reform, Congress and OIRA should determine the best discount rate that reflects actual consumer preferences, not the figure that most easily justifies regulation.

Finally, although OIRA still struggles with transparency, its role, given the regulatory output, is more important today than ever. Under OIRA's watch, it continually fails to follow the Regulatory Right to Know Act by submitting tardy reports to Congress on the costs and benefits of federal rules. In addition, it has failed to issue an Information Collection Budget of the U.S. for the past two years, an inexcusable delay that has never been explained.[14] There are also constant problems with agency and OIRA compliance with the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the Congressional Review Act. If there is a reason talks of regulatory reform and enhanced OIRA scrutiny are prevalent, it is because the current law is often ignored or perhaps willfully flouted.

The figures above are not meant to paint a picture that OIRA does not serve an important role. Its role in a well-functioning regulatory state is essential. Annually, its staff of around 40 review approximately 400 rulemakings to determine if rules serve the intended statutory purpose without unduly burdening the economy. Despite harsh criticism that OIRA causes unnecessary delays, the agency limits the total lifetime of major rulemakings (from first publication in the Unified Agenda to final publication in the Federal Register) to 401 days.[15] Although OIRA has approved record levels of regulation recently and has struggled with transparency, there is still plenty of room for sensible reforms of the agency.

Additive Retrospective Review

Although President Obama has issued several major executive orders outlining his vision for the regulatory state, to date there have been relatively modest efforts to "modify, streamline, expand, or repeal" burdensome regulations. Instead, the administration has implemented more regulations to expand than to repeal.[16]

Despite reform attempts, every year Democrats and Republicans bemoan the current state of regulation. President Obama continued that tradition when he issued Executive Order 13,563, demanding that the "regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It also called on regulators to look back at existing regulations to "modify, streamline, expand, or repeal" those that were redundant or ineffective.

After more than five years of regulatory reform, it's clear that regulators have sought to expand regulations more than modify. Retrospective review reports are filled with more new proposals designed to address current issues than regulatory reviews designed to examine whether past rules succeeded or failed. For example, energy efficiency standards are included in retrospective

[13] American Action Forum, "Discounting Consumers: How DOE's Wishful Thinking Leads to Higher Costs, Fewer Jobs," available at http://bit.ly/292tWEv.
[14] Office of Management and Budget, "Information Collection Budget of the United States Government," available at http://1.usa.gov/295auZs.
[15] Regulation, "What Regulatory Ossification?" available at http://bit.ly/294PLt0.
[16] 76 Fed. Reg. 3,821, available at http://1.usa.gov/1CzWyCQ.

reports, even though they are implementing new standards. The Department of Education continues to insist the new "Gainful Employment" regulation that adds billions of dollars in costs and millions of burden hours was somehow designed to scrutinize "existing significant regulations." It clearly was not.

Regulators either engage in an honest attempt to examine the regulatory state by looking back at past rules and measuring their costs and benefits, or they add new burdens that address current problems. Too often, it is the latter. In the most recent retrospective reports, the administration managed to add $16 billion in regulatory costs, even though the reports are ostensibly deregulatory in nature. For example, with all the problems that the Department of Veterans Affairs has had in the past, they managed to list just one specific rulemaking. By comparison, the Department of Transportation listed 43 rulemakings, planning to cut $847 million in costs and remove 21 million hours of paperwork.[17]

The cabinet-wide success of retrospective review is incredibly uneven. Typically, agencies implement new regulation under the guise of retrospective review. Take the Department of Health and Human Service's recent inclusion of a food safety rule, implementing the Food Safety Modernization Act of 2011 (coincidentally, the same year President Obama signed his lodestar executive order on reform). The rulemaking imposes $3.3 billion in long-term costs and imposes 6.2 million paperwork burden hours.[18] It isn't retrospective. If it is, then all new rulemakings are retrospective. How can a rulemaking be retrospective if it is implementing a new law?

New greenhouse gas standards are retrospective because they "look back" at previous regulations addressing emissions at power plants and then add new standards? Thankfully, EPA has not included these measures in its retrospective reports, but it does include its "Tier 3" rulemaking, which imposes $1.5 billion in annual burdens and its 2017 to 2025 vehicle efficiency standards, at an annual cost of $10.8 billion. Incredibly, the administration routinely includes new Affordable Care Act regulations in its retrospective reports, perhaps hoping that no one will notice. Its most recent report included a rule for "Covered Outpatient Drugs," adding $330 million in costs and 3.1 million new paperwork hours.

On its website touting the success of retrospective review, OIRA proclaims, "review of regulations has resulted in finalized initiatives expected to achieve $20 billion in savings over five years."[19] We have never seen an itemized list of these savings, but we suspect the final annual cost savings reach $7.2 billion, with another $420 million in proposed annual savings. By comparison, measures that increase costs that were included in these reports will add more than $18.9 billion in annual costs. Thus, on net, the regulatory burden will increase by $11.7 billion because of rulemakings contained in these supposedly "retrospective" reviews. After five years, the retrospective review effort might have earned the administration some public relations plaudits, but from a public policy perspective, it has failed.

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[17] American Action Forum, "Administration's First 2016 'Regulatory Review' Adds $16 Billion in Costs," available at http://bit.ly/29O8oIx.
[18] American Action Forum, "Regulation Rodeo," available at http://bit.ly/1UmtdD8.
[19] Office of Management and Budget, "Retrospective Review of Regulations," available at http://1.usa.gov/1QRqpYE.

The failure of recent retrospective review efforts masks what could have been a positive agenda for regulatory reform. All the ingredients were present for reform: a willing Congress, voters generally upset with the amount of regulation, and a President who had expressed an interest in reform. The House has passed several measures that would have more effectively addressed retrospective review than the president's agency-led approach.

The Searching for and Cutting Regulations that are Unnecessarily Burdensome Act (SCRUB) would delegate authority to an independent commission to determine which past regulations are no longer generating significant benefits at an acceptable cost. According to past estimates from the American Action Forum, SCRUB could save more than $48 billion in costs and 1.5 billion paperwork hours.[20]

In addition, a well-designed regulatory budget is another possible tool Congress and the administration could use to address past regulation. The United Kingdom and Canada have both adopted forms of a regulatory budget, without environmental or workplace safety calamities.[21] A budget is merely the recognition that society has a finite amount of resources. We employ budgets for fiscal policy and limit taxes, but regulators are free to regulate as much as possible, absent intervention from the courts and occasionally OIRA. A budget would allow regulators to prioritize the most pressing regulations annually, while giving them credit for reforming past rules. A budget would also give Congress much needed input on the nation's regulatory output.

Twilight and Midnight Regulation

Rushing regulation after a presidential election and before the next president takes office, defined broadly as "midnight regulation," has plagued administrations from President Carter, to Presidents Clinton and Bush. To paint a picture of how swiftly some rules can move through the process, an economically significant rule for heat pumps was proposed in October 2000 and finalized by January 2001, a period of just 107 days.[22] There are comment periods that last longer than the entire history of that significant rulemaking.

Like his predecessors, Administrator Shelanski has issued a memo warning against a rush in federal rules this year. He urged, "Agencies should strive to complete their highest priority rulemakings by the summer of 2016 to avoid an end-of-year scramble that has the potential to lower the quality of regulations that OIRA receives for review and to tax the resources available for interagency review."[23] President George W. Bush's Chief of Staff made similar pleas in 2008, but the midnight regulatory rush still proceeded at a historic pace.

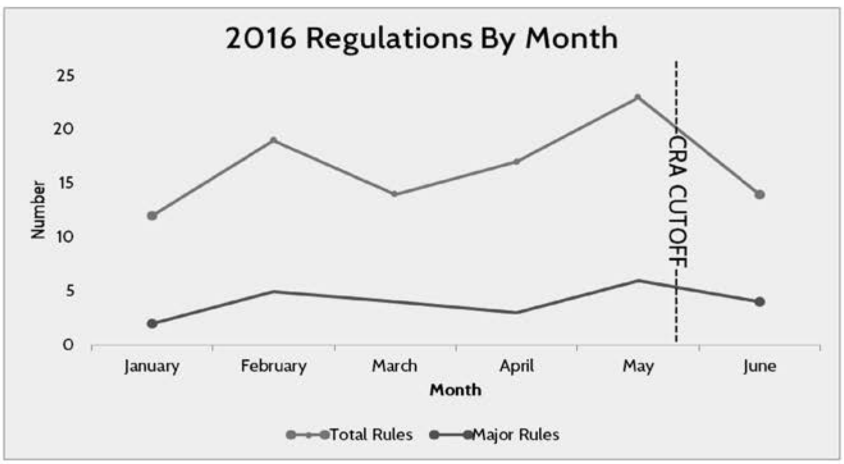
Congress and the public won't know the success of Administrator Shelanski's memo until next year. The result of the upcoming election will largely determine the speed with which the administration,

[20] American Action Forum, "Sue and Settle Reform, SCRUB Act Could Save $48 Billion, 1.5 Billion Hours," available at http://bit.ly/1ns1zX2.
[21] American Action Forum, "Why Critics of a Regulatory Budget Have it Wrong," available at http://bit.ly/295hc1y.
[22] Office of Information and Regulatory Affairs, "Standards for Central Air Conditioners and Heat Pumps," available at 1.usa.gov/1UOwQi7.
[23] Office of Information and Regulatory Affairs, "Regulatory Review at the End of the Administration," available at 1.usa.gov/1TH9753.

OIRA, and independent agencies proceed this fall. However, the administration already has an aggressive regulatory record and pending agenda planned this year.

To date, regulators have finalized more than $87 billion in final rules, accompanied with 46 million hours of paperwork.[24] There is some evidence the rush in regulation is already in the past. Faced with the carryover provision of the Congressional Review Act (CRA), which the American Action Forum estimated initially at May 17, 2016, there were obvious incentives for the administration to finalize as many controversial regulations as possible without the fear the next Congress and administration could rescind the measures.[25]

For example, through the first five months of the year, regulators have approved 58 significant rulemakings; the next two closest outputs during presidential election years were 42 and 39 rulemakings, respectively. In April, the administration released 16 significant rules and in May it approved 14. These include final overtime standards, the Silica rule, revised food labeling standards, and a fracking measure for oil and gas wells. Below is a graphical look at total and major rulemakings, with a line denoting a probable CRA carryover date.



The graph is hardly a slam dunk in favor of the hypothesis that presidents act to finalize rules before the CRA takes effect, but there is a noticeable spike in May for total and major rules. In May of 2016, OIRA approved 14 significant rulemakings, which was more than any other May in a presidential election year since 1996. Regulators also published $22 billion in costs, compared to just $2.8 billion in costs in May of 2015. Although this data might be suggestive, it doesn't definitively prove that the carryover provision of the CRA rushed certain decisions from the White House.

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[24] American Action Forum, "Regulation Rodeo," available at http://bit.ly/1ndLMvv.

[25] American Action Forum, "May 17, 2016: Regulation Day for Obama Administration," available at http://bit.ly/293w3c0.

Finally, if there is a legitimate rush in regulation, where the life of major rulemakings is measured in days, instead of months and years, Congress has a policy tool to address this abuse: the CRA. Although it has been used only once successfully, the CRA allows Congress the convenience of expedited procedures to address major regulations. If there are potential rules to which a majority of Congress objects, Congress is well within its right to rescind those measures. However, if repealed, they "may not be reissued in substantially the same form," so the CRA is a blunt policy instrument to address rules Congress finds truly objectionable. Allowing Congress to address several measures *en banc* would expedite the process, which the law itself seeks to do in several different ways. Regardless of the process, Congress should use its power to scrutinize rules that lack proper, or any review, and that have significant negative impacts on their constituents.

Conclusion

OIRA has played a critical role in managing the nation's regulatory apparatus for more than a generation. Although critiques of the agency are justified, mainly on transparency grounds, its status as a gatekeeper for federal regulation is vital. Unfortunately, its output during this administration will have profound implications for the American economy. These implications may not show up in national unemployment numbers, but in the wages of hundreds of industries, and in the prices paid by millions of Americans.

OIRA should continue to stand firm against a potential rush of rules this fall and Congress should explore additional reforms to increase transparency, accountability, and curtail inefficient regulation.

Thank you. I look forward to answering your questions.

Mr. MARINO. Thank you. I will start by questioning the witnesses for my 5-minute period.

Dr. Holtz-Eakin, what are some potential reforms that could stem midnight regulations?

Mr. HOLTZ-EAKIN. There are a range, and I think the question is which ones would be the most desirable. So you know, sometimes people want to just put a freeze on regulations. I think that's too blunt an instrument. I prefer to have changes to the regulatory process that would sort of make the midnight rush impossible.

So for example, there is the ALERT Act that the House has looked at. That kind of transparency, knowing what's coming down the line, the timetables for rulemaking would, in fact, styme—stymie the midnight activities. And so, I think look to the entire regulatory process, reform that and stop the midnight rush in the process.

Mr. MARINO. Dr. Beach, when the Administration, whatever the Administration it happened to be, at the end of their period, imposes major changes through guidance or other regulatory dark matter, is the damage—is there damage to the economy and is there damage to our government and our liberties?

Mr. BEACH. Yes, I happen to believe that. I think that when you have an accumulation of regulations, whether it be in the major rules, it be in the minor rules or be in the dark matter that Wayne has so eloquently developed, these add to the cost of investment, they add to the cost of labor, they add to all those costs which go into the operation of a business.

One of the reasons, as Doug pointed out, we have such a low level, a stunningly low level of firm creation has to be in the barriers which we've set up on the cost side, with all good intentions of helping people protect themselves against health and other kinds of injuries. It has prevented a lot of entrepreneurship. I'm very concerned about that.

Mr. MARINO. Mr. Crews, would you care to respond to my question?

Mr. CREWS. The same. Yeah, well, it's one of the things that you look at what OIRA's purview is. There are 3,400 or so rules that go through every year, and OIRA looks at about 500 of them. There are about 60 that it looks at, including budget rules where there are just transfers involved, but then, it's just a very small handful that get any cost analysis at all.

But on top of that, as the economy gets more complex, I think there is a concern now—there was a hearing in the Senate last week on this, of so-called—of agency guidances and memoranda and notices and bulletins. There's a whole word cloud of these things that agencies are using now to effectuate policy, and I think that matters a lot.

We do have some review at OIRA. We didn't talk about it earlier when the administrator was here, but there is a good guidance practices memo from OIRA by which agencies can, they don't have to, present their so-called economically significant guidance. By my brief inventory of it, there are 580 pieces of that, but that's equivalent to the number of major rules at that go through every year. But those are scattered all over the place in terms of where you can find them on agency Web sites, so it's very, very difficult.

We've got a very complex economy now. We've got a lot of new high technologies coming across the board. The FAA just dropped its drone rule 2 weeks ago, and I was just curious about this guidance issue. And, I just glanced—it's a 500-page rule, but I glanced through it quickly, you know, doing some word searching, and there are at least six substantive areas in there where the agency says, Well, we're just going to issue guidance in the future.

The same thing has occurred with the Dodd-Frank law and the Unfair Deceptive Trade Practices principles there, not regulations forthcoming, but the administrator saying: We're not going to issue regulations. You just need to check with us.

FCC was brought up earlier. Page 88 in the 400-page Federal Communications rule on net neutrality, it says: Well, from now on, we're going to be using these administrative notices like the FCC—like the FTC does with respect to antitrust. So you see, we've got a complex economy now that's increasingly at risk of being regulated, not by laws passed by this Congress, not even by the regulations that go through the Administrative Procedure Act but more of this guidance. So that's why I think some of the guidance materials is of great concern.

OIRA does have some authority and even some ability, or it could just take the initiative to look at it and make the disclosure of it much more transparent.

Mr. MARINO. Professor Driesen, I—tell me if I've understood you correctly. You were saying that there's no need for OIRA at all?

Mr. DRIESEN. No. I think we could do without OIRA, but that's not what I've suggested today. What I suggested is that it focus only on these rules that cost over $100 million a year, and that it get out of the couple of areas that are really vital to safeguarding America from real economic calamity like we experienced when we had the deregulation causing the financial crisis, that is, climate disruption and terrorism where the cost-benefit analysis is not going to do us any good because it's too incomplete, and where the science of climate says there're tipping points out there that could set off runaway warming, but we don't know where they are.

And, terrorism is the same way. You don't know what the next thing is going to be, and for that reason you can't quantify the benefits. And there are potential disasters here. So I'm suggesting this now.

Mr. MARINO. Dr. Holtz-Eakin, you heard Professor's comment about quantifying cost, but there are, in my opinion, many other areas where we can quantify cost, and particularly when it comes to jobs, and more so, small businesses. You know, what say you about regulations that have come down at—with this Administration beyond what we've seen in the past, but other Administrations as well, what's it doing to our jobs in the United States, and particularly, small business jobs?

Mr. HOLTZ-EAKIN. I think it's been quite damaging. I understand the argument that says there are the benefits out there that need to be quantified as well, and I want echo what I believe Administrator Shelanski said very well, which is, you should try to quantify everything you can, and that imposes a discipline on the rule-making process that's actually very important.

But it is easy to quantify cost. We take the agencies at face value. I'm not even sure they're right, but even with those estimates, $800 billion of cumulative burden in 7½ years is just like putting $800 billion of taxes onto America's businesses and small businesses, and the evidence on that impact on jobs, wages, growth, is unmistakably bad.

Mr. MARINO. My time is more than expired, and I now ask Congressman Johnson for 5 minutes of questioning, or 6.

Mr. JOHNSON. Thank you. Thank you, sir.

Dr. Holtz-Eakin, do you have any evidence whatsoever that the Obama administration plans a midnight rush of regulations, prior to its exit from the presidency?

Mr. HOLTZ-EAKIN. We know only that in past Administrations, this phenomenon has happened.

Mr. JOHNSON. You don't see any evidence that this is going to happen in this Administration, do you?

Mr. HOLTZ-EAKIN. And, we have some suggested evidence presented in the written testimony of trying to sort of get things out before May, which is likely when the Congressional Review Act hits.

Mr. JOHNSON. There's certainly no new evidence——

Mr. HOLTZ-EAKIN. That's what we know.

Mr. JOHNSON [continuing]. Of a midnight rush. That's kind of like a—kind of like a hidden kind of situation that's sprung on people at the last minute, they can't do anything about it. We don't have any evidence that that's what the Obama administration is planning?

Mr. HOLTZ-EAKIN. If they're planning, they didn't call me.

Mr. JOHNSON. Okay. Well, so you have no evidence. Isn't that correct?

Mr. HOLTZ-EAKIN. The evidence I have I told you about. We have a chart——

Mr. JOHNSON. You have no evidence?

Mr. HOLTZ-EAKIN [continuing]. And, we have history.

Mr. JOHNSON. Okay. All right. Well, let me ask you this: You remember when Alan Greenspan came to testify before Congress back in 2008 about the fact that he had made a mistake in believing that banks and operating—that banks operating in—would be operating in their own self-interest and thus would—it would be not necessary for the government to protect their shareholders and institutions. You remember that?

Mr. HOLTZ-EAKIN. I remember he testified. I don't remember the details of it.

Mr. JOHNSON. And, do you remember he did say that he made a mistake about thinking that we didn't need any regulations?

Mr. HOLTZ-EAKIN. I'll take your word for that. I'm——

Mr. JOHNSON. Well, that's what he said. I mean, you remember more than the fact that he testified before Congress. I know you remember that he did a mea culpa, and he, said, Look, I made a mistake. You don't remember that?

Mr. HOLTZ-EAKIN. Everybody makes mistakes. I don't find that a shocking statement.

Mr. JOHNSON. Well, the mistake that he made was, he said that the government should play a much more active regulatory role over financial firms. Do you think that that was wise in the light of the Great Recession that he was talking about?

Mr. HOLTZ-EAKIN. I think that it's too simple to pin the Great Recession on financial regulation, and the reason it's too simple—if I could finish.

Mr. JOHNSON. Do you believe——

Mr. HOLTZ-EAKIN. Is that——

Mr. JOHNSON [continuing]. That it occurred due to lack of regulation——

Mr. HOLTZ-EAKIN. No.

Mr. JOHNSON [continuing]. Or overregulation?

Mr. HOLTZ-EAKIN. There was overregulation at Fannie and Freddie.

Mr. JOHNSON. Overregulation.

Mr. HOLTZ-EAKIN. There was underregulation in some cases. The issuers of subprime mortgages at the State level were often very unregulated. We saw some really bad mortgage origination.

Mr. JOHNSON. So regulation would have helped that, wouldn't it?

Mr. HOLTZ-EAKIN. In some cases, with better prudential regulations, it helped. In some cases, we overregulated.

Mr. JOHNSON. And, it was the lack of regulation that enabled it to happen. That's what Greenspan was talking about, correct?

Mr. HOLTZ-EAKIN. You can question him about his views. What I'm saying is my experience on the Commission is that——

Mr. JOHNSON. Let me ask——

Mr. HOLTZ-EAKIN [continuing]. There were evidence of both overregulation and underregulation.

Mr. JOHNSON. Let me ask one of the other hostile witnesses, if I will.

Mr. Crews, would you agree that Professor—or that Mr. Greenspan was correct when he said that we needed more regulation in the financial markets to prevent a reoccurrence of the Great Recession that threatened to become a Great Depression?

Mr. CREWS. The financial markets have been heavily regulated for 100 years. The Federal—we have a Federal Reserve. The Federal Government sets interest rates and money supplies. We testified, I don't know what Committee it was, but in 1999, making the case that the government—that government-sponsored entities that were extending homeownership beyond what could be handled was going to lead to problems. It's in the record. You can see that. So yet——

Mr. JOHNSON. But there have been some——

Mr. CREWS. You asked the question about——

Mr. JOHNSON. There have been some——

Mr. CREWS. Your choice.

Mr. JOHNSON [continuing]. Regulations that resulted in some harm, but I'm asking you about the lack of regulation that resulted in harm.

Mr. CREWS. I don't understand——

Mr. JOHNSON. I don't think that it——

Mr. CREWS [continuing]. Talk of a lack of regulation because in free markets, there's no such thing as a lack of regulation. Laissez faire doesn't mean companies get to run around and do whatever they want to do.

Mr. JOHNSON. Well, that's exactly what would happen.

Mr. CREWS. You said—no, I just said we had a heavily——

Mr. JOHNSON. The financial part.

Mr. CREWS [continuing]. Regulated financial sector. But you have a lot of forces that are arrayed against companies that misbehave if you're not thinking that a central regulator is going to take care of the problem, and I don't think that they are.

Mr. JOHNSON. You're talking about——

Mr. CREWS. Media, Wall Street, consumers.

Mr. JOHNSON [continuing]. Free market forces?

Mr. CREWS. A lot of them.

Mr. JOHNSON. That would cover——

Mr. CREWS. Consumers, media, exactly.

Mr. JOHNSON. Well, let me ask you this, Mr. Crews, since I'm talking to you. The Washington Post awarded the famous two Pinocchio's to claims based on your report on regulatory costs. Ten Thousand Commandments was the name of it. They called it misleading, unbalanced, and—well, idiosyncratic guesstimate with serious methological problems. What is your response to their characterization of your Ten Thousand Commandments paper which they gave it two Pinocchio's?

Mr. CREWS. Well, maybe that they should have read the subtitle. This is The Washington Post. The paper that they're referencing was called, "Tip of the Cost-berg." It's a working paper compiling OMB numbers on the cost of regulations on environment, health and safety, and OMB has quit compiling the paperwork cost that it ought to be compiling, and the economic regulatory cost that it ought to be compiling.

Nobody sees the same rainbow. We all look through different drops when we see it, and nobody sees the same costs and benefits of regulation. I use a low ball figure for the cost of regulation of 1.9, which OMB's numbers, back at the turn of the century, were over a trillion. There have been a lot more regulation since then, and these days, the NAM has a cost study on regulatory cost, annual regulatory cost of over $2 trillion, Mercatus has a new study with substantial cost for regulation. There's another——

Mr. JOHNSON. You're getting a little——

Mr. CREWS [continuing]. Study of the cost of regulation that would put cost over 50 trillion a year.

Mr. JOHNSON. You're starting to dazzle me now. I just have one last question.

Mr. CREWS. Good.

Mr. JOHNSON. I'll try to make it as clear as I can. Tom Donohue, the President and CEO of the Chamber of Commerce, is quoted as saying that "we need" many of the regulations included in your antiregulatory report, and that they are important for the economy, and we support them.

That's what Tom Donohue, CEO and President of the Chamber of Commerce said. I want to know if you agree with that, and I also, I want to get your comment about the fact that prior versions of your Ten Thousand Commandments report admitted that it was not scientific, and it was back of the envelope, but that language did not appear in the most current version, the one that was given the two Pinocchio's, and I wanted to know why did you remove those caveats from the two Pinocchio's, Ten Thousand Commandments report.

Mr. CREWS. I didn't remove them. It's still all in there. The Ten Thousand Commandments report is citing the Cost-berg figures where I have all those disclaimers there. I cannot go below those figures. Those are—those are using largely government's own numbers for the cost of regulation and then other compilations that are out there. As for—as for Donohue's——

Mr. JOHNSON. Do you disagree with what Tom Donohue said?

Mr. CREWS. Yeah. As for what he said, Ten Thousand Commandments is not an antiregulatory report, and the Competitive Enterprise Institute is not an antiregulatory group, and the majority here is not an antiregulatory entity. This is an OIRA hearing. We're talking about your job of reviewing the regulatory state and what the regulators, who are not elected, are doing.

So that's the purpose of the hearing. But the Ten Thousand Commandments is not an antiregulatory report. Your question is what does the best regulation? Is it always going to be a political system that does the best regulation, or do you need other kinds of disciplines to play a role?

Mr. JOHNSON. Well, Mr. Crews, you've been quite gracious in your responses, and Mr. Chairman, you've been quite gracious with the time. I'm way, way over the limit, and with that, I will yield back.

Mr. MARINO. I have another question I'd like to ask, and if you would like to, Hank, you certainly can.

Even I don't consider Professor Driesen to be hostile, so this will pertain to you as well, sir, if you care to. Can you give me an end-of-term grade that would assign—that you would assign to the Obama administration for its performance in regulating without inflicting unnecessary economic harm or imposing unnecessary regulations?

Dr. Beach?

Mr. BEACH. I'd give it a C minus or a D plus. I think the regulations which have been produced out of the recession, well-meaning, as they were, were done without due regard for the cumulative cost and the effects on the enterprise system.

Mr. MARINO. Thank you. Dr. Crews—Mr. Crews.

Mr. CREWS. I think looking at cumulative effects of regulations matter a lot, and even what Mr. Johnson said, what you said about OIRA's role in looking at and reviewing regulations, I think matters a great deal.

Mr. MARINO. Professor Driesen.

Mr. DRIESEN. Well, with the caveat that that's a really difficult question to answer, none of us here have read all these rules. I would say that the ones I know about seem sensible to me and look like an A. I've seen them going after things that really need the attention and seem to be doing it in a reasonable way.

Mr. MARINO. Dr. Holtz-Eakin.

Mr. HOLTZ-EAKIN. I guess I'm in the vicinity of a C, C minus. I'd say the—the break they deserve is that a lot of this comes from the Dodd-Frank Act and the Affordable Care Act, which were drafted very poorly by the U.S. Congress and have led to some real regulatory problems in filling that out.

The thing I think they did most poorly was to not keep track of the breadth of the regulatory burden. That's been unusually active, not just at HHS and at the SEC and CFTC, but the Department of Labor, the FCC, you know, the Department of Energy, sort of every agency has issued regulations that are remarkable, right, and I think it is OIRA and the Administration's responsibility to look at that and modulate its impact on the economy, and they did a bad job there.

Mr. MARINO. Mr. Crews, did I not hear you give a grade? If I did not hear you, then my ear is as bad as my arm.

Mr. CREWS. I did.

Mr. MARINO. You did or didn't?

Mr. CREWS. Yeah.

Mr. MARINO. You did. I think—what was yours? I'm sorry.

Mr. CREWS. I just said I think the presentation of the—there need to have been a lot more review of regulations than it was, and I wish that we could use OIRA more effectively to govern that.

Mr. MARINO. So is that an A, C, or an E?

Mr. CREWS. I've got to say a C, because——

Mr. MARINO. Okay. Now, one more thing I want to ask each of you to respond to. How important to each—how important is the fact that we must look at the economics involved when it comes to job creation or job loss in regulation, if it's important, in your opinion, at all?

Dr. Beach.

Mr. BEACH. Well, yes. It's something we haven't talked about today is the important to whom, and it's largely important to people who are low and moderate incomes. They are—they bear a disproportionate share relative to their income, of the cost of regulation. So when we impose well-meaning regulations and it does what it does, we need to keep them in mind. It's called regressive effects, and I think they're—they're much in your mind in other areas as well, certainly.

Mr. MARINO. Mr. Crews.

Mr. CREWS. One thing related to that, too, in terms of job effects of regulation, it'd be good to look at how regulations might stack up as a small firm grows. Mr. Trott had mentioned growing a business and had mentioned I couldn't do it today if I were setting out in this kind of a regulatory enterprise.

Well, if we disagree about that, let's find out why we disagree about it. Let's look at what laws are taking effect as this firm hits four employees, five employees, 10, and 49, and see what adds up, and look at it from the statutory side and from the regulatory side and see what we—what kind of inventory we have of how these things stack up when a small firm grows and affects job creation and job growth.

Mr. MARINO. Professor Driesen.

Mr. DRIESEN. I do not think regulation is a—at least overregulation has not been a significant factor in causing job loss. Underregulation has, because we legalized subprime mortgages, which were illegal at one point. We allowed large firms to get into the—large banking firms that got them into the subprime business. When they were separated, there was no problem. I can give you the whole—I wrote an article to spell it out for you.

So deregulation has caused a financial crisis. Regulation has a tiny effect on jobs, and in the environmental area, it's a small net positive. And, we used to have statistics on this from the Bureau of Labor Standards, but Congress has defunded it.

Now, what those statistics shows is that environmental public health and safety was about 0.2 percent of mass layoffs. Mergers and acquisitions were a big cause of unemployment. And so, if you're going to get serious about unemployment, you've got to stop hammering away at regulation, refund BLS and look at what's really causing it, and I don't think you're going to find regulation to be prominent among the problems of job loss.

Mr. MARINO. Dr. Holtz-Eakin.

Mr. HOLTZ-EAKIN. So as I said, I think you should quantify everything you can so that you understand the comprehensive benefits and costs of a rulemaking process, but certainly, you should always place priorities on the most pressing issues. And, in the past, from the end of World War II to 2007, this economy grew fast enough that even with population growth, the standard of living doubled every 35 years, roughly, one working career.

The projections are that this economy will grow only at 2 percent, and if you roll in population growth, that means the standard of living doubles every 75 years. I believe that's the primary domestic economic policy problem that we have, and that we should devote all of our attention in the regulatory tax and budgetary process to solving that problem.

Mr. MARINO. Thank you. Mr. Johnson, do you have any questions?

Mr. JOHNSON. Thank you, yes. Dr. Beach, with respect to the assertion that you just made and you also made it in your written testimony——

Mr. BEACH. Yes, sir.

Mr. JOHNSON [continuing]. That regulations disproportionately burden low income populations and undermine economic productivity, and you said that citing studies conducted by the Mercatus Center. I just want a note from you whether or not the lead in the contaminated water in Flint was the result of overregulation?

Mr. BEACH. I'm not an expert on how it got there. I'm very concerned about it, as I'm sure you are as well.

Mr. JOHNSON. Well, was it overregulation that was one of the factors——

Mr. BEACH. I'm not the best one to answer that question.

Mr. JOHNSON [continuing]. That contributed to lead getting into the——

Mr. BEACH. It could have been a number of factors. I'm not sure. It could have been the land. Who knows? I'm an economist.

Mr. JOHNSON. It wasn't overregulation, was it?

Mr. BEACH. Well, who knows. I mean, it could have been—it could have been this. For example, if you have a municipality that has a lot of—in a State that has the burden of a lot of regulation, that can undermine the tax base. If the tax base is undermined, you might not take care of your infrastructure. I've known lots of cities that have had poor infrastructure, which gets into things leaching into the water supply. So unless you—or and I are experts on now it actually got there, I could make an argument that yes, it could have been because of overregulation.

Mr. JOHNSON. Well, if there were no regulations, then, of course, you would have all kinds of contaminants in the water. Isn't that correct?

Mr. BEACH. That doesn't necessarily follow. You could——

Mr. JOHNSON. So in other words, you're saying in an environment with no regulations, you're going to always have safe drinking water.

Mr. BEACH. Absolutely not. We need—we need the regulations we have around——

Mr. JOHNSON. Need the regulations.

Mr. BEACH [continuing]. Around the drinking water today. They've been very effective.

Mr. JOHNSON. And those regulations——

Mr. BEACH. Yeah.

Mr. JOHNSON [continuing]. Do not hurt, or disproportionately burden anybody, much less low income people?

Mr. BEACH. Exactly. Right. And so they, in fact, they benefit everybody, but my point is this: If you have——

Mr. JOHNSON. That is the point that I want to make.

Mr. BEACH. If you have a slow economy because of a regulatory—cumulative regulatory burden, then wages grow slowly in the bottom half of the distribution. Now, they, of course, benefit from the clean water just like the top half, but they don't have the benefits of the growing economy like the top half does.

Mr. JOHNSON. Well, I mean, but you can have a couple of companies making a gazillion dollars, and then you have the consumers, the people who purchase the product or service dying at an early age, as we heard someone say today, we've got people dying at an early age. I mean, what is best? I mean, should we just have an unregulated environment and a free market system to let the buyers beware, and let the companies do whatever they want to do, and there's no regulations?

Mr. BEACH. I think we're past that, aren't we, Congressman? I said in my remarks——

Mr. JOHNSON. From what I'm hearing from the Republican witnesses and from the messaging from that side of the aisle is that we are overregulated, all of these regulations need to be abandoned, and we need to get government off the backs of the business community so that they can make more money, and it doesn't matter the health, safety of the people.

Mr. BEACH. Of course, health and safety matters a great deal, and we are——

Mr. JOHNSON. How can you quantify that on a cost-benefit analysis?

Mr. BEACH. Well, I think it can and should be done so that you have the best advice possible for making decisions, as you must make, between spending on A, B, and C. If you——

Mr. JOHNSON. Do you think the regulators should have that——

Mr. BEACH. I think we should all do——

Mr. JOHNSON [continuing]. Ability?

Mr. BEACH. Yeah, cost-benefit analysis needs to be done in much more than it's being done now.

Mr. JOHNSON. Well, I'm going to—I'm going to yield back the balance of my time, and I thank you all for your testimony.

Mr. BEACH. Thank you.

Mr. JOHNSON. I'm sorry I didn't get to you, Mr. Driesen. Thank you.

Mr. MARINO. Thank you all for being here. This concludes our hearing, and without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record. The hearing is adjourned.

[Whereupon, at 5:52 p.m., the Subcommittee was adjourned.]

A P P E N D I X

Material Submitted for the Hearing Record

Response to Questions for the Record from the Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs

Questions for the Record Submitted by Chairman Tom Marino:

Guidance/Regulatory Dark Matter

1. Do you acknowledge the potential for the weakening of congressional and judicial checks and balances on agencies when agencies make major substantive policy changes under the guise of non-binding guidance?

I believe it is important for all agencies to observe the notice-and-comment requirements of the Administrative Procedure Act (APA). As a general matter, the courts, Congress, and other authorities have emphasized that agencies are required to comply with these requirements when establishing new binding rules, regardless of how they are initially labelled.

Co-benefits

2. Is excessive reliance on co-benefits appropriate when another statute, under which the agency is not regulating, authorizes direct attainment of the same co-benefits? What if the agency thereby avoids statutory analytical requirements that would apply to regulation under that statute?

One of the goals of a thorough benefit-cost analysis, as described in more detail in OMB Circular A-4[1], is to describe the state of the world in the presence of a new regulation. All the impacts, including those that could be characterized as "co-benefits," or benefits incidental to or not the direct subject or goal of a regulation, should be included in that description of the future state of the world. The same holds true if a regulation were to have an incidental cost.

OMB Circular A-4, also emphasizes that agencies should conduct a thorough analysis of the alternatives to the regulation being considered. In their analysis, agencies should consider whether other regulatory approaches, including, to the extent permitted by law, other options authorized by statute, could more efficiently achieve the benefits of the regulation under consideration. Executive Orders 12866 and 13563, which establish the Administration's regulatory approach and OIRA's responsibilities, emphasize that regulations must adhere to all statutory requirements.

Social Costs of Carbon/Discount Rates

3. On July 2, 2015, OIRA released an updated Social Cost of Carbon (SCC) estimate as part of a technical support document for agency use in Regulatory Impact Analysis. That estimate uses discount rates all less than 5.1%. This methodology contravenes OMB Circular A-4, which specifically directs agencies to use a 7% discount rate, though it permits others to be used in addition. In written responses to this Subcommittee's questions last year, OIRA gave a technical justification for lower discount rates, but failed to answer a key question which I will now ask again:
    a. At a minimum, for transparency purposes, why wasn't a scenario with a 7% discount rate included as directed in the OMB circular? Such inclusion would have been particularly reasonable, since OIRA's response acknowledged that "disagreement remains in the academic literature over the appropriate discount rate."

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[1] https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf

b. Was the 7% calculation actually performed? If so, what Administration official decided not to publish it?

The choice of a discount rate, especially over long periods of time, raises difficult questions of science, economics, policy, and law. Although it is well understood that the discount rate has a large influence on the current value of future damages, there is no consensus about what rates to use in this context. Carbon dioxide emissions are long-lived; subsequent damages occur over many years. For rules with both intra- and intergenerational effects, agencies traditionally employ constant discount rates of both 3 percent and 7 percent in accordance with OMB Circular A-4. As Circular A-4 acknowledges, however, the choice of discount rate for intergenerational problems raises distinctive problems and presents considerable challenges and Circular A-4 contemplates these challenges by permitting some flexibility in the selection of discount rates for these kinds of matters.

In light of these challenges, the Interagency Working Group (IWG) decided to calculate the social cost of carbon (SCC) using three different discount rates: 2.5%, 3%, and 5%. The technical reasons for the choice of these three rates are explained in detail in the February 2010 Technical Support Document (TSD) for the SCC.[2] *The reasons for not including the 7% rate from Circular A-4 were further discussed in the IWG's Response to Comments on the November 2013 Federal Register Notice.*[3]

As explained in the TSD, the choice of discount rates was based on an extensive review of the discount rate literature. OMB and the IWG (which OMB co-chairs) believe that this represents a reasonable range of discount rates for use in intergenerational discounting. While we stand by our statement that disagreement remains in the academic literature over the appropriate discount rate, we also note that most of this disagreement centers on whether the low-end rate of 2.5% is too high. There is little support in the economics literature for using rates higher than 5% in an intergenerational context. The determination of which discount rates to use was made before the probabilistic model runs that generated the final SCC estimates were conducted. As a result, the IWG did not calculate SCC values using a 7% rate.

Questions for the Record Submitted by Representative Doug Collins:

1. Concerns have been raised that "influential scientific information" released as part of DOE's Notice of Proposed Rulemaking published March 12, 2015, in Docket Bo. EERE-2014-BT-STD-0031, has not been properly peer-reviewed, in violation of OMB's "Final Information Quality Bulletin for Peer Review".

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[2] https://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf; pp 17-23

[3] https://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-response-to-comments-final-july-2015.pdf; pp 20-22

> While a peer review report was issued in 2007 regarding a 2005 peer review of a 2004 DOE model, that model that was then peer-reviewed has changed in important and substantive ways that affect outcomes such that the peer review report done in 2007 is obsolete regarding the current scientific information being relied upon by DOE to set standards.
>
> I understand that OMB is currently reviewing a supplemental NOPR related to this rule and I am concerned that a lack of appropriate peer review will result in a regulatory process failure which will cause significant harm to the American public. To that end, I request that you provide me with detailed information regarding the steps OMB will take to ensure that an adequate peer review process will be undertaken.

Our understanding from DOE is that, the models underlying DOE's proposed rule titled, "Energy Conservation Program for Consumer Products: Energy Conservation Standards for Residential Furnaces," published on March 12, 2015, in Docket Bo. EERE-2014-BT-STD-0031, have not been subject to additional peer review consistent with OMB's "Final Information Quality Bulletin for Peer Review" since the 2007 report to which you refer[4].

However, the modelling approach, source of the input data, and model parameters have not changed significantly since 2005. Although OMB and DOE are clear that stakeholder involvement does not substitute for peer review, it is worth mentioning that DOE held multiple public meetings with stakeholders with expertise in the application of these peer reviewed models, with at least one of these meetings focusing on the analytic tools used to develop the rulemaking. During OIRA's review of the supplemental proposed rule under Executive Orders 12866 and 13563, we worked with DOE to better highlight these past stakeholder and scientific review efforts of its influential models and ensured that technical concerns raised by commenters about the sensitivity of the model results to the assumptions being made were largely transparent in the Preamble of this proposed rulemaking. . We will take careful note of your interest in this rulemaking and consider your comments and concerns.

[4] http://energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0.

Response to Questions for the Record from William W. Beach, Ph.D., Vice President for Policy Research, Mercatus Center at George Mason University

MERCATUS CENTER
George Mason University

September 23, 2016

The Honorable Bob Goodlatte
United States Representative
Chair, House of Representatives Committee on the Judiciary
Washington, DC 20515

Dear Chairman Goodlatte:

Thank you for the opportunity to testify on July 6 at the hearing "Assessing the Obama Years: OIRA and Regulatory Impacts on Jobs, Wages and Economic Recovery." I'm happy to provide answers to the post-hearing questions you posed in your letter of August 19.

1. The American Action Forum found that 36 major regulations were estimated to increase consumer prices by more than $11,000 per consumer – everything from a more expensive car ($3,100), and mortgage ($362), to a microwave ($14), and air conditioner ($320). How do these data points fit in with the Mercatus Center's work on the regressive effects of regulation?

The American Action Forum's estimates of greater costs for ordinary household purchases stemming from the implementation of major regulations is entirely consistent with Mercatus's analysis of regulation's regressive effects. We argue in two recent studies[1] that low- and moderate-income households bear a disproportionate cost from regulations that increase consumer products prices, when compared with the burden borne by high-income households.

One example illustrates the problem. The recently implemented energy efficiency standards for household appliances (most recently based on the Energy Independence and Security Act of 2007, P.L. 110-140) have begun to increase the costs of ordinary necessities such as washing machines, toasters, refrigerators, and other appliances many would view as necessities. This increase in costs may not be a concern for families in the top 20 percent of the income distribution (or at or above $112,000 dollars). However, for families in the bottom two income quintiles (incomes up to $41,186), the percentage of income that must be devoted to pay for the higher cost could well crowd out new clothes, discretionary medical care, or higher quality food.

When the burden of a government imposed cost falls more heavily on lower than higher income families, the effect is called "regressive." We may be more familiar with this term when used in tax analysis. A sales tax is more difficult to pay for low than high-income individuals. Payroll

[1] See Diana Thomas. "Regressive Effects of Regulation." Working Paper, Mercatus Center at George Mason University, November 2012. http://mercatus.org/publication/regressive-effects-regulation; and Dustin Chambers and Courtney A. Collins. "How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation." Working Paper, Mercatus Center at George Mason University, February 2016. http://mercatus.org/publication/how-do-federal-regulations-affect-consumer-prices-analysis-regressive-effects-regulation.

3434 Washington Blvd., 4th Floor, Arlington, VA 22201 Phone: (703) 993-4930 Fax: (703) 993-4935 www.mercatus.org

taxes (that provide revenues for Social Security, Disability Insurance, and Medicare Part A) are more burdensome for low-income than high-income workers. Both of these taxes are called regressive, even though advocates of payroll taxes argue that low-income individuals receive benefits that are proportionally more generous than the benefits received by high-income retirees.

However, the regressive effects stemming from regulation differ from those arising in the tax arena in one important respect. While the financial burden from regulation decreases as income rises, the benefits of many regulations may be the same at all income levels. For example, everyone enjoys similar benefits from cleaner air and water, from presumably less volatile financial markets, and from safer products. This similarity in benefit, however, means that high-income families often get more "bang for their buck" or a better return on the percentage of income that goes to pay for the higher costs than do low-income families. Suppose the benefit from operating an energy efficient refrigerator is $50 in lower electrical costs per year. Then a high-income family that pays 2 percent of their income to purchase the refrigerator has a better deal than a low-income family that pays 8 percent for the same appliance. The deal is worse for a low-income family who pays 4 times more to see their electrical bill fall by the same dollar amount, while a high-income family pays 2 percent of their income to realize the same $50 benefit.

2. What is your view of the propriety of agencies using behavioral economics in rulemaking?

I oppose its use in rulemaking and have several reasons for this view.

Researchers publishing in the relatively new field of behavioral economics are shedding considerable light on how consumers make economic decisions. Sometimes those decisions support the traditional economic model of a rational, utility maximizing individual. At other times, they support the view that consumers make irrational decisions not in keeping with their own best interests or the clear signals from markets. In other words, economists can no longer assume that all economic action stems from a rational, self-interested individual whose decisions, on average, rebound to his or her wellbeing.

The widespread finding that consumers often do not act in their own best interests has given rise to employing behavioral concepts in rulemaking. For example, the EPA causes the costs of using certain products to rise above their market price in order to "nudge" consumers away from high utilization of scarce resources or products that degrade air and water quality standards. In other areas, regulators incentivize obese consumers to eat "smarter" or to consume fewer carbohydrates and so forth.

These nudges stem from the presumption that the consumer does not know what is best for themselves and that the regulator does. Another way to put this is to think of nudges and incentives as corrections of the marketplace. Regulators who apply behavioral economics explicitly reshape market results by causing market actors to respond to the nudges in addition to the other signals that the relevant market is giving them. This form of regulation stands in contrast to the traditional approach that lays down broad guidelines within which markets are relatively free to work.

Traditional regulatory practice makes heroic assumptions about the regulator's knowledge of consumer tastes, needs, capacities, tradeoffs, and so forth. Nobel prize winning economist Friedrich Hayek called this assumption of knowledge the fatal conceit of modern government, since it is impossible for regulators to know anything other than a small fraction of the relevant information of even a small subset of market transactions.

This conceit is even greater among regulators who employ behavioral economics. They not only assume they possess all of the relevant information to make rational, utility maximizing decisions for other people, but they also assume that their nudges will work flawlessly with other market signals to produce outcomes that are superior to those of markets without nudges. If traditional approaches failed on the knowledge test, behavioral approaches fail even more.

It is difficult to know if consumers who overuse natural resources or who eat themselves into severe health problems are making the wrong decisions. We do know, however, that markets will price up resources as they become scarcer through use, and that the higher price will invite the development of lower cost substitutes. We also know that many individuals with health problems associated with their weight ultimately seek dietary or surgical solutions that restore their health. In other words, there's a non-paternalistic alternative to behavioral economics, and that's a well-functioning, free market.

3. Has the Obama Administration's rhetoric on addressing overregulation matched its actions?

The answer is an emphatic no.

The Obama administration has repeatedly stated that it has reviewed and thinned out the regulations that inhibit economic growth. In 2011, President Obama argued:

> What I have done—and this is unprecedented, by the way; no administration has done this before—is I've said to each agency, 'Don't just look at current regulations or don't just look at future regulations, regulations that we're proposing. Let's go backwards and look at regulations that are already on the books and if they don't make sense, let's get rid of them.[2]

The record is otherwise. Rather than lead the charge against regulations, the Obama administration has outperformed every presidential administration since Jimmy Carter in adding new rules and regulations.

Mercatus scholars have estimated that regulatory restrictions (as measured by Mercatus's RegData project) have grown by **over 80,000** since the start of the Obama administration.[3] This growth in

[2] Robert Farley. "President Barack Obama Claims His Regulatory Review is Unprecedented." *Politifact*, June 29, 2011. http://www.politifact.com/truth-o-meter/statements/2011/jun/29/barack-obama/obama-claims-his-regulatory-review-unprecedented.

[3] Patrick McLaughlin and Oliver Sherouse. "The Accumulation of Regulatory Restrictions Across Presidential Administrations." Mercatus Center at George Mason University, August 2015. http://mercatus.org/publication/accumulation-regulatory-restrictions-across-presidential-administrations.

regulatory restrictions is part of a 40-year bipartisan trend across presidential administrations of regulatory accumulation.

Specifically looking at President Obama's administration, the government has imposed a total of 20,642 new regulations since 2009, of which 566 are considered major rules (costs in excess of $100 million per year economy wide). Of these 566, only 26 reduced the financial burden on households and businesses while 229 clearly increased that burden. The decreased burden saved Americans $3.4 billion annually, but the increased burden took $112 billion annually out of otherwise private use.[4]

The data clearly show that the administration is adding to, not reducing, the problem of too much regulation.

I hope this additional information is helpful in the committee's consideration of the economic effects of regulation. Please feel free to contact me if I can provide any additional information.

Sincerely,

William W. Beach
Vice President for Policy Research
Mercatus Center at George Mason University

[4] James Gattuso and Diane Katz. "Red Tape Rising 2016: Obama Regs Top $100 Billion Annually." Heritage Foundation, May 2016. http://www.heritage.org/research/reports/2016/05/red-tape-rising-2016-obama-regs-top-100-billion-annually.

Response to Questions for the Record from Clyde Wayne Crews, Jr., Vice President for Policy/Director of Technology Studies, Competitive Enterprise Institute

Post-Hearing Questions for the Record
July 6, 2016 OIRA Oversight hearing

Submitted to the Judiciary Committee Subcommittee on Regulatory Reform, Commercial and Antitrust Law

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(1) When the administration imposes major changes through guidance or other regulatory dark matter is the damage to the economy to Liberty to our form of government or all of the above?

When the administration imposes major changes through guidance or other regulatory dark matter, it damages the economy, liberty and our very form of government itself.

What, anymore, can the administrative state not do? What are its bounds? It is increasingly unclear. There are powers over our economic and social lives that even Congress, the most accountable branch, cannot claim, since we citizens individually do not possess such powers to delegate to representatives.

Yet Congress (which often doesn't even read its own laws) assumed vast power and then delegated not just discretionary wiggle room, but acreage, to agencies. In turn, the delegated-to, unelected administrators feel empowered. While we say we're a democracy, we don't have large numbers calling the shots. We have relatively small numbers of the unelected, the self-interested.

Congress passes and the president signs a few dozen laws every year, while agencies issue over 3,000 rules and regulations annually. Then, there are thousands of guidance documents, memoranda and other "non-rules" that evade notice-and-comment and (with a few exceptions), the federal Office of Management and Budget's review mechanisms. Among these, there are several hundred pieces of "significant" guidance in play as far as we know from what agencies have disclosed.

Yet even when rules do undergo notice and comment procedures it may not be sufficient, making guidance proliferation all the more worrisome. A recent Administrative Conference of the United States paper finds that final rules increasingly are not being submitted to the Government Accountability Office (GAO) for its database on such rules, and to Congress as is required under the 1996 Congressional Review Act (CRA).

The CRA requires agencies to submit reports to Congress on major rules—those costing $100 million or more. The neglect of this submission is a significant lapse, adding to the pre-existing issue of independent agencies rules guidance being exempt from OIRA review.

The CRA's shortcomings are one of the reasons some support a required affirmation of major rules—and I recommend, guidance—by Congress, not merely the option to disapprove. This step would re-establish congressional accountability for agency actions. In the meantime, unfortunately, if agencies anticipate Congress taking more interest in the CRA as far as ordinary regulation is concerned, they may rely even further on guidance.

The Administrative state all too often dispenses with the Administrative Procedure Act that allegedly governs it, for rules, let alone the guidance, bulletins, memoranda, notices and the other material that I've taken to calling "regulatory dark matter."

Despite traditions going back to the ancients that inspired our framers, the heavy administrative hand in so many economic sectors—financial, telecommunications, energy and more—can mean nothing gets written down at all by today's rulers. One simply must ask permission before taking action.

Some agencies run their own finances without congressional oversight, as isolated, independent national governments. Even a change in presidential administrations may render little or no control over some independent agency heads.

As far as liberties and our form of government, indeed what anymore is regarded by the state as *not* its business. What bureaucratic stretch is not championed by the bulk of academics? The Constitution is one of humanity's loftiest creations. In retrospect we see it could have been stronger and even more explicit than it is in restraining the state and unforeseen agencies that now regulate unimpeded. What a disappointment to see the all-too-natural human failings of this precious, unique creation get turned against the very nation it created and used to justify manifestly unintended expansions of the state. Questions the administrative state's legitmacy hinge on what government is, and can be, in the evolution of human liberty. America is now clearly governed by the view that the Constitution authorizes the administrative state and dark matter. But even if the Constitution didn't ban delegated power by design (however I side with scholar Philip Hamburger that it did), or if the Constitution failed to ban delegated power in practice (which is obvious), we remain able to envision, and enable, the ideal of limited government.

(2) Has the Obama administration's rhetoric on addressing over-regulation matched its actions

The Obama administration's early rhetoric on recognizing over-regulation has been left behind by later actions.

To give credit where credit is due, the Obama administration issued a regulatory freeze as its very first action in 2009. But the executive "pen and phone" quickly prevailed as the president promised to go around Congress. Indeed, in this the "most transparent administration in history," last year's White House *Report to Congress on the Benefits and Costs of Federal Regulations* was the latest ever, and this year, 2016, it is later still. The *Unified Agenda of Federal Regulations* is also regularly overdue. As it happens, the *Federal Register* just passed the 70,000 page mark and is set to be the highest ever. In fact, so far six of the highest ever *Federal Register* page counts have occurred under the Obama administration.

Early actions seemed promising. President Obama's own January 18, 2011 E.O. 13565 on review and reform ("Improving Regulation and Regulatory Review") carried on the Clinton executive order 12866 and also pledged to address unwarranted regulation (*Federal Register*, Vol. 76, No. 14, January 21, 2011). The president achieved a only a few billion dollars in savings, and joked in the 2013 State of the Union Address about eliminating a rule that had categorized spilled milk as an "oil." Rest assured that such trivial rules are not the source of modern regulatory excess and the economic stagnation that harm many; the few billion dollars saved by President Obama have been swamped by rules otherwise issued.

Independent agencies, while they are subject to APA notice-and-comment are not subject to enforceable regulatory review. Here, we also saw positive signs from President Obama in his July 11, 2011 E.O. 13579 ("Regulation and Independent Regulatory Agencies") with a call to fall into line on disclosure (*Federal Register*, Vol. 76, No. 135, July 14, 2011). The president cannot change congressional directives with respect to independent agencies, but can use his office to, if not restrain agencies, to not encourage their excesses. But instead of constraining independent agencies, Obama took on a major role in getting the Federal Communications Commission to issue its net neutrality order (he called on FCC "to take up the strongest possible rules to protect net neutrality" (White House, 10 November 2014).

In all, four of President Obama's executive orders addressed over-regulation and rollbacks and the role of central reviewers at OIRA (All are available on OMB's "Regulatory Matters" site, https://www.whitehouse.gov/omb/inforeg_regmatters#eo13610). Unfortunately, the expansion of government into economic, social and environmental realms has been the administration's emphasis rather than cutbacks. The state of affairs today is that agency power expansions are supported and encouraged by the administration.

So despite Obama's executive orders ostensibly shining a light on regulatory excess, walking the regulatory liberalization walk likely awaits a different executive. Formal executive branch regulatory review processes cannot work when the presidents core operating philosophy is that government, not private individuals and interactions, should dominate finance, health care, energy policy, manufacturing and other large spheres of human action. President Obama's repeated pledges to go around Congress attest to this while every instance from Obamacare to breath-mint serving size rules to school lunch mandates underscores a federal government disinclined to stay out of American's lives. Like the original E.O. 12291 that President Reagan issued to help institutionalize cost-benefit analysis, the potential for executive orders to boost oversight and review is high when the motivation exists. But those circumstances didn't apply in the Obama administration despite some technically good executive orders on regulatory process.

Response to Questions for the Record from Douglas Holtz-Eakin, President, American Action Forum

Questions for the Record Submitted by Chairman Tom Marino:

1. How does President Obama's regulatory output compare historically?

Douglas Holtz-Eakin: In terms of recent history, there is no comparison. In eight years in office, President Bush finalized 496 major rules. President Obama is on track to finalize roughly 650 major regulations, a 31 percent increase. President Clinton averaged roughly 66 major rules annually and President Obama is on pace for approximately 80 per year or 21 percent more than President Clinton.

In the administration's own report to Congress on the benefits and costs of federal regulation, it concedes FY 2012 was the most expensive year on record. Currently, the American Action Forum records $807 billion in cumulative regulatory costs from 2009 to present, with more than 545 million associated paperwork burden hours.

These figures make sense in the context of the administration's overall agenda. Transforming the health care industry (Affordable Care Act) financial services (Dodd-Frank), and energy industry (EPA) will result in dozens of major regulations. No one, including the Congressional Budget Office (CBO), expected these transformations to arrive without a cost, but the combined total of these initiatives is approaching $400 billion. In sum, there is no recent precedent for the regulatory output of this administration.

2. How do you respond to the argument that low unemployment proves that regulations do not have a negative effect on the economy?

Douglas Holtz-Eakin: Regulations are heterogeneous and can affect the economy in various ways. Although unemployment is low, labor force participation rates are also low and CBO has predicted the regulatory impact of ACA regulations will impact labor participation. Regulation can also affect wages and prices. Wage growth has been relatively stagnant and unimpressive during the recovery and there are literally dozens of rules that regulators themselves have admitted will raise prices for consumers.

Sometimes regulators predicted that rules will raise overall employment, as EPA did with the Clean Power Plan. At best, regulations will transfer employment from the heavily regulated sector to an industry with fewer rules, e.g. coal power to wind or solar generation. The topline employment might remain unchanged, but there are still real costs to those who are displaced because of federal rules. In sum, that both President Obama and Secretary Hillary Clinton have proposed aid packages for those in the coal industry should illustrate that there are human consequences from federal regulation.

3. Can you provide a sense of how much better we would be doing in terms of jobs, wages, economic growth, and new business startups if the Obama Administration did better at regulating without inflicting unnecessary economic harm or imposing unnecessary regulation?

Douglas Holtz-Eakin: It is difficult to prove the counter-factual that economic growth would be substantially higher with a better regulatory environment, but our Gross Domestic Product (GDP) figures offer some insight. Consider that two percent growth is now considered strong, the new normal. In the middle of a recovery with low unemployment, GDP grew by just 1.2 percent in the second quarter of this year and just 0.8 percent in the first quarter. A combined regulatory and tax environment that punishes wealth and capital formation is certainly impacting economic growth.

The American Action Forum has studied some of the effects from recent regulations on economic performance. We have found the ACA, in concert with rising premiums, has reduced small business pay by $22.6 billion annually and cut employment by 350,000 jobs, with the average small business employee losing roughly $900 in wages. We've also found Dodd-Frank has reduced revolving consumer credit by 14.5 percent since 2010. There are likely other profound consequences from major regulations that will be studied later, but there is little doubt recent rules have affected economic performance.

4. Professor Driesen questions the utility of requiring agencies to perform cost-benefit analyses, particularly of environmental regulations. Do you agree? What is the value of cost-benefit analysis in your opinion?

Douglas Holtz-Eakin: Since the presidency of Jimmy Carter, three Republican and three Democratic administrations have embraced the concept and practice of benefit-cost analysis, including for environmental regulations. For example, President Carter emphasized that regulations should not "impose unnecessary burdens" and sought a regulatory system where "compliance costs, paperwork and other burdens on the public are minimized." Benefit-cost analysis is not simply in the mainstream of American policy, but international practice as well. Canada, Australia, England, and South Korea all have a robust regulatory review system in place.

Benefit-cost analysis allows regulators and the public to determine whether the implementation of a federal rule would impose more harm than it would generate in benefits to society. For perspective, even though some might dislike the practice, the overwhelming majority of agency analyses predict rules will generate more benefits than costs. Benefit-cost analysis did not stop Dodd-Frank or Affordable Care Act implementation, although courts have struck down some notable rules because of poor analysis.

In my view, more important than *ex ante* regulatory analysis is an *ex post* review. There are roughly 80 major rules annually and regulators and analysts might review three of four of these measures. Naturally, when an agency promulgates a rule, the affected industry and government officials will duel over the costs and benefits of a proposal. However, rarely can policymakers determine the impact of a rule five or ten years after implementation. Both proponents and skeptics of the regulatory state should support a broader understanding of regulation through enhanced retrospective review.

5. Has the Obama Administration's rhetoric addressing overregulation matched its actions?

Douglas Holtz-Eakin: No. Despite the State of Union Address when President Obama mentioned reform of "spilled milk" regulations and a *Wall Street Journal* op-ed emphasizing that "Washington is Eliminating Red Tape," the record speaks for itself. Paperwork is at an all-time high, major regulation is at an all-time high, and we'll soon cross $100 billion in regulatory costs for 2016.

Unfortunately, the administration turned Executive Order 13,563 on regulatory reform into a public relations vehicle, rather than a serious attempt to reform federal rules. For example, as of this writing, the administration has still not released its July update on retrospective review. When the updates are released, they are often filled will new regulations that increase, not decrease costs. New Affordable Care Act rules and greenhouse gas measures from EPA are routinely included in these supposedly retrospective reports. By our count, these reports have cut $7.2 billion in annualized costs. Commendable, but currently the administration has added $18.9 billion in burdens in these "retrospective" reports, for a net cost gain of $11.7 billion. The rhetoric on overregulation is there, but the results are generating even higher burdens.

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