

# OFFICE OF INFORMATION AND REGULATORY AFFAIRS

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## HEARING BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH CONGRESS FIRST SESSION

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JULY 15, 2015  
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## OFFICE OF INFORMATION AND REGULATORY AFFAIRS

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WEDNESDAY, JULY 15, 2015

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

The Subcommittee met, pursuant to call, at 3:05 p.m., in room 2141, Rayburn House Office Building, the Honorable Tom Marino (Chairman of the Subcommittee) presiding.

Present: Representatives Marino, Goodlatte, Farethold, Collins, Ratcliffe, Trott, Bishop, Johnson, and Peters.

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

Mr. MARINO. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will come to order. In the interest of our people that are testifying, we are going to get started.

Without objection, the Chair is authorized to declare a recess of the Committee at any time. And I think that will happen, because we have our last series of votes coming up maybe in an hour or so.

We welcome everyone to today's oversight hearing on the Office of Information and Regulatory Affairs. And I will begin by recognizing myself for my opening statement.

Congress has an ally in the fight against overregulation. The Office of Information and Regulatory Affairs, known as OIRA, is charged with ensuring that agency regulations are the least burdensome possible and that their benefits justify their cost.

Accordingly, I asked Administrator Shelanski, how can Congress help you? I understand your staffing levels are near historic lows and that your team has been moved out of the Executive Office complex. I know that resources and proximity matter.

How can we help you combat the scourge of midnight rules, in which Presidential administrations issue a heightened number of new regulations as their terms reach a close? The George W. Bush administration took steps to prevent the practice. What steps do you plan to take?

I am also concerned that the agencies are failing to comply with important procedures designed to improve the quality of rule-making. For example, a 2008 study found that required regulatory

impact analyses have become perfunctory, rather than real inquiries into the necessity of new regulations.

Similarly, agencies make the questionable claim that their rules will not have a significant impact on a substantial number of small businesses in order to skirt Federal requirements designed to limit regulatory burdens. The EPA made just such a certification for its controversial waters of the United States regulation, despite the obvious potential consequences for impacts on small businesses. What can be done? Does OIRA need additional enforcement powers?

There also seems to be a wide disparity in the seriousness with which agencies are taking their obligations to perform regulatory lookbacks. A number of articles in academic journals suggest ways to improve the regulatory lookback process. I am curious if you have been able to incorporate any of them.

Former OIRA Administrator Cass Sunstein wrote recently that, "Many independent agency regulations, including very expensive ones, have not been accompanied by careful cost-benefit analysis." This suggests that Executive orders from President Obama urging independent agencies to conduct cost-benefit analysis have been inadequate. Is there anything more OIRA can do, or is congressional action mandating OIRA review in order?

While I support OIRA, I have concerns. These include a potentially flawed cost-benefit methodology and the controversial update to the social cost of carbon. We are also missing OIRA's required annual report to Congress on the cost and benefits of the previous year's Federal regulations. By law, it is to be submitted "with the budget." This timing—as Congress is determining how much money to allocate to each agency—helps ensure agency accountability for its regulatory determinations. That report needs to be delivered on time.

My overall message to Administrator Shelanski is this: Help us help you stand up to the Administration pressure, particularly as the midnight regulation period commences.

I thank all of our witnesses and look forward to the discussion.

And I now recognize the Ranking Member of the Subcommittee, the gentleman from Georgia, Congressman Johnson, for his opening statement.

Mr. JOHNSON. And thank you, Mr. Chairman.

Impeccable timing, if I must say, on my part. Sorry for being late, though, and thank you for forbearing.

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, or OIRA, functions as the gatekeeper of the regulatory system for the most important Federal rules.

Issued by President Clinton in 1993, September, Executive Order 12866 requires 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 a retrospective re-

view of existing regulations to determine whether any should be modified, streamlined, expanded, or repealed.

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 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 Mr. Shelanski and, thus far, appear to be working. As Mr. Shelanski noted in March, the retrospective review process is expected to achieve \$20 billion in savings over 5 years and is on track to eliminate over 100 million paper-work burden reduction hours. Combined, it is 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 financial system have undermined the economic recovery and job growth. But this could not be further from the truth.

The latest report from the Bureau of Labor Statistics shows that unemployment has fallen to 5.3 percent. While there is more work to do to grow the economy and help our Nation's middle class, there have been 64 straight months of private-sector job growth. That is 12.8 million private-sector jobs created amidst a regulatory system that is pro-worker, pro-environment, pro-public health and safety, and pro-innovation.

Furthermore, as I have noted on many occasions, there is overwhelming consensus that the benefits of regulation vastly exceed their costs. According to the Office of Management and Budget's 2012 draft report on the benefits and costs of Federal regulations, the net benefits of regulations in the first 3 years of this Administration totaled \$91 billion, which is 25 times greater than during the comparable period under the Bush administration.

Additionally, according to the 2014 benefits-costs report, OMB estimates that the benefits of regulations are in the aggregate between \$217 billion and \$863 billion, while the estimated annual costs are in the aggregate of between \$57 billion and \$84 billion.

In closing, I thank Administrator Shelanski for taking the time to appear before us today, and I thank our witnesses for being here today. And I look forward to today's hearing.

And, with that, I yield back.

Mr. MARINO. Thank you, Congressman.

Mr. JOHNSON. Mr. Chairman, if I might, I would like to introduce the statement of the Ranking Member, Mr. Conyers, into the record, without objection.

Mr. MARINO. So ordered.

[The prepared statement of Mr. Conyers follows:]



**Statement of the Honorable John Conyers, Jr. for the Hearing on  
“Oversight of the Office of Information and Regulatory Affairs” Before  
the Subcommittee on Regulatory Reform, Commercial and Antitrust  
Law**

**Wednesday, July 15, 2015, at 3:00 pm  
2141 Rayburn House Office Building**

The Office of Information and Regulatory Affairs plays a central role in the federal rulemaking process. It is charged with reviewing regulations issued by Executive Branch agencies as well as working to improve the process and quality of federal rulemakings.

It has been two years since Administrator Shelanski was appointed to head OIRA. Based on his tenure, I would very much appreciate hearing his thoughts – as well as those of the other witnesses – on the current state of affairs with respect federal rulemakings and whether any legislative fixes are needed.

**For example,** some of my colleagues on the other side of the aisle are convinced that our Nation's regulatory system is severely broken and in need of repair.

To that end, they support a series of anti-regulatory measures. Take, for example, H.R. 427, the "Regulations From the Executive in Need of Scrutiny Act" or so-called REINS Act, which is likely to be considered on the floor later this month. This bill would require *both* Houses of Congress *and* the President to approve *all* new major rules *before* they can take effect.

In effect, the REINS Act would impose a procedural "chokehold" on federal agency rulemaking so that essential public safety, health, and environmental protections that business interests oppose would not go into effect.

Yet another bill, H.R. 712, the “Sunshine for Regulatory Decrees and Settlements Act,” would allow *virtually anybody* to intervene in a court proceeding if he or she claims to be affected by a proposed decree or settlement resolving a federal agency’s failure to promulgate a rule pursuant to statutory directive.

Thus, for example, if the settlement pertains to the Clean Air Act, the bill would conceivably allow anyone who breathes air to intervene in the court case.

This potentially litigious process, as mandated by H.R. 712, would delay critically needed rules from going into effect.

From my perspective, these bills simply do not make sense. But, I would appreciate the witnesses’ thoughts on these measures.

**And, I want to know what the Administration has been doing to make the regulatory process more efficient *without* congressional intervention.**

I believe all of us on this Subcommittee can agree that good regulations are necessary to protect public health and safety. And, we would agree that agencies should periodically assess whether their regulations are accomplishing their intended goals and whether they are unnecessarily burdensome.

This is why the Obama Administration has demonstrated a remarkable ability to balance the Government's obligation to protect the health, welfare, and safety of Americans with the need to foster economic growth.

The Administration has issued a series of executive orders intended to reduce regulatory burdens –

- by requiring meaningful retrospective reviews of regulations that are already on the books;
- by ensuring greater opportunities for members of the public to comment on proposed rules through the Internet and by providing online access to the rulemaking docket in an easily searchable and downloadable format; and
- by requiring agencies to identify ways to reduce costs by harmonizing rules through inter-agency coordination.

I would like the witnesses today to discuss whether these executive orders have been effective.

**Finally**, I want to hear from Mr. Shelanski as well as from each of the other witnesses about whether there are further improvements OIRA should consider.

For example, OIRA has been chronically understaffed and underfunded for years. In prior hearings, both Majority and Minority witnesses have observed that OIRA needs more resources.

It is my understanding that there are only 25 desk officers who must review hundreds of highly complex proposed rules within a 90-day timeframe. As a result, a substantial backlog of regulations has accumulated at OIRA from time-to-time.

Others suggest that OIRA's review process needs to be more transparent and accountable to all stakeholders.

And, still others claim that OIRA's analyses accentuate the positive over the negative.

Given the stature and experience of the witnesses on both panels, I am optimistic that they will have some pragmatic and meaningful recommendations for reform.

Accordingly, I look forward to hearing the testimony from today's witnesses and I thank Chairman Marino for holding this important hearing.

Mr. MARINO. And the Chairman of the full Committee, Congressman Goodlatte from Virginia, he is in a meeting also and will not be here. Therefore, I will, without objection, ask that his statement be entered into the record.

Seeing none, so ordered.

[The prepared statement of Mr. Goodlatte follows:]



Statement of Judiciary Committee Chairman Bob Goodlatte  
Subcommittee on Regulatory Reform, Commercial and Antitrust Law  
"Oversight Hearing on the Office of Information and Regulatory Affairs"  
July 15, 2015, 3:00 p.m., 2141 Rayburn H.O.B.  
Final

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**This hearing is timely. We recently celebrated July Fourth, and overregulation is among the grievances that the Declaration of Independence lists against King George:**

**"He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance."**

**Perhaps that is why, for much of our history, the federal government remained quite small. In 1790, it had just 1,000 nonmilitary workers. The growth began in the middle of the 20<sup>th</sup> century. Today, we have 2.8 million federal workers in 15 departments, 69 agencies and 383 nonmilitary sub-agencies.**

**The enormous growth of the federal regulatory state has brought a shift of power from elected officials to unaccountable bureaucrats at federal regulatory agencies. In 2014, rules from administrative agencies outnumbered laws passed by Congress sixteen-to-one.**

**The Committee is working to reverse this excess and imbalance with legislation like the REINS Act.**

**In the meantime, the Office of Information and Regulatory Affairs is supposed to police agency regulations, particularly by reviewing high-impact regulations before they are published.**

**The Administration professes to agree that over-regulation “stifles innovation” and has “a chilling effect on growth and jobs.” Administration directives**

also require that a rule's benefits must justify its costs.

Unfortunately, there is evidence that these statements are merely lip service. In practice, agencies do not implement them faithfully enough, knowing that the cameras are off and the public has neither the time nor the expertise to notice the details.

For example, in 2010, roughly two-thirds of the claimed benefits of economically significant final rules were actually from secondary effects that were not the statutorily authorized objectives of the rules. The Administration also counts secondary benefits, but not secondary costs.

The Supreme Court took notice in 2015, in the context of a controversial EPA regulation limiting mercury emissions. Only .02% of the alleged benefits

actually came from limiting mercury emissions. The other 99.98% came from the reduction of particles like soot, that were not the stated objective of the rule, and were already at levels EPA deemed safe. This prompted the Chief Justice to observe that such disproportionate reliance on secondary benefits makes one “begin to wonder whether it’s an illegitimate way” of dodging limits on agency power.

Rigorous agency cost-benefit analysis is crucial given the law of diminishing marginal returns. With so many regulations already working to protect the public, the low-hanging fruit is gone. Further gains will require spending increasingly more to achieve increasingly less. This means agencies will be tempted to pad their benefit estimates in order to justify favored rules.

OIRA must not let agencies game the rules. In 2014 alone, regulations imposed an estimated \$1.88 trillion in costs. That is roughly \$15,000 per U.S. household and eleven percent of GDP. U.S. regulatory costs now exceed the GDP of Australia and Canada.

How can this not hurt jobs and economic growth? A recent survey of manufacturers found that 88% would devote funds currently allocated to federal regulatory compliance toward investment or employees' initiatives, if they could.

OIRA has not done enough to ensure that agencies obey rulemaking procedures designed to prevent overly-burdensome or unnecessary regulations. I want to know what specific steps

Administrator Shelanski will take to do more and how Congress can help.

I thank Administrator Shelanski and our other witnesses for appearing and look forward to their testimony.

Mr. MARINO. Without objection, other Members' opening statements will be made part of the record.

Administrator, would you please stand and raise your right hand to be sworn in?

Do you swear that the testimony you are about to give before this Committee is the whole truth and nothing but the truth, so help you God?

Mr. SHELANSKI. I do so swear.

Mr. MARINO. Thank you. Please be seated.

And let the record reflect that the witness has answered in the affirmative.

Administrator Shelanski of the Office of Information and Regulatory Affairs in the Office of Management and Budget, it is an honor to have you here today.

The Administrator was previously Director of the Bureau of Economics at the Federal Trade Commission (FTC) and a professor at Georgetown University Law Center. From 2011 to 2012, he was of counsel at the firm of Davis and Polk. From 1999 to 2000, Administrator Shelanski served as Chief Economist of the Federal Communications Commission and, from 1998 to 1999, as Senior Economist for the President's Council of Economic Advisors at the White House.

Administrator Shelanski received his B.A. from Haverford College and a J.D. and Ph.D. from the University of California at Berkley. After law school, he clerked for Judge Williams on the D.C. Circuit Court of Appeals and Justice Antonin Scalia, as the Justice referred to, on the U.S. Supreme Legislature, just recently.

The witness' written statement will be entered into the record in its entirety.

I ask that you would please summarize your statement in 5 minutes or less. And you see the lights in front of you. I am color blind; I don't know what color they are. But I know when the third one goes on your time is up.

And I will politely—and this seems to work, because I focus on my statement as opposed to watching the light. I will diplomatically just pick up the gavel and ask you to please, when you see that, summarize.

#### **TESTIMONY OF THE HONORABLE HOWARD A. SHELANSKI, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS**

Mr. SHELANSKI. Very good.

Thank you very much, 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 the role of the Office of Information and Regulatory Affairs, OIRA, in regulatory review.

I would like to start by noting that OIRA has a broad portfolio. For example, under the Paperwork Reduction Act, OIRA is responsible for reviewing collections of information by the Federal Government and ensures that those collections are not unduly burdensome. OIRA also develops and oversees the implementation of government-wide statistical standards and policies. And we also, pur-

suant to Executive order, have a fundamental role in international regulatory cooperation.

The largest area of OIRA's work, however, is the review of regulations issued by executive branch departments and agencies. Several Executive orders, as have been noted, establish the principles and procedures for OIRA's regulatory reviews. Executive Order 12866, implemented across Administrations of both parties, sets forth standards and analytic requirements for rulemaking by departments and agencies and calls, to the extent permitted by law, for agencies to regulate only when the benefits of a rule justify its costs.

OIRA works with agencies to continually improve the review process and the quality of government regulation. OIRA first and foremost upholds the standards of review that the Executive orders establish while remaining mindful that unnecessary delays in reviews are harmful across the board—harmful to those wishing to comment on proposed rules, to those who must make plans to comply with rules, and to those denied the benefits of regulation. Both rigor and efficiency in regulatory review are essential to improving the clarity and quality of our regulatory environment.

OIRA does not review all executive branch regulations, nor would it make sense for the office to do so. 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 is an annual effect on the economy of \$100 million or more.

There are other factors that may lead to a rule to be deemed significant beyond economic impact. Under Executive Order 12866, rules are also potentially significant and subject to interagency review if they create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; if they materially alter the rights and obligations related to entitlements, grants, user fees, or loan programs; or if they raise novel legal or policy issues.

Once a rule is under review, OIRA plays two basic roles. The first is to coordinate interagency review of regulations. OIRA circulates the rule to other agencies around the Federal Government whose own policies and responsibilities may in some way interrelate with the rule under review.

The second main role that OIRA plays is to ensure that the rule complies with the Executive order principles for sound regulation and to review the analysis underlying the rule. OIRA has long-standing guidelines for how agencies should analyze economically significant rules, and OIRA reviews those analyses for consistency with these guidelines as a standard part of our review.

While reviewing a rule, OIRA's job is to review the reasonableness of the underlying analysis and to identify areas where the regulation potentially could be improved or be more consistent with the principles set forth in the Executive orders. Often, the focus of regulatory review is to help the agency hone and sharpen its arguments and to identify areas where more evidence or discussion will strengthen or clarify a regulation.

Finally, another important objective of the Executive orders under which OIRA operates is the introduction of flexibility into



and removal of unnecessary burdens from Federal rules. Ensuring regulatory flexibility for small businesses and reducing regulatory burdens for everyone through the retrospective review process are high priorities for OIRA.

In conclusion, regulation can bring great benefits to Americans but also carries costs. 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. We look forward to continuing our efforts to meet these challenges.

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

[The prepared statement of Mr. Shelanski follows:]

**EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503  
[www.whitehouse.gov/omb](http://www.whitehouse.gov/omb)**

**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 15, 2015

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 the role of the Office of Information and Regulatory Affairs (OIRA) in regulatory review.

As the Administrator of OIRA, it is my privilege to work with the skilled and dedicated OIRA staff, the first-rate leadership team at the Office of Management and Budget under Director Shaun Donovan, and our excellent colleagues throughout the Federal Government. We are all working to continue the Nation's economic recovery and employment growth while protecting the health, safety, and welfare of Americans, now and into the future.

OIRA has a broad portfolio. For example, under the Paperwork Reduction Act, OIRA is responsible for reviewing collections of information by the Federal Government to ensure that those collections are not unnecessarily burdensome. OIRA also develops and oversees the implementation of Government-wide statistical standards and policies, facilitates efficient and effective data sharing, and provides guidance on privacy and confidentiality policy to Federal agencies.

The largest area of OIRA's work, however, is the review of regulations promulgated by Executive Branch departments and agencies. A set of Executive Orders (E.O.s), most significantly E.O. 12866 and E.O. 13563, provide the principles and procedures for OIRA's regulatory reviews. Executive Order 12866 is long established, and has been implemented across several Administrations of both parties. Both E.O. 12866 and E.O. 13563 set forth standards and analytic requirements for rulemaking by departments and agencies, and call for agencies to regulate only when the benefits of a rule justify its costs, to the extent permitted by law.

OIRA works with agencies to continually improve the review process and the quality of Government regulation. First and foremost, OIRA upholds the standards of review that the Executive Orders establish, while remaining mindful that unnecessary delays in review are harmful across the board: to those wishing to comment on proposed rules, to those who must

make plans to comply with rules, and to those denied the benefits of regulation. Both rigor and efficiency in regulatory review are essential to improving the clarity and quality of our regulatory environment.

Another important objective of the Executive Orders under which OIRA operates is the introduction of flexibility into, and removal of unnecessary burdens from, Federal rules. Ensuring regulatory flexibility for small businesses and reducing regulatory burdens for everyone through the retrospective review process are high priorities for OIRA. We have worked successfully with the Office of Advocacy, the Small Business Administration and agencies across the Executive Branch to minimize the particular burdens that regulation might disproportionately impose on small and new businesses, especially in areas where emerging technologies have the potential to greatly enhance public welfare. This is an area that OIRA continues to emphasize as we review new regulations.

OIRA does not review all Executive Branch regulations, and nor would it be efficient for the office to do so. Each year agencies issue thousands of rules, many of which are minor and technical. OIRA review applies only to “significant” regulatory actions, which may include guidance documents, notices, or other actions in addition to rules that have regulatory effect. 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.” That threshold is the same one Congress has used to define rules as “major” under the Congressional Review Act.

There are other factors that may lead a rule to be deemed significant beyond economic impact. Under E.O. 12866, rules are significant and subject to interagency review if they:

1. Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
4. Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the relevant Executive Orders.

Once a rule is under review, OIRA plays two basic roles. The first role is to coordinate interagency review of regulations. OIRA circulates the rule to other agencies around the Federal Government whose own policies and responsibilities may in some way interrelate with the rule under review. The second principal role that OIRA plays is to ensure that the rule complies with the principles of sound regulation laid out in E.O.s 12866 and 13563 and to review the analysis underlying the rule that is called for in these E.O.s. OIRA has longstanding guidelines for how

agencies should conduct their Regulatory Impact Analysis (RIAs) for economically significant rules, and OIRA reviews those analyses for consistency with these guidelines as a standard part of our review. In their RIA's, agencies need to discuss the market failure or other problem a regulation is designed to address, the reason a Federal Regulation is an effective way of addressing the identified problem, the costs and benefits of the proposed regulatory approach, the costs and benefits of feasible alternative approaches (such as different levels of stringency, or scope), and the uncertainty of these estimates. To the extent feasible, agencies should attempt to quantify and monetize estimated impacts; however, both the E.O.s and OIRA guidance recognize that qualitative impacts may be important decision criteria.

When reviewing a rule and the underlying RIA, OIRA's job is to review the reasonableness of the underlying analysis and to identify to the agency areas where the regulation potentially could be improved or be more consistent with the principles set forth in E.O. 13563. Often, the focus of a regulatory review is to help the agency hone and sharpen their arguments, and to identify areas where more evidence or discussion will strengthen or clarify a regulation. Additionally, the scope of OIRA review is not limited to regulations. Agencies' guidance documents, for example, can be brought in for review, especially if they are being issued pursuant to a regulation or have clear interagency equities.

Existing rules, too, warrant scrutiny to ensure that they achieve their benefits and goals without imposing unnecessary costs. 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 is modern, streamlined, and does not impose unnecessary burdens on the American public. Even regulations that were well crafted when first promulgated can become unnecessary or excessively burdensome over time and with changing conditions. The Administration's retrospective review efforts to date will yield savings of over \$20 billion over the next five years. Moving forward, and as President Obama made clear in remarks at the Business Roundtable this past December, it is a critical part of this Administration's regulatory agenda that we do an even better job of finding and reforming regulations that are unduly burdensome or missing their mark.

To that end, OMB has convened a series of meetings with various stakeholders, including State and local government officials, community groups, and representatives from numerous industries to better understand what approaches, cross-cutting themes, and particular areas of regulation could most usefully inform agencies' retrospective review efforts. Input from those meetings has been shared with agencies, which are concurrently engaging in their own stakeholder outreach efforts on retrospective review. E.O. 13610 directs agencies to submit biannual reports on the status of their retrospective review efforts to OIRA, and agencies will be filing their next round of retrospective review plans with OIRA this week. OIRA intends to complete its review of those plans within the coming weeks, after which time they will be released. As agencies move forward, OIRA will continue to work closely with them to make additional progress in the plans the agencies will file this month, and throughout the next two years.

Finally, under E.O. 13609 OIRA has important responsibilities related to international regulatory cooperation. We have made progress in a number of areas with our international partners through the Canada-United States Regulatory Cooperation Council and the Mexico-United States

High Level Regulatory Cooperation Council. OIRA has also furthered its international regulatory cooperation mission through work in coordination with the Department of State and through activities in support of the U.S. Trade Representative's trade negotiations. Regulatory cooperation benefits both businesses and consumers by promoting consistent standards and procedures across borders, and by preserving safety and welfare while promoting competitiveness here and abroad. While the international role of OIRA is modest compared to its key missions of regulatory review and implementing Federal information policy, it is nonetheless an increasingly important part of our agenda going forward.

In conclusion, regulation activities can bring great benefits to Americans but also carries costs. 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. 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, Administrator.

I am going to begin with recognizing myself for my 5 minutes of questions for you.

Administrator, the Bush administration took steps to prevent “midnight rules,” in which Presidential administrations issue a heightened number of new regulations as their term reaches a close.

What steps will you take to prevent the practice of this “midnight rules” situation?

Mr. SHELANSKI. Thank you very much for that question, Mr. Chairman.

We have been engaging with agencies now to set priorities and to try to establish a smooth and orderly process for the issuance of regulations over the remainder of this Administration.

As I said in my statement, the most important thing to OIRA is to ensure that there is high-quality review of the significant regulations that the executive branch issues. We cannot do high-quality review if we have a flood of last-minute regulations.

So we are working closely and regularly with agencies to ensure that they are continuing to move their priorities forward in the chain so that we will have time to perform that review.

Mr. MARINO. Thank you.

My concern is with apparent victories. The Supreme Court recently remanded without vacating the EPA’s Utility MACT rule to regulate mercury emissions. The Justices found that the EPA failed to appropriately consider costs when it promulgated the rule.

This decision was an incomplete victory because this rule has been in effect since 2012. For 3 years now, while litigation was pursued, millions of dollars was spent to comply with the rule, only for it to be found unlawful. This is a major drain on our economy and costs jobs.

What can be done to ensure that OIRA better reviews these regulations and that the effective date of major rules is delayed until the judicial process has been exhausted?

Mr. SHELANSKI. Thank you, sir.

So, on the particular rule that you referenced, I think the Supreme Court’s decision is still being reviewed, and how that will be handled in the context of this specific rule is not something I am able to speak to today. But your general question is an important one.

It is an uncommon situation for a fundamental legal question of that magnitude to be raised in a rule. So, typically, OIRA review can proceed because the agency has the authority to issue the rule, and we are typically getting the kinds of analysis that we require under the Executive orders. There isn’t a perceived statutory barrier to that analysis, and we are able to perform our review.

Now, of course, the Administrative Procedure Act provides for judicial review of final rules. In the normal case, where an effective date might come into play prior to the end of the judicial process, it is up to the courts to determine whether or not there would be a sufficient prejudice to affected parties by having the rule take effect pending the judicial process.

So, fortunately, the judicial process affords a very good forum in which the courts can decide should the rule be allowed to take effect while we are reviewing it or not.

Mr. MARINO. Administrator, does anything prevent you or OIRA from suggesting to the courts that the issue be stayed, pending litigation, because of the expense involved for industry?

Mr. SHELANSKI. OIRA does not play a role in the judicial process. That would be up to the Justice Department, typically.

What OIRA does is to ensure that the agency has done a sufficient—if it is an economically significant rule, a sufficient analysis that is part of the administrative record, that the court can review the record and come to a determination of precisely that kind of issue.

Mr. MARINO. Thank you.

My last question, it looks like. 98.98 percent of the claimed benefits from EPA's mercury rule came from reducing particles other than mercury. Chief Justice Roberts called such a disproportionate reliance on co-benefits a potentially illegitimate way of avoiding limits on agency power.

Will OIRA reevaluate the extent to which it permits agencies to rely on secondary benefits?

Mr. SHELANSKI. When OIRA reviews a rule, we look at all the costs and benefits, direct and indirect, that might come from a rule. But one of the things that we try to do is to ensure that a rule is well-tailored to its stated purposes. So OIRA does try to make sure that a rule does achieve its stated purposes and that its benefits come from the lawful purpose for which the rule is being promulgated.

Mr. MARINO. Thank you, Administrator. My time has expired.

The Chair recognizes the Ranking Member of the Subcommittee, the gentleman from Georgia, Congressman Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Administrator Shelanski, bills have been proposed, such as H.R. 427, the REINS Act of 2015, which would require both houses of Congress and the President to approve all new major rules—i.e., rules with an annual impact on the economy of at least \$100 million or having one of a number of economic impacts—before they can take effect.

Are you familiar with the REINS Act?

Mr. SHELANSKI. Yes, sir, I am.

Mr. JOHNSON. And what do you think about that concept?

Mr. SHELANSKI. Thank you, Mr. Johnson.

The REINS Act is something on which the Administration has spoken, at least in the last Congress and the Congress before that. I understand the bill may come up again in this Congress, and the Administration will have to determine its view at that time on the current version. But the Administration has issued a statement against this bill, and I certainly share that view.

The main concern with the REINS Act is that it introduces, in my view, an unnecessary layer of review and delay in what could be very important health, safety, and welfare regulations. By requiring a joint resolution of Congress, the authority of the executive branch agency to put forward its policies is subject to potentially limitless delay or very long delay.

And that seems to me, in the context of a regulatory system with numerous checks and balances—internal review by OIRA within the executive branch, public comment, and judicial review under the Administrative Procedure Act—strikes me as an unnecessary hurdle to getting the business of the country done.

Mr. JOHNSON. Thank you.

Among other things, H.R. 1155, which is the SCRUB Act—are you familiar with the SCRUB Act?

Mr. SHELANSKI. I have just learned about the SCRUB Act. I don't have sufficient familiarity at this point to comment on it.

Mr. JOHNSON. It would establish a regulatory CutGo process. Are you familiar with the CutGo process?

Mr. SHELANSKI. I do understand what that refers to, yes.

Mr. JOHNSON. Yeah. Would you discuss the ramifications of a mandatory CutGo process?

Mr. SHELANSKI. I think this is something I would really like to engage with anybody in the Congress who would like to talk about a CutGo process or some kind of regulatory review commission.

The devil really is in the details on the kinds of proposals that are in the SCRUB Act. The Administration has not yet, I think, had a chance to formulate a view on this, and I certainly can't speak for the Administration, but it is something we are certainly interested in working with you on and learning more about.

Mr. JOHNSON. Okay.

Other bills, such as H.R. 185, the Regulatory Accountability Act, would give greater power to the courts and the Administration to override congressional mandates. It does this by requiring the courts to exercise their independent judgment over that agency's experts.

What are your views regarding heightened judicial review of agency rulemaking?

Mr. SHELANSKI. Mr. Johnson, we have grave concerns and I have grave concerns about judicial review over the expert processes within the agencies. There is no single, one-size-fits-all type of analysis or type of process that is fit for all the different kinds of agency processes that go on. So I have concerns that this introduces judicial review at a far more granular level, a very technical and detailed level, where I think good decisionmaking by general courts will be extremely difficult.

Moreover, we should keep in mind courts have the opportunity to review the complete administrative record. So if there is not sufficient evidence and basis for an agency's decision, courts already get to review that. Agencies are already held to a good standard of having record evidence for their decisions. Further judicial review down to the expert level within the agency strikes me as something that could grind to a halt the deliberative process and good policy development.

Mr. JOHNSON. And going back to regulatory CutGo, is it wise to have a broad restriction on introduction of new regulations, mandating that if one comes in you have to get rid of another? Is that wise?

Mr. SHELANSKI. Thank you, sir.



As a general matter, I do not favor some kind of a cut-and-go or, often called, regulatory PAYGO obligation. Sometimes a rule needs to be issued to meet a vital public matter.

The United States Department of Transportation had to engage in a very, I think, essential set of rules relating to the transport of volatile crude oil by rail. This was something that received, sort of, broad support across the spectrum from many States. For the Department to have had to spend a lot of time thinking about what rules it was going to have to cut before it could go with its new vital health and safety regulation, I think, could have been very harmful.

More to the point, we have a retrospective review process. I would much prefer that we use the retrospective review process to get rid of rules that should be cut, because that way those rules could be considered on a full record. They could be considered on an appropriate timeline. We at OIRA would have the opportunity to review any rules that were implementing retrospective review, either repeal or reform. And that way we would be sure that the rules that are cut are rules that we don't need. My concern is we lose that review in a kind of process like cut-and-go, mandatory cut-and-go, as you described.

Mr. JOHNSON. Thank you.

And I yield back.

Mr. MARINO. Thank you, Congressman.

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

Mr. TROTT. Thank you, Mr. Chairman.

I appreciate the witness testifying today.

One of the attributes of the REINS Act was it called for more opportunities for industry experts to provide input into the rule-making process. Do you think there is a enough, or too much, or need more input from industry experts when writing rules?

Mr. SHELANSKI. Thank you, Mr. Trott.

I think, as a general matter—and then I will get specifically to your question—as a general matter, I think OIRA has the tools and the input that it needs to do good regulatory review.

On the specific question of industry input, I think there are numerous opportunities for industry in the system we have today to have serious input into the process. It is extremely rare, I mean, hard for me to think of a significant regulation where industry has not actually been involved with the agency as a stakeholder in the development of a rule.

Once the agency sends the rule to us at OIRA, that fact that the rule is with us becomes public, and we are required under our Executive orders to have meetings with anybody who requests a meeting, under Executive Order 12866. As it so happens, we have no control over this. Industry avails itself quite heavily of that opportunity, so we are hearing a lot from industry.

Now, typically, this just gets us to ask questions, and the agency is often very familiar with the arguments that industry is making. And then, of course, once the proposed rule is out for public comment, industry has a great opportunity to get all of the facts and issues into the public record—a record that the agency is required by law to address in order to withstand judicial review.

Of course, during the finalization process, there is further interaction at the agency level and then back through the 12866 process.

So it strikes me that industry has a wealth of opportunity, as things currently stand, to be involved with the rulemaking process.

Mr. TROTT. I appreciate those comments. That is helpful. In hindsight, maybe some of the feedback I am getting from businesses is they have plenty of opportunity for input but some of their input is not listened to or followed, so maybe that is the real issue.

But, along those lines, one of the concerns I have heard from a number of businesses is the timeframe when rules are finalized and implemented is sometimes too short of a window for them to properly respond and implement procedures and software changes to adapt. Do you have any concerns in that regard?

You know, when I was in the business sector for many years, that was one of my biggest nightmares, was when a client or customer would give us a short timeframe to implement significant changes in operations, and we had no choice but to make it happen. But I just worry sometimes that the rulemaking undermines businesses because they don't have adequate time to respond.

Mr. SHELANSKI. I fully agree that a realistic implementation period is vital to a regulation. It is vital for a number of reasons.

Stakeholders do need time to order their affairs. The businesses that are being regulated are the engines of our economy, they are engines of employment. And we need to ensure that the timeframe in which a rule will be implemented and the way it will be implemented is consistent with those vital functions that industry plays.

We review implementation periods, typically, as part of our review of a rule, because costs can change drastically depending on what the ramp-up period is or the implementation period is. Do agencies always get it right? My supposition is occasionally they don't, but it is not for lack of trying. It is part of our review, and it is something on which we frequently take input.

Mr. TROTT. Executive Order 12866 calls on agencies to bring regulatory burdens to your attention and to give suggestions on how they can be resolved. Is that being done, to your knowledge? And do you get many suggestions on how we can improve the regulatory burden on businesses? And if not, how can we make sure they cooperate?

Mr. SHELANSKI. Yes, sir. We do have a lot of back-and-forth with the agencies on precisely that point.

One of the things we are most concerned with at OIRA is to make sure that rules achieve their goals but that, in doing so, they don't take an unnecessarily high-cost path.

And so, during the course of review, we have a number of sources of information that lead to almost a majority of our exchanges with agencies are questions on this kind of topic, whether they are brought to us by other agencies, which is frequently the case through the interagency process, or the Small Business Administration, which is a very effective advocate for small businesses on business burdens, and also through our obligation under the Regulatory Flexibility Act to ask agencies to think about alternatives.

Mr. TROTT. Great.

I see my time has expired. I thank you for your time and your insight this afternoon, sir.

Mr. MARINO. The Chair now recognizes another gentleman from Michigan, Congressman Mike Bishop.

Mr. BISHOP. Thank you, Mr. Chair.

Administrator Shelanski, I appreciate your testimony today.

I would like to build on what my colleague from Michigan was getting to, and I want to refer you to an event. At the end of May, the Department of HHS and Treasury and Labor published a rule announcing that, as of 2016, all plans would be required to embed an individual cost-sharing limit in all options offering family coverage.

This is a huge change in the plan for both the employee and the employer, large and small, and their administrative vendors and carriers, as Mr. Trott indicated, will not be able to accommodate the rule by 2016.

I am wondering how it is possible that something of this magnitude can be implemented by the government without any statutory requirement and without any rules by way of the Administrative Procedure Act?

Mr. SHELANSKI. There are a number of things that agencies can do that don't have to be done by rule, whether explicitly by statute or by precedent. I would have to go back and look into the particular situation that you are raising, because I can't explain under what authority they acted.

But, typically, there are many lawful authorities that do allow agencies to proceed with administrative changes that occur outside of the regulatory process and that are not subject to OIRA jurisdiction.

Mr. BISHOP. Okay.

I have a couple questions with regard to the process, as well.

A recent analysis by the GAO found that, since 2011, 43 major or significant rules were not submitted to Congress, as required by the Congressional Review Act. Without this submission, Congress is, in effect, robbed of the opportunity to introduce resolutions of disapproval.

I am wondering what OIRA can do to remind agencies of their obligations according to this rule so we don't go through this over and over again?

Mr. SHELANSKI. Thank you, Congressman. You raise a very good point. The GAO pointed out something I think is very important, and I absolutely agree that agencies should uphold their obligations to report these rules.

After we received the GAO report, we contacted agencies to remind them strongly that they have the obligation to report these rules. Under the statute, under the law, this is an agency obligation. It is not something OIRA can do for the agencies. But we have reminded the agencies that they have this obligation and should live up to it.

Mr. BISHOP. So we know the agencies must submit rules to OIRA for review, but what process do you use to ensure that the agencies properly comply with the submission requirements?

Mr. SHELANSKI. The submission requirements to OIRA?

Mr. BISHOP. Yes.

Mr. SHELANSKI. So we typically know what rules an agency has on the agenda going forward because we publish twice a year, or publish and then update, a regulatory plan and agenda. It is very unusual for an agency to—in fact, I can almost not think of an example in the 2 years that I have been in the job where an agency has not submitted a rule to OIRA that should be submitted to us. So we don't have a problem. Agencies comply quite well with that.

We often will have differences of opinion about something that is not a rule and whether OIRA should review it. And so we have often called in things that the agencies have captioned as guidances or notices because we believe they have regulatory effect. But the agencies have been very cooperative when we have identified such documents.

Furthermore, agencies will often have a difference of opinion with OIRA over a significance determination and whether we should review a rule. They have shown us the rule; we know it exists. The significance determination is ultimately up to us. So, while we have had agencies ask that rules not be deemed significant, we make an independent judgment. Again, agencies have been quite cooperative.

So we have not had a problem with the agencies' compliance and cooperation with submissions.

Mr. BISHOP. Thank you very much, sir. I appreciate it.

I yield back my time.

Mr. MARINO. Thank you.

The Chair now recognizes the gentleman from Georgia, Congressman Collins.

Mr. COLLINS. Mr. Chairman, I just have a unanimous-consent request.

We had sent a letter to your department. We are working on that. We have not received a response yet. This was from several months ago. I just wanted to insert that into the record and also just ask that you do everything in your power to make sure that your office is complying with our office to get the answers that are needed.

[The information referred to follows:]

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COMMITTEE ON RULES

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March 9, 2015

The Honorable Howard Shelanski  
Administrator, Office of Regulatory and Information Affairs  
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Dear Mr. Shelanski:

As you may be aware, the American Council on Education recently released a report entitled "Recalibrating Regulation of Colleges and Universities." The Report focused on the large volume of potentially burdensome and confusing regulations that face higher education institutions and makes the case for regulatory relief and improved processes. Given your position as the head of the agency tasked with reviewing regulations to promote an efficient regulatory system, I wanted to be sure you were aware of the report and to encourage you to take its findings into account when reviewing education-related regulations. I believe your role in reviewing regulations on higher education is particularly important given that higher education is regulated not only by the Department of Education (DoE) but by every Cabinet-level agency.

While we must maintain oversight of federal investments in higher education, we must also ensure that regulations do not impose onerous and costly burdens on institutions of higher learning. Oversight does not have to come with mountains of bureaucratic red tape. Rather, we should ensure that higher learning institutions are able to focus on their primary priority—educating our future generation of leaders—rather than tying up resources with compliance costs.

Moreover, DoE has recently undertaken the promulgation of several notable regulations absent Congressional action, including action on gainful employment, credit hours, and teacher-preparation programs. DoE's "increasing appetite for regulation," as noted by the Report, is cause for considerable concern. DoE is frequently not acting under direction from Congress but rather promulgating regulation seemingly at-will. These regulations have real consequences and can create real burdens on institutions of higher education, yet DoE seems almost oblivious to the real-life effects of its rulemaking.

According to the Report, as a result of regulations "[colleges] must allocate resources to compliance that would be better applied to student education, safety, and innovation in instructional delivery." For example, at my alma mater, the University of North Georgia, existing regulations for teacher preparation programs require one and a half data entry and management personnel, with an expectation of moving to two full time positions in the near future. The

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University told me that “increased regulation with regard to data collection also affects the provision of field experiences in public schools.” While the University feels that the goals of the regulation are appropriate, “the data collection and reporting demands are costly in terms of time and funding.” In terms of the impact of regulations on teacher preparation programs, the University of North Georgia has shared with me that an even greater concern is “the financial ramifications of the increasingly complex regulations on prospective teacher candidates.” The University of North Georgia is not alone in expressing these types of concerns.

Georgia State University has indicated that it would benefit from simplification of the process to return Title IV funds when a student withdraws. Additionally, Georgia State University has suggested that “the creation of a single student loan program would simplify the process for students and aid administrators, presenting a clear, predictable model.” Finally, Georgia State stated that the “student aid application process continues to be overly complex” and that FAFSA could be more user-friendly and efficient.

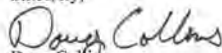
Many of the issues mentioned by Georgia State University and the University of North Georgia are explicitly referenced in the Report as areas for concern or areas with burdensome and complex regulations. That the examples provided above were so readily identified as areas of concern—both in first-hand accounts provided to me and in the Report—is a clear indication that these issues need to be addressed.

The Report succinctly and correctly states, “Rather than impeding institutional productivity and innovation, federal regulation ought to be facilitating it.” To that end, I would like to know:

- What steps your office will take to ensure that new and existing regulations on institutions of higher education do not create unnecessary burdens and instead actually promote productivity and innovation?
- How can your office use the retrospective review process to ensure that regulations on institutions of higher education are meeting changing needs?

I strongly urge OIRA to take the findings in the “Recalibrating Regulation of Colleges and Universities” Report, along with examples provided by universities in Georgia and beyond, into account when reviewing new and existing regulations. It is critically important that we do not create unnecessary burdens—however well-intentioned they might be—that ultimately detract from the ability of educational institutions to perform their core functions. I encourage you to use your position to ensure that regulations are promoting the goals of higher education rather than hindering them and I look forward to your response.

Sincerely,

  
Doug Collins  
Member of Congress

Mr. SHELANSKI. Thank you, Mr. Collins.

I did just this morning receive your letter from our Legislative Affairs Office. I assure you of a response.

I have also read the letter, and I found it extremely interesting and look forward to reading the report you reference in the letter and acting accordingly.

Mr. COLLINS. Thank you.

Mr. Chairman, thank you.

Mr. MARINO. The Chair now recognizes the Vice-Chairman of the Regulatory Subcommittee, the gentleman from Texas, Congressman Farenthold.

Mr. FARENTHOLD. Thank you. Administrator Shelanski, I appreciate your being with us.

I want to start at a 30,000-foot view, and I wanted to get your opinion on how you think the law of diminishing returns applies in the regulatory context.

In other words, once basic safeguards are in place, will further improvements often require spending increasingly more money to achieve increasingly less results?

Mr. SHELANSKI. That is a great question, Congressman.

One of the things that we look at when we review a rule is whether that rule, specifically that rule, building on the baseline of the costs that exist in the industry and what the state of play is in the industry as it stands when the rule is brought to us, whether it will achieve benefits that justify the costs.

Mr. FARENTHOLD. At some point, we might just get the low-hanging fruit and leave the rest for the plaintiffs' attorneys.

I want to get down into the weeds a little bit with some specific regulations that directly affect folks in Texas and throughout the country.

The EPA's controversial waters of the U.S. rule has obvious potential consequences for small businesses, especially agribusiness, our farmers and ranchers. Yet the EPA did not convene a Small Business Advisory Panel, as required by the Regulatory Flexibility Act.

Why didn't OIRA insist that the EPA follow the law?

Mr. SHELANSKI. The EPA's determination at the time that the SBREFA issue, the Small Business Panel issue, came up was that what they were doing in this rule was effectively codifying in regulation what had been existing jurisdictional practice, just trying to spell out more clearly what had been happening through many, many years of practice, in which the courts, indeed the Supreme Court, had found had not been sufficiently spelled out.

So the——

Mr. FARENTHOLD. I am going to take issue, and, certainly, I think some of the farmers and ranchers, who feel like they are directly affected by these rules. They hadn't had the EPA crawling over their property, and this certainly seems to give the EPA a whole lot more jurisdiction, down to stock tanks, irrigation ditches, and, if we keep along this path, probably swimming pools in people's backyards.

Mr. SHELANSKI. Well, I think I would have a different take on what the possible reach of the rule is. But I think, as a general matter, what the EPA was doing was simply spelling out jurisdic-

tion that it had previously under the Clean Water Act and trying to make a little clearer when and where it would exercise it.

At this point, for any given body of water, there is still a determination to be made on whether permitting and whether the Clean Water Act provisions would apply.

Mr. FARENTHOLD. Well, OIRA approved these waters of the U.S. Rules in just 2 months. That seems awful fast considering that the final costs that showed up for the rule were triple the original cost projections, and the final version further extended the EPA's jurisdiction.

Was there any pressure that you all faced from the outside to run this rule through? And what factors was your approval and the speedy decision thereof based on?

Mr. SHELANSKI. Thank you very much.

Under the Executive orders, the normative time for review of regulations is 90 days. Sometimes we are able to be much faster.

By far, the biggest component in the timing of regulation is the priority that the agency places on the rule. Very often, OIRA conducts an interagency process rather quickly, gets feedback from the agencies, passes its comments and the interagency comments back to the agency, and, if an agency has made a rule a high priority, the rule then comes back to us. And when we have decided that the rule has sufficiently addressed the concerns that were raised, we conclude review.

Mr. FARENTHOLD. Well, generally, I am a supporter of the government being more efficient, but I certainly don't think in the rulemaking process there should be any incentive to cut corners, especially considering the financial impact.

One last question on the EPA. Congress has long been concerned about their evaluation of co-benefits from lowering particulate matter emissions in the context of limiting other air pollution.

What is your view of how the EPA accounts for co-benefits? In particular, how robust is the science about the health effect of additional marginal reductions in particulate matter emissions?

Mr. MARINO. Administrator, could you pull that microphone a little closer to you? You are not coming over loud enough on the TV.

Mr. SHELANSKI. Is that better?

Mr. MARINO. That is better.

Mr. SHELANSKI. Okay. My teenage son tells me I am very loud.

Mr. FARENTHOLD. I am an old radio guy. You can't beat me in loud.

Mr. SHELANSKI. In terms of co-benefits—and I believe I got a similar question from Chairman Marino—what we try to do when an agency comes to us with a rule is we look at what the rule achieves. We try to make sure that the agency, although we do not typically make independent legal determinations, has the authority to achieve what it is trying to achieve. And then we look at the costs and benefits to make sure that those costs are justified by the benefits.

When it comes to the state of the science and the analysis underneath the rule, OIRA does not do an independent scientific evaluation. We are not scientists. What we do, however, is make sure that the evidence that the agency relies on meets certain requirements, that it meets the requirements of generally accepted science to the



extent it exists, that the agency employs a generally accepted method, and that the quality of data and evidence that the agency is relying on meets sufficient data quality standards. And one of the things that we are very mindful of is that the agency look at the full body of evidence that is in the scientific record, does not choose selectively things that cut only in favor of its rule.

So we do a pretty rigorous set of questioning of the agency. And if an agency is basing its determination on supposition rather than science, that will make it harder to get a rule through us.

Mr. FARENTHOLD. Thank you. I see my time is well-expired.

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

Mr. RATCLIFFE. I thank the Chairman for holding this hearing, because the Texans that I represent certainly are frustrated with what they see as an ever-expanding government that invades so many aspects of their lives. And they are certainly frustrated with unelected bureaucrats that sometimes have the power to impose regulations that have the force of law with little or no time for meaningful preparation.

So I think it is important that we, at a minimum, make sure the folks do get the information they need to comply with new regulations and to fully analyze the effects that these regulations would have on their businesses.

Administrator Shelanski, I appreciate you being with us today.

I am sure that it won't come as a surprise to you that some of the concern that I am talking about does relate to OIRA's tendency to have delayed informing the American people about regulations developed by Federal regulations—the Unified Agenda, as we call it. So I would like to ask you a couple of questions about some of those factors that I hope that we are able to agree on.

First of all, do you believe that getting this information about agency regulations to the American people, particularly the small businesses who are especially burdened by compliance costs, that that is something that is vitally important?

Mr. SHELANSKI. I fully agree that getting the agenda and plan is extremely important so that stakeholders can have notice of the rules that are going to be forthcoming.

Mr. RATCLIFFE. So, putting yourself in the place of a small-business owner trying to prepare for impending regulation, you would agree with me that getting that information on time and in a streamlined manner is equally important?

Mr. SHELANSKI. I think, to the extent at all possible, getting information out in advance and in a timely fashion is quite important.

Mr. RATCLIFFE. Okay.

And I know you are relatively new to the position there at OIRA, but I am hoping that you will agree with me that such reports on upcoming Federal regulations should never be a political exercise.

Mr. SHELANSKI. I would agree with that. Certainly, in the 2 years that I have been in the job, we have been able to get the agenda and plan out each spring and fall, as required and on time.

Mr. RATCLIFFE. But, obviously, you are aware of the past history at OIRA. And so, in that respect, do you find it troubling that during the 2012 election year the Obama administration refused to

issue either a spring or a fall Unified Agenda of planned rulemakings?

Mr. SHELANSKI. My understanding—and, of course, I wasn't there, so I can't answer as to what happened or what the reasons were—was that one plan and agenda did not get issued.

Mr. RATCLIFFE. Okay.

Mr. SHELANSKI. Just one. I certainly——

Mr. RATCLIFFE. But that one—we can try and minimize that, but the fact is that one would be one violation of law.

Mr. SHELANSKI. Even apart from being a violation of law, I think it is not good policy. Therefore, when I was having my confirmation hearings a little over 2 years ago, one of the things I pledged to do and that I have carried through on was to ensure that each spring and fall that plan and agenda does get published and, moreover, to work closely with the agencies to try to improve the completeness and accuracy of that plan and agenda.

Mr. RATCLIFFE. So can I take it by your answer, then, that you have just given me your assurance that in 2016, the next election year, that the Unified Agenda will issue on time?

Mr. SHELANSKI. Yes, sir.

Mr. RATCLIFFE. And you have taken steps to ensure that that will be the case?

Mr. SHELANSKI. To the extent that it is within my power, sir, those plans and agenda will be published on time.

Mr. RATCLIFFE. Okay. Very good.

I thank you for being here today, and I am going to yield back the balance of my time.

Mr. MARINO. Thank you.

And this concludes today's first panel of our hearing. I want to thank Administrator Shelanski for being here.

You are excused, sir.

Mr. SHELANSKI. Thank you.

Mr. MARINO. And we have been called to vote. So we have four votes, and it looks like it could be about 30 minutes before we call the second panel. We will get back here as soon as possible.

I declare a recess at this point.

[Recess.]

Mr. MARINO. The Regulatory Reform Subcommittee will come to order. And I will begin by swearing in our witnesses for our second panel.

Would you please stand and raise your right hand?

Do you swear that the testimony you are about to give before this Committee is the truth, the whole truth, and nothing but the truth, so help you God?

Please let the record reflect that the witnesses have answered in the affirmative.

And, yes, please be seated.

I am going to introduce all four members before we start out with your opening statements, if you don't mind.

Dr. Douglas Holtz-Eakin—am I pronouncing that correctly?

Mr. HOLTZ-EAKIN. It is actually "Holtz-Eakin."

Mr. MARINO. "Holtz-Eakin." Okay. Thank you—is the president of the American Action Forum.

Dr. Holtz-Eakin has served in numerous government and policy positions, including as Director of the nonpartisan Congressional Budget Office. During his time with the President's Council of Economic Advisors, he helped to formulate policies addressing the 2000-2001 recession in the aftermath of the terrorist attacks of September 11, 2001.

Dr. Holtz-Eakin received his B.A. From Denison University in mathematics and his Ph.D. in economics from Princeton.

And welcome, Doctor.

Ms. Karen Harned—is that correct?

Ms. HARNED. Yes.

Mr. MARINO. Just want to make sure. Thank you—has served as executive director of the National Federation of Independent Business' Small Business Legal Center since April of 2002. Prior to that, Ms. Harned was an attorney at a Washington, DC, law firm specializing in food and drug law, where she represented clients before Congress and Federal agencies.

Ms. Harned appears frequently in the national media to discuss issues including regulations, health care, and other issues important to small business. She is a graduate of the University of Oklahoma and earned her J.D. From The George Washington University Law Center.

Welcome.

Dr. Richard Williams is director of the Regulatory Studies Program at George Mason University's Mercatus Center. Prior to that, Mr. Williams served as Director for Social Sciences at the Center for Food Safety and Applied Nutrition in the Food and Drug Administration.

Dr. Williams has appeared in national media outlets, including NPR and The Wall Street Journal. He is a U.S. Army veteran who served in Vietnam—and, sir, thank you for your service.

Dr. Williams holds a B.S. in business administration from Old Dominion University and earned his M.A. and Ph.D. in economics from Virginia Tech.

Welcome.

Professor Noah Sachs is a professor at the University of Richmond School of Law and Director of the school's Merhige Center for Environmental Studies. He specializes in environmental law, torts, and administrative law and has written casebooks in those areas.

In 2014, Professor Sachs was awarded a Fulbright grant to study challenges to market-oriented environmental reforms in developing countries. Professor Sachs received his B.A. from Brown University, his M.P.P. from Princeton, and his J.D. from Stanford Law School.

Welcome, Professor.

Each of the witnesses' written statements will be entered into the record in its entirety.

I ask that each of you summarize your statements in 5 minutes or less. And you see the lights in front of you, and by the time it gets to the last one, that pretty much means your 5 minutes is up. I know that people concentrate on their statements, so I will just politely do this, and that will give you an indication to please wrap your statement up.

And, with that, thank you all for being here.

Dr. Holtz-Eakin, please.

**TESTIMONY OF DOUGLAS HOLTZ-EAKIN, Ph.D., PRESIDENT,  
AMERICAN ACTION FORUM**

Mr. HOLTZ-EAKIN. Well, thank you, Chairman Marino, Ranking Member Johnson, Congressman Bishop, for the privilege of being here today.

Let me make three brief points and submit my written statement for the record.

The first is that OIRA is doing a very important and valuable job. And this is, I think, highlighted by the scale of recent regulatory activity. There are a lot of details in the written statement, but paperwork burdens have risen by 30 percent since the year 2000 to the present. That is an enormous rise in the cost of regulation. The year 2010 alone saw 100 major rules finalized. OIRA has put in its data that 2012 is probably the most expensive regulatory year in recent history.

And if you look at the success in taking costs off the books, the retrospective reviews done under the Executive orders that have been discussed have, on net, increased costs and have often not even included retrospective review. It has been new regulations and higher costs. So there is a significant issue that needs to be addressed.

And OIRA itself could do a better job; there's no question. There are issues in transparency that have been highlighted by its history with the Unified Agenda in recent years—not putting it out in some years in the spring, putting it out on the 23rd of December or just before Thanksgiving, just before Memorial Day, July 3. The tradition of waiting for a holiday and doing it at 4 o'clock on a Friday or something is something that is not exactly consistent with their mandate.

There is the failure to comply on a regular basis with the Unfunded Mandates Reform Act and highlight mandates placed on the private sector. There is the inconsistent performance on the Congressional Review Act and reporting of regulations to the House, the Senate, and the Government Accountability Office.

In their annual report, there is a highly incomplete accounting of the overall costs and benefits of regulatory activity. And there is, as the Chairman noted in his opening remarks, the failure to deliver it along with the budget each year, as was originally intended.

But, more broadly, even if OIRA did a better job, it is our belief that broader regulatory reform is needed in the United States and that, in doing that, it would be important to codify the benefit-cost principles that are in the various Executive orders, to include judicial review, so that agencies face some consequence for the failure to undertake a rigorous economic analysis of the activities that they are about to impact; that legislation should include some limits on the regulatory activity under that legislation and maybe even a budget of some sort to limit it; and that there needs to be a formal and systematic retrospective review of existing rules in order to, on a regular basis, answer the question, is this regulation still a good idea, presuming it was done well at the time of its initial enactment.

So I'm delighted for the chance to be here today to discuss OIRA and regulation in general, and I look forward to your questions.  
[The prepared statement of Mr. Holtz-Eakin follows:]

Oversight of the Office of Information and Regulatory Affairs

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 15, 2015

\*The views expressed here are my own and not those of the American Action Forum.

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:

- Despite efforts from the administration to eliminate red tape,<sup>1</sup> regulators continue to set new records. The Office of Information and Regulatory Affairs (OIRA) concedes that FY 2012 was the most expensive year in recent history for regulatory costs. According to the Government Accountability Office (GAO), 2010 set a record for the number of “major” rules (100) in a year.
- Full transparency at OIRA remains elusive. Unified agendas and reports to Congress are often late, if published at all, and there is strong evidence that the administration hides data on unfunded mandates and fails to comply with the Congressional Review Act.
- Under Executive Orders 13,563 and 13,610, the administration endeavors to “modify, streamline, expand, or repeal” burdensome regulations. Unfortunately, a review of the administration’s reports finds that there is more expansion than repeal. Agencies often list new regulations that add hundreds of millions of dollars in economic burdens in these allegedly “retrospective” reports, and
- There is more the nation can do on regulatory reform to reduce unnecessary burdens while ensuring essential public health protections. Balanced regulatory reform that retrospectively examines past rules and prospectively evaluates the costs, benefits, and regulatory alternatives is an international standard practice, not a partisan exercise.

Let me provide additional detail on each in turn.

### **The Scale of Regulatory Burdens**

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.<sup>2</sup>

In this regard, here are a few facts on regulations taken directly from the administration’s Office of Information and Regulatory Affairs (OIRA) and GAO: Since FY 2000, the paperwork burden from cabinet-level agencies has increased from 7.1 billion hours to more than 9.3 billion hours, a 30 percent increase.<sup>3</sup> Currently, Americans must manage more than 9,200 government forms, imposing 9.9 billion hours of paperwork.<sup>4</sup> In 2010, federal agencies published 100 “major” rules,

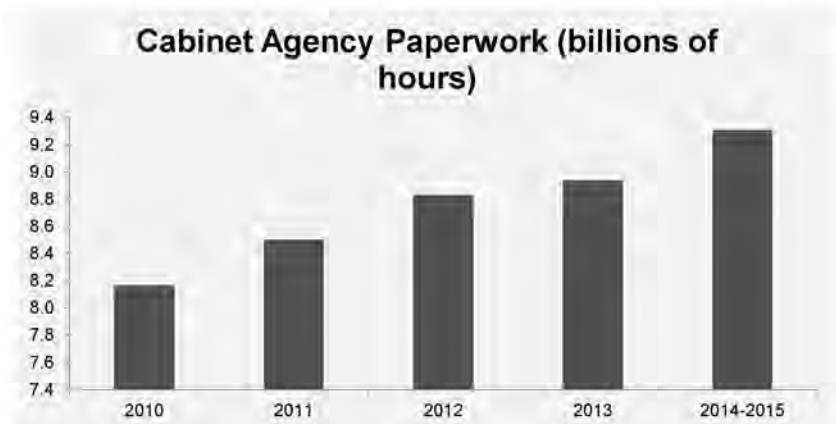
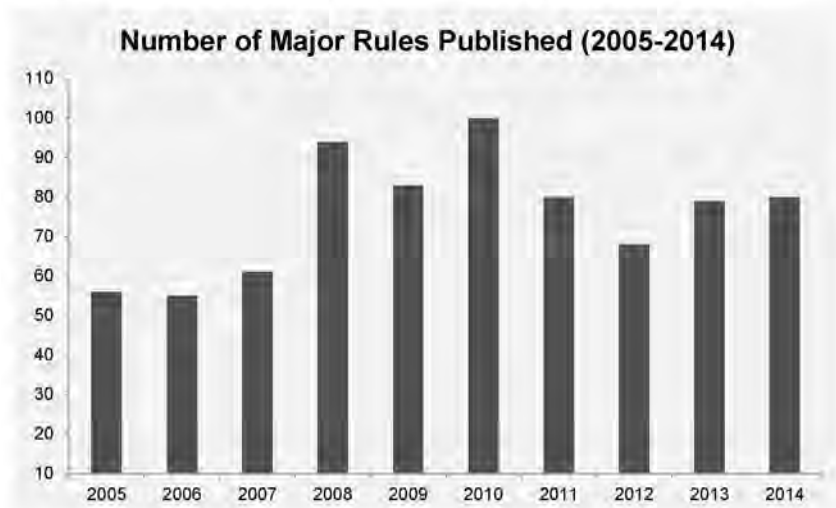
<sup>1</sup> Sunstein, Cass. “Washington is Eliminating Red Tape,” *Wall Street Journal*, available at <http://www.wsj.com/articles/SB10001424053111903596904576518652783101190>.

<sup>2</sup> 76 Fed. Reg. 3,821, available at <http://1.usa.gov/1C/WyCQ>.

<sup>3</sup> 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](https://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb_2014.pdf).

<sup>4</sup> Office of Information and Regulatory Affairs (OIRA), “Inventory of Currently Approved Information Collections,” available at <http://www.reginfo.gov/public/do/PRAReport?operation=11>.

more than any other year in the history of the Congressional Review Act. OIRA data make plain that FY 2012 was one of the costliest years for regulation in at least a generation.<sup>5</sup> See below.



<sup>5</sup> 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](https://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/2013_cost_benefit_report-updated.pdf).



The American Action Forum (AAF), in an effort to track 100 percent of federal rulemakings, has tallied the cumulative burden for every year since 2007. 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.” AAF does not re-estimate 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.

In 2015, the federal government has published more than \$128 billion in long-term regulatory burdens from proposed and final rules. At this pace, regulators could impose more than \$240 billion in economic burdens, a record according to AAF data. However, OIRA’s recordkeeping omits many of these burdens. For example, in FY 2013, OIRA reported \$2 billion to \$2.5 billion in annual economic costs (2001\$).<sup>6</sup> However, OIRA’s report only monetized seven rulemakings from the fiscal year.

There are obvious limitations to OIRA’s methodology, and some of them are unavoidable, but the federal government imposed more than \$2.5 billion in burdens during FY 2013. AAF found 310 federal rules that imposed costs or paperwork burden hours. According to our calculations, the federal government imposed \$7.2 billion in costs.<sup>7</sup> Thus, OIRA’s reported total was just 31 percent of what was likely published in the Federal Register.

For example, OIRA’s report 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 won’t be tallied when OIRA issues its FY 2014 report, which as of this writing, is late.<sup>8</sup> 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.

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 tallies 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.

The Supreme Court’s opinion in *Michigan v. EPA* highlights that certain changes should be underway for how OIRA and agencies use benefit-cost analysis. In the Court’s opinion, Justice Antonin Scalia wrote, “No regulation is appropriate if it does more harm than good.”<sup>9</sup> This is a

<sup>6</sup> Id.

<sup>7</sup> American Action Forum, “Comments to the White House on Costs and Benefits of Regulation,” available at <http://americanactionforum.org/comments-for-the-record/aafr-comments-to-white-house-on-costs-and-benefits-of-regulation>.

<sup>8</sup> 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>.

<sup>9</sup> Supreme Court of the United States, “*Michigan v. EPA*,” available at <http://1.usa.gov/1LTD8T>.

powerful statement, and although not directly related to benefit-cost analysis across the federal government, the ruling has profound implications for the regulatory state.

Professor Cass Sunstein, a former OIRA Administrator, recently acknowledged the breadth of the opinion and its potential affect on EPA and independent agencies. He wrote, “[T]he court has now given a strong signal to independent regulatory agencies such as the FTC, the FCC, the Commodity Futures Trading Commission and the Federal Reserve. If they don’t weigh the costs against benefits, they might well find themselves in legal jeopardy.”<sup>10</sup> The Securities and Exchange Commission has already lost several high-profile cases over its benefit-cost analysis. Because independent agencies are notoriously careless with their analyses, *Michigan v. EPA* should give them added incentive to persuade OIRA that additional scrutiny is warranted. As Professor Sunstein concluded, “The cost-benefit state has arrived.”<sup>11</sup>

### Transparency at OIRA

Despite several laws and executive orders laying the groundwork for heightened transparency at OIRA, recent troubling events cloud what many view as a secretive government entity. From the Unified Agenda to missing reports to Congress, there is plenty of room for improvement, especially considering that OIRA is breaking the law when it violates many of these transparency measures.

In 2012, the administration decided that they weren’t going to publish a spring edition of the Unified Agenda of Regulatory and Deregulatory Actions. This, despite the clear language of governing executive orders and the Regulatory Flexibility Act: “During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda.”<sup>12</sup>

Instead, the administration opted to publish a single agenda on December 21, 2012, the Friday before Christmas, the latest an agenda has ever been published. Each subsequent agenda has been released not with an eye toward transparency, but to avoid scrutiny. The next “spring” agenda was published on July 3, with the fall agenda released before Thanksgiving. The spring 2014 agenda was released the Friday night before Memorial Day and the fall agenda on the Friday before Thanksgiving. The most recent spring agenda actually saw some sunlight, with a publication the Thursday, not Friday, before Memorial Day.

How can an agenda on federal regulations that regulators have compiled since 1996 possibly be a controversial or political exercise? Releasing a calendar of pending rulemakings should be viewed as ministerial standard practice, not some game designed to hide the ball on federal regulation. OIRA and the administration should return to traditional “spring” and “fall” publication dates for the Unified Agenda and ensure that all pending rulemakings are included.

<sup>10</sup> Sunstein, Cass, “Thanks, Justice Scalia, for the Cost-Benefit State,” available at <http://www.bloombergview.com/articles/2015-07-07/thanks-justice-scalia-for-the-cost-benefit-state>.

<sup>11</sup> Id.

<sup>12</sup> Regulatory Flexibility Act, 5 U.S.C. § 602, available at <https://www.law.cornell.edu/uscode/text/5/602>.

Beyond the Unified Agenda, there are concerns with compliance with the Unfunded Mandates Reform Act (UMRA) and the Congressional Review Act (CRA). For both the Unified Agenda and OIRA's website (<http://www.reginfo.gov/public/do/eoAdvancedSearchMain>), agencies and OIRA are supposed to certify whether the rule would result in unfunded private sector or intergovernmental mandates. Despite the myriad of exemptions in the law, it appears that OIRA routinely omits whether a rule contains unfunded mandates.

Take a recent rule that requires new vehicles to install rear-view cameras. The aim of this measure was to prevent death and injury to pedestrians, typically young children, while the car is in reverse. The rule may very well generate benefits exceeding its costs, but its burdens could total more than \$900 million annually, enough to trigger UMRA. However, the Unified Agenda and OIRA's website report that the rule contains no unfunded mandates. See below:

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OIRA Conclusion of EO 12866 Regulatory Review

<p>RIN: 1920642 <a href="#">View EO 12866 Meeting</a></p> <p>Title: Federal Motor Vehicle Safety Standards for 19' Rearview Mirrors</p> <p>Agency/Subagency: DOT/NHTSA</p> <p>Concluded Action: Consultation with OIRA</p> <p>Legal Deadline: Solicitary</p> <p>Publication Date: 04/07/2014</p> <p>Major: Yes</p> <p>Regulatory Flexibility Analysis Required: No</p> <p>Federalism Implications: No</p> <p>International Impact: No</p>	<p>Recruited Date: 12/25/2013</p> <p>Stage: Final Rule</p> <p>Concluded Date: 03/19/2014</p> <p>Economically Significant: Yes</p> <p><a href="#">Informational Transparency</a></p> <p>Related To Homeland Security: No</p> <p>Small Entities Affected: No</p> <p>Affordable Care Act (PPACA, P.L. 111-148 &amp; 111-152): No</p> <p>Dodd Frank Act (Dodd Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203): No</p>
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Yet, the rulemaking itself acknowledges UMRA status, "[T]oday's final rule would result in expenditures by the private sector of over \$100 million annually."<sup>13</sup> Even GAO acknowledged that the measure contained unfunded mandates: "NHTSA determined that this final rule will result in expenditures by the private sector of over \$100 million annually."<sup>14</sup> This was not an isolated incident. AAF found seven other instances where the administration omitted critical data on unfunded mandates, either in the Unified Agenda or on OIRA's website.<sup>15</sup>

There are also thousands of instances where agencies and OIRA are failing to comply with the CRA. In a recent report from the Administrative Conference of the United States, Curtis Copeland found 43 major and significant rules that were never submitted to Congress or GAO.

<sup>13</sup> 79 Fed. Reg. 19,242, available at <http://www.federalregister.gov/a/2014-07469/p-662>.

<sup>14</sup> Government Accountability Office, "Federal Motor Vehicle Safety Standards; Rear Visibility," available at <http://www.gao.gov/assets/670/663984.pdf>.

<sup>15</sup> American Action Forum, "Administration Data Hiding Unfunded Mandates," available at <http://americanactionforum.org/insights/administration-data-hiding-unfunded-mandates>.

as required by the CRA.<sup>16</sup> This raises serious legal issues because under 5 U.S.C § 804, the OIRA Administrator makes the finding of major rule status. Furthermore, 5 U.S.C § 801 clearly states, “Before a rule can take effect,” federal agencies must submit reports to each House of Congress. The Copeland report outlines 1,200 rules published between 2012 and 2013 that could be in legal limbo because of improper procedure.

Under the Regulatory Right to Know Act, the administration “shall prepare and submit to Congress, with the budget” a report outlining “total annual costs and benefits” of federal regulation.<sup>17</sup> Nothing in the law limits reporting to cabinet agencies and the language is clear: the report on costs and benefits is to be submitted with, in a temporal sense, the federal fiscal budget.

However, the current administration rarely complies with this requirement, and as of this writing, it has still not submitted a draft 2015 report to Congress. In 2010 and 2011, the administration published the preliminary report with the budget, and after taking public comment, published the final report later in the year. Then in 2012, the administration waited more than a year to publish the final report. It replicated this practice in 2013 and 2014. Legislative history reveals that there was good reason the “with the budget” language was included in the Regulatory Right to Know Act. Congress and the nation were to be given a view of the administration’s fiscal and regulatory record. OIRA has now decoupled these two aspects and has attempted to hide its regulatory record, just as it does with the Unified Agenda.

The reports to Congress are hardly contentious policy documents. They do not receive widespread media attention. For example, the 2014 report received just 11 substantive comments.<sup>18</sup> There are no good reasons why OIRA and the administration should refuse to follow the law and delay publication. I suspect the pending report is already ready for publication and OIRA will report annualized costs of roughly \$4.5 billion (in 2010\$), compared to benefits near \$20 billion, although the actual costs are likely far higher.

### **Implementation of Executive Order 13,563**

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 four 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

<sup>16</sup> Administrative Conference of the United States, “Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress,” available at

<https://www.acus.gov/sites/default/files/documents/CRA%2520Report%25200725%2520%25282%2529.pdf>.

<sup>17</sup> Regulatory Right to Know Act, 31 U.S.C § 1105, available at

[http://uscode.house.gov/view.xhtml?req=\(title:31%20section:1105%20edition:prelim\)](http://uscode.house.gov/view.xhtml?req=(title:31%20section:1105%20edition:prelim)).

<sup>18</sup> Office of Management and Budget, “Public Comments,” available at

[https://www.whitehouse.gov/omb/inforeg/2014\\_cb/comments](https://www.whitehouse.gov/omb/inforeg/2014_cb/comments).

rules succeeded or failed. For example, energy efficiency standards are included in retrospective 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 \$2.9 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 47 rulemakings, planning to cut \$2.5 billion in costs and remove 68.9 million hours of paperwork.

The cabinet-wide success of retrospective review is incredibly uneven. Typically, agencies just implement new regulation under the guise of retrospective review. Take the Department of Energy’s recent inclusion of efficiency standards for external power supplies. The rulemaking imposes \$3.3 billion in long-term costs;<sup>19</sup> it isn’t retrospective. If it is, then all new rulemakings are retrospective. 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 a cost of \$10.8 billion. Incredibly, the administration did include new Affordable Care Act regulations in its retrospective reports, perhaps hoping that no one would notice.

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.”<sup>20</sup> We have never seen an itemized list of these savings, but we suspect the final annual cost savings reach \$4.5 billion, with another \$500 million in proposed annual savings. By comparison, measures that increase costs that were included in these reports will add \$17.3 billion in annual costs. Thus, on net, the regulatory burden will increase by \$12.7 billion annually because of rulemakings contained in these supposedly “retrospective” reviews.

### **Essential Principles of Regulatory Reform**

It is because regulatory reform has failed so often in the past that we continue to talk about its place in the future. Broadly, regulatory reform should contain three principles:

- Codify the current informal executive orders on benefit-cost analysis and apply those principles to all federal agencies, with the prospect of judicial review if agencies fail to conduct the legally required analyses.

<sup>19</sup> 79 Fed. Reg. 7,850, available at <http://www.federalregister.gov/a/2014-02560/p-180>.

<sup>20</sup> Office of Management and Budget, “Retrospective Review of Regulations,” available at <https://www.whitehouse.gov/omb/oira/regulation-reform>.

- Insert intelligible principles in future legislation that limit new regulation, enhance benefit-cost guidelines, and place a timeline for reviewing the efficacy of new rules.
- Create a formal system to retrospectively analyze the past regulations of all agencies. A formal bipartisan commission with diverse expertise could examine existing regulations and submit recommendations to Congress.

Currently, there is nothing stopping the next administration from ending the process of centralized review and abolishing generations-old principles of benefit-cost analysis. Despite the success of benefit-cost analysis, it is not applied equally across the federal government, and even within the executive branch, agencies sometimes omit crucial information or fail to consider regulatory alternatives. Codifying the current executive orders on reform, and extending their scope to powerful independent agencies, would enshrine sound analysis into law. By inserting language on judicial review, another branch of government would be able to exercise important oversight.

Too often, agencies take the broad authority that Congress grants and abuse that power. For instance, in the last few years alone, federal courts have struck down more than a dozen regulations that exceeded the scope that Congress contemplated.<sup>21</sup> AAF experts Ike Brannon and Sam Batkins first broached the idea of an “upstream” approach to regulation in 2011. They wrote:

“This approach would insert specific guidelines into all major legislation imposing federal mandates, including: 1) requiring agencies to conduct reviews of regulations once implemented, 2) demanding agencies rescind duplicative rules, 3) placing a limit on the number of regulations an agency could promulgate during implementation of a particular law, 4) establishing regulatory ‘pay as you go’ that would require the elimination of a rule whenever a new rule is adopted, and 5) prohibiting new regulations where costs exceed benefits.”<sup>22</sup>

Congress does not have to adopt all five reforms, but including more specific guidelines for agencies could reform the regulatory process and give agencies a greater margin for error when challenged in court. This upstream approach would abolish the current “whack-a-mole” tactics that target current controversial rules and instead focus on crafting sound rules before they become contentious.

There must also be a formal structure to evaluate past regulations to determine whether these measures are still generating significant benefits at an acceptable cost. This is not a partisan exercise. The OECD recommends that nations “adopt a dynamic approach to improve regulatory systems over time to improve the stock of existing and the quality of new regulations.”<sup>23</sup>

<sup>21</sup> American Action Forum, “President’s Regulatory Record in the Courts,” available at <http://americanactionforum.org/research/presidents-regulatory-record-in-the-courts>.

<sup>22</sup> Regulation Magazine, “Obama, Ryan, and the Future of Regulatory Reform,” available at <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2011/9/regv34n3-2.pdf>.

<sup>23</sup> OECD, “Guiding Principles for Regulatory Quality and Performance,” available at <http://www.oecd.org/fr/reformereg/34976533.pdf>.

Currently, there are more than 2,400 federal paperwork requirements, totaling 9.9 billion hours of compliance time for Americans. This is not solely the fault of the current administration, but generations of regulatory accumulation that policymakers have often overlooked. Whether addressing these burdens is conducted by an independent commission or an independent agency, there must be an outside arbiter that forces regulators to examine past rules. The current agency led process will produce piecemeal reforms at best and completely ignore past rules at worst. Without an effort to rescind or amend duplicative rules, any regulatory reform effort will garner only partial success.

This Committee has already considered a piece of legislation that would address past cumulative burdens and future rulemakings. The Searching for and Cutting Regulations that are Unnecessarily Burdensome Act, or SCRUB, would establish an independent commission to identify duplicative regulations and allow Congress to vote on repeal or amendment. It would also establish a “cut-go” pool for regulators, where they would remove an older duplicative rule if they want to implement a new rule. As AAF found, a 15 percent reduction in regulatory costs, which SCRUB sets, could generate approximately 1.5 billion fewer paperwork hours and anywhere from \$48 billion to \$90 billion in annual cost savings.<sup>24</sup>

Embedded in the SCRUB Act is a form of a regulatory budget, an idea meriting increased attention on Capitol Hill. Whatever the form of a regulatory budget, cumulative or “one-in, one-out,” recent evidence reveals that it can generate tremendous savings without adverse health and safety impacts. For example, the United Kingdom adopted a regulatory budget five years ago and it has saved roughly \$1 billion in costs.<sup>25</sup> Meanwhile, particulate matter pollution and greenhouse gas emissions continue to decrease. It is legally doubtful that OIRA could adopt a regulatory budget unilaterally, but AAF proposed the idea of a flexible paperwork budget, which might be more palatable, legally and practically.<sup>26</sup>

### 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. In a post *Michigan v. EPA* world, OIRA should exercise enhanced oversight of powerful financial regulators. Better analysis in the future will serve regulations and our economy well, but broader reform would deliver even greater benefits.

Thank you. I look forward to answering your questions.

<sup>24</sup> American Action Forum, “SCRUB Act Could Save \$48 Billion, 1.5 Billion Hours,” available at <http://americanactionforum.org/research/suc-and-settle-reform-scrib-act-could-save-48-billion-1.5-billion-hours>.

<sup>25</sup> American Action Forum, “Why Critics of a Regulatory Budget Have it Wrong,” available at <http://americanactionforum.org/insights/why-critics-of-a-regulatory-budget-have-it-wrong>.

<sup>26</sup> RegBlog, “Can a Regulatory Budget Trim Red Tape,” available at <http://bit.ly/1K3IGAG>.

Mr. MARINO. Thank you, Doctor.  
Ms. Harned?

**TESTIMONY OF KAREN R. HARNED, ESQ., EXECUTIVE DIRECTOR, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, SMALL BUSINESS LEGAL CENTER**

Ms. HARNED. Thank you, Chairman Marino, Ranking Member Johnson, and Congressman Bishop. On behalf of the proximately 350,000 small-business members of NFIB, I thank the Subcommittee for its work to ensure that OIRA is effectively carrying out its mission.

Overzealous regulation is a perennial cause of concern for small business. Since January 2009, government requirements and red tape have been listed as among the top three problems for small-business owners. When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden. Regulatory costs are now nearly \$12,000 per employee per year, which is 30 percent higher than the regulatory-cost burden that larger businesses face.

This is not surprising, that the small-business burden is higher, since it's the small-business owner, not one of the team of compliance officers, who is charged with understanding new regulations, filling out required paperwork, and ensuring that the business is in compliance with new Federal mandates.

When reflecting on her time as OIRA Administrator, Susan Dudley stated that the first lesson she learned at OIRA was that OIRA has no constituency. From the perspective of the Administrator, that may indeed be true. OIRA is the proverbial skunk at the picnic, keeping agencies wanting to do more in check. I have great respect for Ms. Dudley, but, from NFIB's perspective, OIRA does have a very important constituency: small business.

During my 13 years at NFIB, I have heard countless stories from small-business owners struggling with a new regulatory requirement. To them, the requirement came out of nowhere, and they are frustrated that they had no say in its development.

Small-business owners are not roaming the halls of administrative agencies, reading the Federal Register, or even inside EPA. Small-business owners rely heavily on SBA's Office of Advocacy and OIRA to check agency power so they are doing what the Regulatory Flexibility Act requires, which is ensuring that agencies don't impose costly new mandates on small businesses when viable and less expensive alternatives to achieve regulatory objectives exist.

Recently, we have seen a number of costly rules and proposals come out of Federal agencies despite stakeholders raising significant cost concerns about them. NFIB is concerned that OIRA is not performing the rigorous independent analysis needed to ensure that the proposed benefits of a new rule truly outweigh the negative economic impacts.

Two recent examples are of particular concern. On June 29, the waters of the U.S. rule was issued. The rule radically expands Federal jurisdiction and regulatory power over hundreds of thousands of landowners, including small businesses. The Administration has consistently touted this rule as one that will give small businesses



more certainly in determining whether a Federal permit is going to be required, yet the only certainty that small businesses will see from this rule is a certainty of more costs in consulting and permitting fees, not to mention the risk of 37,500-day penalties if they make the wrong decision.

Remarkably, EPA had the audacity to certify the rule as not having a significant economic impact on small business. Even SBA's Office of Advocacy publically called on EPA to withdraw the rule and perform an RFA analysis before moving forward. Yet OIRA did not require the agencies to comply with the RFA. OIRA's lack of engagement truly was astounding and begs the question, is anyone minding the regulatory store?

On July 6, the Department of Labor's Wage and Hour Division published a proposed rule that would more than double the salary threshold for white-collar employees who are eligible to receive overtime pay. According to DOL's own estimates, under the rule, small businesses would pay on average \$100 to \$600 in direct costs and \$320 to \$2,700 in additional payroll costs to employees in the first year after the proposed rule becomes effective.

As the Obama administration is in its final stretch, OIRA should be proactive in discouraging agencies from promulgating midnight regulations. Administrator Shelanski and the White House should establish and enforce firm deadlines for regulatory actions in the Administration's final months. At a minimum, all final rules should issue by November 1, 2016.

Finally, NFIB is very concerned about the efforts of agencies to subvert OIRA in the rulemaking process altogether. The Legal Center has conducted significant research and analysis of several regulatory activities by Federal agencies that harm small business, and we will be issuing a detailed report in the coming weeks.

Small businesses are drowning in a sea of regulation. NFIB is concerned that OIRA has given final approval to new regulations that have significant costs and few benefits.

Thank you for holding this hearing.

[The prepared statement of Ms. Harned follows:]



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

On the date of

July 15, 2015

On the subject of

"Oversight Hearing on the Office of Information and Regulatory Affairs"

Dear Chairman Marino and Ranking Member Johnson:

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony for the Subcommittee on Regulatory Reform, Commercial and Antitrust Law's hearing entitled the "Oversight Hearing on the Office of Information and Regulatory Affairs."

My name is Karen Harned and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

#### **Impact of Regulation on Small Business**

Overzealous regulation is a perennial concern for small business. The uncertainty caused by future regulation negatively affects a small-business owners' ability to plan for future growth. Since January 2009, "government requirements and red tape" have been listed as among the top-three problems for small business owners, according to the NFIB Research Foundation's monthly *Small Business Economic Trends* survey,<sup>1</sup> within the small business problem clusters identified by *Small Business Problems and Priorities* report, "regulations" rank second behind taxes.<sup>2</sup>

Despite the devastating impact of regulation on small business, federal agencies continue to churn out approximately 10 new regulations each day.<sup>3</sup> According to the Administration's spring 2015 regulatory agenda, there are 3,260 federal regulations in the pipeline, waiting for implementation.<sup>4</sup>

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden. Regulatory costs are now nearly \$12,000 per employee per year,

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<sup>1</sup> NFIB Research Foundation, *Small Business Economic Trends*, at p. 18, June 2013. <http://www.nfib.com/research-foundation/surveys/small-business-economic-trends>

Wade, Holly. *Small Business Problems and Priorities*, at p. 18, August 2012. <https://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-problems-priorities-2012-nfib.pdf>

<sup>3</sup> Data generated from [www.regulations.gov](http://www.regulations.gov)

<sup>4</sup> <http://www.reginfo.gov/public/do/eAgendaMain>

which is 30 percent higher than regulatory cost burden larger businesses face.<sup>5</sup> This is not surprising, since it's the small business owner, not one of a team of "compliance officers" who is charged with understanding new regulations, filling out required paperwork, and ensuring the business is in compliance with new federal mandates. The small business owner is the compliance officer for her business and every hour that she spends understanding and complying with a federal regulation is one less hour she has to service customers and plan for future growth.

### **The Importance of the Office of Information and Regulatory Affairs to America's Small Businesses**

Understanding the impact regulations have on small business owners nationwide, the NFIB is pleased that this Subcommittee is taking the time to ensure that the Office of Information and Regulatory Affairs is effectively carrying out its mission to, among other things, ensure that before an agency promulgates a regulation it

has adequately defined the problem that it intends to address; considered alternatives; assessed available information, risks, costs, and benefits (both qualitative and quantitative); consulted affected parties and promoted transparency and participation; and tailored the regulation to focus on the problem in a simple and clear way that does not conflict with other rules or statutes. OIRA seeks to ensure, to the extent permitted by law, that the benefits of agency regulations justify the costs and that the chosen approach maximizes net benefits to society.<sup>6</sup>

When reflecting on her time as OIRA Administrator under President George W. Bush, Susan Dudley stated that the first lesson she learned as administrator was that OIRA has no constituency.<sup>7</sup> From the perspective of the OIRA administrator, that may indeed be true. OIRA is the proverbial "skunk at the picnic." As Ms. Dudley explains, it's the one member of the federal branch that checks the "agencies' natural proclivity to want more (whether it's more budget resources or more regulatory authority)."<sup>8</sup>

I have great respect for Ms. Dudley and the wonderful work she has done throughout her career communicating to the public the importance of the regulatory process, in general, and the need for honest analysis of the cost and benefits of regulation, in particular. But from NFIB's perspective, OIRA does have a very important constituency – small business.

<sup>5</sup> Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, September 10, 2014. <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>

<sup>6</sup> [https://www.whitehouse.gov/omb/organization\\_mission/](https://www.whitehouse.gov/omb/organization_mission/)

<sup>7</sup> Dudley, Susan E., "Is there a constituency for OIRA? Lessons Learned, Challenges Ahead," *Regulation*, at 6, Summer 2009.

<sup>8</sup> *Id.*

During my thirteen years at NFIB I have heard countless stories from small business owners struggling with a new regulatory requirement. To them, the requirement came out of nowhere and they are frustrated that they had “no say” in its development. That is why early engagement in the regulatory process is key for the small business community. But small business owners are not roaming the halls of administrative agencies, reading the *Federal Register* or even *Inside EPA*. Early engagement in the rulemaking process is not easy for the small manufacturer in White Oak, Texas or Bismarck, North Dakota. As a result, small businesses rely heavily on the Office of Advocacy at the Small Business Administration and OIRA to check agency power so that they are doing what the Regulatory Flexibility Act requires – ensuring that agencies don’t impose costly new mandates on small business when viable and less expensive alternatives to achieve regulatory objectives exist.

#### **Small Business Concerns with Recent Regulations that Survived OIRA Review**

Over the last six and a half years, a number of costly rules have been issued despite stakeholders raising significant cost concerns about them. Given the impact these regulations will have on small business and the economy as a whole, NFIB is concerned that OIRA is not performing the rigorous independent analysis needed to ensure that the proposed benefits of a new rule truly out-weigh the negative economic impacts. Two recent examples are of particular concern to small business.

##### Waters of the U.S. Rule

On June 29, the Clean Water Rule: Definitions of “Waters of the United States” was published in the Federal Register.<sup>9</sup> The “Waters of the United States Rule” radically expands federal regulatory powers over hundreds of thousands of privately owned properties throughout the United States. In practical terms it means that ordinary landowners—homeowners, farmers, ranchers and other small businesses—must now pursue costly federal permits in order to make almost any use of affected portions of their lands, even for something as basic as landscaping. And these permits are tremendously expensive, costing tens of thousands of dollars.

In *Rapanos v. United States*<sup>10</sup> and *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*<sup>11</sup>, the Supreme Court rejected two previous attempts by EPA and the Army Corps to dramatically expand their jurisdiction over private wetlands. The Court explained that the Constitution prohibits federal regulation of private property unless the government can demonstrate a meaningful connection to interstate commerce. Yet, with the Waters of the U.S. rule, the agencies are once more asserting jurisdiction over lands that Congress did not intend to be covered by

<sup>9</sup> 80 Fed. Reg., 37,054 (<http://www2.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0380-20862.pdf>)

<sup>10</sup> 547 U.S. 715 (2005)

<sup>11</sup> 531 U.S. 159 (2001)

the Clean Water Act, and in a manner that mischaracterizes the *Rapanos* and *SWANCC* decisions to justify expansion of CWA jurisdiction.

The Administration has consistently touted this rule as one that will give small businesses and other property owners more certainty in determining whether a federal permit will be required. Yet the only certainty that small businesses will see from this rule is the certainty of more costs.

Under this new rule, a small business with property over which water occasionally flows will be confronted with one of three costly choices before they can landscape or make other alterations to land: (1) pay hundreds, if not thousands, of dollars to a consultant to determine whether or not an EPA/Army Corps of Engineers permit is required; (2) assume CWA jurisdiction and pay tens of thousands dollars to obtain the appropriate permit; or (3) assume no jurisdiction and risk ruinous daily penalties of \$37,500 in the event EPA should assert the property to be jurisdictional. But in reality, these staggering costs and potential liabilities will result in a chilling effect; in practical terms, the new rule makes most land use projects—except for the most massive of development projects—economically unfeasible. It will result in further adverse economic impacts in the devaluation of affected lands, which will, as a practical matter, be rendered nature reserves in most cases.

Property is one of the biggest assets many small business owners have. Many small business owners have invested substantial personal assets into acquisition of land, as real property is essential for their business operations and their overall economic well-being. Yet the Waters of the U.S. rule encumbers this asset in uncertainty for millions of small businesses across the country.

Remarkably, EPA had the audacity to certify the Rule as not having a significant economic impact on small business—notwithstanding NFIB's objections and near unanimous calls from the few small business interests whom the Agencies reached out to informally. Of course this certification is a farce. NFIB has repeatedly raised concerns over Regulatory Flexibility Act compliance in the past, when agencies have failed to give serious consideration to how their regulations might impact small businesses; however, we've never seen a more blatant case of contempt for small business than the Environmental Protection Agency and Army Corps' certification that this Rule will not impact small businesses.

Even the Small Business Administration's Office of Advocacy publically called on the Environmental Protection Agency to withdraw the rule and to perform a Regulatory Flexibility Act analysis before moving forward.<sup>12</sup> Despite this rare act by the Office of Advocacy, OIRA did not require the agencies to perform the required Regulatory Flexibility Act compliance. OIRA's lack of engagement truly was astounding and begs the question, "Is anyone minding the regulatory 'store'?"

<sup>12</sup> <https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>

### **Department of Labor “White Collar” Exemption to Fair Labor Standards Act**

On July 6, the Department of Labor's Wage and Hour Division (DOL) published its proposed rule, which would amend the Fair Labor Standards Act (FLSA) regulations governing the “white collar” exemption from overtime pay for executive, administrative and professional employees.

Under the proposed rule the salary threshold for employees who are eligible to receive overtime pay would more than double from \$23,660 to \$50,440 and would be updated every year in the Federal Register. Although, the proposed rule would not change existing duties tests, which require employees to perform certain primary duties to qualify for an overtime exemption, DOL is asking whether these duties tests should be revised.

According to DOL's own estimate, the rule would directly affect 4.6 million U.S. workers at an estimated total direct employer costs for the first year of \$592.7 million. Small business will pay, on average, \$100 to \$600 in direct costs and \$320 to \$2,700 in additional payroll costs to employees in the first year after the proposed rule becomes effective. DOL also estimates each small business would spend one hour of time familiarizing itself with the regulatory requirements; one hour per each affected worker in adjustment costs; and five minutes per week scheduling and monitoring each worker expected to be classified as overtime eligible as a result of the proposed rule.

Even according to DOL's numbers, NFIB is concerned that the proposed rules will make it harder for small employers to promote workers up to management level by creating additional costs and record-keeping headaches for America's small businesses.

The proposed rule would be particularly expensive for small businesses in small markets where wages are commensurate with the cost of living. Promoting someone to manager is going to be a costly proposition for many small businesses, and the result will be less mobility and fewer opportunities for workers at the bottom.

That's a very big expense for small restaurants and retailers, and the businesses that will be hit hardest are in parts of the country where the cost of living is low. Employers will be forced to limit hours for their workers and eliminate management positions.

The proposed rule is the latest in a string of well-meaning regulations advocated by politicians and bureaucrats who don't know the first thing about running a business.

### **OIRA Should Work to Prevent “Midnight Regulations”**

As the Obama Administration is in its final 18-month stretch, OIRA should be proactive in discouraging agencies from promulgating “midnight regulations.” “Midnight regulations” are regulations promulgated at the end of an Administration, particularly those that issue post-election. These regulations generally are rushed with inadequate analysis and opportunity for public comment.

NFIB appreciates Administrator Shelanski’s efforts to encourage agencies to start prioritizing regulatory objectives now.<sup>13</sup> However, we think it imperative that Administrator Shelanski and the White House demonstrate their commitment to good government and transparency by establishing and enforcing firm deadlines for regulatory actions in the final months of the Obama Administration. Former White House Chief of Staff, Joshua B. Bolton, famously sent a memorandum to agency heads setting a deadline of June 1, 2008 for proposed rules and November 1, 2008 for final rules.<sup>14</sup> At a minimum, NFIB believes similar deadlines should be imposed on agencies in 2016. We are concerned that, to date, Administrator Shelanski has been unwilling to define exactly when “midnight” will be when it comes to regulation for this Administration. At a minimum, we strongly believe all final rules should issue by November 1, 2016.

### **“Subregulatory” Activities Skirt OIRA Review Process to the Detriment of Small Business**

Finally, NFIB is very concerned about the efforts of agencies to subvert OIRA and the rulemaking process altogether. Agencies are increasingly imposing new regulatory burdens on small business outside of the formal rulemaking process. The NFIB Small Business Legal Center has conducted significant research and analysis of the “subregulatory” activities by federal agencies. In the coming weeks, we will issue a report detailing how these “subregulatory” activities, like regulation through amicus, are hurting small business. When the report is finalized, we look forward to sharing it with the Subcommittee.

### **Conclusion**

Small businesses are drowning in a sea of regulation. Small business owners are spending more and more time trying to understand new regulatory requirements, complying with them and filling out the paperwork that seems to accompany every new regulation.

OIRA plays a critical role in ensuring new regulations undergo rigorous analysis so

<sup>13</sup> Bolen, Cheryl, “To Avoid Midnight Regulations in 2016, Obama Tells Agencies to Set Priorities Now,” BNA’s Daily Report for Executives (Feb. 11, 2015).

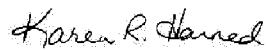
<sup>14</sup> Memorandum of Joshua B. Bolton to the Heads of Executive Departments and Agencies and the Administrator of the Office of Information and Regulatory Affairs, May 8, 2008.



that the benefits of a new regulation are maximized and costs are reduced. NFIB is concerned that in the last several years OIRA has given final approval to new regulations that have significant costs and few benefits. NFIB appreciates this Subcommittee holding this hearing. We hope that the members of this Subcommittee and Congress continue aggressive oversight of OIRA and administrative agencies.

NFIB and the NFIB Small Business Legal Center stand ready to assist the Subcommittee in its efforts to hold OIRA and agencies accountable to small business.

Sincerely,

A handwritten signature in black ink that reads "Karen R. Harned". The signature is written in a cursive, slightly stylized font.

Karen R. Harned, Esq.  
Executive Director  
NFIB Small Business Legal Center

Mr. MARINO. Thank you, Ms. Harned.  
Dr. Williams?

**TESTIMONY OF RICHARD WILLIAMS, Ph.D., DIRECTOR OF  
REGULATORY STUDIES PROGRAM, MERCATUS CENTER**

Mr. WILLIAMS. Yes. I thank you for the invitation, Mr. Chairman and Ranking Member.

Mr. MARINO. Doctor, is your microphone on?

Mr. WILLIAMS. Now it is.

Mr. MARINO. Thank you.

Mr. WILLIAMS. Thirty-five years ago, President Carter began an experiment based on the proposition that the best way to ensure we have only those regulations that work would be to require an economic analysis of those regulations and to have them overseen by a centralized reviewer. Subsequent to President Carter, every President has agreed with that goal.

In President Carter's words, he said we needed to "regulate the regulators" so that we could, again, in his words, "eliminate unnecessary Federal regulations." No doubt he had looked at the nearly 85,000 pages of regulations in 1977 and thought something had to be done.

He said, going into office, he knew he was going to have difficulty controlling the regulatory agencies, so at first he tried a few internal committees to oversee them. But, ultimately, in 1980, he settled on creating the Office of Information and Regulatory Affairs in the President's Office of Management and Budget, and he staffed it with about 80 people.

That was his experiment to control the regulatory state from getting out of hand. But here we are, 35 years later, with lots of evidence as to whether or not President Carter's experiment, OIRA, is the only thing necessary to achieve his goal. It is not.

That is not to say that OIRA has not been punching above their weight and trying. They have. But they have not nor cannot solve the problems alone. Even if we could solve the internal problems of OIRA, such as having way too few people, being constrained not to touch politically favored agencies, and putting independent agencies under OIRA review, they would still be, as many people call them, a speed bump.

The reason that is true is because they reside in the executive branch, the same branch as the regulatory agencies. The only way they can stop unnecessary rules is to use their extremely limited political capital within the White House.

So what is the evidence that President Carter's experiment has failed? I believe there are five pieces of evidence.

Number one, as I said, OIRA is too small relative to the regulatory agencies to exercise effective oversight. OIRA now has about 45 people, compared to several hundred thousand regulators who are producing 3,000 to 4,000 rules per year.

Number two, agencies know and use lots of ways to get around OIRA through what we call stealth regulation, things like guidance, notices, sue and settle, and other tools that get firms to comply, and OIRA plays no role in those. And agencies use these despite the fact that OIRA examines so few of their rules.

Number three, the regulatory state has grown to gigantic proportions since OIRA's founding. In 1977, as I said, there were 85,000 pages of rules; in 2014, there are now 175,000 pages of rules. And those rules contain over 1 million requirements. These rules are cranked out by regulatory agencies, and they almost never go away. This leaves firms and small governments to attempt to comply with this staggering set of commandments.

Number four, Presidents can't control the regulatory state, as evidenced by, amongst other things, midnight rules—rules that are rushed through at the end of an Administration. I will get back to that.

Finally, number five, too many regulations don't have a solid analytical foundation, the economic analysis that President Carter insisted on, and, therefore, they don't achieve the results that are promised.

So the evidence is that OIRA is too small, they are easy to get around using stealth regulations, and both informal regulations and stealth regulations continue to grow at a fantastic rate, and there is very little quality analysis accompanying the informal rules.

We also know that every President since President Carter has complained about how hard it is to control the regulatory agencies, and every one of them has supported OIRA and the requirements to do economic analysis, in hopes of constraining regulations to only those that are truly necessary. But every President since 1980 has failed.

So the answer has to lie beyond the President. The answer lies in getting both other branches of government, Congress and the Judiciary, more involved in overseeing agencies. Congress needs better information to help it exercise oversight, and stakeholders need to be able to use the judicial system to remedy missing, misleading, or ignored regulatory analysis.

We now appear to be entering a very strange period of midnight rules. It appears as though agencies are rushing out big rules to ensure that they are finalized well before the 60-day period that a new Congress and a new President would have to disapprove them under the Congressional Review Act. This would ensure that no new President could come in and change the rules that have been rushed through the process with very little political accountability.

With all of the tools at their disposals, agencies are masters at avoiding OIRA, and the evidence for President Carter's failed experiment is clear after 35 years.

Thank you.

[The prepared statement of Mr. Williams follows:]



**MERCATUS CENTER**  
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## TESTIMONY

### OIRA ALONE COULD NOT ACHIEVE PRESIDENT CARTER'S GOALS

BY RICHARD A. WILLIAMS, 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

Oversight Hearing on the Office of Information and Regulatory Affairs

July 15, 2015

Thank you Chairman Marino, Ranking Member Johnson, and members of the Committee for the opportunity to testify today. I am vice president for policy research at the Mercatus Center at George Mason University. My three-and-a-half decades of experience with rulemaking and regulatory analysis includes work at the Food and Drug Administration and a stint at the Office of Information and Regulatory Affairs (OIRA) in the Office of Budget and Management (OMB) reviewing rules from other agencies.

Thirty-five years ago, President Jimmy Carter began an experiment to, in his words, "regulate the regulators" to "eliminate unnecessary federal regulations."<sup>1</sup> His experiment was to form, through the Paperwork Reduction Act of 1980, the Office of Information and Regulatory Affairs within OMB to allow the president to gain control over the regulatory agencies. We have now had 35 years of experience to see if President Carter's goals have been achieved. They have not. To be clear, OIRA does excellent work. But even if the office (1) had more than 45 people to control hundreds of thousands of regulators; (2) wasn't constrained to stay away from agencies that are political favorites; and (3) covered independent agencies, it would still be, as some have described it, "a speed bump."<sup>2</sup>

OIRA will always serve as only a minor check on the quality of regulations implemented because it is in the same branch of government as the regulatory agencies, and it often carries less political clout than the agencies whose work it reviews.

1. Jimmy Carter, "Paperwork Reduction Act of 1980 Remarks on Signing H.R. 6410 into Law, December 11, 1980, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=44390>. In an adversarial hearing held by Oversight and Government Reform Committee Chairman John Dingell, there was apparently some confusion over the role of OIRA. The new administrator, Jim Miller, reports that the OMB Assistant Director Jim Tozzi summed up why it was adversarial: "You are regulating the regulators; that's what they think they [Congress] are supposed to do," in James C. Miller III, "The Early Days of Reagan Regulatory Relief and Suggestions for OIRA's Future," *Administrative Law Review* 63, Special Edition (2011): 98.

2. OMB, "About OIRA," accessed July 13, 2015, <https://www.whitehouse.gov/omb/oira/about>.

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*The ideas presented in this document do not represent official positions of the Mercatus Center or George Mason University.*

A credible effort by any OIRA administrator to push back on a regulation, therefore, depends on whether the administrator knows if OIRA can win the political argument that will follow. Having to win a political battle to ensure that analysis is done well and is considered in rulemaking is never going to provide the kind of quality check that the last six presidents have called for. The issues for OIRA include:

- There is substantial evidence that President Carter's experiment has failed. The quality of economic analysis in rulemaking is poor, which leads to poor regulations. More troubling, agencies are seeking to evade the safeguards of the Administrative Procedure Act through a variety of "stealth" regulations.
- The consequent regulatory accumulation imposes a considerable burden on American households and a drag on the economy.
- Addressing regulatory accumulation requires comprehensive reform, and staffing up OIRA would only be a small element of that reform.

#### THE FAILURE OF OIRA AS FEDERAL WATCHDOG

What is the evidence that this experiment has failed? President Carter wanted to eliminate unnecessary federal regulations. Today, far too many regulations fail to address a problem, do not solve any problem, or have unintended consequences.<sup>3</sup> President Carter also instituted the first major requirement for economic analysis (Executive Order 12844) that OIRA is expected to oversee.

*Poor economic analysis:* We have observed through years of scholarly research that only a small fraction of rules have an analysis, the analysis is often poorly done, agencies rarely use the analysis as part of their decision-making, or analysis is done after decision-making to justify the agency's position.<sup>4</sup>

3. Sherzod Abdukadirov, "Justifying Regulations: Examining the Benefit Side of the Equation," *William and Mary Policy Review* 4, no. 2 (Spring 2013); Jerry Ellig and James Broughel, "Regulation: What's the Problem?" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, November 2011), <http://mercatus.org/publication/regulation-whats-problem>; Sherzod Abdukadirov, "The Unintended Consequences of Safety Regulation" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, June 2013), <http://mercatus.org/publication/unintended-consequences-safety-regulation>.

4. See Jerry Ellig, "Regulatory Impact Analysis: Four Decades of Foibles" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, January 2015), <http://mercatus.org/publication/regulatory-impact-analysis-four-decades-foibles>; Jerry Ellig and Richard Williams, "Reforming Regulatory Analysis, Review, and Oversight: A Guide for the Perplexed" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, August 2014), <http://mercatus.org/publication/reforming-regulatory-analysis-review-and-oversight-guide-perplexed>; Richard Williams, "The Influence of Regulatory Economists in Federal Health and Safety Agencies" (Mercatus Working Paper, Mercatus Center at George Mason University, July 2008), <http://mercatus.org/publication/influence-regulatory-economists-federal-health-and-safety-agencies>; Arthur Fraas and Randall Lutter, "The Challenges of Improving the Economic Analysis of Pending Regulations: The Experience of OMB Circular A-4," *Annual Review of Resource Economics* 3 (2011): 71-85; Arthur Fraas and Randall Lutter, "On the Economic Analysis of Regulations at Independent Regulatory Commissions," *Administrative Law Review* 63, Special Edition (2011): 213-41; Jerry Ellig and Hester Peirce, "SEC Regulatory Analysis: A Long Way to Go and a Short Time to Get There," *Brooklyn Journal of Corporate, Financial & Commercial Law* 8, no. 2 (Spring 2014): 361-437; Jamie Belcore and Jerry Ellig, "Homeland Security and Regulatory Analysis: Are We Safe Yet?," *Rutgers Law Journal* 40, no. 1 (Fall 2008): 1-96; Robert W. Hahn, Jason K. Burnett, Yee-Ho I. Chan, Elizabeth A. Mader, and Petrea R. Moyle, "Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866," *Harvard Journal of Law and Public Policy* 23, no. 3 (2000): 859-71; Robert W. Hahn and Patrick M. Dudley, "How Well Does the Government Do Benefit-Cost Analysis?," *Review of Environmental Economics and Policy* 1, no. 2 (2007): 192-211; Robert W. Hahn, and Robert E. Litan, "Counting Regulatory Benefits and Costs: Lessons for the US and Europe," *Journal of International Economic Law* 8, no. 2 (2005), 473-508; Robert W. Hahn, Randall W. Lutter, and W. Kip Viscusi, *Do Federal Regulations Reduce Mortality?* (Washington, DC: AEI-Brookings Joint Center for Regulatory Studies, 2000); Government Accountability Office, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses*, Report GAO/RCED-98-142 (May 1998); Government Accountability Office, *Air Pollution: Information Contained in EPA's Regulatory Impact Analyses Can Be Made Clearer*, Report GAO/RCED 97-38 (April 1997); Jerry Ellig and Sherzod Abdukadirov, "Regulatory Analysis and Regulatory Reform: An Update" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, January 2015), <http://mercatus.org/publication/regulatory-analysis-and-regulatory-reform-update>.

Among other research, the Mercatus Center's Regulatory Report Card confirms these findings. For the period from 2008 through 2012, the Regulatory Report Card found an average score of 52 percent, or a grade of F for many schools, for 108 economically significant regulations, using 12 criteria based on Executive Order 12866.<sup>5</sup>

*OIRA is simply too small:* How could OIRA possibly address these problems? With a current staff of 45 in fiscal year 2014,<sup>6</sup> OIRA is simply too small to provide effective oversight to the hundreds of thousands of employees at federal agencies producing regulations—with more than 200,000 employed in rule-writing agencies alone.<sup>7</sup> In 1981, OIRA had a staff of 77, and federal agencies had total staffing of 115,047.<sup>8</sup> Over the years, OIRA's mission has been cut back from reviewing all regulations to only reviewing economically significant ones. But even that remains a daunting task when the budget devoted to rulemaking by regulatory agencies outspends the OIRA's budget for reviewing regulations by a factor of 7,000 to 1.<sup>9</sup>

Over the last decade, rulemaking agencies finalized 37,000 regulations, but OIRA reviewed only 3,000. Of these, only 116 had both benefits and costs appearing in OIRA's annual report. (See attachment 1.)<sup>10</sup> What's more, OIRA has evolved from "being a watchdog whose job was to ensure that agencies used economic logic and quality benefit-cost analysis when regulating to being a 'conveyor and convener' and 'information aggregator' for the agencies."<sup>11</sup>

*"Stealth" regulations:* OIRA cannot regulate the regulators effectively because the regulators have numerous ways of creating "stealth" regulations to avoid OIRA review. Examples include "sue and settle" lawsuits, guidance documents, and other nonregulatory means of compliance.<sup>12</sup> Guidance documents have the same effect, in practice, as regulations—but without notice and comment safeguards. Rule interpretations work in a similar fashion. For example, between January 2007 and now, there has been exactly one FDA notice reviewed by OIRA. (See attachment 2.)<sup>13</sup> A recent GAO report suggests that the FDA is not an outlier; procedures and oversight for guidance documents are severely lacking.<sup>14</sup> Alternatively, to get around OIRA, agencies can collaborate with interest groups through "sue and settle" lawsuits to get a consent decree, or work with state regulators to establish what become de facto national standards.<sup>15</sup>

5. Jerry Ellig, Patrick A. McLaughlin, and John F. Morrall III, "Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across US Administrations," *Regulation and Governance* 7, no. 2 (June 2013).

6. Executive Office of the President, Office of Management and Budget, "Fiscal Year 2016 Budget," OMB-II, [https://www.whitehouse.gov/sites/default/files/omb/assets/organization/fy2016\\_omb\\_budget.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/organization/fy2016_omb_budget.pdf).

7. OMB, "About OIRA."

8. Curtis W. Copeland, "Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs," Congressional Research Service, June 9, 2009.

9. Jerry Ellig and James Broughel, "OIRA Spending Falls as Agency Spending Swells," Mercatus Center at George Mason University, Arlington, VA, October 17, 2013, <http://mercatus.org/publication/oira-spending-falls-agency-spending-swells>.

10. Richard Williams and James Broughel, "OIRA Quality Control Is Missing for Most Regulations," Mercatus Center at George Mason University, Arlington, VA, October 1, 2014, <http://mercatus.org/publication/oira-quality-control-missing-most-regulations>.

11. John F. Morrall III, "Reinvigorating, Strengthening, and Extending OIRA's Powers" (Testimony before the House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, Mercatus Center at George Mason University, Arlington, VA, September 30, 2013), <http://mercatus.org/publication/reinvigorating-strengthening-and-extending-oiras-powers>.

12. See John D. Graham and James Broughel, "Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act," *Harvard Journal of Law and Public Policy*, Federalist Edition 1, no. 1 (2014); Nina Mendelson and Jonathan Wiener, "Responding to Agency Avoidance of OIRA," *Harvard Journal of Law and Public Policy* 37, no. 2 (2014); Henry N. Butler and Nathaniel J. Harris, "Sue, Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism," *Harvard Journal of Law and Public Policy* 37, no. 2 (2014); Jerry Brito, "Agency Threats and the Rule of Law: An Offer You Can't Refuse," *Harvard Journal of Law and Public Policy* 37, no. 2 (2014); Stuart Shapiro, "Agency Oversight as 'Whac-a-Mole': The Challenge of Restricting Agency Use of Nonlegislative Rules," *Harvard Journal of Law and Public Policy* 37, no. 2 (2014).

13. Richard Williams, James Broughel, "Where Is the OIRA Oversight of FDA Guidance Documents?," Mercatus Center at George Mason University, Arlington, VA, June 9, 2015, <http://mercatus.org/publication/where-oira-oversight-fda-guidance-documents>.

14. General Accounting Office, "Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices," GAO-15-368, April 2015.

15. Graham and Broughel, "Stealth Regulation" (2015). See also Mendelson and Wiener, "Responding to Agency Avoidance of OIRA,"

### THE COST OF REGULATORY ACCUMULATION

When President Carter took office in 1977, there were 84,729 pages in the Code of Federal Regulations. By 2014, there were 175,268 pages, an increase of 107 percent.<sup>16</sup> These pages contain over 1 million requirements that would take an average person three years to read, although many more to comprehend.<sup>17</sup> While the number and scope of regulations has continued to grow, agencies have largely failed to follow the rulemaking standards laid out in the executive orders.<sup>18</sup> This growth has not been costless; one estimate shows that without those additional regulations, American families would be richer by an average of \$277,100 per household.<sup>19</sup>

### THE NEED FOR A COMPREHENSIVE SOLUTION

With the massive growth in federal regulations during the last 35 years, every American president since President Carter has embraced the idea of economic analysis to try to ensure that only necessary regulations are passed.<sup>20</sup> For nearly 70 years, presidents have complained about their inability to manage the regulatory agencies. Jimmy Carter said that although he knew that “dealing with the federal bureaucracy would be one of the worst problems [he] would have to face,” the reality had been even “worse than [he] had anticipated.”<sup>21</sup> Even President Obama noted in 2011 that sometimes the rules get out of balance, “placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs.”<sup>22</sup>

Evidence of each president’s failure to control the regulatory agencies is surely illustrated by “midnight rules.”<sup>23</sup> In general, these rules are rushed and contain worse analysis than rules usually do. They are enacted after a new president is elected and before the new president is inaugurated. Given the surge that we are observing in rules lately, there may be a new category of midnight rules. The Congressional Review Act allows Congress to overturn

16. Office of the Federal Register, “Code of Federal Regulations: Total Pages 1938–1949, Total Volumes and Pages 1950–2014,” accessed July 13, 2015, <https://www.federalregister.gov/uploads/2015/05/Code-of-Federal-Regulations-Total-Pages-and-Volumes-1938-2014.pdf>.

17. See Omar Ahmad Al-Ubaydii and Patrick A. McLaughlin, “RegData: A Numerical Database on Industry-Specific Regulations for All US Industries and Federal Regulations, 1997–2012” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, November 2014), <http://mercatus.org/publication/regdata-numerical-database-industry-specific-regulations>; Patrick A. McLaughlin, “The Code of Federal Regulations: The Ultimate Longread,” Mercatus Center at George Mason University, Arlington, VA, April 2015, <http://mercatus.org/publication/code-federal-regulations-ultimate-longread-game-thrones-hunger-games>; and Patrick A. McLaughlin and Richard Williams, “The Consequences of Regulatory Accumulation and a Proposed Solution,” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, February 2014), <http://mercatus.org/publication/consequences-regulatory-accumulation-and-proposed-solution>.

18. Ellig, “Regulatory Impact Analysis: Four Decades of Foibles”; Ellig and Williams, “Reforming Regulatory Analysis, Review, and Oversight.”

19. Patrick A. McLaughlin, “On the Human Costs of the US Regulatory System: Should Congress Pressure Agencies to Make Rules Faster?” (Testimony before the Senate Committee on the Judiciary, Subcommittee on Oversight, Federal Rights, and Agency Action, Mercatus Center at George Mason University, Arlington, VA, August 1, 2013), <http://mercatus.org/publication/human-costs-us-regulatory-system-should-congress-pressure-agencies-make-rules-faster>.

20. John W. Dawson and John J. Seater, “Federal Regulation and Aggregate Economic Growth,” *Journal of Economic Growth* (2010): 1–41.

21. Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114, no. 8 (2001): 2272–73.

22. Barack Obama, “Toward a 21st-Century Regulatory System,” *Wall Street Journal*, January 18, 2011, <http://www.wsj.com/articles/SB10001424052748703396604576088272112103698>.

23. See Sherzod Abdulkadirov, “Regulating in the Dark: Examining Bush Midnight Regulations” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, November 2012), <http://mercatus.org/publication/regulating-dark-examining-bush-midnight-regulations>; Jerry Ellig, “Midnight Regulation: Decisions in the Dark?” (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, August 2012), <http://mercatus.org/publication/midnight-regulation-decisions-dark>; Patrick A. McLaughlin, “The Consequences of Midnight Regulations and Other Surges in Regulatory Activity,” *Public Choice* 147, no. 3–4, (June 2011); Veronique de Rugy, “The Midnight Regulation Phenomenon” (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, November 2008), [http://mercatus.org/sites/default/files/publication/MOP31\\_RSP\\_Web\\_The\\_Midnight\\_Regulation\\_Phenomenon.pdf](http://mercatus.org/sites/default/files/publication/MOP31_RSP_Web_The_Midnight_Regulation_Phenomenon.pdf).

rules (with presidential signature) within 60 days of passage. It appears to be the case that agencies are trying to finalize big rules prior to two months before inauguration to ensure that a new administration cannot overturn them.<sup>24</sup>

After 35 years of research showing—along with presidential statements conceding—that the system is not working, it is time to admit that Congress must address these problems. While staffing up OIRA will be helpful, it will not solve the problems that President Carter and every president since has identified. Just as the problem is systemic and nonpartisan, so must the solution be.

Comprehensive reform is required to ensure that Congress has the necessary economic (and risk) information to effectively exercise oversight over regulations prior to their being issued. This information must also inform Congress as to when regulations or regulatory programs need to be enhanced, modified, or eliminated. Congress cannot do this alone—rather, stakeholders must be allowed access to judicial remedy when agencies fail to do the required analysis or do so badly. Without these kinds of remedies, we will continue to experience the same failures as we have observed over the last 35 years.

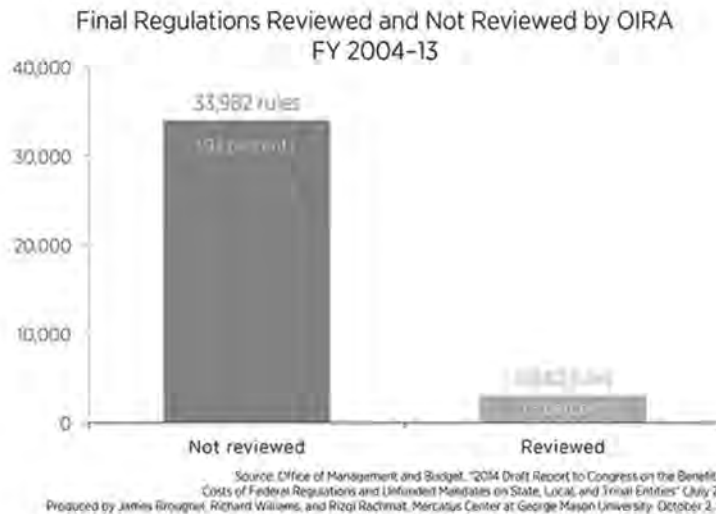
24. Congressional Review of Agency Rulemaking §801-808, 5 U.S.C. 8.



# Attachment 1. OIRA Quality Control Is Missing for Most Regulations

Richard Williams, James Broughel | Oct 01, 2014

Over the last decade, federal regulatory agencies finalized more than 37,000 regulations, yet 92 percent of rules escaped review by the Office of Information and Regulatory Affairs (OIRA), a small office tasked with reviewing significant regulatory actions promulgated by such agencies. Of the roughly 3,000 rules OIRA did review, only 116 have estimates of both benefits and costs appearing in OIRA's annual report. Relative to the cost of many of these regulations, expecting agencies to analyze benefits and costs before issuing a rule is a fairly low bar to set.



The numbers suggest that the analysis of rules reviewed by OIRA is severely lacking in most cases. Of roughly 3,600 rules finalized last fiscal year, only seven had estimates of both benefits and costs appearing in OIRA's report.

By confirming that agency actions are consistent with executive orders that set standards for regulatory analysis, OIRA is charged with ensuring that analysis meets minimal levels of quality and that agency rules are informed by those analyses. Each year OIRA puts out a report with details on the costs and benefits of the US regulatory system, but the report provides little insight because so many regulations escape review by OIRA. These missing rules also lack OIRA's critical quality control check.

Most rules that avoid OIRA review are not deemed "significant," meaning they aren't expected to have large economic impacts, raise novel legal issues, or meet certain other criteria signifying the importance of a regulation. Yet, even if any of these rules by themselves might be small,

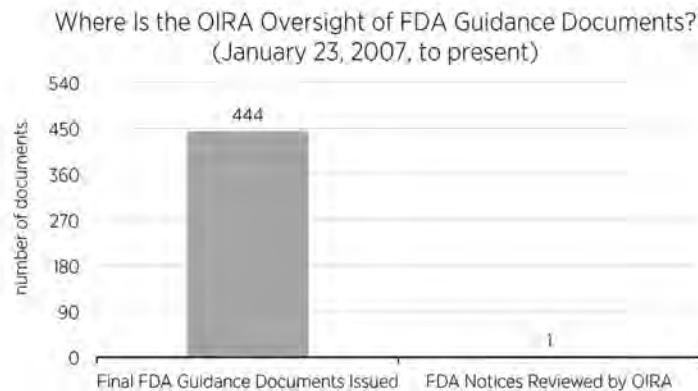
cumulatively their effects can be large. Even worse, the rules that have estimates of both benefits and costs in OIRA's report are not necessarily the ones that are most important to the American public. Of fiscal year 2013 rules, OIRA reports benefits and costs for a rule that defined "gluten-free" for the purposes of labeling foods that are gluten-free, but four major regulations emanating from the Affordable Care Act do not have any benefit or cost information, and none of the regulations implementing the Dodd-Frank Act have estimates of both benefits and costs. This last point is not surprising, as independent agencies (including most financial regulators) do not have to comply with executive orders setting regulatory analysis standards. Still, these examples suggest the true costs to the public are simply not captured in OIRA's report.

OIRA performs an important role, but its staff is too small (45 in fiscal year 2014) relative to the hundreds of thousands of employees working in regulatory agencies to provide effective oversight. This means that there is no effective check on the vast majority of regulations, where there is often a total absence of analysis, analysis is ignored in the decision-making, or analysis is made to conform with a predetermined decision.

## Attachment 2: Where Is the OIRA Oversight of FDA Guidance Documents?

Richard Williams, James Broughel | Jun 09, 2015

Federal agencies issue guidance documents that typically consist of sets of instructions or announcements written to inform regulated parties how to stay in compliance with the law. Owing to a confusing set of events, it is unclear whether these documents are receiving executive branch oversight from the Office of Information and Regulatory Affairs (OIRA). In the case of the Food and Drug Administration (FDA), hundreds of guidance documents appear on its website, yet there is almost no evidence of oversight from OIRA.



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Data note: Final FDA guidance without issuance dates in the FDA database were dropped from this tally.  
Source: FDA Guidance Documents database, [www.fda.gov/regulatoryinformation/guidances/](http://www.fda.gov/regulatoryinformation/guidances/) and [www.Reginfo.gov](http://www.Reginfo.gov), accessed May 29, 2015.  
Produced by James Broughel, June 2015

On January 23, 2007, then-President George W. Bush issued Executive Order 13422, requiring executive branch regulatory agencies to submit their significant guidance documents for review by OIRA. OIRA, an office located within the Office of Management and Budget, was already tasked with reviewing other significant regulatory actions to ensure that such actions are supported by strong technical evidence. As such, it was natural for the same office to review guidance documents likely to have significant impacts. Upon entering office, President Obama repealed President Bush's executive order.

The Office of Management and Budget, however, still maintains the right to review significant guidance, as it did even before the Bush executive order. The question that remains is the extent to which OIRA is reviewing these documents. One source that allows analysis of this activity is the FDA's new guidance document database. According to this database, the FDA has issued 444 final guidance documents since President Bush issued his executive order in 2007. The pace

of guidance issuance has remained steady over time, with the FDA finalizing on average four documents a month under both the Bush and Obama administrations. This figure is likely an underestimate since many documents in the FDA database are not even dated or are not labeled as draft or final. These documents were excluded from our analysis.

Meanwhile, the OIRA website lists only one FDA “notice” as having been reviewed during this period. The OIRA website is vague as to what documents are included in its “notice” category, saying only that these are documents that announce new programs or agency policies, which presumably includes guidance documents. Alternatively, it is also possible that informal review of FDA guidance is taking place that is not tracked on the OIRA website. If this is the case, this suggests a serious transparency problem exists. Regardless, the statistics available to the public suggest that there is little OIRA oversight of FDA activities when it comes to guidance.

The FDA is just one of dozens of executive branch and independent agencies that have the ability to issue guidance. If the FDA experience is representative of oversight at these other federal agencies, this is reason for concern since the effects of agency guidance often mirror those of regulations. In fact, a recent report by the Government Accountability Office chastised several agencies for a lack of compliance with agency good guidance practices. This suggests that both procedures and oversight are lacking with respect to guidance and need improvement.

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Mr. MARINO. Thank you, Doctor.  
Professor Sachs?

**TESTIMONY OF NOAH M. SACHS, PROFESSOR, AND DIRECTOR,  
ROBERT R. MERHIGE CENTER FOR ENVIRONMENTAL STUD-  
IES, UNIVERSITY OF RICHMOND SCHOOL OF LAW**

Mr. SACHS. Thank you, Mr. Chairman and Ranking Member Johnson, other Members of the Committee. Thank you for inviting me here today.

I am going to speak today about the need for both an effective and an efficient regulatory system. Agency regulations have been essential for carrying out congressional mandates, and they have protected life, health, fair competition, and property.

The focus of attacks on the regulatory system usually goes to their costs, but numerous studies have found that the benefits of Federal regulations vastly exceed the costs. OMB's 2014 report to Congress showed that the benefits of regulations that were enacted between 2003 and 2013 exceeded their costs by 3 to 15 times. And I would say that is an excellent return on investment by any measure.

There is no evidence that Federal regulations are contributing to layoffs. In fact, a comprehensive book-length investigation on this subject by scholars at the University of Pennsylvania concluded, "The empirical works suggests that regulations plays relatively little role in affecting the aggregate number of jobs in the United States."

And there are a lot of myths about the costs of regulation. There is a number that is frequently heard around this town, that regulations from the Federal Government are costing over \$1.8 trillion per year. That is a number that was used in some of the testimony submitted by others today. And that figure is 20 to 30 times the cost estimate provided by OMB itself. The number comes from a report 3 years ago by two economists, Crain and Crain. It was recirculated again last year by the Competitive Enterprise Institute. And the number has been thoroughly debunked by The Washington Post, by the Congressional Research Service, and others.

Restoring efficiency to the system means, first and foremost, that we have to reduce the delay that now occurs between the time when agencies formulate policy and when regulation goes final. The system is slow, cumbersome, complex, and opaque, and OIRA contributes to all of that.

For an agency, the time from policy development to final regulation is easily between 3 and 7 years. And what that means for Congress is that it can often be a decade between the time that Congress passes a law ordering the agency to do something and the time when the agency actually enacts its implementing regulations. So, rather than adding to the procedural requirements that we have, Congress should be examining ways to streamline it, including by reducing multiple levels of review, reforming the OIRA process, and ensuring that agencies have sufficient personnel.

If you recall the original APA, the Administrative Procedure Act, it set out essentially a four-step process for enacting rules. The agency issues a draft rule, it takes public comment, it considers the comments, and then it enacts the final regulation. And what we

have done over the past 30 years is we have added onto that a really dizzying array of procedural requirements and complexity. And we can debate whether any particular requirement is good or bad, but the upshot of this is that the requirements have contributed to an extraordinary delay in rulemaking.

OIRA is part of the problem here. First of all, OIRA provides an opportunity for industry to raise arguments and to scale back public health and safety protections, when those same arguments were already made in the agency process itself during public comment.

Second, OIRA has amassed a great deal of power over agency priorities and rules. In fact, it has effective veto power over which rules can go forward and which cannot, even though OIRA itself is not staffed by scientific or technical experts, as Administrator Shelanski said this morning.

Third, OIRA routinely delays rulemakings without explanation, exceeding its own 90-day limit on reviews, and, in many cases, that delay effectively kills the regulations.

Finally, transparency within OIRA remains low. It doesn't disclose its internal deliberations. It doesn't disclose who within the executive branch has requested changes to regulations. And it doesn't explain to the agency itself why regulations are being held up.

So reform of this process must begin with transparency, and it must also begin with giving agencies the resources and the personnel that they need.

Thank you for your attention.

[The prepared statement of Mr. Sachs follows:]

TESTIMONY OF  
NOAH M. SACHS

PROFESSOR  
UNIVERSITY OF RICHMOND SCHOOL OF LAW

MEMBER SCHOLAR  
CENTER FOR PROGRESSIVE REFORM

BEFORE THE JUDICIARY COMMITTEE  
UNITED STATES HOUSE OF REPRESENTATIVES

OVERSIGHT HEARING ON THE  
OFFICE OF INFORMATION AND REGULATORY AFFAIRS

JULY 15, 2015

Chairman Marino and Members of the Committee, thank you for inviting me here today to testify about the Office of Information and Regulatory Affairs (OIRA), federal regulations, and regulatory reform. These are exceedingly important issues that deserve high-level attention.

I am a Professor at the University of Richmond School of Law and a Member Scholar of the Center for Progressive Reform (<http://www.progressivereform.org/>). Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of 60 scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary.

My work on regulation and administrative law includes multiple articles in leading law reviews, book chapters, and a law textbook on hazardous substances regulation. At the University of Richmond School of Law, I teach courses in environmental law and international environmental law, and I direct the Robert R. Merhige Center for Environmental Studies. Prior to teaching at the University of Richmond, I was a lecturer at Harvard Law School and practiced regulatory and administrative law for five years at major law firms in New York and Boston.

I welcome this opportunity to share my views about the importance of effective regulation and about oversight of the Office of Information and Regulatory Affairs (OIRA).

## INTRODUCTION

Our regulatory system was intended to ensure that the will of Congress is carried out by administrative agencies, with accountability, public input, and transparency. The long history of effective regulation—airbags, removing lead from gasoline, cleaning air and water, mandating disclosure of the true interest rates charged by banks, and more— demonstrates that when agencies fulfill their legislative mandates, they save lives, prevent serious injuries, and protect the economic livelihood of millions of Americans. By comparison, there are many areas where under-regulation has led to loss of life, jobs, and property. Consider the Upper Big Branch Mine disaster and the frequent outbreaks of serious food poisoning that have killed many and injured thousands more.

My testimony today makes three points:

- Regulations have benefited our country greatly, with benefits that far exceed costs.
- Many agencies are not carrying out their statutory missions in a timely and effective manner, which should be of great concern to Congress. Extraordinary delays continue to hamper rulemaking.
- OIRA has amassed too much power over the regulatory process and contributes to the delays in needed and effective regulation.



## I. The Benefits of Regulations

Study after study has concluded that the benefits of federal regulations far exceed the costs and that the costs of regulations are consistently overestimated at the time that regulations are being drafted. Federal regulations are not a significant contributor to job loss. Consider the following:

- OMB's 2014 Report to Congress on the Benefits and Costs of Federal Regulations showed that federal regulations enacted between 2003 and 2013 yielded annual benefits between \$217 billion and \$863 billion, while imposing annual costs of \$57 billion to \$84 billion.<sup>1</sup> In other words, the benefits exceeded costs by three to fifteen times.
- In a 2011, the Economic Policy Institute (EPI) found that the major EPA rules issued during the first two years of the Obama Administration produced total annualized benefits of between \$44 billion and \$148 billion, as compared to total annualized costs of between \$6.7 billion and \$12.5 billion. The EPI report also found that four of EPA's proposed major rules generated total annual benefits of between \$173 billion and \$457 billion, as compared to total annual costs of between \$14 billion and \$15 billion.<sup>2</sup>
- A comprehensive book-length study by scholars at the University of Pennsylvania concluded: "to date the empirical work suggests that regulation plays relatively little role in affecting the aggregate number of jobs in the United States." The authors explained that "the empirical evidence actually provides little reason to expect that U.S. economic woes can be solved by reforming the regulatory process."<sup>3</sup>
- NYU's Institute for Policy Integrity made the same point: "The current debate on jobs and environmental regulation too often relies on thinly-supported forecasts about jobs 'killed' or 'created' by public protections."<sup>4</sup>
- Regulatory opponents frequently cite the statistic that federal regulations impose \$1.8 trillion in annual costs on the economy. This figure is *twenty to thirty times* the cost estimates provided by OMB itself. The \$1.8 trillion figure comes from a report from the Competitive Enterprise Institute, the "Ten Thousand Commandments," which has been thoroughly debunked. The Washington Post found that the report has "serious methodological problems" and does not compute the benefits of the regulations.<sup>5</sup> The claim of \$1.8

<sup>1</sup> OMB, 2014 Report to Congress on the Benefits and Costs of Federal Regulations, *available at*

<sup>2</sup> Isaac Shapiro, *Tallying Up the Impact of New EPA Rules: Combined Costs of Obama EPA Rules Represent a Sliver of the Economy and are Far Outweighed by Cumulative Benefits* (Econ. Pol'y Inst., Briefing Paper No. 311, 2011), *available at* <http://www.epi-data.org/temp2011/BriefingPaper311.pdf>.

<sup>3</sup> GARY COGLIANESE, ADAM M. FINKEL & CHRISTOPHER CARRIGAN, DOES REGULATION KILL JOBS? Chapter 1 (2013).

<sup>4</sup> NYU Institute for Policy Integrity, Regulatory Red Herring: The Role of Job Impact Analyses in Environmental Policy Debates, *available at* <http://policyintegrity.org/publications/detail/regulatory-red-herring>.

<sup>5</sup> *Fact Checker: The Claim that American Households Have a \$15,000 Regulatory Burden*, WASHINGTON POST, January 14, 2015.

trillion in annual regulatory costs deserved “two pinocchios,” the Post said, given that the report’s authors themselves admitted that the report is “not scientific” and “back of the envelope.”<sup>6</sup> The author of the report acknowledged that “a wave of assumptions and guesses without scholarly pretensions underly this tally” of \$1.8 trillion.<sup>7</sup>

- Department of Labor statistics on the reasons for mass layoff events in the United States in the fourth quarter of 2012, one of the most recent periods available, indicate that only 0.2% of the layoffs were due to “government regulation/intervention.” This compares with 3.2% for “changes in business ownership/restructuring,” and 23.5% due to “contract completion.”<sup>8</sup>

Raw numbers on costs and benefits do not fully portray the critical role that regulations play in our lives every day. Over the last century, regulations have made our food supply safer, vastly improved air quality, saved consumers billions by ensuring fair competition, made nursing homes safer, empowered disabled persons, saved the lives of thousands of workers, and saved the lives of thousands of motorists through car safety standards.

In looking at studies of the costs and benefits of regulation, we should keep in mind that estimates of the cost of regulations are usually supplied by industry itself. Agencies rely primarily on surveys of the companies that are subject to the regulation. Because companies know the purpose of these surveys, they have every incentive to overstate their costs, thereby skewing the final cost-benefit analysis toward weaker regulatory standards.<sup>9</sup>

Moreover, industry cost estimates do not account for technological innovations that reduce the cost of compliance over time. When companies are asked to predict their compliance costs for a new regulation, they often will point to the most expensive existing “off-the-shelf” compliance technology available. Once the regulation actually goes into effect, however, companies have a strong incentive to find less costly technologies. As a result, overall compliance costs tend to be less than the predicted costs. Moreover, the technological innovations can produce co-benefits unrelated to the regulation—such as increased productivity and efficiency.<sup>10</sup>

As the following chart indicates, several retrospective studies of regulatory costs have found that the initial cost estimates were too high.

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<sup>6</sup> *Id.*

<sup>7</sup> Clyde Wayne Crews, Jr. *Tip of the Cost-Curve 10* (2015 edition), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2502883](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2502883).

<sup>8</sup> Department of Labor, Economic News Release, Reason for Layoffs: Extended Mass Layoff Events, <http://www.bls.gov/news.release/inslo.i02.htm>.

<sup>9</sup> Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2011, 2044-45 (2002).

<sup>10</sup> *Id.* at 2049-50.

## Retrospective Studies of Regulatory Costs

Study	Subject	Results
PHB, 1980 <sup>11</sup>	Sector level capital expenditure for pollution controls	EPA overestimated capital costs more than it underestimated them, with forecasts ranging 26 to 126% above reported expenditures
OTA, 1995 <sup>12</sup>	Total, annual, or capital expenditures for occupational safety & health regulations	OSHA overestimated costs for 4 out of 5 health regulations, with forecasts ranging from \$5.4 million to \$722 million above reported expenditures
Goodstein & Hedges, 1997 <sup>13</sup>	Various measures of cost for pollution prevention	Agency and industry overestimated costs for 24 of 24 OSHA & EPA regulations, by at least 30% and generally by more than 100%
Resources for the Future, 1999 <sup>14</sup>	Various measures of cost for environmental regulations	Agency overestimated costs for 12 of 25 rules, and underestimated costs for 2 rules

We should keep in mind as well that while some businesses pay the cost of regulation, other businesses are among the primary beneficiaries of regulations. When catastrophe results from a failure to regulate adequately, the attendant costs can be devastating for businesses. Think of all the restaurants and businesses in Charleston, West Virginia, that had to close their doors for more than a week following the 2014 spill of MCHM into the Elk River. Or consider all the hotels, fishermen, and restaurants that were devastated by the 2010 Gulf Oil spill. Stronger regulations can deliver benefits to many businesses that might otherwise be caught in harm's way.

This leads to a larger point, which is that regulations typically do not impose *new* costs on society. Rather, they re-allocate who pays the costs. Regulations reflect Congress's judgment, in enacting a statute, that a particular harm is occurring and that the cost of preventing that harm should be shifted onto the party that is responsible. So when a regulation is killed, overturned, or repealed, the costs to industry of that regulation do not vanish. Instead, those costs continue to be borne by the general public, in terms of lives lost, preventable cancers, and lost work-days. For example, a study of environmental and public health externalities found that coal-fired power plants create air pollution damages that are much larger than the value that the plants provide to society.<sup>15</sup> By definition, the general public bears the costs of this air pollution,

<sup>11</sup> Winston Harrington, Richard D. Morgenstern, & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates* 6 (Resources for the Future, Discussion Paper 99-18, 1999).

<sup>12</sup> OFFICE OF TECHNOLOGY ASSESSMENT, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH 58 (1995).

<sup>13</sup> Elban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, 8 AM. PROSPECT 64 (Nov./Dec. 1997).

<sup>14</sup> Harrington, Morgenstern, & Nelson (1999).

<sup>15</sup> Nicholas Z. Muller, Robert Mendelsohn & William Nordhaus, *Environmental Accounting for Pollution in the United States Economy*, 101 AM. ECON. REV. 1649 (2011), available at <http://pubs.acaweb.org/doi/pdfplus/10.1257/aer.101.5.1649>.

and improved regulation of coal-fired power plants would, properly, shift some or all of these costs to the power plant owners.

## II. Extraordinary Delays Continue to Hamper Rulemaking

Despite an overall record of regulatory success, agencies are often being prevented from carrying out their missions effectively by the destructive convergence of funding shortfalls and excessive procedural hurdles.

Significant rulemakings in the United States routinely take three to seven years from policy formulation to the end of judicial review. This means that when Congress identifies a compelling national problem and passes a statute to address it, it can take a decade before agencies promulgate all the relevant implementing regulations and court challenges are resolved. As Professor Richard Pierce has observed, “[I]t is almost unheard of for a major rulemaking to be completed in the same presidential administration in which it began. A major rulemaking typically is completed one, two, or even three administrations later.”<sup>16</sup>

A typical time schedule for significant rules would look like the following:

- 12-36 months to develop a proposed rule
- 3 months for OIRA review of the draft proposal
- 3 months for public comment
- 12 months to review comments and write final justification
- 3 months (or more) for OIRA review of the final rulemaking
- 2 months delay under the Congressional Review Act
- 12-36 months for judicial review (assuming a court stays the rule)

### **TOTAL: 47-95 months (3.9-7.9 years)**

This is an extraordinarily lengthy process for developing rules that Congress itself has authorized or mandated. With the Administrative Procedure Act (APA), public comment processes, judicial review, and a host of statutory requirements passed in the last two decades, there are sufficient procedures to ensure accountability and fairness. In fact, the system is already laden with too much procedure. Since the 1990s, statutes and executive orders have added multiple layers of new rulemaking procedures and analytical requirements on top of the APA’s procedures. As a result, the rulemaking process has become inordinately complex, time-consuming, and resource-intensive.

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<sup>16</sup> Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 912 (2007).

Keeping in mind that the agency rulemaking process is meant to **carry out** congressional will, these delays frustrate what Congress intended when it passed the legislation. In fact, regulatory delay often violates the law. A 2012 report by Public Citizen examined 159 regulations that Congress had authorized agencies to promulgate by specific deadlines.<sup>17</sup> Agencies missed the deadline for 78 percent of the regulations. A recent Government Accountability Office (GAO) report found a similar pattern of repeated delays in rulemaking. The report includes an extraordinary chart tracking the time elapsed between when EPA was obligated by law to issue a regulation and when it actually issued the regulation. For one Clean Air Act rule, the elapsed time was 26 years after the Congressional deadline, and for another it was 19 years.<sup>18</sup>

Regulatory delay can kill. When regulations governing food safety, occupational hazards, mine safety, nursing home safety, or transportation safety face such extraordinary delay, the public suffers in the meantime.

Consider the Occupational Safety and Health Administration's (OSHA) long-delayed safety improvement regulations for construction cranes. In the late 1990s, construction accidents involving cranes were killing 80 to 100 workers annually. OSHA's then-governing safety standards for cranes dated to 1971, so in 1998, OSHA initiated a rulemaking to update the standards. A decade in the regulatory maze followed for OSHA officials, including frequent stakeholder consultation, federal register notices, preparation of a Regulatory Impact Analysis, OIRA review, review of the impact on small business, and endless reporting and fact-finding, before OSHA could finalize the regulation in 2010. OSHA estimated that 220 lives would have been saved if the crane rule had been completed in 2000 instead of 2010.<sup>19</sup>

Delay is a fact of our regulatory system. The system is slow and cumbersome, and delay has real impacts in terms of lives lost and injuries that could have been avoided. In this testimony, I do not intend to comment on all the pending regulatory reform legislation in the House. But this Committee should be quite concerned about the delays that I have outlined here, and it should be wary of adding even more procedural requirements to the rulemaking process.

### **III. OIRA Has Too Much Power Over the Regulatory Process and Contributes to the Delay of Needed and Effective Regulations**

OIRA now serves as the primary choke point for new regulations as they undergo review pursuant to Executive Orders 12866 and 13563. OIRA reviews both proposed regulations and draft final regulations, and it has gradually extended its reviews to a host of non-significant rules and guidance documents. Not only does OIRA review extend the length of time for rulemaking, but it also provides numerous opportunities for political interference with the content of the rule. During OIRA review of agency regulations, industry lawyers and lobbyists use OIRA as a court

<sup>17</sup> Public Citizen, *Public Safeguards Past Due: Missed Deadlines Leave Public Unprotected* (June 2012), available at <https://www.citizen.org/documents/public-safeguards-past-due-report.pdf>.

<sup>18</sup> GOV'T ACCOUNTABILITY OFFICE, GAO-15-34, ENVIRONMENTAL LITIGATION: IMPACT OF DEADLINE SUITS ON EPA'S RULEMAKING IS LIMITED (DEC. 2014), available at <http://www.gao.gov/assets/670/667533.pdf>.

<sup>19</sup> For an overview of this regulatory saga, see Public Citizen, *Cranes & Derricks: The Prolonged Creation of a Key Public Safety Rule* (2011), available at <https://www.citizen.org/documents/CranesAndDerricks.pdf>.

of last resort to weaken or block pending regulations that have been vetted within the agency that promulgated them.

An agency may not publish a proposed or final rule that is undergoing review until it has received OIRA's blessing, which sometimes means agreeing to drastic changes to the rule's substance. OIRA does not merely serve an advisory role in the regulatory process. Instead, although it has limited staff and subject-matter expertise, OIRA has become a kind of super-regulator for every major federal agency, determining which regulations can and cannot go forward. It has effective veto power. As Georgetown Law Professor Lisa Heinzerling concluded, "the head of OIRA is effectively the head of the EPA" in the rulemaking domain.<sup>20</sup>

Political interference in agency rules through OIRA review has been well-documented. A 2011 study by the Center for Progressive Reform examined ten years of data on OIRA reviews and found that when industry lobbied OIRA, the review was more likely to be delayed, going beyond the 120-day limit permitted by Executive Order 12866. The white paper also found that rules were more likely to be changed during those OIRA reviews where industry lobbied heavily.<sup>21</sup> The study found that 65 percent of all participants in OIRA meetings represented corporate interests, compared to just 12 percent who represented public interest groups.<sup>22</sup>

Through the years, OIRA has expanded its influence over the regulatory system by asserting review authority over a wide universe of agency actions. Executive Order 12866 directs OIRA to focus its reviews, with rare exceptions, on only the biggest agency regulations, those with an annual economic impact of \$100 million or more. Yet OIRA has broadly interpreted Executive Order 12866 to include almost any agency rule, no matter how minor. OIRA has also asserted review authority over various non-regulatory actions, including guidance documents and purely scientific determinations and assessments.

Increasingly, OIRA's workload is becoming oriented toward these minor rules and non-regulatory actions. According to OIRA's Regulatory Dashboard, of 32 federal rules that have been pending at OIRA for more than 90 days, only 3 of them are major, economically significant rules.<sup>23</sup> Former OIRA Administrator Cass Sunstein has reported that over 80% of OIRA-reviewed rules are reviewed for reasons other than economic significance.<sup>24</sup>

At the same time that OIRA's influence over agency priorities and decisions has increased, transparency within OIRA remains abysmal. OIRA does not make public the minutes of its meetings or other communications with lobbyists. OIRA also does not consistently disclose its internal deliberations or its communications with the affected agency. Indeed, OIRA

<sup>20</sup> Lisa Heinzerling, Sunstein's Simpler Government is Legally Suspect, Overly Secretive, and Politically Unaccountable, Thinkprogress, Apr 4, 2013.

<sup>21</sup> Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 2011), available at [http://www.progressivereform.org/articles/OIRA\\_Meetings\\_1111.pdf](http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf).

<sup>22</sup> Id.

<sup>23</sup> OIRA Regulatory Dashboard, <http://www.reginfo.gov/public/>.

<sup>24</sup> Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1868 (2013).

typically does not even explain in writing to the agency itself why it is insisting on changes to regulations or is refusing to act on regulations.

OIRA review has served to delay critical rulemakings by months or even years: OSHA's draft proposed rule to protect workers against harmful exposure to silica dust languished at OIRA for over two-and-a-half years before the review was finally completed in August 2013.<sup>25</sup> The Food and Drug Administration's rulemaking on preventing pathogen contamination of fruits and vegetables—which Congress directed the agency to issue to implement the Food Safety Modernization Act of 2010 (FSMA)—was stuck at OIRA for nearly 13 months before OIRA completed its review in January 2013.<sup>26</sup> Remarkably, this delay took place even though Congress itself had clearly stipulated in the FSMA that the proposal should be issued no later than January 2012.

To avoid criticism of delay, OIRA has resorted to discouraging agencies from sending it draft rules, even when these drafts are ready for review.<sup>27</sup> By taking this unusual step, OIRA can delay a rule without having to officially start the clock on the review period, which Executive Order 12866 caps at 90 days with a possible one-time extension of 30 days. The formal procedures of Executive Order 12866 put OIRA in the position of *reviewing* agency decisions, yet by using off-the-record phone calls and oral communications, OIRA has pressured agencies from the beginning to shape rules to OIRA's liking.<sup>28</sup>

Given how OIRA has expanded its reach over agency rulemaking, providing an ideal window for industry lobbyists to have a second crack at undermining health and safety regulations, this is not the time to extend OIRA's authority to independent agencies, as some members of Congress have proposed. Congress purposely established these agencies, such as the FCC, the NLRB, the NRC, and the SEC, as independent from White House control. Usually headed by multi-member commissions whose members have staggered terms, these agencies are designed to be insulated from the political control of the President. This insulation has the virtue of ensuring continuity and uniformity of policy over time, without abrupt reversals when a new President takes office. To make independent agencies subject to OIRA review under Executive Order 12866 would undercut the ultimate goal of shielding them from politics and will cut into

<sup>25</sup> Off. Info. & Reg. Affairs, White House Off. Mgmt & Budget, OIRA Conclusion of EO 12866 Regulatory Review: Occupational Exposure to Crystalline Silica, <http://www.reginfo.gov/public/do/eoDetails?rid=119957> (last visited July 13, 2015).

<sup>26</sup> Off. Info. & Reg. Affairs, White House Off. Mgmt & Budget, OIRA Conclusion of EO 12866 Regulatory Review: Produce Safety Regulation, <http://www.reginfo.gov/public/do/eoDetails?rid=121344> (last visited July 13, 2015).

<sup>27</sup> CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 38 (Revised Draft, Nov. 1, 2013, prepared for the Administrative Conference of the United States), available at <https://www.acus.gov/sites/default/files/documents/Revised%20Draft%20OIRA%20Report%20110113%20CIRCULATED.pdf> ("Starting in 2012, however, these employees said they have had to meet with and/or brief the OIRA desk officer before submitting each significant rule for formal review (which were sometimes referred to by the agency employees interviewed for this report as 'Mother-may-I' meetings), and have had to obtain OIRA's approval before submitting each rule.").

<sup>28</sup> SELECT COMMITTEE ON ENERGY INDEP. & GLOBAL WARMING, MAJORITY STAFF, 110<sup>TH</sup> CONG., INVESTIGATION OF THE BUSH ADMINISTRATION'S RESPONSE TO MASSACHUSETTS V. EPA 2 (2008) (noting pressure from the Bush Administration's OIRA to the EPA not to send greenhouse gas regulations for OIRA review in the wake of *Massachusetts v. EPA*).

their ability to issue mission-critical rules. A President could easily block regulations from independent agencies that he or she opposes.

Although these independent agencies are currently outside of OIRA review, they still have numerous checks on their discretion and their rule-making authority. All of these agencies are still subject to the APA (and/or their respective authorizing statutes) when they promulgate regulations, their rules undergo public comment, they are subject to Congressional oversight, and their rules are subject to judicial review. No one disputes that independent agencies, like other agencies, should make reasoned decisions and assess the consequences of their regulatory activity, but subjecting them to OIRA review is not warranted.

If Congress is concerned that independent agencies are issuing regulations with costs that far exceed benefits, it could take sensible steps that do not put the agencies under the thumb of OIRA or the White House. It could, for example, require the agencies to prepare regulatory impact statements for their major regulations and make them public. Congress could also have these regulatory impact statements periodically reviewed for accuracy by the Congressional Budget Office or Government Accountability Office.

#### **IV. The Path Forward**

In overseeing the regulatory process, Congress should ensure that agencies have the resources and personnel to carry out directives from Congress and that they can undertake their work without unnecessary delay. OIRA needs to reorient its role in the regulatory system so that it works with agencies to help them achieve their statutory missions of protecting public health, safety, and the environment. It should be a watchdog for the public interest.

A task that OIRA could usefully perform would be to evaluate, on an *ex post* basis, the accuracy of agency's *ex ante* estimates of costs and benefits of federal rules. This evaluation should use current data not available at the time of the original analyses in order to check the accuracy of the original projections. Such an analysis would provide a wealth of useful information and would send a strong signal about how much we should rely on *ex ante* estimates of regulatory costs and benefits in regulatory impact analyses.

Going forward, OIRA should also limit its review to economically significant rules and should not review non-regulatory actions, including guidance documents and purely scientific determinations and assessments. Executive Order 12866 should be amended to require increased transparency at OIRA. OIRA should disclose all of its communications with agencies, the reasons for changes in the content of regulations that it is suggesting, and the substantive changes to regulations that are being made at OIRA's behest. Given the power this small office exerts over American life, the public deserves this transparency from OIRA.

As a regulatory clearing-house, OIRA is well-positioned to tackle the problem of regulatory delay outlined above. OIRA should submit an annual report to Congress and the President that: (1) describes the activities that it has undertaken to expedite rulemakings, (2) identifies common sources of undue regulatory delay, including unnecessary and duplicative analytic and procedural obstacles in the rulemaking process, and (3) proposes any needed legislative or administrative reforms for eliminating these sources of undue regulatory delay.



Promoting effective and protective regulation also requires assistance to federal agencies themselves. Needed reforms should include:

**Providing agencies with the resources they need.** One of the reasons that regulatory agencies cannot adequately fulfill their statutory missions is that financial resources and personnel have been reduced or maintained at constant levels in recent years. This has been occurring as the agencies' missions have become more complex, forcing these agencies to effectively do more with less.

**Providing agencies with enhanced legal authority.** For many regulatory agencies, the statutes under which they operate have not been reviewed or refreshed in decades. The intervening years have revealed shortcomings in those statutes while new public health, safety, and environmental issues that were not initially addressed by the original statutes have emerged. In some cases, agencies lack the enforcement and rulemaking authority they need to tackle these issues.

**Avoiding unnecessary analytical requirements.** Over the past few decades, the rulemaking process has become encumbered by a growing number of analytical requirements. These analytical obstacles draw upon agencies' already stretched resources and distract them from focusing on their regulatory missions without meaningfully improving the quality of agency decision-making. Regulatory reform legislation of the kind introduced in Congress during the last few years would exacerbate these existing problems, creating a rulemaking process so laden with procedural and analytical requirements that the process would become completely dysfunctional.

Thank you for this opportunity to testify at this hearing this afternoon.

Mr. MARINO. Thank you, Professor.

I will begin with my 5 minutes of questioning, and I will start with Dr. Holtz-Eakin.

Doctor, some suggest that, since employment is improving, whether that is marginally or not, concerns about overregulation are overblown. How do you respond to that?

Mr. HOLTZ-EAKIN. To say something has no impact on the level of employment is not the same thing as saying there is no impact on the labor market or the welfare of employees.

So, if you look at the work that has been done at the American Action Forum on the regulatory burden of finalized rules since the beginning of the Obama administration, that is about \$650 billion, so about \$100 billion a year.

That money has to come from somewhere. So businesses might choose to pay their workers \$650 billion less. That is about a percentage point in wage growth every year. And that has been the achilles heels of the labor market, no wage growth. It is hardly surprising, because the resources have to come from somewhere.

Or they can pass it along to their customers, who would need to come up with another \$650 billion in raises just to pay the higher costs.

So you can keep employment fixed, but that doesn't mean that regulations don't affect the labor market and that they aren't very costly to the welfare of employees.

Mr. MARINO. Thank you.

Ms. HARNED, do you have anything to add to that?

Ms. HARNED. Yes, I think that when you look at it from the perspective of the small-business owners that we represent, you see it daily. I hear it in anecdotes. They are very aware of the regulatory requirements coming down the pike that they might—whenever you ask them, how many employees do you have, they say, well, we are trying—not everybody, but depending on where their number is—let's say they are at 30—we are trying to stay under, you know, 50, or we are trying to stay under—there are certain members of the small-business community that are very aware that when they hit that next level they are going to have a whole new raft of regulatory requirements.

And so I do think that you see that inhibit growth. They want to stay where they are comfortable, where they know they are not going to have to hire that extra compliance officer. We have definitely seen that in our dealings with our small-business members.

Mr. MARINO. Dr. Williams, should we be strengthening OIRA, improving the regulation process? And if that is done, do you see that as a partisan issue, or does everyone stand to gain in the long run?

Mr. WILLIAMS. I don't believe that strengthening OIRA is a partisan issue. Certainly, every President has agreed that OIRA is necessary to try to control the executive branch, and every President has agreed toward the end of their Administration that they haven't been successful at doing that. As I said in my testimony, I believe that OIRA can only be a part, and perhaps a small part, of solving the problems of the regulatory state.

Mr. MARINO. Professor Sachs, does the law of diminishing marginal returns apply in the regulatory context—i.e., once basic safe-

guards are in place, does further improvement required spending increasingly more to achieve increasingly less? Do you understand my question?

Mr. SACHS. I do, yes.

I can imagine a situation where it is true, where there is a remarkably effective regulation in place, and it makes little sense to keep adding on to that. But that is certainly not the case in a lot of areas of law. What I see in my work is there are whole areas of law that are either uncovered by regulation or that are covered by very weak regulations.

And one thing that I urge the Committee to look at is the GAO's biannual report on high-risk Federal programs, those that are in danger of failure or in need of transformation. And so, in that report, it is a great example of how the law of diminishing returns does not apply. These are broken regulations that need fixing and need attention from Congress.

Mr. MARINO. Professor, you said—I think it was in your opening statement or even in a document that I read—you referred to the regulatory agencies are being slowed by “excessive procedural hurdles.”

Why is regulating regulators more bad but overregulating small businesses appears to some regulatory agencies as good?

Mr. SACHS. Well, I mean, there are several costs to the way that we conduct regulation in the U.S.—costs in terms of delay, costs in terms of injuries that could have been avoided, deaths that could have been avoided because of that delay. So that is my big concern about the number of procedural hurdles that we have put in front of the agencies.

Impacts on small business, I am concerned about that, as well, and support the laws we have in place to make sure that those are addressed.

Mr. MARINO. Okay.

My time has expired. The Chair now recognizes the Ranking Member, Congressman Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Dr. Williams, would you agree with me that the 2008 Great Recession was not caused by too much regulation?

Mr. WILLIAMS. Yes, I would absolutely agree with that.

Mr. JOHNSON. So, in other words, it is possible that too little regulation was what caused the Great Recession of 2008, correct?

Mr. WILLIAMS. Sir, I am not an expert in the regulation of financial products, but I would have serious doubts that too little regulation is what caused the financial crisis.

Mr. JOHNSON. Well, I will tell you, do you remember when Alan Greenspan came to Congress after the onset of the Great Recession and after he was finished with his chairmanship of the Federal Reserve and he testified that he had made a mistake in believing that banks operating in their own self-interest would do what was necessary to protect their shareholders and their institutions and that he recommended during his testimony that the government should play a much more active regulatory role over financial firms? Do you remember that?

Mr. WILLIAMS. I do. And I think my concern, particularly with respect to financial regulation, is there is a great deal of financial regulation that is going on right now for which there is no analysis.

Mr. JOHNSON. Well, but—

Mr. WILLIAMS. Too few analysis overall, but there is no cost-benefit analysis—

Mr. JOHNSON. Well, there may be some regulations that are questionable, but I guess the point that I am making is that that environment was caused, according to Alan Greenspan, a famous free-marketer, was caused by a lack of regulations.

Ms. HARNED, you would agree that costly rules, such as airbags, came down the pike on businesses at some point in the past, but those costly rules were passed on to consumers, and they were actually beneficial to American families. Would you agree?

Ms. HARNED. Well, small businesses are not opposed to all regulation. There are regulations that—

Mr. JOHNSON. Well, and I take it from your—

Ms. HARNED [continuing]. Need to happen. But at the same point—

Mr. JOHNSON.—I take it from your testimony that there was really no fine distinction between good rules and bad rules. It was almost like all rules are bad. And you would agree with me that that is not the case.

Ms. HARNED. All rules are not bad. But there are definitely ways to do this where it is not a one-size-fits-all that really hurts the small-business owner disproportionate to the larger counterpart.

Mr. JOHNSON. Well, and so we should not just look simply at the cost—at the cost of a rule without regard to the benefit of the rule in determining whether or not the rule is a good rule.

Ms. HARNED. Right. But I feel—I think my concern has been—

Mr. JOHNSON. So you agree with that?

Ms. HARNED [continuing]. It has been more focused—they have been overselling the benefits and underplaying the costs in recent years on many of these regulatory requirements.

Mr. JOHNSON. Well, I appreciate your—you know, the weight of your testimony goes more towards, you know, the emphasis on cost as opposed to benefits. But you do agree that you should consider both cost and benefits in analyzing whether or not a rule is appropriate.

Ms. HARNED. Yes.

Mr. JOHNSON. And how about you, Dr. Holtz-Eakin? You would not disagree with that, would you?

Mr. HOLTZ-EAKIN. I think no one would disagree with the notion that we should examine both benefits and costs.

Mr. JOHNSON. So we should not—

Mr. HOLTZ-EAKIN. The concern is that we don't.

Mr. JOHNSON [continuing]. We should not overemphasize cost, then, when it comes to, you know, the regulatory reform, as they call it.

Mr. HOLTZ-EAKIN. I think that the most important reform would be to actually require that agencies, including the independent agencies, look at both benefits and costs in a systematic and rigorous fashion, which they do not and are not required to do, and,

as a result, there is the great potential that we have some very poor regulations.

The second thing we don't ever do is go back and essentially do a program evaluation of a regulation.

Mr. JOHNSON. Okay.

Mr. HOLTZ-EAKIN. And there are a lot of estimates of benefits that turn out to be way too high, and there is literature on that.

Mr. JOHNSON. Okay. Well, let me—

Mr. HOLTZ-EAKIN. Let's look at actual benefits and actual costs.

Mr. JOHNSON. Okay. Thank you.

Let me get Professor Sachs to weigh in.

What do you think about what you have just heard?

Mr. SACHS. Yeah, a few points.

I mean, in general, I support the idea of a full accounting of the costs of regulations and the benefits. I think it should be done with a knowledge that, in a lot of areas of law, it is hard to measure the benefits. They may come a few years down the line. They may involve health issues that are hard to put a dollar sign on.

Another point I want to respond to is the idea that, you know, regulations might harm wages or might result in price rises for customers. We have to keep in mind that a lot of regulations are simply shifting cost and saying it is not fair to impose those costs on consumers or on the public, who might be threatened, let's say, by a mountain of coal ash, and that it is appropriate and correct to put those costs where they belong, which is on the company that is responsible for accumulating that ash.

Mr. JOHNSON. Thank you.

And I yield back.

Mr. MARINO. Thank you.

The Chair recognizes the Chairman of the full Judiciary Committee, Congressman Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Mr. Chairman, I am sorry I wasn't here at the outset. I will put my statement in the record.

And I want to thank all of the witnesses for being here today.

Ms. HARNED, I will start with you. Your written testimony references sub-regulatory activities by which agencies evade OIRA review, but you do not provide details. Can you elaborate for us on what evasions are occurring and how they impact small businesses?

Ms. HARNED. As I mentioned in my testimony, we will be issuing a detailed report in the coming weeks on this. But examples I mentioned in the testimony are regulation by amicus, where, literally, new standards are being proffered by agencies in amicus briefs in courts across this country. In addition, you see through guidance documents, field rulings, and informal letters new regulatory requirements really being imposed on stakeholders across the Nation. Enforcement continues to be a tool, as well.

Mr. GOODLATTE. What are field rulings?

Ms. HARNED. Like, memos to field staff, to enforcement staff for different agencies, announcing, now we are going to look at X, Y, or Z.

Mr. GOODLATTE. Got it.

Dr. Williams, Professor Sachs argues that subjecting independent agencies to OIRA review is unwarranted because they are already bound by the notice and comment requirements of the Administrative Procedure Act. Would you care to respond to that?

Mr. WILLIAMS. The notice and comment, the APA, absolutely contains nothing about estimating costs and benefits. And we certainly see this. We have seen that the Securities and Exchange Commission has attempted to do benefit-cost analysis. Four court cases later, the courts have said, and the courts are perfectly capable of saying, you didn't follow the right procedure to do benefit-cost analysis, and they have remanded those rules back to the SEC.

I think this states the need that we need to have all of these independent agencies required to do benefit-cost analysis. We now have some 400 to 500 rules coming out of Dodd-Frank. Almost none of them are going to have benefit-cost analysis. We have no idea, at the end of the day, how all of them as a whole are going to affect the financial sector of this country.

Mr. GOODLATTE. Professor Sachs, you cite a number of factors that you say make estimates of regulatory costs unreliable. Would you concede that there are, equally, factors that make claimed benefits similarly speculative?

Mr. SACHS. Look, estimating benefits of a regulation that might be on the books for years, for decades, it is a difficult task—

Mr. GOODLATTE. Or even what is going to happen in months or weeks, right?

Mr. SACHS. Agencies do the best job they can of estimating benefits. And that is one of the reasons I have called for more retrospective reviews of whether those agency estimates of both cost and benefits actually turned out to be correct years down the road.

Mr. GOODLATTE. You say that agencies rely on industry for cost estimates and that industry has an incentive to inflate the numbers. Do you agree that agencies have an incentive to inflate the benefits of the regulations that they wish to promulgate?

Mr. SACHS. Their estimates of benefits are going to be subject to OIRA review and to judicial review, so they better do a good job of getting it right.

Mr. GOODLATTE. Dr. Holtz-Eakin, thank you for coming back to our Committee. We always appreciate having you here.

Do you believe that the Supreme Court's opinion in *Michigan v. EPA* will have a significant impact on the way agencies view cost-benefit analysis?

Mr. HOLTZ-EAKIN. I hope so. It is a very blunt statement of the importance of benefit-cost analysis being the legal definition of what is an acceptable regulation. And it would be my hope that the independent agencies looking for some sort of judicial prophylactic would run their estimates by OIRA and get them a more effective and systematic vetting of the analysis they do.

Mr. GOODLATTE. How positive a development do you think this is? As an economist, do you have any way to express that?

Mr. HOLTZ-EAKIN. As I said, the scale of recent regulatory activities is quite striking. I guess I would just disagree politely with Professor Sachs on how fast it has happened. I mean, we took a look at 362 major regulations over the past decade, and the median time to completion was 400 days. This isn't something that takes

decades. There were 62 major, economically significant regs in Dodd-Frank and the Affordable Care Act that got done in the first 2 years.

When they want to move fast, the agencies move fast. As an economist, I would say the fact that that is being done without a systematic evaluation of the benefits and the costs is a significant risk.

Mr. GOODLATTE. Thank you.

Thank you, Mr. Chairman.

Mr. MARINO. Thank you.

The Chair now recognizes the gentleman from California, Congressman Peters.

Mr. PETERS. Thanks for being here. And I, too, apologize for being here a little bit after some of your presentations.

I want to express sympathy for the effort here. I practiced law for some time and practiced environmental law. I had a lot of clients who were businesses, some large but mostly small, and some local governments trying to get through regulatory process. And it is very frustrating when you have the inconsistency of the various letters and the rulings. And I am more than willing to work to figure out how we can avoid that.

Let me also say that I have had a little bit of frustration in this Committee before on being one of the folks over here who would like to work with the folks to your left but definitely to my right.

And I will give you the example of on NEPA. I worked on the National Environmental Policy Act, efforts to streamline that, to provide deadlines for agencies, to require that all comments be made in a central place so that they could all be considered and so that you wouldn't see these major projects go on for years and years before you got an answer. And I have always felt and my clients always felt, you know, you can tell me yes or tell me no, but tell me soon so I can make plans. I am totally sympathetic with that.

My effort to cooperate on that had been derailed, though, because of the insistence of the majority of including a prohibition on talking about particular content—in this case, the social cost of carbon.

So if we can separate the ideology out from the process, I want you to know that you have an avid advocate for process reform that would help all of business. And I think it is really important—it is really one of the most important aspects for us to support economic growth in the economy. So, if you help me eliminate some of the ideology and let the process come up with the answer, not inject the answer ahead of time, I am more than happy to help you. And I would look forward to working on this in the future.

I did want to ask Professor Sachs an open-ended question, though, with respect to cost-benefit analysis. And maybe you could just tell us whether you think there is a role and what that role would be for cost-benefit analysis in the regulation of economic activity.

Mr. SACHS. I do believe there is a role. I am not an opponent of cost-benefit analysis as a concept. I think the devil is in the details on it. How is it done? What role does it play? Is it a decision rule so that only those regulations with benefits that exceed costs can go forward? Or is it just one input into the process?

I think that there is a role for cost-benefit analysis in telling us where the bad regulations are, where are the ones that have vastly excessive costs compared to benefits.

So I would agree with you on that.

Mr. PETERS. I guess, maybe, as we look at how to maybe land this plane, is there some agency you think is doing it right that we could look at and use as an example?

You know, the problem with saying that it is not exact and it should be a factor is it doesn't really provide the kind of guidance and even oversight that I think this Committee would like to have in the process.

Mr. SACHS. Uh-huh. I am not able to say which agencies as a rule are doing it better than others. What I will say, though, is we can point to a number of cases where Congress itself has not called for cost-benefit analysis and has said, look, we are addressing a difficult field of law, addressing a difficult problem, and the standard we want to put into the statute is something other than cost-benefit analysis, something like "use best available technology"—

Mr. PETERS. Right.

Mr. SACHS [continuing]. Or something like "regulate in the public interest."

Mr. PETERS. Right. Okay.

Well, I know it is a tremendously difficult issue to handle via broad brush, but I do think it is important. I want to thank the Chairman for having this hearing. And I look forward to trying to work constructively to come up with bipartisan solutions to make sure that we get high standards but we do it in a way that, in itself, doesn't slow down the economic activity and job creation we would all like to see. And I hope to be a partner in that.

And I yield back.

Mr. MARINO. Thank you, Congressman. And I look forward to working with you on these issues.

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

Mr. BISHOP. Thank you, Mr. Chair.

And thank you to the panel for your testimony today. Always good to discuss ways in which we can be more efficient, especially with regard to our small-business community.

Having spent the good part of my professional career in the practice of law and representing small business and just coming out of a small business myself, helping run a small business, I can attest firsthand to how difficult it is to comply with the massive amount of regulation that exists. I was the compliance officer in the business, so I know how this works, everything from HIPAA to Dodd-Frank to across the board, the spectrum.

I am a little bit taken aback by the idea that, somehow, someone came to the conclusion that in this environment the benefits outweigh the costs of regulation. And I am wondering how that is measured. How do we measure costs? How do we measure benefits? Is that a unified system and standard?

I guess I would like to get your take on that, Professor Sachs.

Mr. SACHS. Yeah, I think the studies on whether the benefits exceed the costs are done annually by OMB. And what they are looking at are the benefits and costs that are used in the regulatory



process, that are submitted by the agencies themselves, and that form the basis of the OIRA review. So that is where the numbers come from. They are estimates; there is no doubt about that. Both that the cost and the benefits are estimates.

Mr. BISHOP. From my perspective, in kind of a real-world setting, having been in a small business, and for virtually everybody—and I can't think of a single soul that I have spoken to in a small business who has made that conclusion. I mean, all I get from the constituents, the folks that I represent is that it is wildly oppressive, and they are overburdened with the excessive amounts of regulation.

I would be interested to hear the NFIB's position on that. Just give me an idea as to what the reaction would be from your membership if they were up on this stand and heard that testimony about the benefits outweighing the costs.

Ms. HARNED. Well, they would react like your constituents. We see that every month. Our research foundation does their small-business economic trends, where they look at what is the plans for hiring in the next 3 months, what is the plans for layoffs, inventory, all of that. And then, when it is not a good time to hire, they ask why. Every month, they ask, why, if you are not going to hire, is this not a good time? And for the last several years, one of the top three answers has been government regulation. So that is a realtime, real-world thing we are facing.

On the benefits, one thing I would say, you know, we have been talking generally about how we, at least on the side of small business, think that benefits have been inflated in the calculations as of late.

The Clean Power Plan Rule that was issued last year is a perfect example of this. They weighed the benefits to the world. Literally, go look. It's the benefits to the world, not just to Americans, that was used as part of their benefit calculation. And we think that was inappropriate.

Mr. BISHOP. Thank you very much for that.

Mr. Holtz-Eakin, I wondered if you might be able to—as a former head of the CBO, it is obvious that you are familiar with this process of estimating costs. And I am wondering, what is your current view of the Administration's cost-estimating methodology for major rules? And if you can give me some background on this. And is there any current rule or Committee in place in Congress to oversee the methods? How did we get to this point?

Mr. HOLTZ-EAKIN. I think the major problem is the lack of consistency and the incompleteness in the process.

Estimating benefits and costs is hard, but it should be done. You should do it to the best of your ability, explain how you did it, be quite transparent in your efforts. And every agency, the independent ones, the Cabinet-level ones, should be doing it. They should be doing it using the same methods. And that is not happening right now, and you get very incomplete reports as a result.

So, for example, the report that Professor Sachs mentioned about how benefits exceed costs, if you look in the 2013 report, OIRA monetized seven rules and came up with their estimate of cost. We looked at the same data in the Federal Register, and there were 310 rules that had significant paperwork or burden costs.

So it is a very incomplete accounting of cost and benefit. So you need a completeness in the process and completeness in the accounting.

Mr. BISHOP. Thank you, sir.

I yield back.

Mr. MARINO. Thank you.

Seeing no other congressional Members, this concludes today's hearing.

I want to thank all of the witnesses for attending. I learn something from you each time.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 5:24 p.m., the Subcommittee was adjourned.]

## A P P E N D I X

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MATERIAL SUBMITTED FOR THE HEARING RECORD

**Material submitted by the Honorable Henry C. “Hank” Johnson, Jr., a Representative in Congress from the State of Georgia, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law**



July 15, 2015

**Board of Directors**

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Chairman Marino  
Ranking Member Johnson  
U.S. House Committee on the Judiciary  
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Re: House and Senate OIRA Oversight Hearings

Dear Chairman Marino and Ranking Member Johnson,

**Advisory Council**

Patricia Bauman  
Frances Beinecke  
Eula Bingham  
W. Thompson Comerford, Jr.  
Sally Greenberg  
John Passacantando  
Henry Waxman  
Robert Weissman

Through its oversight of the White House Office of Information and Regulatory Affairs (OIRA), Congress should insure that the federal regulatory system, to the extent required by law, protects the environment and keeps people safe. By any objective measure, that is not happening. Too often, the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), the Food and Drug Administration (FDA), and other agencies are impeded or even blocked from satisfying their congressionally mandated duty to defend public health, safety, and the environment. The pattern of recent industrial catastrophes—including the BP oil spill in the gulf, massive oil train explosions from Illinois to West Virginia, and tainted steroid injections from the New England Compounding Pharmacy—provides a stark reminder of the harmful consequences of our weakened regulatory system.

Unfortunately, the many proposals to “reform” the regulatory system now pending before Congress would impair our agencies even more. In this letter, we focus on three antiregulatory proposals now before you and explain how each would put the American public at risk.

**Extending OIRA review authority to independent regulatory agencies**

This proposal would allow the president to subject independent agencies to the kind of centralized regulatory review that OIRA currently conducts for executive-branch agencies under Executive Orders 12866 and 13563. The White House would be given unprecedented influence over independent agencies’ regulatory decision-making, allowing future presidents to block or dilute the work of independent agencies they oppose. Congress explicitly designed independent regulatory agencies to be institutionally insulated from excessive political interference from the president. Subjecting these agencies to executive order requirements—especially oversight by OIRA, which is without question the most potent conduit for presidential influence over new rules—would thoroughly undermine Congress’s careful and deliberate institutional design.

Independent regulatory agencies oversee some of the most important and complex aspects of the U.S. economy, including guarding against banking abuses and protecting consumers against unsafe products. By designing independent regulatory agencies to be insulated from undue political pressure, Congress also sought to ensure that these agencies would be able to use their unique expertise on policy matters to develop the best solutions to the social problems that Congress meant for them to address. OIRA review of independent agency rulemakings would undermine this structure by giving the White House an easy way to override independent agency expertise in response to lobbying from business or other outside interests.

One currently pending bill that would establish OIRA review authority over independent agencies is the Independent Agency Regulatory Analysis Act (S. 1607). This bill would also subject independent agencies to several new time-consuming and resource-intensive analytical requirements that are irrelevant to protecting the public interest and that would needlessly delay critical safeguards. In particular, S. 1607 would require that all independent agencies' "economically significant" rules undergo a highly subjective and politicized analytical test known as quantitative cost-benefit analysis. This analysis, which has often served to protect regulated entities at the expense of the public, is in many cases not required or even envisioned by the regulations' authorizing statutes. Independent agencies would have to satisfy this requirement even though they operate under a wide variety of statutory standards, which, while different in their specifics, are all oriented toward protecting people and their surroundings.

#### Codifying "one size fits all" regulatory "lookback" requirements

Over the last few years, several bills have been introduced that would require new processes and procedures for conducting burdensome, one-size-fits-all "lookbacks" for existing agency regulations. These include the Regulatory Improvement Act of 2015 (H.R. 1407 and S. 708) and the Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act of 2015 (H.R. 1155 and S. 1683).

No one denies that agencies should regularly review and assess their regulations, and many already do. Such reviews are arguably more beneficial and productive than the highly speculative *ex ante* cost-benefit analyses that agencies perform for many of their rules.

But, the recent lookback proposals have serious defects. First, these proposals would make government more sluggish by duplicating programs that already exist. For lookback programs of all shapes and sizes already abound in our government. The Regulatory Flexibility Act, for example, requires agencies to review every rule that has "a significant economic impact upon a substantial number of small entities" within 10 years after the final rule is published. Further, Executive Order 13563 requires agencies to conduct similar resource-intensive reviews on an ongoing basis for all significant rules.

In addition, several procedures are already in place for third parties to independently evaluate agencies' existing regulatory programs. For instance, federal law establishes a network of independent Inspectors General for every major executive and independent agency, which, among other things, audits and evaluates the effectiveness of agencies' regulatory programs. In addition, Congress created the Government Accountability Office (GAO), an independent agency that works to aid Congress's oversight of the federal government. A key component of

the GAO's work is to audit and evaluate specific regulatory programs in response to requests from members of Congress. As part of this effort, the GAO maintains a "High Risk List," which it updates at the start of each new Congress in order to bring "attention to agencies and program areas that are high risk due to their vulnerabilities to fraud, waste, abuse, and mismanagement, or are most in need of transformation."

Second, programs requiring burdensome one-size-fits-all lookback procedures are conceptually flawed. Last year, Michelle Sager, the Director of Strategic Issues at the GAO, testified before the U.S. Senate Committee on Homeland Security and Governmental Affairs that agencies already conduct discretionary lookbacks of their existing regulatory programs, and that these discretionary reviews were more effective than the mandatory ones in terms of producing meaningful policy changes. As she put it, "discretionary reviews generated additional action more often than mandatory reviews, which most often resulted in no changes."

Third, the regulatory lookback proposals are highly biased. Their required methodologies focus heavily or even exclusively on ways to reduce regulatory costs with nary a thought on how to improve public safety. Instead of providing an honest accounting of existing rules' impacts, these lookbacks would likely generate results that are meaningless or unhelpful. After all, many of the regulatory lookbacks that already occur tend to find that existing rules are either not imposing undue costs or indeed need to be strengthened. For instance, a 2011 Center for Progressive Reform white paper reviewed 38 regulatory lookbacks conducted by the EPA and OSHA under the Regulatory Flexibility Act and found that every review concluded that there is a "continued need" for the regulation, meaning that a significant risk to public health, safety, or the environment exists and that the controls called for in the regulation continue to be successful in reducing that risk. Likewise, many regulatory programs end up on the GAO's High Risk List because they are inadequate and need to be strengthened—not weakened or rescinded. For instance, the GAO included "Transforming EPA's Process for Assessing and Controlling Toxic Chemicals" because it found that the agency was failing to effectively implement key chemical assessment programs, including the Integrated Risk Information System (IRIS) program and the Toxic Substances Control Act (TSCA).

Rather than add duplicative and wasteful lookback requirements, Congress should consider providing agencies with the necessary resources so that they can conduct discretionary lookbacks that are better tailored to the individual regulations undergoing review.

#### Regulatory budgeting or regulatory "pay-go"

The most extreme of all the antiregulatory reforms, this proposal would place an arbitrary cap on new safeguards that is purportedly aimed at limiting the total cost of regulations on polluting industries. Depending on how the cap is designed, agencies would be prohibited from issuing new rules, no matter how beneficial they are, unless they first identify and eliminate an existing rule that involves greater or equal costs for industry.

Regulatory budgeting would prohibit agencies from taking any actions that add new regulatory costs without offsetting those costs by eliminating existing regulations. If the agency sought to regulate a harmful activity, it would have to drop an existing protection against some other risk. Alternatively, the agency could choose not to act, and leave the existing safeguard in place, at the

price of leaving some other hazard unaddressed. In either case, people and the environment would be left unprotected against an identifiable and preventable risk. While agencies would face a cap on regulatory costs, regulated industries would of course face no similar “cap” on their ability to impose new and unique harms on public health, safety, and the environment.

Under standard economic theory, a rule that creates more benefits than costs is a “good deal” for society, and a rule that creates fewer benefits than costs is not. Administrations from both parties have implemented this insight by requiring executive agencies to subject their biggest rules to a technical form of cost-benefit analysis to the extent permitted by their authorizing statutes.<sup>1</sup> Regulatory budgeting completely ignores this lesson, and thus is even more extreme than cost-benefit analysis in its disregard for regulatory benefits. For example, suppose a cost-benefit analysis determines that a rule will cost \$100 million to implement but will yield \$200 billion in benefits. Regulatory budgeting would block adoption of this rule—even though it is a huge net plus for society—unless the agency finds a different rule to repeal that costs \$100 million or more to implement. Under regulatory budgeting, it is irrelevant that the repealed rule might be on an entirely different subject matter or that it might also generate far more benefits than costs. There should not be a limit on the amount of net good a government can provide to its people.

Regulatory budgeting would also be subject to several complex and intractable implementation problems that would render the proposal almost impossible to put into practice. For example, would there be a single cap for the entire government? If so, how would it be set? If set on an agency-by-agency basis, how would the budgets be changed to account for a reorganization of existing agencies or to accommodate the creation of new ones? The answers to these and other crucial implementation questions defy simple resolution.

#### Conclusion

Thank you for attention to these criticisms of the antiregulatory proposals discussed above. At your request, we would be happy to discuss these views with you further.

Sincerely,

Robert R.M. Verchick  
President, Center for Progressive Reform  
Gauthier ~ St. Martin Eminent Scholar Chair in  
Environmental Law  
Loyola University, New Orleans\*

James Goodwin  
Senior Policy Analyst  
Center for Progressive Reform

\* University affiliation is for identification purposes only.

<sup>1</sup> To be sure, as noted above, the use of cost-benefit analysis in regulatory decision-making is problematic in part because it treats the protection of individuals and the environment as just another asset that is worthy of protection only if the “value” of human beings or the environment is greater than the cost of protection. More broadly, cost-benefit analysis in practice cannot give due weight to qualitative benefits that it inevitably commodifies.

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

**Questions for the Record  
House Committee on the Judiciary  
Subcommittee on Regulatory Reform, Commercial and Antitrust Law**

*Hearing: "Oversight Hearing on the Office of Information and Regulatory Affairs"*

**CHAIRMAN TOM MARINO**

**Response to Congressional Oversight**

1. **Since March 2015, the Oversight Committee has been seeking documents from OIRA pertaining to the controversial Waters of the United States rulemaking. To date, OIRA has provided the Committee with hundreds of pages of publicly available information and less than 100 pages of non-public information. Given OIRA's limited resources, why would your staff spend time printing out publicly available information instead of working to provide substantive non-public information?**

The Office of Management and Budget (OMB) staff continue to search for documents responsive to the House Oversight and Government Reform Committee's requests. To date, the Office of Information and Regulatory Affairs (OIRA) has produced hundreds of pages of non-public records regarding the review of this rule.

**Agency Compliance with Regulatory Procedures**

2. **There is a concern about OIRA routinely omitting whether a rule contains unfunded mandates. For example, the recent rear-view camera rule explicitly states that "[T]oday's final rule would result in expenditures by the private sector of over \$100 million annually." This is the definition of an unfunded mandate, yet OIRA's website lists "no" under "unfunded mandates." The American Action Forum found seven similar examples. Are you aware of this? Is there a systemic problem? How do you plan to fix this?**

OIRA's conclusion summary data contained a technical error and incorrectly indicated this final rule as not having an unfunded mandate (the proposed version of the rule was correctly identified as an unfunded mandate). The text of the rule itself that was officially published in the Federal Register correctly identified this rule as imposing an unfunded mandate, and the agency followed the analytical requirements that are triggered by such a designation.

**Social Cost of Carbon Estimate**

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.**



- a. **Outside of the SCC context, are you aware of any cases where agency Regulatory Impact Analyses depart from Circular A-4 and simply omits analysis using the 7% discount rate.**
- b. **If so, how frequently do such omissions occur? If not, why is the Social Cost of Carbon the only exception?**
- c. **At a minimum, for transparency purposes, why shouldn't a 7% discount rate be included?**
- d. **The discount rate is a financial analysis concept, related to investment returns. Accordingly, why shouldn't that discount rate be the same across the board, entirely independent of the substance of the rule being analyzed?**

In July 2015, the interagency working group (IWG) on the Social Cost of Carbon (SCC) issued its response to public comments<sup>1</sup> resulting from OMB's November 2013 request for comment on the IWG's SCC estimates and supporting technical support documents. Several commenters raised the issue of why the 7% rate recommended by Circular A-4 was not used in the SCC estimates. This issue is addressed in two places in the Response to Comments document. In *Section 10, Process Related Comments*, the IWG notes as follows:

Circular A-4 is a living document, which may be updated as appropriate to reflect new developments and unforeseen issues. OMB was fully involved in the development of the SCC estimates as a working group co-chair, and supports the working group's recommendations regarding the discount rate and the focus on global damages. The departure from the standard discount rate recommendations in Circular A-4 is explained in detail in the TSDs and in Section 5 of this document. Briefly, the use of 7 percent is not considered appropriate for intergenerational discounting. There is wide support for this view in the academic literature, and it is recognized in Circular A-4 itself. (*Response to Comments*, p 36)

*Section 5: Discount Rates* includes detailed responses to a number of technical concerns raised by commenters related to the range of discount rates used in the SCC estimates. With regard to the use of a 7% discount rate, the IWG responds as follows:

OMB guidance in Circular A-4 recommends that discount rates of 3 percent and 7 percent be used in regulatory impact analysis. The 7 percent rate is an estimate of the average before-tax real rate of return to private capital in the U.S. economy. It is a broad measure that reflects the returns to real estate and small business and corporate capital and is meant to approximate the opportunity cost of capital in the United States. The 3 percent rate is an estimate of the real rate at which consumers discount future consumption flows to their present value, often referred to as the social rate of time preference or the consumption rate of interest. As stated in the 2010 TSD, in a market with no distortions, the return to savings would equal the private return on investment, and the market rate of interest would be the appropriate choice for the social discount rate. In the real world, however, risk, taxes, and other market imperfections drive a wedge between the risk-free rate of return on capital and the consumption rate of interest.

<sup>1</sup> <https://www.whitehouse.gov/sites/default/files/omb/irforeg/scc-response-to-comments-final-july-2015.pdf>

While most regulatory impact analysis is conducted over a time frame in the range of 20 to 50 years, OMB guidance in Circular A-4 recognizes that special ethical considerations arise when comparing benefits and costs across generations. Although most people demonstrate time preference in their own consumption behavior, it may not be appropriate for society to demonstrate a similar preference when deciding between the well-being of current and future generations. Future citizens who are affected by such choices cannot take part in making them, and today's society must act with some consideration of their interest. Even in an intergenerational context, however, it would still be correct to discount future costs and benefits generally (though perhaps at a lower rate than for intragenerational analysis), due to the expectation that future generations will be wealthier and thus will value a marginal dollar of benefits or costs less than the current generation. Therefore, it is appropriate to discount future benefits and costs relative to current benefits and costs, even if the welfare of future generations is not being discounted. Estimates of the discount rate appropriate in this case, from the 1990s, ranged from 1 to 3 percent. After reviewing those considerations, Circular A-4 states that if a rule will have important intergenerational benefits or costs, agencies should consider a further sensitivity analysis using a lower but positive discount rate in addition to calculating net benefits using discount rates of 3 and 7 percent.

The IWG examined the economics literature and concluded that the consumption rate of interest is the correct concept to use in evaluating the net social costs of a marginal change in CO<sub>2</sub> emissions, as the impacts of climate change are measured in consumption-equivalent units in the three IAMs used to estimate the SCC. This is consistent with OMB guidance in Circular A-4, which states that when a regulation is expected to primarily affect private consumption—for instance, via higher prices for goods and services—it is appropriate to use the consumption rate of interest to reflect how private individuals trade-off current and future consumption.

As explained in the 2010 TSD, after a thorough review of the discounting literature, the IWG chose to use three discount rates to span a plausible range of constant discount rates: 2.5, 3, and 5 percent per year. The central value, 3 percent, is consistent with estimates provided in the economics literature and OMB's Circular A-4 guidance for the consumption rate of interest. The upper value of 5 percent represents the possibility that climate damages are positively correlated with market returns, which would suggest a rate higher than the risk-free rate of 3 percent. Additionally, this discount rate may be justified by the high interest rates that many consumers use to smooth consumption across periods. The low value, 2.5 percent, is included to incorporate the concern that interest rates are highly uncertain over time. It represents the average rate after adjusting for uncertainty using a mean-reverting and random walk approach as described in Newell and Pizer (2003), starting at a discount rate of 3 percent. Further, a rate below the riskless rate would be justified if climate investments are negatively correlated with the overall market rate of return. Use of this lower value also responds to the ethical concerns discussed above regarding intergenerational discounting.

The IWG recognizes that disagreement remains in the academic literature over the appropriate discount rate to use for regulatory analysis of actions with significant

intergenerational impacts, such as CO<sub>2</sub> emissions changes that affect the global climate on long time scales. The IWG will continue to follow and evaluate the latest science on intergenerational discounting and seek external expert advice on issues related to discounting in the context of climate change. (*Response to Comments*, pp 21-22)

The IWG recently announced that it has contracted with the National Academies of Sciences, Engineering and Medicine to provide advice on a number of issues related to estimating the SCC, including the appropriate choice of discount rates.

#### **Timeliness of Regulatory Agenda & Related Disclosures**

- 4. Congress has not yet received OIRA's required annual report on the costs and benefits of the previous year's federal regulations. By law it is to be submitted "with the budget". This timing, as Congress is determining how much money to allocate to each agency, helps ensure agency accountability for its regulatory determinations. When will Congress receive the report and what will you do to ensure that, in 2016, Congress receives the report "with the budget."**

OIRA takes its reporting responsibilities seriously and endeavors to meet all statutory deadlines. The annual Cost-Benefit Report is sometimes delayed due to the scope of the analysis, and by the fact that we utilize peer reviewers, as required by law, as the report is being compiled. OIRA will continue to work towards a release of this report as soon as possible while maintaining accuracy and comprehensiveness in its analysis.

#### **OIRA Enforcement**

- 5. OIRA can "return a rule" to an agency that fails to comply with the procedural safeguards designed to ensure high-quality rulemaking. How many rules has OIRA returned during your tenure? Agencies can also withdraw rules. How many times in your tenure has that happened? What other tools are available and how many times have you used them?**

One of my goals as Administrator is to ensure that agencies submit rules for OIRA review that meet the criteria described in our various governing Executive Orders and Circulars. Therefore, I have not had the need to issue any return letters during my tenure. On rare occasions, agencies have chosen to withdraw rules, which can happen for a number of reasons potentially unrelated to the quality of the analysis or interagency concerns expressed during Executive Order Review. For example, at times, during review the underlying statutes or judicial decisions governing an agency's authority to regulate could change, or an agency's priorities could change due to unforeseen or emergency circumstances. According to a search of [reginfo.gov](http://reginfo.gov), since I became Administrator in 2013, agencies have withdrawn 38 regulatory actions, which is approximately 4% of all regulatory actions reviewed during this period.

#### **Legislative Ideas**

- 6. The Administration's retrospective review efforts have been underway for a few years now. There appears to be a broad disparity in the number of rules agencies identify in their biannual regulatory lookback reports to OIRA. What further steps**

**can you take to ensure that agencies take their retrospective review obligations seriously and produce robust results?**

Thank you for your interest in retrospective review, which is a crucial way to ensure that our regulatory system is modern, streamlined, and does not impose unnecessary burdens on the American public. In Executive Order 13563, the President called on Federal agencies to undertake a Government-wide review to identify regulations that had become outdated or that no longer justified their costs. Since that time, Federal agencies have completed over 179 retrospective initiatives which are expected to yield \$22 billion in savings over the next five years. In their July 2015 bi-annual reports, agencies reported approximately 340 ongoing initiatives to streamline or otherwise improve the implementation of regulations, and another 40 initiatives to reduce the burden of information collected under the Paperwork Reduction Act. The July 2015 agency reports, available at <https://www.whitehouse.gov/omb/oira/regulation-reform>, identify not only rules to be reviewed and potentially revised, but also two dozen rules or regulatory provisions that agencies will remove wholesale from the books. The July reports also identify several initiatives—some new or ongoing, others recently completed—that continue the emphasis on several key areas of burden reduction we identified when agencies released their last biannual reports, in March 2015. (The key areas of burden reduction we identified are available at <https://www.whitehouse.gov/blog/2015/03/17/accelerating-progress-and-institutionalizing-retrospective-review-1>). The completed retrospective reviews and the initiatives listed in the report represent a notable investment of time and resources by agencies into meeting President Obama's call.

Given this success, we look forward to continuing to strengthen the Federal Government's emphasis on retrospective review. Both through ongoing stakeholder engagement and through agencies' own initiatives, the Federal Government will continue to identify specific rules as well as broader categories of regulation in which our regulatory system can be made more efficient and thereby increase its value to the American people. For example, in August OMB announced a new initiative to review government regulation of university research in order to reduce unnecessary burdens on universities in their management and compliance with Federal contracts, grants, and other awards. We are hoping this engagement with outside stakeholders will help identify new areas that would benefit from retrospective review. In addition, the aforementioned elements—robust stakeholder engagement, periodic reporting, and coordination with OIRA—provide all the tools necessary to conduct a serious and robust retrospective review process.

**Cost Benefit Analysis**

- 7. Please provide a list of all proposed or final rules, reviewed by OMB since January 2009, in which the regulatory evaluation showed that the costs exceeded the benefits by at least one method of calculation.**

OIRA's annual *Report to Congress on the Benefits and Costs of Federal Regulation* contains significant information regarding this issue. Specifically, *Table A-2: Estimates of Annual Benefits and Costs of Major Final Rules* is updated each year, and contains information on the costs and benefits for each rule for which such information is available over the preceding 10 fiscal years.

- 8. Please provide a list of all proposed or final rules, reviewed by OMB since January 2009, where the cost-benefit analysis, by one or more methods of calculation, would be negative, if co-benefits were excluded.**

OIRA's annual *Report to Congress on the Costs and Benefits of Federal Regulation* discusses the role of co-benefits in detail.

**REP. MIKE BISHOP**

**The Departments of HHS, Treasury, and Labor at the end of May published a rule announcing that as of 2016, all out-of-pocket policy plans would be required to embed an individual cost-sharing limit in all family coverage options.**

- 1. How is it possible that a change of this magnitude can be implemented by the government with no statutory justification and without following the rules of the Administrative Procedure Act?**
- 2. The new out-of-pocket “clarification” was never included in the actual rule or regulation; it was included only in the preamble. Why did you not make this “clarification” part of the regulation?**
- 3. What studies did you perform to determine the cost-impact of this significant rule change on the design and cost structure of plans as well as the premium impact on employees?**
- 4. Can you commit to at least delay the impact of this significant rule change for at least a year? If not, why not? What is your time frame for addressing the legitimate concerns of plan sponsors with respect to this mid-year rule change?**

As the Departments of Health and Human Services, Treasury, and Labor noted in “FAQs about Affordable Care Act Implementation (Part XXVII)”, released on May 26, 2015:

Public Health Service (PHS) Act section 2707(b), as added by the Affordable Care Act, provides that a non-grandfathered group health plan shall ensure that any annual cost sharing imposed under the plan does not exceed the limitations provided for under section 1302(c)(1) of the Affordable Care Act. Under section 1302(c)(1), an enrollee’s out-of-pocket costs for essential health benefits are limited. For plan or policy years beginning in 2015, the maximum annual limitation on cost sharing under section 1302(c)(1) is \$6,600 for self-only coverage and \$13,200 for coverage other than self-only coverage. For plan or policy years thereafter, the maximum annual limitation on cost sharing (also referred to as the maximum annual limitation on out-of-pocket costs) is increased by the premium adjustment percentage described under Affordable Care Act section 1302(c)(4). For plan or policy years beginning in 2016, the maximum annual limitation on cost sharing is \$6,850 for self-only coverage and \$13,700 for other than self-only coverage. In the final HHS Notice of Benefit and Payment Parameters for 2016 (2016 Payment Notice) (80 FR 10750), HHS clarified that under section 1302(c)(1) of the Affordable Care Act, the self-only maximum annual limitation on cost sharing applies to each individual, regardless of whether the individual is enrolled in self-only coverage or in coverage other than self-only.

The Departments received questions regarding the application of the clarification in the 2016 Payment Notice to self-funded and large group health plans, and issued the above-mentioned FAQs to address these questions from stakeholders (available here: <http://www.dol.gov/ebsa/pdf/faq-aca27.pdf>). The final 2016 Payment Notice, issued after notice and comment rulemaking, itself clarified that the self-only maximum annual limitation on cost

sharing applies to each individual, regardless of whether the individual is enrolled in self-only or other-than-self-only coverage.

Further questions regarding agency guidance on this issue are best directed to the Departments of Health and Human Services, Treasury, and Labor.



**Response to Question for the Record from Noah M. Sachs, Professor, University of Richmond School of Law, Member Scholar, Center for Progressive Reform, and Director, Robert R. Merhige Center for Environmental Studies**

**Response to Questions for the Record from  
Prof. Noah M. Sachs  
Director  
Robert R. Merhige Jr. Center for Environmental Studies  
University of Richmond School of Law**

**Questions submitted for the Record from Subcommittee Chairman Marino**

1. You cite several retrospective studies of regulatory costs finding that the initial cost estimates were too high. There are other studies finding that benefit estimates are too high. For example, a recent retrospective study concluded that, “the benefits of FDA’s egg rule may be a small fraction of the prospective estimate of benefits.” (Regulatory Performance Initiative, Jun. 2015). Are you familiar with this or similar studies?

**ANSWER:** No, I am not familiar with the study on FDA’s egg rule or other studies that have concluded that the initial benefit estimates of regulation were too high.