

TOWARD A 21ST CENTURY REGULATORY SYSTEM

HEARING

BEFORE THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
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CONTENTS

Opening statements:	Page
Senator Johnson	1
Senator Carper	2
Senator Lankford	18
Senator Ernst	21
Senator Portman	23
Senator Heitkamp	27
Senator Ayotte	30
Prepared statements:	
Senator Johnson	43
Senator Carper	44

WITNESSES

WEDNESDAY, FEBRUARY 25, 2015

Douglas Holtz-Eakin, Ph.D., President, American Action Forum	5
Jerry Ellig, Ph.D., Senior Research Fellow, Mercatus Center, George Washington University	7
Michael Mandel, Ph.D., Chief Economic Strategist, Progressive Policy Institute	9
Hon. Sally Katzen, Professor, New York University School of Law, Former Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget	11

ALPHABETICAL LIST OF WITNESSES

Ellig, Jerry, Ph.D.:	
Testimony	7
Prepared statement	56
Holtz-Eakin, Douglas, Ph.D.:	
Testimony	5
Prepared statement	47
Katzen, Sally:	
Testimony	11
Prepared statement	72
Mandel, Michael:	
Testimony	9
Prepared statement	62

APPENDIX

Chart submitted by Senator Johnson	46
Responses to post-hearing questions for the Record:	
Mr. Holtz-Eakin	86
Dr. Ellig	89
Dr. Mandel	95
Ms. Katzen	99

TOWARD A 21ST CENTURY REGULATORY SYSTEM

WEDNESDAY, FEBRUARY 25, 2015

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Ron Johnson, Chairman of the Committee, presiding.

Present: Senators Johnson, Portman, Lankford, Ayotte, Ernst, Sasse, Carper, Heitkamp, Booker, and Peters.

OPENING STATEMENT OF CHAIRMAN JOHNSON

Chairman JOHNSON. This hearing will come to order.

I want to welcome all the witnesses. Thank you for your thoughtful testimony, and I am looking forward to this hearing.

Coming from a business background, I have done a lot of strategic planning, and I have thought about this in terms of the Federal Government. In a business setting, I know a lot of people here in Washington have not heard of a strengths, weaknesses, opportunities, and threats (SWOT) analysis. And, if you were to do a SWOT analysis on the American economy, it is actually pretty easy to do.

From my standpoint, the greatest strengths we have in this Nation is we are the world's largest economy. If you are a manufacturer, and I come from a manufacturing background, you want to be close to your customers. So, it is a huge economic advantage we have in this country. And, then, we have relatively low energy prices. Also from a manufacturing background, if you are going to manufacture things, you need power. Cheaper power is better than expensive power. We should try and do everything we can to lower the cost of energy. And, so, those are our strengths.

Our weaknesses, well, a huge weakness is the subject of this hearing here today, our regulatory burden. It is huge, and, of course, we have a very uncompetitive tax system. I do want to put up a chart¹ that, I think, pretty well describes what business organizations, what any organization is up against in terms of trying to expand, trying to create good paying jobs. It is the regulatory burden.

Now, I realize the numbers from the National Association of Manufacturers, of the Competitive Enterprise Institute in terms of

¹ The chart referenced by Senator Johnson appears in the Appendix on page 46.

their estimate, their cost estimate of how much it costs per year to comply with the Federal regulations, I realize those are estimates. I realize people dispute that. But, I think it is still good to put that estimate up against the size of our economy, just to put it in perspective.

So, whether you agree or disagree, the regulatory burden is huge. These estimates are somewhere between \$1.75 and over \$2 trillion per year. Now, compare that to the size of the American economy. Last year, it was \$16.8 trillion. So the regulatory burden, potentially—again, this is a projection—potentially could be more than 12 percent the size of our economy. That is a massive burden on job creators and we need to recognize that is a huge weakness.

That is something that this Committee can really concentrate on, because there have literally got to be thousands of regulations that are hampering the ability of businesses in red States and blue States, and certainly what I have asked the Members of this Committee is, let us identify those. Let us work together. We do not have to ask anybody to violate their principles. We can find those areas of agreement for regulatory reform, whether it is streamlining, modernizing, just outright eliminating those regulations, it would be very helpful to our American economy.

The last point I want to make in terms of the actual size is we have listed the GDPs, the size of the economies of the 10 largest economies in the world. You will notice our regulatory burden is as large as all but 10 economies in the world. I mean, that is what we are burdening job creators with and I think that is a pretty significant burden.

I do want to point out that Senator Lankford is here. I appreciate that. He is going to be chairing a Subcommittee of this Committee that is really going to be focusing on regulatory reform. So, this is sort of the Committee-level kick-off meeting, let us put it that way, and Senator Lankford is really going to be lasering in on this and, again, trying to find those areas of agreement, so I appreciate that, and you will be sitting in the chair here for a few moments while I go to the Budget Committee.

The last point I want to make, to indicate the level of burden here, and again, this is not perfect, but if you take a look at the number of Federal Register pages published—now, this is actually published versus what is the Federal regulations in a particular year—on an annual basis, during the FDR administration, it was about 15,000 per year. Under Nixon, it was 45,000. Today, we are publishing about 80,000. So, we are just kind of ramping up this potential problem. Again, just trying to put some perspective to the regulatory burden. I think Mr. Holtz-Eakin will speak a little bit more to some of these metrics.

With that, I will turn it over to our Ranking Member.

OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Thanks, Mr. Chairman.

It is very nice to see you all today. Thank you so much for coming, for preparing, and for presenting, and for responding to our questions. I think we are going to have a good conversation and a timely one, as well.

I heard of the word aphorism earlier this week. You do not hear that word every day. It is a fairly simple statement that conveys a principle, a hopefully significant principle. And, one of my favorite aphorisms is about job creation. Guys like me, people who serve in these roles, we do not create jobs. I was a Governor for 8 years. A lot of jobs were created in my State during those 8 years. I did not create them. Presidents do not create jobs. Mayors do not create jobs. What we do is create a nurturing environment for job creation. That is the aphorism. Help to create a nurturing environment for job creation.

That includes access to capital. That includes reasonably priced electricity, health care. That includes public safety, transportation infrastructure, cybersecurity protection, protection against those kinds of attacks. Somebody who is going to bat for us to make sure we can export our goods and services into foreign markets, all that stuff. Part of it is a reasonable tax burden. But, also, part of it is common sense regulations, and that is all part of the nurturing environment. And, we have to find the right balance in a lot of those, and today's hearing, I think, will help us find that balance.

I thank the Chairman for bringing us here and thank all of my colleagues for joining us here today. I think it is an important hearing because regulations are important. We issue them for a number of reasons, including to better protect our health, our safety, our environment, and the economy. So, whether or not we are aware of it, regulations do play a role in our daily lives, a necessary role, not always, but usually in a positive way.

We enjoy the benefits of regulations every time we have a drink of water, every time we drive a car or go to the bank. And, while there may be disagreements on occasions about certain rules, I believe everyone generally agrees that some regulation is necessary and good.

It is important to note that regulations sometimes come in response to court orders. People go to court and they sue because they feel like an agency is not complying with a law that has been passed and the courts order regulations to be either issued or modified.

Regulations also exist because we pass and the President signs a law that draws lines between what is acceptable and what is not in our society, and that directs an agency to take a certain action.

But, those of us in Congress cannot legislate every detail of a particular matter, even if we tried, and legislative language cannot possibly take into account every situation that may arise as a result of enactment of a law. So, we have to leave some of the details to the regulatory process. And, sometimes, the way we write the laws, we make that very difficult, as you know.

The regulatory process can be time consuming. It is also more difficult to understand and follow than the legislative process, and that is saying something. It should be our goal, though, to have the most effective, efficient, and transparent regulatory process we can have and to ensure that process results in common sense regulations that achieve the objectives laid out in the laws that we have passed in this Congress.

While some people think we need to choose between regulations and having a robust, growing economy, I think that is a false

choice. We do not have to make that choice. But, it is important that what do we say in the Constitution, the Preamble to the Constitution, "In order to form a more perfect Union." It does not say a "perfect Union," a "more perfect Union." So, our goal should be to try to pass laws that enable us to use common sense and provide common sense legislation and, hopefully, common sense regulations to accompany those.

For example, by advocating a common sense, cost effective approach to our Nation's environmental and energy challenges, we can reduce harmful pollutions. We can live healthier lives. We can lower our energy costs. And, we help put Americans to work manufacturing new products. Regulations also often provide the stability and predictability that businesses need, and they can help instill consumer confidence in the products they buy.

Of course, many regulations do, by necessity, impose requirements and additional costs on businesses and others that must comply with them. And it is not always easy for those of us who want to participate in the process to have a say in a regulation they may be interested in as it is developed and finalized. So, I believe it is also important to conduct oversight of the regulatory process to ensure that we try to reduce burdens and ensure transparency where we can while achieving the greatest public benefit.

I have been encouraged by the Administration's work in this area. I have also been impressed by the personal commitment the President has shown to his administration's efforts to identify existing regulations that should be reexamined or even repealed. It is my understanding that these retrospective reviews have already identified ways to reduce burdens and to save billions of dollars, and I expect these look-back efforts to continue to bear fruit.

Finally, as I often say when it comes to issues like this that come before our Committee, we need to figure out what works and do more of that. That is another aphorism. But, this applies to regulatory reform, as well, and I hope that as our Committee continues to discuss these issues, we take a real look at this process, and that the Administration's ongoing efforts to acknowledge what is working and help them do more of it.

I want to thank our Subcommittee Chairman over here on my left flank for his commitment to working on these issues, as well, and we look forward to the fruits of your labors.

Thanks, Mr. Chairman.

Chairman JOHNSON. Thank you, Senator Carper.

Let me quickly introduce the witnesses before I swear them in. Our first witness will be Douglas Holtz-Eakin. He is the President of the American Action Forum. He has previously served as Commissioner on the congressionally chartered Financial Crisis Inquiry Commission, an economist at the White House Council of Economic Advisors, and as Director of the Congressional Budget Office from 2003 to 2005.

Our next witness will be Jerry Ellig, a Senior Research Fellow at the Mercatus Center at George Mason University. He has previously served as Acting Director of the Office of Policy Planning at the Federal Trade Commission and as Senior Economist for the Joint Economic Committee.

Our next witness will be Michael Mandel. He is the Chief Economic Strategist at the Progressive Policy Institute and President of South Mountain Economics. He was previously Chief Economist at Business Week.

And, our final witness will be Sally Katzen. She is a Visiting Professor at NYU Law School and a Senior Advisor at the Podesta Group. She has previously served as Administrator of the Office of Information and Regulatory Affairs and Deputy Director for Management of the Office of Management and Budget.

It is the tradition of this Committee to swear in witnesses, so if everybody would rise and raise their right hand.

Do you swear the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. HOLTZ-EAKIN. I do.

Dr. ELLIG. I do.

Dr. MANDEL. I do.

Ms. KATZEN. I do.

Chairman JOHNSON. Thank you.

We will start with Mr. Holtz-Eakin.

**TESTIMONY OF DOUGLAS HOLTZ-EAKIN,¹ PH.D., PRESIDENT,
AMERICAN ACTION FORUM**

Mr. HOLTZ-EAKIN. Well, thank you, Mr. Chairman, Ranking Member Carper, Members of the Committee, for the privilege of being here today to talk about Federal regulatory reform. You have my written testimony. Let me just touch on three points briefly and then I look forward to answering your questions.

Point No. 1 is that, as the Chairman has pointed out, the regulatory burden continues to grow. If you look, for example, at the paperwork burdens of cabinet-level agencies since fiscal year (FY) 2000, they have increased by 30 percent. They are now 9.3 billion hours. And if you look at 2010 as an example, in that year, there were 100 major rules, which is the most in the history of the Congressional Review Act. These are strikingly large regulatory initiatives.

The second major point I would like to make is that those kinds of measures only scratch the surface of the implications of the regulatory burden. Like taxes, which people are very familiar with, regulations have a burden on the economy and they distort the natural organization of the economy and make it less efficient. We have seen examples of this in recent years, as well.

Since 2008, the American Action Forum estimates that we have increased the annual regulatory burden by about \$100 billion in annualized costs. For perspective, that increase exceeds the higher estate taxes, capital gains taxes, dividend taxes that were part of the 2010 so-called fiscal cliff. And, so, these are an important impact on the economy.

And, they will do two things. No. 1, they will be paid for by someone in the U.S. economy. It will show up in the form of higher prices for products. It may show up in part as lower wages paid or fewer people hired. Or, it could be less capital investment and

¹ The prepared statement of Mr. Holtz-Eakin appears in the Appendix on page 47.

lower profits. But, this cost will be borne by the economy and the American public in some form.

And, the second thing it does is it does shift the composition of economic activity and the regulations in that way make our economy less efficient than it would otherwise be. If you look, for example, at some important prices that Americans pay, the \$100 billion increase since 2008 has translated into about \$3,100 increase in the price of a passenger vehicle. It is a \$360 increase in the mortgage for every mortgage every year. It looks like about \$135 a year in higher energy costs for Americans, or \$108 a year in higher health care costs for Americans. These are price impacts of the increased regulatory burden we have seen just since 2008.

The other kind of example of the impact of regulations, you can look in the State of Ohio as a random example, Senator Portman, and since—the BLS reports that there have been 1,100 fossil fuel electricity jobs lost in the State of Ohio, while, on the flip side, we have seen employment in solar energy employment rise sharply. That is the regulatory results of shifting the composition of activity away from what the market had otherwise established. Those are important implications for the scale of regulation in the United States.

So, the things that I would recommend to the Committee and to your efforts, Senator Lankford, would be to have some principles for regulatory reform, and first and foremost would be to codify the various Executive Orders (EO) that have existed for a long time and to insist on benefit-cost analysis in every Federal agency, including the so-called independent agencies, not going on at the moment. And, allow for judicial review if the agencies fail to conduct legally required analyses. At the moment, there is literally no penalty for violating the order to conduct a benefit-cost analysis.

It would be useful to insert principles in future legislation that say there will be time lines for the regulatory implementation of this legislation. There will be a requirement for benefit-cost review. And, there will be limits on the amount of regulation that the legislation is about to produce. Those would provide for a better system.

And, then, there should be a more formal process of retrospective review than the one we have at the moment. I know other witnesses are going to talk about that.

The last thing I would say is to note that the United States is not alone. I thought the chart was very important in this regard. The other nations on that chart, the United Kingdom, the OECD countries, have all recognized the importance of regulatory review and reform and they are undertaking serious efforts to minimize their regulatory burden. I think the United States should follow suit, and I look forward to working with the Committee in that regard.

Thank you.

Chairman JOHNSON. Thank you, Mr. Holtz-Eakin.

Our next witness is Dr. Ellig.

TESTIMONY OF JERRY ELLIG, PH.D.,¹ SENIOR RESEARCH FELLOW, MERCATUS CENTER, GEORGE MASON UNIVERSITY

Dr. ELLIG. Thank you, Chairman Johnson, Ranking Member Carper, Members of the Committee. I am also happy to be able to be here and talk with you today about regulatory reform, and particularly the role of regulatory impact analysis in regulatory reform.

I work at a university. That means I am for knowledge and I am against ignorance. I think that the regulators and other decision-makers have a moral responsibility to make decisions based on actual knowledge of the likely effects of a regulation and its alternatives, not just based on intentions or assumptions. A decision-maker's failure or refusal to obtain this information is a willful decision to act based on ignorance.

The tool that generates and organizes our knowledge about the effects of regulation and alternatives is called regulatory impact analysis. Unfortunately, regulatory impact analysis produced by Federal agencies is often not done very well and it often seems to have little effect on agency decisions. We are not likely to see substantial improvement in the quality of regulatory impact analysis unless we see legislation that turns it into a statutory requirement and provides for some type of judicial review to ensure that the analysis meets some minimum standard of quality.

Now, let me expand on these points. A good regulatory impact analysis does at least four things. First, it assesses and identifies and traces the root cause of the problem the agency is trying to solve.

Second, it outlines alternative solutions, and then it evaluates the benefits of the different alternatives and the costs of the different alternatives. When regulators have this information, they have a better shot at writing regulations that actually solve real problems at an acceptable cost.

But, Congress should also have this information. Under the Congressional Review Act, Congress has an expedited process for vetoing regulations that Congress has decided it does not want to allow agencies to issue. Under the proposed REINS Act, Congress would play an even bigger role in regulatory decisionmaking by having to affirmatively vote before certain types of regulations take effect.

Now, honestly, I do not know, if I were called to make a yes or no vote to approve or disapprove a regulation, I do not know how I could claim that I was making an informed decision if I did not know whether the regulation was solving a real problem and whether there were better alternatives out there. A yes or a no vote would be buying a pig in a poke if I did not have that information.

Oversight Committees also should be able to find this kind of information useful. Oversight Committees look at what Federal regulatory agencies do to see if they are doing their job well and see if they are producing good results for the public. It is a lot easier to do oversight when you have access to a good regulatory impact analysis where the agency has declared, here are the results we are trying to achieve with our regulations, so that then there is some

¹ The prepared statement of Dr. Ellig appears in the Appendix on page 56.

kind of a standard or a scoreboard where you can say, OK, did you achieve it or did you not achieve it? Let us go look.

Let me give you a couple of examples of what happens when the analysis is not up to snuff. A few years ago, the Food and Drug Administration (FDA) proposed a rule that essentially required anyone who produces or transports or handles animal food has to have processes and procedures in place to make it as safe as human food, and the FDA did not trace any kind of problem to its root cause, did not estimate the benefits. One of my colleagues who spent a number of years in the FDA, though, took a look at it and found that pretty much all the benefits of the regulations come from preventing transmission of salmonella from pet food to human beings. So, the real problem was pet food, not animal feed. And, if the FDA had done a thorough analysis of alternatives and traced the problem to its root cause, the FDA would have discovered that it could have issued a much more carefully tailored regulation that was a lot less costly and still accomplished all the public health benefits.

That is not an isolated example. In a project that I have run at the Mercatus Center since 2009 called the Regulatory Report Card, we evaluate the quality of analysis that agencies conduct when they issue really big regulations, the economically significant regulations. We find that, typically, on average, the quality of the analysis is not very good. On the four major items that are supposed to be in a regulatory impact analysis, we usually find that agencies earn about 60 percent of the possible points or less, and in my book, 60 percent or below is basically an F. I do not know that we should be making regulatory decisions based on information of that poor quality. This is consistent with the research of other scholars who have examined the quality of regulatory impact analysis.

What can we do about it? What can Congress do about it? The first step in solving the problem is understanding that it is not the fault of a particular political party or a particular administration. My research, "research by other scholars" finds that there are deficiencies in regulatory impact analysis under Republican administrations, Democratic administrations, administrations under various Presidents. So, it is not a partisan or political problem. It is an institutional problem that requires an institutional solution.

The current enforcement mechanism is review of regulations in the Executive Branch by the Office of Information and Regulatory Affairs (OIRA). There is evidence that OIRA review improves the quality of regulatory analysis, but it falls far short of what you would expect if you have read 40 years' worth of Executive Orders and the Office of Management and Budget (OMB) guidance that tell agencies what they are supposed to be doing. OIRA does help improve things, but we are still far short of where we ought to be.

The most obvious solution, to me, is a statutory requirement that agencies conduct regulatory impact analysis, that traces problems to their root cause, explores alternative solutions, and evaluates the benefits and the costs of alternatives, coupled with some type of judicial review to ensure that that analysis meets some minimal quality standards. We need to improve the quality of regulatory impact analysis because good intentions do not automatically create

good results. Decision makers should act based on genuine knowledge, not just hopes or assumptions or good will, good wishes.

That is why the real conflict in the debate over regulatory reform should not be Republicans versus Democrats, liberals versus conservatives, business versus the public. The real conflict is knowledge versus ignorance, and I urge you all to choose knowledge.

Thank you.

Senator CARPER [presiding]. Senator Johnson has asked me to turn to the next witness, Congressman Lankford. Do you want to do it with me?

Senator LANKFORD. Sure. Let it rip.

Senator CARPER. All right. You are on, Dr. Mandel.

TESTIMONY OF MICHAEL MANDEL,¹ PH.D., CHIEF ECONOMIC STRATEGIST, PROGRESSIVE POLICY INSTITUTE

Dr. MANDEL. Senator Carper, Senator Lankford, Members of the Committee, thank you very much for the opportunity to address the question of how to design a 21st Century Regulatory System. My remarks today will focus on retrospective regulatory review and offer up an alternative mechanism for reducing the burden of regulation without losing its benefits.

My testimony is drawn from a series of policy briefs on regulatory improvement issued by the Progressive Policy Institute (PPI), where I am the Chief Economic Strategist. PPI stresses the importance of growth and innovation for lifting the living standards of all Americans. We are especially concerned with regulatory policy as an untapped tool for accelerating innovation and growth.

Regulation, as you know, is essential for our whole economy. However, if policymakers allow the regulatory burden to become too heavy, innovation and entrepreneurial energy can be suppressed. As I noted in a recent essay, even the most regulation minded can see how the accumulation of well-intentioned rules can have a pervasive and negative effect on innovation. One useful analogy is that of a small child tossing pebbles in a stream. One or two or even 10 pebbles will not make an obvious difference in the flow of the stream, yet accumulating gradually over the years, thousands of pebbles can make an effective dam.

One logical way to fix the regulatory system is to go back and review old rules. This process of retrospective review has been embraced by every President from Jimmy Carter to Barack Obama. Administratively, retrospective review seems simple. Executive agencies are ordered to make a list of regulations that are candidates for reform. They then go down the list one by one and ask if the benefits exceed the costs. This procedure seems fool proof, and yet with no exceptions, several studies have shown that these attempts at retrospective review have fallen far short of the desired result.

I am going to argue here that retrospective review is a seriously flawed process that cannot by itself provide the answer to regulatory accumulation. In my written testimony, I give four reasons. I am going to focus on two of these here.

¹ The prepared statement of Dr. Mandel appears in the Appendix on page 62.

First, we must recognize that assessing the costs and benefits of an existing regulation is far more expensive and time consuming than projecting the costs and benefits of a prospective rule. When an agency is first considering a new rule, it can use whatever limited evidence exists from academic studies and existing research. By contrast, after a major regulation has been in effect for years, the amount of potentially relevant real world data is enormous, expensive to collect, and potentially burdensome for companies.

So, it actually turns out that retrospective review, if you did it right, imposes more burdens on the companies to provide the information. It is not very easy to design studies that actually fairly test whether a regulation is working or not because you have to figure out what would have happened without the regulation in terms of technology, in terms of investment, in terms of how the market would have developed.

Equally important, retrospective review is inherently focused on assessing individual regulations. However, the impact of regulations is cumulative and non-linear. That means as rules pile up, they interact with each other to create more of an impediment, even if each rule makes sense on its own. Now, the fact is, both Democrats and Republicans have agreed on the impact of accumulation of regulations. The OIRA under Cass Sunstein published a memorandum on this. But, in fact, pretty much all agencies do not take regulatory accumulation seriously in any way, and neither, apparently, does OIRA.

So, to augment the formal process of retrospective analysis, which does have its benefits, we see the need for a low-cost, non-bureaucratic channel for improving regulations and taking into account regulatory accumulation. A 2013 paper by myself and a colleague, Diana Carew, proposed a Regulatory Improvement Commission (RIC) that would be authorized by Congress for a fixed length of time and consist of a panel appointed by the President and by Congressional leaders of both parties. The Regulatory Improvement Commission, would have a limited period of time to come up with a package of regulations to be eliminated or improved, drawing on public suggestions. The package would then be sent to Congress for an up or down vote and then on to the President for signing. This complements retrospective review. It deals with some of the issues that retrospective review cannot get to.

A version of the RIC was introduced in the Senate and in the House in the last 2 years with bipartisan sponsorship in both cases. It has the virtue of embodying regulatory reform that can be embraced by both Democrats and Republicans, and if I dare may say, could conceivably be enacted even in today's political climate.

Let me mention several important characteristics of the RIC. First, it is specifically designed not to eliminate any Congressional prerogatives. Indeed, Congress gets two bites at the apple, once when RIC is authorized and again when the package of proposed rule changes come through.

Second and related—and this is very important—the RIC does not lean exclusively on a supposedly objective measure, such as cost-benefit analysis. Instead, the RIC embraces the idea that regulations are a joint creation of the Executive and Legislative Branches with politics deeply embedded.

Finally, the RIC is about small steps to build trust rather than big dramatic changes. The Regulatory Improvement Commission is designed to show voters that Washington can get things done. Retrospective regulatory review sounds good and has the benefit that it can be implemented unilaterally by the Executive Branch. However, we know from repeated uses that it falls short of expectations for what it can achieve for fundamental reasons. We have to have another mechanism that complements retrospective review, and we suggest that at the appropriate time the Committee seriously considers the RIC legislation when it is reintroduced.

Thank you.

Chairman JOHNSON [presiding]. Thank you, Dr. Mandel. Ms. Katzen.

**TESTIMONY OF SALLY KATZEN,¹ PROFESSOR, NEW YORK
UNIVERSITY SCHOOL OF LAW**

Ms. KATZEN. Thank you, Chairman Johnson, Senator Carper, Members of the Committee. I appreciate your inviting me to testify today.

It is my strong belief that the regulatory system and the rules that it produces is an integral component of governance and one of our country's strengths. Echoing what Senator Carper said, Congress makes the law, but it typically does not have the time, expertise, or sometimes the ability to identify or resolve all of the details. That responsibility is usually delegated to the agencies, which issue regulations that translate general statutory directives into concrete requirements or prohibitions with which the public must comply.

We have heard a lot about the increased burden of regulations since the 1970s, and in my written testimony, I discuss several metrics for measuring that activity and whether they support the allegation that this administration is engaged in an unprecedented and unjustified amount of regulatory activity. I do not think they make that case.

There are, essentially, two measures the critics of regulation cite. First is the volume, as in pages in the Federal Register or the number of regulations, and second, calculations of the cost of new or total rules. Both can be large, if not scary, but neither really tells us very much about the extent or nature of an administration's regulatory activity.

Two points worth emphasizing. First, the fallacy of focusing on the length of the rule itself—how many lines, how many pages—is that, often, the length is driven by the need or desire to carve out exceptions or waivers. The Internal Revenue Code, for example, would be a lot shorter if there were no deductions or credits, or oil and gas depletion allowances, or accelerated depreciation, or alternative minimum taxes.

And, also, think about the rules that set up government programs for benefits or for subsidies, from Food Stamps to Small Business loans. Detailed and, hence, lengthy eligibility standards and reporting requirements are often critical for accountability and a hedge against waste, fraud, and abuse.

¹ The prepared statement of Ms. Katzen appears in the Appendix on page 72.

And, finally, brevity may not be a blessing in the world of regulations. A one-liner can ban a product, much more draconian than a very lengthy, complex set of rules about who can use it, when they can use it, how they can use it.

Second about the numbers, it masks what they do. It may shock some people that the vast majority of rules are ministerial or routine, like changing the day for filing your income tax to Monday if April 15 falls on a Saturday or Sunday.

Others are as non-controversial as they are necessary. I refer here to the Federal Aviation Administration (FAA) airworthiness directives. Should we stop them, or the FAA's rule this past year to stop ongoing flights over the Simferopol area because of the wars in Crimea, or the DOI rule which sets the bag limit for shooting fowl traveling north and south under the Migratory Bird Treaty. Without a limit, no one could enjoy that spot.

So, it may be counterintuitive, but there are some, in fact, a lot of regulations that people actually want and that they need. This would include those structuring programs, this would be leveling the playing field. A lot of businesses ask for rules and regulations to provide certainty of operations for their activities.

Now, a lot of these are major rules and are included in those vast numbers we see, because major rules are not just rules that have \$100 million or more in an annual impact, but are rules that have \$100 million or more in benefits, or rules that have a novel legal or policy issue involved, or have a material effect on the budget.

Because my time is so short, I am not going to talk about the retrospective review or the RIAs, although I think it really is important to note on the RIAs, and I have been in this field now for a number of years, that the quality of the work done by the agencies is, indeed, mixed, as you would expect, because the agencies are mixed. They have different missions, different cultures, different budgets, different resources. And, so, to have them all performing at the same level would be unexpected, at best. But, what I have also seen over the years is that they have improved. They have come a long way since the 1980s when they were asked to start this effort.

On the retrospective review, I will try to address that in the questions and answers.

But, I, too, wanted to offer some general principles or framework for evaluating various regulatory reform bills that are likely to come before this Committee. Now, I fully recognize that Congress, unlike Federal agencies, is not constrained from enacting legislation that it deems salutary. But, as a prudential matter, I think this Committee, before it endorses a particular regulatory reform bill, should ask and answer some of the questions that Dr. Ellig had posed. What is the compelling need? How significant is it? Are there alternatives? That is what a Federal agency does in rule-making. I think this Committee should think in that context rather than going to the bottom line.

It is worth noting that Congress has imposed a series of process and analytical requirements on the Federal agencies over the last 30 years and has not increased the resources that the agencies have to do that work. Asking them to do more with less is simply

not sustainable over the long term. Congress has other alternatives, as well, as Senator Carper indicated.

I have tried today to emphasize that regulations are an important, valuable force in our society and are the reason that the air we breathe, and the water we drink is clean, our food and medicine is safe, our workplaces are secure, our markets operate as advertised, and our values are embodied in our public and our private institutions. That is why I think it is a strength, not a weakness, of our country.

Now, we talk about the international scene and how everybody is engaged in trying to do better. I would tell you, they are trying to become us. We are the gold standard. We have the most transparent regulatory process in the world. We have the most accountable regulatory process in the world. And, the benefits of that system inure to all of us.

Thank you. I appreciate your time.

Chairman JOHNSON. I would like to thank all the witnesses for their thoughtful testimony.

Dr. Ellig, like you said, you have to start with information. I would argue that the first step in solving any problem is you have to admit you have one. The reason we try and grapple with some kind of metrics, whether it is pages or whether it is dollars, is we are trying to describe a problem that exists. Now, I realize they are all imperfect measures.

I was trying to get my staff to quickly come up with the exact numbers, but let me lay out part of the problem, is Congress now passes frameworks for the regulatory agencies to write the laws and the rules and regulations. We all agree, a job with the Federal Government should be providing a legal and regulatory framework to provide certainty for our economy, so you understand what the rules of the road are, like the Uniform Commercial Code. The problem is, we have passed so many, they are so confusing, they are conflicting, it is not providing that kind of certainty, not by any stretch of the imagination.

Two examples. Both Obamacare and Dodd-Frank, when they were written, they were a few hundred thousand words—I do not have the exact numbers right now—a couple hundred thousand words apiece. The last time I looked, Dodd-Frank, in terms of regulatory number of words, was over 15 million. Obamacare was over 12 million. So, again, those are the large metrics to try and describe the problem that our private sector is trying to grapple with as they are trying to grow and produce good paying jobs.

Anecdotally, I have had small banks in Wisconsin come up to me, small bankers, and say, “Senator, I had to fire, layoff a loan officer because I had to hire a compliance officer.” I am having banks say, “I cannot survive as a single-branch bank anymore. I have to consolidate just to be able to afford and comply with all the regulations.” So, whether it is anecdotally or this is from a macro sense, this is just a real problem.

I think one of the problems we have in terms of regulatory agencies—and again, I am very impressed with the quality of the Federal workforce. That is just true. I am a limited government guy, but I am impressed with the people, the dedication, their intelligence. The problem is, I am concerned about their experience.

How many regulators, what percentage—and I do not think anybody has this, but I want one of you to speak to the problem of regulators who have very little experience in the private sector understanding—for example, having the George McGovern moment. Do you remember when Senator McGovern ended up starting up a bed-and-breakfast, and I think his comment was, “If I had only known.” If I had only known what all these rules and laws and regulations and how difficult it was to comply.

So, can somebody speak to just the private sector experience that is lacking in the regulatory community? Mr. Holtz-Eakin, you are looking away, but——

Mr. HOLTZ-EAKIN. I do not have any metrics, which is what you would like to know. But, certainly, the anecdotal evidence is exactly what you described, that those who walk from one side of this line to the other are stunned at how misinformed they were about the burdens that the regulations impose on people.

Ms. KATZEN. Well, with respect, I think that that is one of the reasons we have public participation in rulemaking. Agencies have to say what it is they intend to do, and they have to provide all of the data and all of the analyses that they rely on. And then there is an opportunity for comment, and at least during my tenure at OIRA, and I had some private sector experience before I went into the government, businessmen would come in and say, there is a problem, and we would listen and we would respond. It is not a closed, mindless exercise. So, I cannot give you a percentage, but I can give you a cultural attitude of openness and inclusion for information.

Chairman JOHNSON. Sir.

Dr. MANDEL. Just to add one sentence here, part of the problem is the intersection of different regulations. So, what happens is that the regulatory agencies focus on—when they are developing regulations, they think about the impact of that single regulation. They do not think about the overlaps and the intersections and the problems that it causes with other regulations. And, when I talk to business people, a lot of what they complain about, they can deal with any single regulation. It is when they start layering on top of each other that it becomes a real problem. And we have to think about what we do in response to this. It is the intersection not just in the Federal level, but the State and local level, as well.

Chairman JOHNSON. Yes. It is the conflicting regulations. I mean, you are damned if you do, damned if you do not, that type of problem.

By the way, I do not think anybody here is claiming this is just an Obama Administration problem. This has been a problem as the fourth branch of government has grown exponentially in terms of the regulatory burden over the years. This is on a bipartisan basis.

Ms. Katzen, you mentioned about the notice and comment period. I think we have witnessed—I do not have the exact numbers, but I have seen numbers in the past—I think we have witnessed lack of notice and lack of comment, and I actually want to ask somebody to explain the substantive rule requirement in terms of notice and comment period.

Ms. KATZEN. [Laughter.] I laugh only because I devote two full classes in my admin law class to this.

Chairman JOHNSON. Very good.

Ms. KATZEN. The APA is quite clear that where there is a substantive rule that is binding—it has the force and effect of law—there must be notice and opportunity for comment. The APA explicitly carves out general statements of policies and interpretative rules, and as to those, there is no requirement for notice and comment, although OMB has a policy that if it is a statement of policy with significant economic impact, there should be a modicum of opportunity for public participation.

Now, that issue is actually before the Supreme Court today. It was argued in December in the Perez case and we should have a decision by the end of the year as to whether those words in the APA, in fact, mean what they say.

Chairman JOHNSON. Now, a Federal judge did actually rule—

Ms. KATZEN. He did.

Chairman JOHNSON [continuing]. I think, last week that President Obama's executive actions as regards to deferred action on—or we will call it executive amnesty, because it is easier to say—was a substantive rule and required notice and comment period and there was none, is that not correct?

Ms. KATZEN. That is what he—

Chairman JOHNSON. Would you challenge—

Ms. KATZEN. Yes.

Chairman JOHNSON [continuing]. That interpretation?

Ms. KATZEN. Yes, I would, and I think the Obama Administration will be challenging that, and I think that, in fact, his view of the law is not correct.

Chairman JOHNSON. Can anybody else comment on that? Is anybody else qualified to speak to that?

Dr. Ellig, you wanted to chime in—

Dr. ELLIG. Oh, on—

Chairman JOHNSON [continuing]. On something else.

Dr. ELLIG. I am sorry. On your earlier question, I wanted to mention, I worked in a regulatory agency and the sum total of my prior private sector experience was cleaning hamster cages at a Woolworth's store and dressing up as Santa Claus at Christmas in the same place. But, I think—

Chairman JOHNSON. That is better than none, by the way.

Dr. ELLIG. But, I think, even if you have regulatory agencies largely staffed by folks like us on the panel who have pursued pretty much analytical, policy oriented careers, there are certain fundamental questions that come out of how to do good policy analysis that agencies ought to be asking and answering that they are not always asking, like, what is the root cause of the problem we are trying to solve. And, so, I am not sure if you have to have a lot of people with private sector experience, but you at least ought to have people who know how to do good policy analysis.

Chairman JOHNSON. And value good information. Thank you. Senator Carper.

Senator CARPER. Thanks. I said to Senator Johnson, this is a good hearing, and a timely hearing. I think we have the four right people in front of us.

I am reminded, though, that sometimes we do not make, as legislators, we do not make it easy for folks who are writing regula-

tions. And you know, sometimes we are trying to find a compromise and it is maybe inartful, but we have to get some kind of agreement so we can pass a bill and then we say, you guys clean it up when you write the regulations. We are guilty of that, so we have some responsibility. So, it is a shared responsibility, if you will.

Ms. Katzen, given your time at OIRA, I know you fully understand the details of assessing the cost and benefits of some rules. For example, it is difficult for the Environmental Protection Agency (EPA) to assess the benefits of regulating certain toxins, including lead and mercury. Science is clear that these toxins impact our health, especially our children's health and their IQs, but calculating the direct dollar benefit of a smarter, healthier child just is not easy to do.

Conversely, estimating the cost is not always easy. Agencies often end up overstating the cost. I believe the estimated cost of the acid rain program launched by former President George Herbert Walker Bush, I think they estimated the cost of the acid rain program, to be 50 percent higher than what it turned out to be. And actually, we got it done in, like, half the time. It is pretty amazing.

During your time at OIRA, did you work on a rule that ended up having far more benefits and far less costs than estimated, and what should agencies do when it is difficult to determine estimated costs and benefits?

Ms. KATZEN. Well, Senator Carper, it has traditionally always been easier to quantify and monetize costs than benefits. We have done a lot of work, and there has been a lot of thoughtful analysis that has enabled us to do better analysis of benefits, although some are still escaping us, like invasions of privacy. How do you value that? How do you value national security? If you harden one site, terrorists can move to another site, so what is the reduction in risk of reducing an attack on a particular site? This is the Homeland Security Committee. These are things you deal with all the time. It is very difficult and we are sometimes not very sophisticated.

But, we have made a lot of progress and OIRA does a lot of analysis, and the answer to your specific question is, yes, we always look to see that the benefits justify the costs—not outweigh as though it is some mathematical precision formula, but, rather, do they justify the costs. It should be informative but not necessarily dispositive. There are some things that are difficult to monetize.

Nonetheless, even with only monetized benefits, reports have shown for the last two decades that the regulations that are adopted and issued by both Republican and Democratic Administrations—George W. Bush, the end of Clinton, and now Obama—the benefits clearly exceed the costs. Our regulations produce estimated net benefits to our country on an annual basis that is consistent and verifiable.

Now, are they the benefits we will actually see, and this is the reason that you hear calls for retrospective review? No. These are estimates at the time and more work has to be done.

Senator CARPER. OK.

Ms. KATZEN. And, I would not deny that there is more progress that can be made to the system and that there are improvements to be had.

Senator CARPER. Good. Thank you. Just hold it at that. That was great.

Dr. Ellig—when people in Delaware spell their name E-l-l-i-g, we pronounce it “Aay-league.” Would that be all right, to call you Dr. Ellig? I just want to say, you convey a sense of optimism and almost a sense of joy in attacking an issue that a lot of people find pretty boring— [Laughter.]

And, I said to the Chairman, how—

Dr. ELLIG. Well, somebody has to make it interesting.

Senator CARPER. That is good. Well, you do. And, I wrote down—I have a new aphorism here. I wrote down—this was before you got here, Heidi—I wrote down, you said, “I am for knowledge and against ignorance.” Is that not good? So, I wrote that one down. I will use that about 10 times today. [Laughter.]

But, Dr. Ellig, you indicated in your statement that you think that codifying the requirement that agencies conduct cost-benefit analysis would improve the process. Could you just expand on that for a little bit, and why do you believe that is necessary?

Dr. ELLIG. Well, happy to. Yes. I think the problem is, we have a fairly weak enforcement mechanism in OIRA review because OIRA is part of the Executive Branch and it is fairly clear from my research and other folks’ research that when there is a conflict between analysis and an administration’s political priorities, it is an administration’s political priorities that will often win. That is why I think some type of quality control needs to occur outside of the Executive Branch rather than having the Executive Branch review its own analysis and say, “what do you know. This looks pretty good.”

Then the question is, where is the logical place for that, and typically, the logical place for that kind of review has been, if there is a problem with a regulation, it violates the law or whatever, you take the agency to court. So, it seems sensible to have a statutory requirement that agencies have to conduct analysis that covers certain topics, together with some kind of a check through the court system on the quality of that analysis.

And, I want to emphasize, I am not saying that judges ought to be free to second-guess the agencies’ policy decisions or impose their own view of what the regulation should have been. But, surely, courts ought to be capable of looking at the evidence in front of the agency and saying, yes, that looks like a decent amount of evidence and the agency has done enough homework, or, no, that does not really look like enough. That is the kind of procedural review that I was thinking about.

Senator CARPER. Good. Thanks.

And, Ms. Katzen, would you just briefly respond to any views, any comments you have on this particular issue that Dr. Ellig has spoken to, any views that you might have. Do you agree that codifying these requirements would improve the regulatory impact assessments, and the regulatory process as he seems to be suggesting?

Ms. KATZEN. Actually, I do not think codification would go a long way, because I think it is a cultural issue. I think it is a resource issue. Congress has enacted a lot of statutes telling agencies what to do and how to do it. And, as the agencies face straight lined and

decreasing budgets, compounded by CRs and sequestration, they simply do not have the ability to do the kind of analysis that is called for. And, I think, casting it in a statute only compounds the problems, because so many terms—like quantifying costs, what does that mean and how would somebody say that is sufficient? He says that he does not want the courts to look at the quality, but at some point, it is more than just did the agency do anything. He does want them to look at the quality and that requires something.

Senator CARPER. Good. Thanks. Thank you so much. Thank you both.

Chairman JOHNSON. Senator Lankford.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Thank you. I really do look forward to the ongoing part of this conversation. And, for the Ranking Member and his comment about trying to bring some happiness to a topic that can be boring, I looked at Senator Heitkamp and said, welcome to our Subcommittee. [Laughter.]

We are going to focus on these issues a lot and spend a lot of time on them, because—

Senator CARPER. Maybe you should just invite Dr. Ellig a lot. [Laughter.]

He can come to every hearing.

Senator LANKFORD. He is a great witness and a great conversation.

The struggle that we have is, is because it is so real life. Up here, we talk about the regulatory issues. But, I just sat down and jotted down some of the conversations I had in Oklahoma last week, so let me just give you a couple quick, brief comments about things that came up last week.

I had a company that approached me that said they did not notify an agency last year that they had nothing to report, and so they just received a fine of half-a-million dollars for not reporting they had nothing to report and they are trying to figure out what to do with this.

Multiple universities I talked to last week are very concerned about some of the new regulations or possible regulations that are coming down on them.

I talked to some county commissioners in my State that have just put millions of dollars into a beetle farm rather than building a bridge in their county because they had to do beetle mitigation for a beetle population that is actually dramatically increasing in their county, but they are saying the beetle populations are decreasing in other counties and so they have to pay mitigation fees in their county because it is decreasing somewhere else. They are having a real struggle with that.

A doctor's office that talked to me that said he has been waiting months for a Medicare number because of a new requirement that has come down on that and he has not been reimbursed since October.

Duplication of forms—one different trucking company said that they have two different agencies that are asking for the exact same information, and they have spent hours and hours and hours filling

out the same form for two different agencies because the agencies would not share that information.

A small rural bank that said they have now stopped doing rural small home loans because of the cost of regulation, saying, basically, they cannot break even for all the compliance costs on it.

There was also a disagreement that one of the companies had with an agency and they asked for a review of that and where do they go, and they were told someone else in the same agency would review it, and so they just gave up.

That was last week. This is a constant issue in the national conversation that I think we do need to address.

I do not know of anyone that I have served with that wants no regulation. There needs to be clear boundaries. There needs to be clear guidelines. All the good actors want to make sure there is regulation so the bad actors are not in there messing up their business and messing with families. So, we need to have good, clear boundaries. But, the boundaries need to stay consistent.

We need to decide who is actually the right one to make that decision. Is it the Federal Government? Is it the State? That is a large responsibility we have to set. We have to deal with the issues of primacy and all the regulatory agencies, of what role does the State have in actually implementing this. We have a lot of issues on judicial review and retrospective review, cost-benefit analysis.

We have to deal with the purpose of fines and fees. Who sets those? Where does that money go? Who gets to change those? How do we actually walk through that review? This does, at some point, to some company, feel like extortion when they say that your money will not come back to you after 4 years of audits, or we will settle with you now if you will take a 40 percent amount. At some point, that just does not smell right to most people.

So, a lot of these are issues that we have to resolve in the days ahead, and I really do look forward to in our Subcommittee getting down and trying to resolve some of these issues, not picking on any one agency, not picking on any political party or the Administration. This is not about those things. Some of these cumulative effects have built up over years and years.

So, I want to say to the Chairman that we look forward to walking through some of these processes and trying to see what we can do to be able to help not only keep people safe in the country and deal with things in an appropriate way, but also trying to resolve some of these issues in the days ahead, so let me just bounce a couple questions to you in the minutes that I have.

Dr. Ellig, you had made a comment about some of the quality of analysis. Is there a consequence for any agency if they do a sloppy review? So, I understand if they do the review just to check the box and say, "I did it," and then you go back and look at it later and find out it really was not good, is there a consequence for that?

Dr. ELLIG. Well, if it is a big enough problem and things line up right, the Administrator of OIRA may return the regulation and say, hey, you have to go back. Go back and do more work on this. The problem is, OIRA is seriously outmanned and outgunned. There are a couple of hundred thousand people in regulatory agencies. There are 40 employees in OIRA. Now, granted, not everybody in regulatory agencies is writing regulations, but there is still a sig-

nificant imbalance there, and these people are working really hard to try to improve things, but it is a heck of an uphill battle.

That is why I think having some kind of review outside the Executive Branch, or at least outside the agency that issued the regulation, is a pretty important thing, and to have some sort of consequence if the analysis is not particularly good, does not answer the questions that ought to be answered before a responsible decisionmaker would make a decision.

Senator LANKFORD. Right. So, we struggle with the costs of actually reviewing, and several of you mentioned this issue about cost. When you actually try to do a review in real time, now you have real information, the cost goes up dramatically. Someone had mentioned even that the problem really becomes one when it is more burdensome to actually do the review than it does to actually walk through the process on it. So, the issue is, how do you do that, because there is a best guess at some point. If that guess is wrong, we have to be able to determine, hey, this was a bad idea. We need to review it.

Dr. MANDEL. That is right. Now, one of the things, when you are talking about all the people that are businesses and organizations that are complaining about regulations, it would be good to have a central place to collect all these complaints, so we know what is actually wrong out there.

Senator LANKFORD. It is actually me and Senator Heitkamp's office. [Laughter.]

Dr. MANDEL. OK. Your office? [Laughter.]

Senator HEITKAMP. His first. [Laughter.]

Dr. MANDEL. Yes, his first. But, a central place that is actually tasked with the idea of assembling them so you can tell these—

Senator LANKFORD. Should that not be OIRA right now?

Dr. MANDEL. No, it should not be.

Senator LANKFORD. OK.

Dr. MANDEL. OIRA is not tasked with that.

Senator LANKFORD. OK.

Dr. MANDEL. OK. It should—

Senator LANKFORD. So, you are saying no one is tasked with that.

Dr. MANDEL. No one is tasked with that at this point. One of the central problems with the regulatory system we have today is that it has no place of central touch, where people can—

Senator LANKFORD. But, every agency has a responsibility to do retrospective review. That is an Executive Order that has been put out for a long time, that every agency is required to do that.

Dr. MANDEL. But, remember—

Senator LANKFORD. So, it is not just the agency. You are saying an entity beyond all those agencies—

Dr. MANDEL. Because when you talk about those multiple forms, those forms are coming from multiple agencies. So, we went to one agency and we say, oh, yes, we sent that form. What is wrong with that? But there is no one anywhere in the system who is tasked with—where the people that were complaining to you could go and say, we have this problem here. We have multiple forms. Can we not do something about it?

Now, there have been States and localities that have assembled agencies like this to do this, but on the Federal level, on the national level, nothing.

Senator LANKFORD. OK. My time has expired. I yield back.

Chairman JOHNSON. Senator Ernst.

OPENING STATEMENT OF SENATOR ERNST

Senator ERNST. First, I would like to thank Senator Johnson and, of course, Senator Carper for calling this meeting. This has been very interesting.

And, I want to thank the witnesses here today. Really lively discussion on, you are right, on an issue that many would not find as fascinating, maybe as some of us. So, thank you. This is a very timely hearing.

Regulatory reform is an issue that I am extremely interested in, and during the course of the past year or so as I traveled across Iowa, that is what I heard about. Concerns coming from everyday Iowans—our small business owners, our individuals, our farmers, our ranchers, and the burdens that are placed on them, and then how we respond as a Congress to their needs or what might not be their needs. But, they are very, very concerned about the costs of the bureaucracy, what the bureaucracy is doing to their livelihoods.

So, one thing that I heard over and over again is that when you talk about the comment periods, many of them do issue comments. They will go online and they will put their comments out there, but they feel those comments, those concerns are not being heard by bureaucrats here, and not having responses back to them and why it is significant that these rules are in place, why maybe they could do something different.

And, because these people feel that they are not being listened to, they really do not trust the government and they do not trust these agencies. They do not feel like they are being heard. So, the sentiment from my constituents is that the government is really out to get them, and that is an unfortunate situation to be in.

And, it does make me reflect back on a line that President Reagan had used many years ago. The nine most feared words in the English language are, "I am here from the government and I am here to help." When you hear that, it puts the fear of God, I think, in some of these folks.

Unfortunately, that is how many Iowans feel, is that there are regulations out there, but they are not really there to help them. So, it is a difficult situation to be in.

The other day, I did send a letter to the EPA Administrator, Gina McCarthy, just inviting her to come to Iowa and see the impacts that some of the rules and regulations proposed, or those that are already in existence, are having on our communities, whether it is the county levels, whether it is the individual farmer or rancher, whether it is the small business owner. We have seen the Waters of the U.S. situation. We have seen the Renewable Fuel Standard. And, these two particular examples are creating a lot of uncertainty in Iowa.

And just yesterday, as I sat in the Agriculture Committee, we had a hearing and an Iowan farmer—corn, soybeans—I asked him,

what are the impacts to you, and because of the uncertainty with the rules and regulations moving forward, he does not know what he needs to produce. He does not know what his production level needs to be. And, he does not know how best to manage his farm, especially when it comes to the Waters of the United States. So, we are creating big problems out there.

And, it is not just rules and regulations by bureaucrats. It is this governing body also proposing legislation. So, we really do need to pay attention to that, but we need to hear from our constituents.

So I am asking the full panel, please, to let us know what we can do better. How can agencies do better in listening to constituents all across the United States?

Dr. ELLIG. Well, if I may, I think this highlights also a problem with the current approach to retrospective review, because agencies are supposed to retrospective review regulations. They are told to do so by Executive Orders. In some cases, they are told to do so by legislation. Agencies put a notice in the Federal Register saying, hey, does anybody have problems with this regulation or this group of regulations? But, who is going to notice that and respond?

The folks who are likely to notice and respond are typically going to be large entities—either large companies or maybe some State governments, if they are affected, who already have invested in the staff to follow regulation and figure out the process. And, the firms who have already figured out how to cope with regulation are not necessarily going to be eager to recommend that anything should be changed to make it easier for their competitors who have not figured out how to cope with things.

So, if we are relying on the regulated entities, large and small, to tell us what is wrong with regulation and what needs to be reviewed retrospectively, we are going to get kind of a biased response or maybe no response at all, and that is why I agree with Dr. Mandel that the impetus for retrospective review has to come from outside the agency and not just counting on put a notice in the Federal Register and see who responds.

Dr. MANDEL. Can I add one thing to that? I think you are absolutely right. We have to have a way of listening constructively to the complaints, OK, and not even as part of the official process. There has to be a place that people can bring, where they know they are going to be listened to, and that it is going to be collated so we know that it is just not a single person or a single organization, that it is put together and we can see across agencies, across regulations, that this one is actually creating lots of problems for people.

And, so, we have to have a kind of an official mechanism, and I would not even call it retrospective review, I would not call it prospective, but some way that people can know that they are being listened to and that the complaints are being collated and somebody is going to have a mechanism for doing something about it.

Senator ERNST. Yes, I would agree, and there has to be a way to double-check regulations and rules from one agency to another, because oftentimes, there will be a rule that will come from one agency that is in direct conflict with another agency. And, I use, for example, positive train control. There is one agency saying, you

must put these control poles in the ground, and you have the FCC saying, no, you cannot do that.

Dr. MANDEL. If I just can say one thing——

Senator ERNST. Yes, please. Thank you.

Dr. MANDEL. I am going to say something nice about your organization, the Mercatus Center. This is where big data and technology can come to our aid, which is that if you can collate all the regulations into one big database——

Senator ERNST. Mm-hmm. Correct.

Dr. MANDEL [continuing]. There are actually ways now of testing these against each other so you can catch these things more or less, I would not say automatically, but there is no excuse in this day and age that these conflicts occur without us knowing about it.

Senator ERNST. Great. My time has expired. Thank you, Mr. Chairman.

OPENING STATEMENT OF SENATOR PORTMAN

Chairman JOHNSON. Senator Portman.

Senator PORTMAN. Thank you, Mr. Chairman. Thanks for holding this hearing and for your work in this area. I am really looking forward to the opportunity to work with the members of this panel and that panel to try to get some stuff done here in the next 18 months. I think we have a window of opportunity here with Democrats and Republicans alike interested in this issue.

there has been a lot of discussion today about whether we have too many regulations and what the impact is. I think it goes without saying that, yes, we need regulations, but, yes, we have real problems in our system. Sally, who was head of OIRA at one point, and I had the honor of being Director of the Office of Management and Budget and had responsibility for OIRA, can tell you there is a real tug-of-war sometimes with the agencies and with OIRA. But, you said it well, and you are the defender of some of this regulatory process that we have currently on this panel. You said that we need to make better progress and more improvements in the regulatory process. So, I think there is an understanding of that and the question is, what do we do that actually moves the ball forward?

We all hear about this when we are home, all the time. Today, I had my weekly coffee, and, of course, people came forward with why do we do this, why do we do that. The one recently was somebody who had a coal mine in Ohio, and the guy has been there over 40 years as engineer, so he has some perspective, and he says, here are the two notebooks, and they were big notebooks, like, much bigger than this one, like, five times this size, and sort of plopped them down on the desk. "Here is my permitting regulations," he said. "I remember when it was two dozen pages." "A lot of this is duplicative," he said. "A lot of it is a waste of time and causes more compliance costs, and some of it just makes no sense and it is driving jobs out of," in this case, the coal business in Ohio.

But, we hear it constantly, and let me give you one data point that I think is interesting. The Code of Federal Regulations (CFR), in 1960 had approximately 22,000 pages. By the end of 2013, it was 180,000 pages. And, so, Sally said earlier, and I think she is right, we do not want to just judge this based on volume, but, wow, that

is a pretty big increase. We are talking about, what is that, eight times larger.

There are some studies out there, and I know Doug Holtz-Eakin has done some of this good work, but that the accumulation of all these regulations—that is one of the points that you made in your testimony, Dr. Mandel—is resulting in less economic growth and fewer jobs. So, this study in 2013 by Dawson and Seater, between 1949 and 2005 that they had the data for, accumulation of Federal regulations slowed economic growth by an average of 2 percent per year. So, we are talking millions of jobs here. So, I think we all understand that, and the question is, what do we do?

As you all know, I have three bills that are bipartisan that we have been promoting that meet a lot of the requirements that you all have laid out. Doug Holtz-Eakin, you talked about the fact that we should be doing cost-benefit analysis codification. I assume you are focused primarily on the regulatory impact analyses. We should be handling independent agencies, bringing them into the cost-benefit world. And, by the way, Ms. Katzen has also talked about that and has supported that. And, you talked about judicial review. You talked about time lines, comment period.

All of that is in the Regulatory Accountability Act, and it has been bipartisan. We have introduced it in the last two Congresses. We are about to introduce it in this Congress. It also has more transparency, more early public outreach, use of best available data, more thorough processes on particularly major rules. And, this is one that I hope we will be able to move forward again, even in this highly partisan atmosphere we find ourselves in, one that seems to have bipartisan support.

The other is Independent Agency Regulatory Analysis Act. It is a piece of this larger bill, just to deal with the independent agencies. Again, this is also part of the RAA, but this is just to say, let us codify what the President wants to do. The President's Job Council recommended this. Former OIRA heads have from both Republican and Democrat administrations, including Ms. Katzen, as I talked about. We introduced it last Congress, Mark Warner and I did. We are going to introduce it again this Congress. We are trying to help the President be able to do what he cannot do by Executive Order, because he has to have us pass a law in order to enforce this on the independent agencies.

And then, finally, is the Federal permitting, which goes to that coal example I used, and we can talk more about that. You all are not necessarily here to talk about Federal permitting, but, wow, what an opportunity. That legislation, we have introduced. Claire McCaskill, who is on this Committee, and I have introduced it. The AFL-CIO Building Trades are very interested in it, as is the Chamber of Commerce, because we are falling behind in terms of permitting as a country and losing jobs and investment.

So, I guess my first question would be to all of you just on this issue of codification. We heard some different aspects of it, and maybe we will just go left to right. Should we be codifying the RIA process as it currently exists. Just give a brief answer, if you would, because I want to leave room for Ms. Katzen at the end to have her argument be heard, which is, I think, probably why it should not be codified. But, Dr. Holtz-Eakin.

Mr. HOLTZ-EAKIN. I have said yes. My biggest complaint with our regulatory system is it is not systematic. We have different agencies doing different things, and there is no consequence in some cases. There are consequences with OIRA, but for other agencies, none. And, so, codification of the requirement of doing a legitimate RIA, some judicial review so there is a consequence for failure to meet the standard. This would improve the quality of what we do enormously, I think.

Senator PORTMAN. Dr. Ellig.

Dr. ELLIG. Yes. I agree, and a few years ago when we first started our research on the quality of regulatory impact analysis and then realized we had a problem and tried to figure out why, my colleagues at the Mercatus Center sat down and tried to figure out, OK, what are all of the different ways that you might improve the quality of analysis, and it kept coming back to it has to be some kind of requirement and review that happens outside the Executive Branch.

Senator PORTMAN. Mm-hmm. And, also, just briefly on this codification for the independent agencies, more and more of the major rules are coming out of the independent agencies.

Dr. ELLIG. Yes.

Senator PORTMAN. They are not under the control of the Executive Branch in the same way that an executive agency is, so the President cannot require them to go through the cost-benefit analysis, the least burdensome alternative, jobs analysis without codification, is that not correct?

Dr. ELLIG. That is correct. Now, the Securities and Exchange Commission (SEC) has some language in its authorizing statute—

Senator PORTMAN. Right.

Dr. ELLIG [continuing]. That has turned into a requirement for benefit-cost analysis, and after losing several court cases, the SEC in 2012 issued new guidance that said, OK, we are going to do good benefit-cost analysis and we are going to do it in accordance with the principles of Executive Order 12866, and I hope a few years from now, we will be able to look and report and say, hey, it has actually gotten better.

Senator PORTMAN. Yes. Dr. Mandel.

Dr. MANDEL. So, I actually have nothing to say for or against codification in particular. In principle, it is a good idea, but it will not actually solve the problems that your constituents are having, OK, because what they are having is the problem of permitting—

Senator PORTMAN. Yes.

Dr. MANDEL. Their problem is they are being hit down from multiple agencies and multiple places and—

Senator PORTMAN. Thirty-five different agencies—

Dr. MANDEL [continuing]. What are they complaining about—

Senator PORTMAN [continuing]. One project—

Dr. MANDEL [continuing]. And what your constituents are complaining about is not going to be dealt with by the codification. In fact, the codification may make it worse by putting on another layer of regulation. I hate to say this, but it has that possibility. We have to have something, a back-channel that exists outside of the codification process that is a way of collecting the complaints

that are unanticipated and figuring out which ones need to be dealt with first.

I am an economist. I hate coming out against cost-benefit analysis. Somebody is going to take me outside and shoot me after I come out of here. [Laughter.]

OK. I had to sign a paper saying I believe in cost-benefit analysis. [Laughter.]

And, in theory, I can do cost-benefit analysis as well as the next person can. But, the fact is, when you think about what your constituents are complaining about, they are not complaining that the cost-benefit analysis was not good enough. They are complaining about the layering of regulations, which codification is not going to deal with. And, there are a lot of different ways of dealing with the regulatory accumulation process, but you should not tell yourself that codification is going to deal with that.

Senator PORTMAN. I will make two quick comments. One, Dr. Mandel, this is not just about codifying existing practice, but it is improving it, as Dr. Katzen talked about—

Dr. MANDEL. Improving it—

Senator PORTMAN [continuing]. Because there does need to be less bureaucracy and more inputs, including the impact on jobs, by the way, which is in our legislation. So, it is not just cost-benefit, but what is the actual impact on jobs.

Second, I would tend to disagree with you that some of what we do here is about that, what is the benefit of this legislation? I know what the cost is, because Dr. Holtz-Eakin talked about the thousand jobs being lost in Ohio. We are losing 15 power plants this year. And then the question is, how do you come up with a better analysis of what the actual benefits are? So, there is an analysis there that needs to be consistent, standard, high quality, and, let us face it, agencies take it more seriously when it is a law than when it is an Executive Order.

Ms. KATZEN. And, first of all, thank you for letting me come talk to your class.

Ms. KATZEN. It was a pleasure and they loved you.

As you know, I agree with you on a lot of the general concerns that exist in this area, and we share, I think, some common beliefs. In particular, I think the work on the permitting process is very important and on the independent regulatory commissions. These are modest improvements at the margins, but I think could go a long way.

Why I resist codification and something like the Regulatory Reform Accountability Act, or what its name is now, is because they are extraordinarily broad—comprehensive by their terms—applying to all agencies in all situations. And, they will cut across from USDA and EPA to DHS and DOD, and those agencies are very different. And, just as there are individual problems, which I do not deny need to be rectified and should be worked on, I do not think the best approach is a one-size-fits-all large rewrite of the Administrative Procedure Act.

You identified some of the pieces in there, but you also said “more thorough processes,” and this is inside-the-Beltway talk or inside an administrative law classroom—like a 556–557 administrative hearing in the middle of a rulemaking hearing. That is an

adjudicatory hearing with discovery, witnesses, on and on and on, and that has been put in the middle of the rulemaking process.

Senator Ernst would like to see the RFS rules come out. A lot of people want to see those rules come out. Those rules would never see the light of day if they had to be subjected to all of the more thorough processes that are included in that particular bill.

Now, are there pieces that might make sense and that could be applied in some instances? That is what you and I have worked on in the past and I would want to continue working on, because I, too, want to see improvements in this area.

Senator PORTMAN. Well, thank you. I am over time. I apologize. I guess I would summarize by saying the legislation is intended to ensure that, given the impact of these regulations, that we measure twice and cut once. I look forward to continue to work with you and others on the panel. Thank you.

Chairman JOHNSON. Senator Heitkamp.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. Thank you, Mr. Chairman.

Just a couple quick stories, and it will kind of give you a context. I, once upon a time, ran a regulatory agency. It was a State regulatory agency. And I, during a campaign, heard all about the regulations on charitable gambling. I thought, how bad could they be? And, I showed up and this small industry in North Dakota dealing mainly with minimum wage workers had a 500-page—or, 300-page book of regulations. And, I brought the young man down who was responsible and I said, who do you think reads these? He kind of shrugged his shoulders and I opened it up and I said, why do you have this one? He said, “Because some person up in Cando, North Dakota, did this and we thought we needed a regulation.”

Every time we did it, my realization was, those regulations were written to write a perfect world. We are never going to have a perfect world through regulation. So, what we are trying to do is get down to the essential, and that is what I told him. I said, take these back. Give me what is essential for our doing our job to maintain the integrity of charitable gaming. He came back and it was down to about a third of what it was.

And, it is that kind of analysis that we need to undergo, and we have been talking a lot about new regulation. There are two issues with new regulation. No. 1, we do not do it quickly enough, going to your point, which is let us take, for instance, the 1232 tank car issue we have now. We probably are going to see a regulation retrofitting 1232s when the Department of Transportation (DOT) should have been engaging earlier on to avoid that misstep. So, now, because we did not have regulation, people have made investments that are going to need to be retrofitted, OK. So, not getting regulation done on time can be just as injurious to the economy as getting regulation done in a thoughtful, stretched out process.

So, we have regulation that does not happen on time, and we have regulation that does not exist in the existing world, that no one could—you heard the examples that my colleague from Oklahoma gave you, and no one can argue with a lot of what he said.

This is not a partisan issue. The last time we reinvented government, you might recall, was when Al Gore took on this challenge

as Vice President for President Clinton and came out and actually had a reasoned discussion that did two things. No. 1, probably not well enough, taking a look at how do we deal with new regulation, and I think the first step, never mind the agency, the first step ought to be telling Congress, when you pass this law, here are the list of regulations you are telling us to adopt within this time period. So, we need a little training in the U.S. Congress about what our expectations are, right, whether it is a farm bill that Senator Ernst talked about, whether it is positive train control that FCC has to get approval from every Tribe in America—that was the problem. We are beyond that now with positive train control.

So, I guess, my point is we need to have a comprehensive look at what the problems are, and the problems in many cases are right here in the U.S. Senate or in the Congress when we set out expectations, and I think that is what you are getting to, Ms. Katzen, and I really appreciate that. But, it does not mean that we should not also be doing a huge project on look-backs.

One of the frustrations that the American public has, rightful, and, I think, meaningful frustration, is they do not know what is coming next. They do not know what is out there that is going to get them. They are going about their business without any real knowledge of what is going to get them.

And, so, how do we do a better job, No. 1, identifying what the regulatory burdens are that we are putting on the agencies to adopt regulation when we adopt legislation?

No. 2, what do we do to have a meaningful discussion to prevent the perfect world mentality of people who write regulation?

And, the third thing is, what do we do to have a meaningful look-back process that is going to respond to legitimate concerns for which there is no venue at this point? I totally agree with you, Doctor. Where is the venue for people to complain broadly about what this is, other than our offices, and we would like to see something maybe other than our offices, because we would be inundated. We do not have enough staff to deal with all the concerns that will come.

And, so, this is one of many discussions that we are going to have, but we have to get this right. We have to make sure that whatever we do actually adds value to the process, actually changes the process and does not prolong or have unintended consequences.

So, not a partisan issue, not something that can be done quickly without really thinking about what is the problem we are seeking to solve, because there is a range of problems we are seeking to solve, and then how can we come to a consensus on how we can improve within those three categories. I do not have a lot of time left, because I yakked on and on, which is a familiar place sometimes for those of us in the U.S. Congress, but I would like just to have feedback on how I have laid this issue out and whether you could debate that or offer some additional suggestions.

Mr. HOLTZ-EAKIN. Well, I think you have articulated quite clearly. The cumulative impact and the fact that there is no venue to—

Senator HEITKAMP. I do not mean to interrupt, but I also want to add another dynamic to this. Everybody talks about Federal reg-

ulation, but it is on top of local standards, it is on top of State standards, and that is another complication of dealing with this issue.

Mr. HOLTZ-EAKIN. Yes. So, I think the notion of having a venue to voice concerns is an important one and would look forward to working with the Committee on that.

There is another alternative that has been proposed about the cumulative burden, which is essentially a regulatory budget that simply says, this is how much burden we are going to place on the American public, and if we hit that cap, it will force something to go away if we put something else in. Now, the United Kingdom has taken a very extreme version of this with two out for every one in on business regulation, but that is something that would be good food for thought in your deliberations on how to deal with the burden issue and force people to make tradeoffs, and that is really what we want them to do.

Dr. ELLIG. Yes. I would just mention your example of the charitable gambling regulations as a great example of regulations being made in response to anecdotes about bad behavior rather than making regulations in response to actual evidence that there is a significant, widespread problem, with an understanding of what caused it and then a regulation that addresses that cause. So, yes, sounds like a great example of failure to ask the most fundamental question that regulators ought to ask, which also happens to be the question that Federal agencies tend to spend the least time on when they are doing regulatory impact analysis. That is a problem.

Dr. MANDEL. Let me talk briefly about the venue for complaints. We have the technological capabilities now for taking in a lot of complaints and sorting them out and figuring out what the patterns are. It is great that your office is here, but because there is no central point, we do not actually know what regulations should we fix or improve first. I cannot answer that question because we do not actually have comprehensive information across all the regulations about what, in fact, people are complaining about. And what happens, is your offices are some of the best places to get some of the interesting changes that could be made without harming the underlying goals.

And, so, one of the things that this Committee or the Subcommittee should consider is how to structure a central location for complaints so that it does not have to be just restricted to Federal, but it can be Federal, State, and local, as well, so that we have a comprehensive view across agencies. I am sorry Senator Portman left, because what I meant to say about cost-benefit analysis was really cost-benefit analysis right now is applied within an agency. It is not applied across agencies. It is not applied across the regulatory accumulation. So, it is significant missing a lot of the key factors that your constituents are complaining about.

And, frankly, the place where I start on this is, having started a small business at one point and realized that, oh, my God, it is impossible for me to comply with everything I am being asked to do. We need some way that is constructive and technological at this point to handle the volume of complaints and collate them so we can see patterns.

Ms. KATZEN. I think you raised very important questions. And, I am sorry for my voice, but I woke up with a cold this morning and it is cracking all over the place. But, I think you presented some of the challenges that are real and that need to be addressed.

I actually was in the administration when Vice President Gore launched the other version of NPR and I went through that experience where there was a request for people's input to try to answer these questions.

But, the hardest question is when and how to regulate. I used in my testimony that derivatives were creative and exciting until all of a sudden we had a financial crisis. Drones—who knew drones—no one thought drones were a problem until they became one by falling on people's property, or by interfering with commercial airlines, and—

Senator HEITKAMP. We call them remotely piloted aircraft in North Dakota. [Laughter.]

Ms. KATZEN. Oh, thank you. I will try to follow that. But, I think these are very important questions that Senator Lankford's Subcommittee are going to be dealing with, with your help, and others, and I just encourage you to keep trying, because they are important and they are very difficult.

Chairman JOHNSON. Senator Ayotte.

OPENING STATEMENT OF SENATOR AYOTTE

Senator AYOTTE. I want to thank the Chairman. I want to thank all of you for being here. I think this is a very important hearing.

Here is what I am interested in. I always feel like it is Groundhog Day, because the bottom line is, I go out—my husband is a small business owner, and so when you said, Dr. Mandel, about small businesses, I live it. And then I go in a State where a lot of our businesses are small businesses, and there is not a business I visit, small or large, that does not have some regulatory story to tell me where the Federal Government is doing things that make it harder for them to put people to work or to grow in a way that just does not make sense.

And, so, why I say it is Groundhog Day is where I think all of you can very much help this Committee is if you were in our position, what are the top two things you would do to change the dynamic that we are in, because the dynamic that we are in, I think, really is harming our economy, and that is the bottom line. And, it is harming the people who are interested in starting the next business, because it becomes discouraging to want to do that. And, so, I would love to hear from the four of you, what are the two things you would do if you were in our position that we could do that would make a difference?

And, let me just add to that, something I think we should do is look in the mirror on ourselves a little bit, too, because we pass this legislation. In so many instances, we are deferring major decisions to regulatory agencies in the regulatory context that, frankly, should be made by us, the Congress. So, as I look at ourselves in the mirror here, we should be giving less authority to regulatory agencies, especially on critical issues where we should be weighing in to ensure that our policy decisions are clear on what we are intending. And, I think a lot of what I hear, too, is things that are

done by agencies that certainly I would be shocked if they were intended by the Congress when things were passed.

So, I am just going to turn it over to you. You are here. You have become a U.S. Senator, and I would like to know—we want to make it better collectively, as a group. Instead of having Groundhog Day and listening, what can we do to make a difference, to make this better?

Mr. HOLTZ-EAKIN. So, I just want to say, I started a business 5 years ago, the American Action Forum. We are up to 30 full-time employees. I am very happy about that.

Senator AYOTTE. Congratulations.

Mr. HOLTZ-EAKIN. I am tired of paying lawyers to deal with all this stuff. It is a tough fundraising ask when you say, what is this for?

Senator AYOTTE. I am a recovering lawyer, so I understand. [Laughter.]

Mr. HOLTZ-EAKIN. So, the No. 1 thing that I would ask you to do would be to cap the total burden. I am a fan of regulatory budgets. They are highly imperfect, but it cannot just keep going up.

Senator AYOTTE. And, who does that?

Mr. HOLTZ-EAKIN. You have to have a cap.

Senator AYOTTE. Who does the regulatory budget in—

Mr. HOLTZ-EAKIN. It does not exist right now, so it would have to be created—

Senator AYOTTE. But, who would do it? Who would you recommend does it?

Mr. HOLTZ-EAKIN. You should pass every year, as you should pass a financial budget—

Senator AYOTTE. So, the Budget Committee would do two forms of budget. We would do a regulatory budget—

Mr. HOLTZ-EAKIN. The Congress should pass budgets.

Senator AYOTTE. OK.

Mr. HOLTZ-EAKIN. And, this is another cost of running the government and you should control that cost, No. 1.

Senator AYOTTE. I think it is a great idea, because it would show more honesty to the American people that we are looking at the big picture on this.

Mr. HOLTZ-EAKIN. The second is, I would like more uniformity. Independent agencies, cabinet agencies should be treated the same. That is a lot of the spirit of the discussion I had with Senator Portman. We have one tax system to fund spending programs. Every agency runs its own tax system by running its own regulatory system and that does not make sense to me. We should have some more uniformity. Standardize things.

And, the last is the sentiment of Senator Heitkamp, do not let the perfect rule this. I mean, they just put out an ozone rule where 100 National Parks are not in compliance. The Cape Cod National Seashore is not in compliance. Sequoia National Park is not in compliance. Death Valley National Park is not in compliance. How are they going to come into compliance? The rule says, unknown technologies. Good luck.

Senator AYOTTE. Yes. That really shows the absurdity of it.

So, Dr. Ellig, what would your top two be? That was great. Thank you, Doctor.

Mr. ELLIG. If I had to boil it down to the top two, I would say, establish a retrospective review process that puts responsibility for review outside of the agencies that issued the regulations, and have a uniform requirement for regulatory impact analysis for all agencies for regulations above a certain size.

Senator AYOTTE. Mm-hmm.

Dr. MANDEL. Two simple ones. One is, as I have been saying, establish a venue for collecting complaints. I do not mean a little office but something that has enough technological power to collate patterns so we can understand where the big problems are because right now, all we have is anecdotes. We have a lot of anecdotes, but all we have is anecdotes.

And, second, to come along with that, you talk about a retrospective review agency. I would suggest something that is actually able to make recommendations about how to improve regulations. We talk about regulatory reform, and every time I heard the word "reform," that has the Groundhog Day quality to it. I think we should start thinking about a continuous process of regulatory improvement, not of reform. I would like to move back to the language of business, as Chairman Johnson says, and think about continuous improvement.

Ms. KATZEN. I guess if I am to provide two, I would say to provide more resources to OIRA, and, on a directed basis, to the agencies to be able to do some of the things that we want them to do.

And, the second is for all of us to stop playing "gotcha," stop finding easy points to score, stop the 30-second sound bites on a very complicated but very critical component of our country's government.

Senator AYOTTE. Thank you all for being there. I think these suggestions that we heard are really helpful as this Committee moves forward to try to put in some legislation with teeth to make a difference for businesses across the country and to be more transparent in this regulatory process. So, I thank the Chairman and Ranking Member for having this hearing today.

Chairman JOHNSON. Thank you, Senator Ayotte.

Dr. Mandel, I do like the phrase "continuous improvement." You do get that inbred in you in the private sector, certainly in the manufacturing setting. It is about continuous improvement.

One thing I would like to point out, though, too, is when you come here from the private sector, one thing you notice about government, the Federal Government particularly, is everything here is additive. I mean, I get the point about having, whether it is the GAO, the Inspectors General, OIRA, or some of these agencies or offices within departments and agencies that are really tasked with auditing and trying to make government more efficient, that they need to be resourced. But, my problem is that there is just no process—and, again, that is another word that is music to my words—there is no process for subtraction.

Mr. Holtz-Eakin, you mentioned the one in—I thought it was the one in, one out rule. I would love a one in, ten out rule, but I would settle for a one in, two out rule. There has to be a process of subtraction. There has to be a process of continuous improvement. And, I agree, if it is within the agencies, again, we have been trying to do this for decades. It has not worked.

One of the first proposals I made—and, trust me, has not gotten traction—was a bicameral Sunset Committee, whose only task was, on a regular basis, rotating basis, go through a group of agencies over a number of years, and, really, the only task was subtraction, taking a look at the rules and regulations that were outdated or that were harmful and either update them, streamline them, modernize them, or eliminate them, and I think that is the kind of process we have to start looking at.

It is, quite honestly, disappointing. I know our leader, Leader McConnell, was with President Obama in the White House and apparently President Obama said, do not even consider regulatory reform. Not interested in it. I hope that is not his real attitude.

Certainly, the bipartisanship of this Committee, I have heard it. Senator Booker walked out and tapped me on the shoulder and he said, “Boy, we have some real opportunities for some bipartisan agreements.” Now, maybe not overall regulatory reform, like a REINS Act or Senator Portman’s permitting act, but at least a rifle shot approach where we can take a look at the individual regulations and, like, again, on a bipartisan basis, hopefully with unanimous consent, if we do our job—and that was one of the aspirational goals that I set out for this Committee in our organizational business meeting, was in order to pass something in the Senate, we are going to need at least six Democrats. We have seven on this Committee. If we can get all seven Democrats and all nine Republicans in agreement, hopefully, we can get some of these marginal improvements, the continuous improvement, I will take any step we can take, and we have really got to direct that.

But, again, it is about getting the information. I know Senator Carper was definitely taken with your, we want knowledge, not ignorance. I did pull up one of my favorite quotes from Thomas Jefferson. He said, “If a nation expects to be ignorant and free, in the State of civilization, it expects what never was and never will be.”

So, this is about information. We are the perfect conduit, trust me. Every day, every Member of Congress hears from constituents who come into our office with their tale of woe of a regulation that is doing great harm to their ability to improve, to grow, to create jobs. And, yes, there are regulations that do great jobs in terms of we have dramatically increased environmental protections, dramatically increased—or decreased the level of pollution. Those are good things. We all support that.

But, there is a point of diminishing returns. There really is. And, I think in many cases, like Senator Heitkamp was talking about, too, is in our quest for a completely risk-free society, which also will never exist—never was, never will be—we have reached that point of diminishing returns, and I think the return on investment in terms of regulatory cost is dramatically diminishing, and, I would say, it has certainly overtaken the benefit.

Mr. Holtz-Eakin, having been former CBO Director, you are talking about a regulatory budget. I mean, I love the concept. Again, a lot of people have criticized the \$1.82 trillion regulatory burden. Again, these are projections. How could you come to agreement? How could you calculate that?

Mr. HOLTZ-EAKIN. So, at present, agencies self-report the compliance costs, the burdens they will impose. Those are not all in eco-

conomic measures of cost and we should not pretend they are, but they are something that the agencies do and you could take those at face value, knowing that there is some multiple of them that is the actual economic cost, but just cap those. Provide some uniformity to the process of delivering those.

I think Ms. Katzen is right about OIRA. If you are going to put all the independent agencies in there and have a more systematic process of delivering the information for a budget, it will have to be better staffed and that is a fact people are going to have to understand.

But, I do not want to hold out the congressional budget process as the model, since it has all sorts of flaws. But, the idea that you systematically collect the information and measure something will give you the capacity to manage it is the appeal there. And, it is the cumulative. You can add it all up. That is the other appeal.

Chairman JOHNSON. Dr. Mandel, I certainly agree with you. I think a number of people made this comment, that the review process has to be outside the agencies. Does it also have to be outside government? I mean, you are talking about a Regulatory Improvement Commission. Would that commission or committee, would that be outside of government, just set up by government and pretty much independent until it makes its recommendations?

Dr. MANDEL. That is basically right. It would be modeled after the Base Closing Commissions, where you would bring in distinguished people from the outside, appointed by the President and leaders of the Congress, and they would be able to make their decisions, their proposals, independent of anything else. Presumably, though, since it has to go through Congress, they would be sensitive to the politics of the situation and what can be passed and what cannot.

Now, I have to make one point here, which is the Regulatory Improvement Commission can go on top of any of these other proposals. It is not, in fact, a substitute. It could go on top of the regulatory budget. It could go on top of Senator Portman's proposal. It is about setting up a back-channel and a place for complaints that everybody can use for any of these proposals.

Chairman JOHNSON. Do you not think you would need Improvement Commissions? Would we not literally need dozens of these things, that they are actually focused and they have experts in particular areas of the private sector?

Dr. MANDEL. I am trying to think of things that can actually get passed under the current situation. So, the nice thing about the Base Closing Commissions is they were a limited term. You passed them. They did the job. They disappear. And then if there is an idea that it was good, you go and do it again.

In today's situation, nobody really wants to layer on another level of permanent bureaucracy. It seems self-defeating. It seems ironic and paradoxical. So, let us go ahead and we will set this up, see if it works, see if we are happy with what it does—it is a small bite to build trust—and then go on from there. Like I said, it does not take the place of any of these other big picture.

Chairman JOHNSON. No, I mean, my point being is what we would do is I would pick the low-hanging fruit. Let us find an area that really needs regulatory reform, something relatively simple,

and let us get some experts in that particular area, set up an ad hoc commission, and have it operate and report back to—it is really what I was—the concept was with the bicameral Sunset Committee, where you do this on a revolving basis over a number of years—

Dr. MANDEL. Yes.

Chairman JOHNSON [continuing]. And I guess what I would like from the panel is, think about that. What would be the best example? What would be the one area where we know we have expertise that is just crying for this type of commission to improve the regulatory environment outside of government, that can come in, report in, make recommendations.

Dr. MANDEL. I think that is an excellent idea, Senator. This can be structured that way and you can set up a couple, parallel to each other, but it is controllable.

Chairman JOHNSON. Think about that. Senator Carper.

Senator CARPER. I am going to ask all of you—I have one specific question, and then I am going to ask all of you the last question. The last question, so you can be thinking about it, is I like to, when we have a panel like this with so many smart people, with some different views but well informed views, one of the things I like to do is ask for each of you to give me something that you think you all agree on, because one of the things we are looking for here is consensus. Just be thinking about that. What do you think could be one point that you all agree on? That would be helpful for us as closing words of advice.

But, the question I want to go back to, I have been in and out of the room. I apologize for that. We have another hearing going on on transportation policy, so I apologize. But, I want to come back to retrospective review, if I could. When agencies are drafting regulations, there are a lot of steps to that process. They need to make sure that they know the law and the requirements that are placed on them, and they get input from stakeholders, they analyze the data, they draft the regulations, they get more input from stakeholders, and then they try to finalize the rule and promulgate it. But, that is not really the end of the process. When agencies learn more and when regulations have been around for a while, it is important to take a look and see, well, how well is it working?

A number of our witnesses have discussed the lack of progress various Administrations have had in reviewing existing regulations. However, it is my understanding that this Administration, including the President himself, is actually committed to making progress in this area. And, I have heard him talk about it in State of the Union Address and I have talked with people like Cass Sunstein and others that seem to think that there is a real commitment.

I would ask, Ms. Katzen, in your testimony, you said that you believe this Administration's efforts at retrospective review seem to be much more aggressive than some previous efforts, and that has been my impression, too. Could you please discuss what you think this Administration is doing right in this area, and if you think the stronger effort will be more successful, and, finally, what more would you suggest that they do to ensure success as they continue this effort? Please, and thank you.

Ms. KATZEN. Thank you, Senator Carper. I think any such effort requires leadership, which the President has shown. He issued not one, but actually three Executive Orders, and he convened a cabinet meeting where he spoke to the members of the cabinet, saying this is real and this is important to me. This is a serious effort.

OIRA provided guidance and several data calls and is now organizing outreach to a lot of the stakeholders so that they can hear some of the stories that we heard this morning that will help inform them of where they should be looking for potential improvement.

I think there is a lot of know how out there. The Administrative Conference of the United States (ACUS), just issued best practices recommendations, which are quite good. The one thing that is missing, and this is a theme I have harped on, unfortunately, several times today, is resources, in that the agencies are caught betwixt and between. There are people pushing them forward and people telling them to look backwards. Do they have sufficient resources to do that, and how do they make those choices.

Will it provide success? I was part of the Clinton look-back experience and I had high hopes and we did not produce a whole lot, I will confess. I think it is a very difficult thing because there is not a whole lot of low-hanging fruit out there in the Federal regulatory system, in large part because some of the onerous or burdensome or costly regulations, as they are called, require capital investments up front and those are now sunk costs. You do not get them back. So I say in my written testimony, if you take seat belts out of cars or scrubbers out of smoke stacks, you are just going to have to incur costs to change the assembly line, or reconstruct the building.

Where you get, I think, the biggest bang for the buck is in continuing operating and maintenance expenses and reporting, which can be done electronically. The references earlier to big data and being able to coordinate—two agencies should not be asking for the same information that we heard Senator Lankford talk about. And, in fact, DOT just issued a rule that eliminated the requirement to report that there is nothing to report for truck motor carriers who otherwise were having to do this kind of reporting.

Those need to be flagged. They need to be immediately rectified. And, there is a will here. So, I am sanguine that we will get something. I am just not sure how much.

Senator CARPER. Thank you. Thanks very much.

I ask, Doug, if you would just lead us off, that final question. Pick one area where you think you all agree that we should take real note of. What would that be?

Mr. HOLTZ-EAKIN. I think that everyone at this table would acknowledge that OIRA has been an improvement in the regulatory process, and it does send back regulations to agencies and it does engage in an attempt to improve the quality of regulation. So, going forward, look at the areas of success and imagine bringing OIRA to scale to encompass the entire regulatory burden and that would be a step in the right direction.

Senator CARPER. OK. Thanks. Dr. Ellig.

Dr. ELLIG. I think we agree on some problems, particularly that there are problems with the quality and the completeness of the

analysis that agencies conduct that is supposed to inform their decisions about regulations. We may not agree on all the solutions.

I think maybe another thing that we all agree with, although I am not sure everybody has spoken to it, is the idea that, yes, independent agencies ought to be gathering the same kind of information and doing the same kind of analysis that Executive Branch agencies are required to do.

Senator CARPER. OK, thanks.

Dr. Mandel.

Dr. MANDEL. I think that we all agree that the regulations can be improved, and that continuous improvement would actually benefit all of us. We have to take a lot of regulations and boiling them down to a smaller number as opposed to just plucking at them one by one.

Senator CARPER. OK, thanks. Ms. Katzen.

Ms. KATZEN. And, finally, I think all of us would subscribe to the notion that economic analysis is good. I think we will all be in favor of knowledge, not ignorance. And, I am glad to hear my copanelists all support OIRA, because I think OIRA is good.

Senator CARPER. All right.

Ms. KATZEN. Not surprising.

Senator CARPER. Good. Well, my closing thought would be here—this is one of my new aphorisms. I wrote it down. It is, I am for knowledge and against ignorance. So, that is another one of my good take-aways. I thank you all for that. I told the Chairman, I said, I will use that often in the days ahead. I will never acknowledge where it came from. [Laughter.]

No, I will. Thanks so much. This was great.

Chairman JOHNSON. He will use it again. Senator Lankford.

Senator LANKFORD. Yes, just a couple of quick questions. Dr. Mandel, just a process thing. As you talk about this gathering organization, trying to filter it, the first regulation that came to mind for me was actually an obscure regulation dealing with 316(b) water rules. That was for, basically, power plants that have a lake around them. They have to take the water in. It is not the water that comes out as steam, it is just cooling in their facility. It had a pretty significant cost increase.

They asked the question—because there were fish being impinged, that means trapped against the screen as they are coming in. In Oklahoma, all these lakes were manmade by the power plants. They were all stocked with fish by the powerplants. Most of the fish that were being impinged were minnows, which, by the way, 100 percent of minnows that you put a hook through their eye and throw it in the water when your fish, die. So, this is a fish that is replaceable in that sense. They did millions of dollars of work to try to do that.

Now, that is a very small group of folks that are complaining about it. It is a very large, as Ms. Katzen said, capital cost up front. You are not going to undo that, because once they are required to do millions of dollars of work, 2 years later when they say, just kidding, you do not have to do that. Actually, what you can do is if 5,000 minnows die on the screen that year, you can just put 5,000 minnows back in the lake and that will work fine, which would cost about \$50 to do. But, that was not an option that was

given to them. It was millions of dollars worth of rescreening and concrete work and everything else in their lake to accomplish that.

How would that instance rise to the level of response when you are gathering things from all over the place? You are not talking about frequency on that one. That is a small group of folks, but it is a big issue to them.

Dr. MANDEL. So, one of the nice things that we could not do before is actually identify patterns that are very important to a small number of people, so that if you have big data techniques, you have an ability to sift through that and pick out things like that. I actually think that a lot of what we are going to find is that, to the extent that there is low-hanging fruit, they are going to be of that nature, small things that, without an organization collecting this in particular, would never rise to the level of doing anything about it.

So, what I would say is that an organization to collect complaints would be intensely focused exactly on finding situations like this, small situations where you can fix a regulation and genuinely deal with a problem.

Senator LANKFORD. But, again, that is supposed to be when they are promulgating the rule. That is the notice and comment. People are coming at them and saying, this is a bad idea. You are not giving us the least intrusive option, basically. We are getting a more expensive option when there is a cheaper option. When that is ignored, the rule comes out. They have limited time. Now, you are trying to argue about it. Going back to Ms. Katzen's statement, well, they have a huge capital cost. You are not going to——

Dr. MANDEL. I think there are things that need to be caught at the beginning, but I would actually put that in the class of if you flag that afterwards, it might improve the quality of future rules. I think we do not actually have a feedback learning loop where we learn from our mistakes in the past to talk about what is going to happen in the future. Your constituents on this would actually be happy knowing that somebody was listening so the next rule that came along that potentially was like this——

Senator LANKFORD. Is not as bad.

Dr. MANDEL [continuing]. Is not as bad.

Senator LANKFORD. Right, and we have notice of common issues and everything else.

Let me make one quick statement on this, as well. We talk a lot about problems. I would like to identify who is doing a good job on this, especially on the retrospective review. Is there any agency in particular that you could identify and say, that agency is more diligent than other agencies on doing a retrospective review and trying to evaluate where there are problems and getting rid of it? So, what I would like to know is, obviously, those are agency heads we would want to visit with and see if there are areas that we can learn and gain from, as well. So, what agency is doing a good job at retrospective review and dealing with this?

Dr. ELLIG. A couple of years ago, Dr. Randy Lutter, who formerly worked at OIRA, now at Resources for the Future, did a study for Mercatus Center looking at agency retrospective review to try to figure out who is doing a good job and he did not find many. He did find, though, that, for some reason, the National Highway Traffic Safety Administration does have a longstanding program of ret-

respective review of regulations that they issued, and that was the only one he could find where he could name an agency that does this consistently over a long period of time.

Senator LANKFORD. But, back to Dr. Mandel's comments, that is an agency that they have State individuals that are watching for it all the time. They are always looking for ways to be able to find that, so it is a limited customer base, I guess, at that point, that is processing that. But, I am glad to hear that.

Dr. MANDEL. The only one that I am aware of, it actually comes out of the same study.

Senator LANKFORD. OK.

Dr. MANDEL. OK. Most of the studies that have looked at this does not pick out ones that have done things especially well.

Senator LANKFORD. OK. Other ideas or thoughts from you on this?

Ms. KATZEN. Well, I think it is an ongoing process now, and if I could get back to you—

Senator LANKFORD. Sure.

Ms. KATZEN [continuing]. I would be happy to do so. But, I am not familiar with the ins and outs currently—

Senator LANKFORD. Let me just say, this Committee would always be willing to be able to hear about good stories, what we are doing well, because that is the kind of story, whether you are in a neighborhood that has extensive poverty and all kinds of crime and you find a few families that are succeeding, to be able to find out, how are they succeeding and how do you multiply that in the neighborhood, or whether it is within agencies that are doing a good job in this process. We want to multiply and elevate the folks that are doing a good job with it.

Ms. KATZEN. That is so constructive. Thank you.

Senator LANKFORD. OK.

Dr. MANDEL. You mentioned the report that was recently done on best practices. Let me actually just read you a short excerpt from that report. In 2014, Executive Branch agencies issued 24 major rules. Not one regulation included a plan for retrospective review of the rule in the future, even though that was mandated by the Executive Orders from the President.

Senator LANKFORD. OK. We will get back to you. Thank you. With that, I yield back, and I appreciate the conversation of the panel today.

Chairman JOHNSON. Thank you, Senator Lankford. And, there is no doubt about it, if you want to achieve continuous improvement, analyzing best practices is probably one of the best, most efficient ways of doing that.

We have a couple more minutes, and Ms. Katzen, I know you have to catch a flight, but without taking too much time, if I were in your chair, I would be sitting here going, OK, there is one thing I just wanted to get out and I did not get asked the question. I will give each one of you the opportunity, if there is something—you do not have to answer, but if there is something that you just want to talk about here and get it on the record before we close out the hearing.

Mr. HOLTZ-EAKIN. Just as a matter of the self-reported compliance burdens, I respect the Administration's intent with the retro-

spective review and every President issues Executive Orders on this front, but if you actually look at the regs revisited under retrospective review, the self-reported compliance costs went up, not down, as a result of that process, and I think that tells you a lot about how hard it is to get this right.

Chairman JOHNSON. Thank you. Dr. Ellig.

Dr. ELLIG. Yes. Several members earlier in the hearing mentioned specifically issues with banks, which triggered something that I forgot to mention earlier. The Mercatus Center, some of my colleagues did a survey of community banks and how they are affected by Dodd-Frank, because, in theory, they are not regulated by Dodd-Frank, but in practice, Dodd-Frank regulates products and services and if they sell those products and service, such as mortgages and other loans, in effect, they have to comply with Dodd-Frank.

And, I think that is a really good example of why it is important to understand what caused the problem we are trying to solve, because if the main point of Dodd-Frank was to try to prevent a financial crisis, I think we have to really ask carefully, what is the evidence that community banks caused the financial crisis.

And, the more general point is if you have a set of regulated entities, or who would be regulated, who are not contributing to the problem you are trying to solve, why does the regulation need to apply to them to begin with?

Chairman JOHNSON. By the way, I am the one that raised the community banks, and I will guarantee you, they feel like they are being affected dramatically by Dodd-Frank.

Dr. ELLIG. Yes.

Chairman JOHNSON. Dr. Mandel.

Dr. MANDEL. I just want to make a point about language. I think we should start thinking about regulatory improvement rather than regulatory reform—

Chairman JOHNSON. OK.

Dr. MANDEL [continuing]. Because regulatory reform puts us all to sleep and it does sound like Groundhog Day, and regulatory improvement is something that it can actually gather more bipartisan support.

Chairman JOHNSON. That is a good suggestion. Words matter. Ms. Katzen.

Ms. KATZEN. I would just like to thank the Chairman and the other Members of the Committee. I thought that what you brought to the table today was highly constructive and forward looking, and I think that is critically important in this area, that we recognize what we have and we build on our successes, and I thank you for the approach that you are demonstrating in this area.

Chairman JOHNSON. Well, I appreciate those kind comments. And, by the way, this has been an excellent Committee since I have been serving here in the Senate for 4 years, very bipartisan, very collegial. And, I am trying to maintain that tradition that I have witnessed with Senators Lieberman and Collins, and Senators Carper and Coburn, trying to do the same thing with Senator Carper now.

And, these hearings, when you have excellent witnesses that provide thoughtful testimony, that provide thoughtful answers to, I

think, some pretty thoughtful questions, I want it to continue. So, in other words, you do not just leave this table and go home and forget about it. Keep thinking about it. For example, if we want to set up one of these test commissions, that would be a good thing. So, keep collaborating. Keep thinking about these things. You are all obviously involved in this issue. Stay in communication with this Committee.

So, again, I really do appreciate your thoughtful testimony, your answers.

This hearing record will remain open for 15 days, until March 12 at 5 p.m., for the submission of statements and questions for the record.

This hearing is adjourned.

[Whereupon, at 12:11 p.m., the Committee was adjourned.]

A P P E N D I X

Opening Statement of Chairman Ron Johnson “Toward a 21st Century Regulatory System” February 25, 2015

As prepared for delivery:

Good morning and welcome.

Today's hearing is focused on moving us toward a modern and efficient regulatory system. Specifically, we've called this hearing to gain a better understanding of the federal regulatory landscape so that we may better engage in reforms necessary to improve it.

Federal regulations are inextricably intertwined with America's economic future – federal rules beset nearly every industry and economic decision. According to the Congressional Research Service, “the number of final rules published each year is generally in the range of 2,500-4,500,” with the *Code of Federal Regulation* amounting to over 100 million words. Measuring the impact of such a massive number of rules is no simple task but is nonetheless a necessary first step to addressing it. The purpose of this hearing is to take that first step and develop an understanding of the scope and effect of the current federal administrative state.

There are of course two sides to the regulatory coin: benefits and costs. As President Obama wrote almost three years ago, “regulations play an indispensable role in protecting public health, welfare, safety ... but they can also impose significant burdens and costs.” Achieving the most effective and beneficial regulatory system, despite efforts by presidents of both parties, requires Congress to take an active and ongoing role in assessing, updating, and reforming the rulemaking process.

Today we will discuss three topics: (1) measuring the size of the total regulatory impact, (2) the use of regulatory impact analysis in rulemaking, and (3) the role of retrospective review of regulation.

Our overarching mission for this committee is to ensure the economic and national security of America. A regulatory process that works for, not against, America's families and businesses is foremost in achieving that goal.

Thank you. I look forward to your testimony.

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Opening Statement of Ranking Member Thomas R. Carper:
 “Toward a 21st Century Regulatory System”
 February 25, 2015

As prepared for delivery:

This hearing is important, Mr. Chairman, because regulations are important. We issue them for a number of reasons, including to better protect public health and safety, the environment, and our economy. So whether we're aware of it or not, regulations play a role in our daily lives – and usually in a positive way. We enjoy the benefits of regulations every time we have a drink of water, drive a car, or go to the bank.

While there may be disagreement on occasion about certain rules, I believe everyone generally agrees that some regulation is necessary and good. It's important to note that regulations sometimes come in response to a court order. They also exist because Congress has passed and the President has signed a law that draw lines between what is acceptable and unacceptable in our society, or that directs an agency to take a certain action.

But those of us in Congress cannot legislate every detail on a particular matter even if we tried. And legislative language cannot possibly take into account every situation that may arise as a result of the enactment of a law. So we leave some of the details to the regulatory process.

The regulatory process can be time consuming. It's also more difficult to understand and follow than the legislative process. It should be our goal to have the most efficient, effective, and transparent regulatory process we can have, and to ensure that process results in common-sense regulations that achieve the objectives laid out in the laws Congress passes.

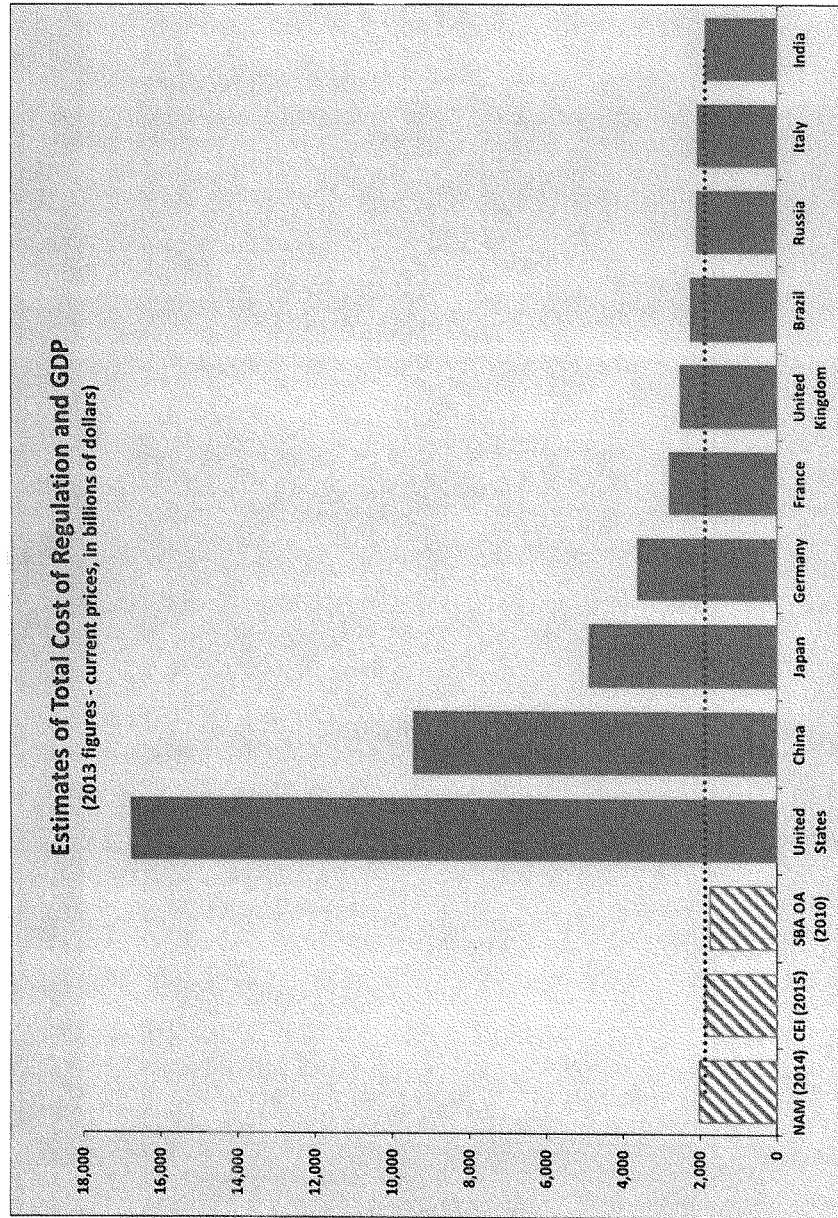
While some people think we need to choose between regulation and having a robust, growing economy, I disagree. For example, by advocating a common-sense, cost-effective approach to our nation's environmental and energy challenges, we can reduce harmful pollutants, lead healthier lives, lower our energy costs, and help put Americans to work manufacturing new products.

Regulations also often provide the stability and predictability that businesses need. And they can help instill consumer confidence in the products they buy. Of course, many regulations do by necessity impose requirements and additional costs on businesses and others that who must comply with them. And it's not always easy for those who want to participate in the process to have a say as a regulation they may be interested in is developed and finalized. So I believe it's also important to conduct oversight of the regulatory process to ensure that we try to reduce burdens and encourage transparency while achieving the greatest public benefit.

I've been encouraged by the Administration's work in this area. I've also been impressed by the personal commitment the President has shown to his administration's efforts to identify existing regulations that should be reexamined or even repealed. It's my understanding that these retrospective reviews have already identified ways to reduce burdens and save billions of dollars. And I expect these 'lookback' efforts to continue to bear fruit.

As I often say when it comes to issues like this that come before this committee, we need to figure out what works and do more of it. This applies to regulatory reform as well. I hope that as this Committee continues to discuss these issues we can take a real look at this process and at the Administration's ongoing efforts, acknowledge what is working, and help them do more of it.

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Toward a 21st Century Regulatory System

United States Senate
Committee on Homeland Security and Government Affairs

Douglas Holtz-Eakin, President*
American Action Forum

February 25, 2015

*I thank Sam Batkins, Marisol Garibay, Dan Goldbeck, and Sarah Hale for their assistance. The views expressed here are my own and not those of the American Action Forum.

Chairman Johnson, Ranking Member Carper, and Members of the Committee thank you for the opportunity to appear today. In this testimony, I wish to make three basic points:

- Virtually everyone agrees that we need some type of regulatory reform, but understanding current burdens and reform attempts can guide any reform effort,
- Regulations have a profound impact on economic performance, affecting employment patterns, the costs of household goods, and the price of energy and health care, among other impacts. During the past six years, the administration has added more than \$95 billion in annual regulatory burdens, and
- 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 four 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.¹

In this regard, here are a few facts on regulations taken directly from the administration’s Office of Information and Regulatory Affairs (OIRA) and the Government Accountability Office (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.²
- Currently, Americans must manage more than 9,200 government forms, imposing 9.9 billion hours of paperwork.³
- In 2010, federal agencies published 100 “major” rules, more than any other year in the history of the Congressional Review Act (see Chart 1).
- OIRA data make plain that FY 2012 was one of the costliest years for regulation in at least a generation.⁴

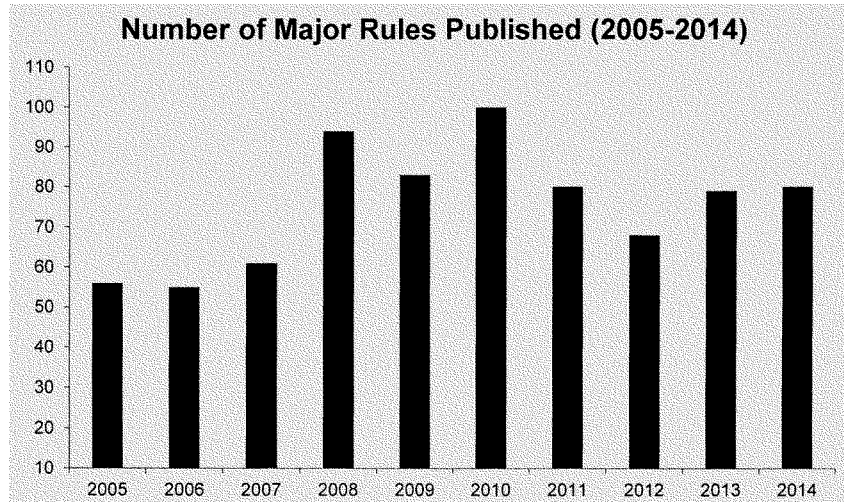
Chart 1

¹ “Improving Regulation and Regulatory Review,” Executive Order 13563 of January 18, 2011.

² Office of Management and Budget, Information Collection Budget of the United States Government 2014.

³ Office of Information and Regulatory Affairs (OIRA), Inventory of Currently Approved Information Collections.

⁴ 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.



The American Action Forum (AAF), in an effort to track 100 percent of federal rulemakings, has tallied the cumulative burden for every year since 2008. 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. To help the public keep track of all the regulations issued by the government, the American Action Forum will soon be launching a website that allows people to generate their own regulatory report based on the Federal Register.

Economic Implications

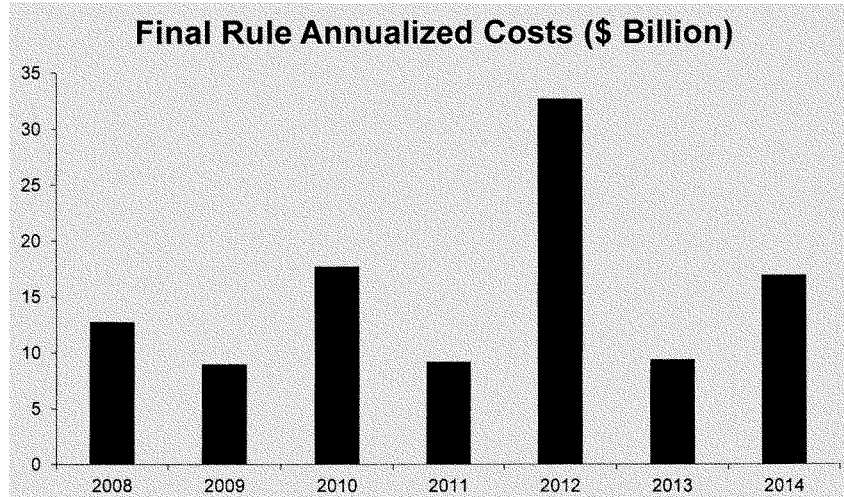
From an economic perspective, the totals are sobering: more than \$100 billion in new annual costs since 2008. This is approximately equal to increased federal tax revenue in FY 2014 and FY 2015 stemming from the higher estate, capital gains, and income taxes adopted in 2012. The U.S. has averaged \$15 billion in new regulatory costs annually since 2008. See Chart 2 below.

These regulatory burdens do not exist in isolation. Someone must eventually bear the cost, either through reduced wages, lower profits, or higher prices for every consumer. In 2014, AAF took a snapshot of a few recent regulations that will increase prices for consumers. From higher vehicle costs to pricier food, here is a brief overview of how consumer goods are more expensive because of federal regulation:

- Passenger Vehicles: \$3,100
- Household Products: \$1,639

- Mortgage: \$362 (annual)
- Energy: \$135 (annual)
- Health Care: \$108 (annual)
- Food: \$14 (annual)

Chart 2

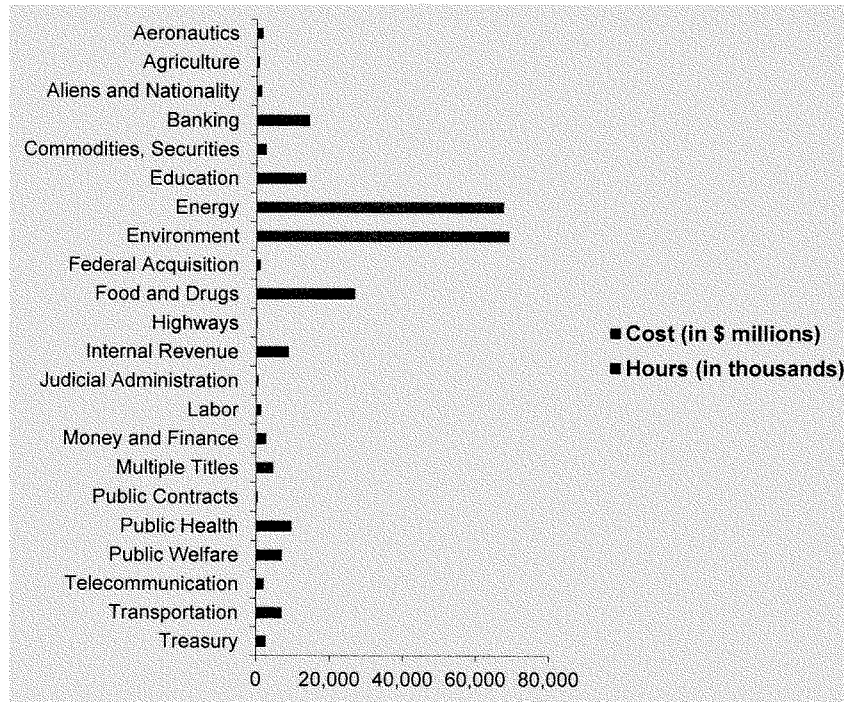


As costs for consumers increase, there will be a natural drop in the demand for goods, depending on how sensitive households are to the higher prices. As demand drops, employment effects will eventually materialize. Although the current unemployment rate is low, heavily regulated industries essentially transfer jobs to government-preferred industries. For example, according to the Bureau of Labor Statistics, since 2008 Ohio has lost 1,088 fossil-fueled power plant jobs, or a 21.8 percent drop.⁵ Meanwhile, in the last three years, employment in solar power generation nearly tripled from just 480 jobs to approximately 1,500. The economy will always attempt to trend toward full employment, but regulation creates hidden distortions that favor certain industries at the expense of others.

We can see the impact of regulation by industry in Chart 3 below, which tracks regulatory burdens across industries from regulations issued in 2014. The vast majority of the costs are distributed among energy and environment.

⁵ American Action Forum, "On Jobs and Regulation: In Graphs," available at <http://americanactionforum.org/insights/on-jobs-and-regulation-in-graphs>.

Chart 3



It's clear from the graph above that environment and energy are the runaway cost leaders. In what may be a surprise to some, new energy efficiency standards on the manufacturing industry actually added more burdens than environmental regulations. In terms of net present value costs, energy topped environmental: \$67.5 billion to \$61.2 billion. However, a vast majority of these overall burdens will affect the manufacturing industry.

In sum, regulation has been an important feature of the U.S. for decades, generating benefits, but also significant costs. That reality has motivated every President since Jimmy Carter to sign an executive order outlining their vision for fundamental regulatory reform. President Obama followed in their footsteps as well, but carrying out that vision has led to more stumbles than successes.

Essential Principles of Regulatory Reform

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 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.

But given the history of regulatory reform, it is not too surprising that the current efforts have fallen short. Almost two decades after passage of the Congressional Review Act (CRA), regulators still fail to follow its principles. 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 the Government Accountability Office, as required by the CRA.⁶ Even with the Paperwork Reduction Act, agencies managed to violate it more than 200 times annually, with the Department of Health and Human Services leading all agencies with 80 violations.⁷

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 cost-benefit analysis and apply those principles to every federal agency, with the prospect of judicial review if agencies fail to conduct the legally required analyses.
- Insert intelligible principles in future legislation that limit new regulation, enhance cost-benefit 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 cost-benefit analysis. Despite the

⁶ 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>.

⁷ American Action Forum, “Delays, Mistakes, and Violations: A Review of OMB’s Information Collection Budgets,” available at <http://americanactionforum.org/insights/delays-mistakes-and-violations-a-review-of-ombs-information-collection-budg>.

success of cost-benefit 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, including the President's orders, 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.⁸ 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.”⁹

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.

Finally, there must 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.”¹⁰

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. For example, in their last retrospective report, the Department of Energy failed to list a single rulemaking that could reduce costs or paperwork burdens. Without an effort to rescind or amend duplicative rules, any regulatory reform effort will garner only partial success.

⁸ American Action Forum, “President’s Regulatory Record in the Courts, available at <http://americanactionforum.org/research/presidents-regulatory-record-in-the-courts>.

⁹ 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>.

¹⁰ OECD, “Guiding Principles for Regulatory Quality and Performance,” available at <http://www.oecd.org/fr/reformereg/34976533.pdf>.

Regulatory Reform Abroad

Curbing regulatory growth is not only a bipartisan issue, but also an international concern, as nations around the globe craft pro-growth reform efforts. From the United Kingdom, to Australia, sensible regulatory policy is hardly a U.S. concern.

The United Kingdom has already adopted an aggressive regulatory reform system that contains the following elements: “1) operating a ‘one in, two out’ rule for business regulation, 2) assessing the impact of each regulation, 3) reviewing the effectiveness of government regulations, 4) reducing regulation for small businesses, 5) improving enforcement of government regulations, and 6) using alternatives to regulation.” Although there are legal hurdles in the U.S. to adopting a “one in, two out,” framework, the other items above are already practiced with some regularity on the federal and state level; however, few are codified, and even fewer apply to independent agencies.

If a “one in, two out,” regulatory budget is adopted in the U.S., it could save billions of dollars. The UK reports that their budgeting system for regulation has saved £1.19 billion, or approximately \$1.83 billion, since the Cameron government instituted the program six years ago.¹¹

According to a report from the Organisation for Economic Co-operation and Development (OECD), South Korea “has made impressive progress in a very short time period implementing regulatory reform to streamline regulations.”¹² Korea has already reviewed more than 11,000 regulations, halving their number, and reforming another 2,400 rules. Needless to say, OECD has issued no such report highlighting U.S. efforts to halve the number of burdensome regulations.

Australia too, has aggressively sought to reform their regulatory state. Prime Minister Tony Abbott announced March 26, 2014 as “Repeal Day,” when Parliament would “abolish regulation and legislation that’s outlived its usefulness or is doing more harm than good.” Prime Minister Abbott pledged to remove more than 9,500 regulations, saving Australians more than \$700 million annually.¹³ For perspective, the U.S. adopts roughly 3,000 regulations annually. Australia’s commitment to reform extends beyond a single day, with a schedule of two “repeal days” annually and deregulatory units within each agency.

The U.S. regulatory system should also be an international model, as opposed to an aberration. Emulating just a handful of the reforms above would lead to a more rational and more effective regulatory state. OECD has 12 specific recommendations for reform and the U.S. has millions of

¹¹ Department for Business and Innovation Skills, The Seventh Statement of New Regulation, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271446/bis-13-p96b-seventh-statement-of-new-regulation.pdf.

¹² OECD, Korea: Progress in Implementing Regulatory Reform, available at <http://www.oecd.org/regreform/38238965.pdf>.

¹³ Regulation Magazine, “Australia’s Regulatory Bonfire,” available at http://object.cato.org/sites/cato.org/files/serials/files/regulation/2014/10/regulationv37n3-8_7.pdf#page=13.

different reasons for codifying internationally recognized principles for reform. Our overseas competitors are acting, and so should the U.S.¹⁴

Conclusion

All Members of this Committee would agree that we need a regulatory system that encourages entrepreneurship, promotes economic growth, and protects the health and safety of Americans. There are doubtless benefits associated with the regulatory costs outlined, but we cannot ignore the cumulative impact of regulations or the burden on small businesses that are ill-equipped to handle thousands of hours of paperwork.

By introducing needed transparency across all federal agencies, measuring costs and benefits of new rules, and reviewing past regulations, we can achieve the dual goals of promoting economic growth and protecting public health.

Thank you. I look forward to answering your questions.

¹⁴ OECD, Recommendation of the Council on Regulatory Policy and Governance, available at <http://www.oecd.org/gov/regulatory-policy/49990817.pdf>.



March 10, 2015

The Honorable Ron Johnson, Chairman
 The Honorable Thomas R. Carper, Ranking Member
 Committee on Homeland Security and Government Oversight
 United States Senate
 Washington, DC 20510

Dear Chairman Johnson and Ranking Member Carper:

Thank you for the opportunity to testify on February 25 at the hearing “Toward a 21st Century Regulatory System.” Since the chairman indicated that the hearing record would remain open until March 10, I would like to address several questions that members of the committee may have, based on topics raised during the question and answer period.

OMB’s annual report to Congress on the benefits and costs of regulations is often used as evidence to support the conclusion that the benefits of federal regulations exceed the costs. Considering that this report examines only agency estimates of benefits and costs, how credible is this conclusion?

The annual OMB report is not a reliable guide to whether the benefits of federal regulations exceed the costs or vice versa. There are several reasons for this:

- The annual OMB report contains no information about the benefits and costs that actually occurred as a result of federal regulations. Rather, it is a compendium of agency estimates from regulatory impact analyses conducted before regulations were implemented.
- Many of these benefit and cost estimates are unreliable, because many regulatory impact analyses are seriously incomplete.
- The annual report includes only the estimated benefits and costs of regulations implemented in the previous 10 years.
- Even for major regulations, agencies do not always produce monetized estimates of benefits and costs. For example, for fiscal year 2013, the most recent year covered in the most recent OMB report, just seven out of 54 major regulations had monetized estimates of both benefits and costs.¹
- The vast majority of federal regulations are not considered in the report, because it only considers regulations classified as “major” or “economically significant.” As my colleague James Broughel noted in comments on the most recent draft report,

¹ James Broughel, “OMB Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities” (public interest comment, Mercatus Center at George Mason University, Arlington, VA, 2014), 5, available at <http://mercatus.org/publication/omb-2014-draft-report-congress-benefits-and-costs-federal-regulations-and-unfunded>. Of the 54 major regulations, 30 were budget regulations. All but one of the budget regulations monetized the full amount of the income transfers.

In the last decade, 33,982 rules issued by agencies escaped OMB review altogether, leaving roughly 92 percent of the regulatory system completely outside of the OMB's purview. Of the 3,040 rules that the OMB reviewed, slightly less than 4 percent (116 rules) have dollar estimates of both benefits and costs appearing in the OMB's report. It is difficult to take the figures about benefits and costs seriously when such a tiny fraction of rules are included in the report. The OMB should explicitly state in its report that it can't say for certain whether benefits exceed costs during the time frame analyzed or in any particular year.²

Should all agencies be held to the same standards for regulatory impact analysis, given that they have diverse missions, authorizing statutes, and decision-making authority?

All agencies should be held to the same standard enunciated in President Clinton's Executive Order 12866: "Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information regarding the need for, and consequences of, the intended regulation."³ If enforced consistently, this standard requires agencies to use in their analysis the best scientific, technical, economic, and other information available given the state of current research, but it also avoids requiring agencies to perform analysis that is impossible given the current state of knowledge. Any statutory requirement for regulatory impact analysis should include this standard.

The "best reasonably obtainable information" standard is flexible enough to accommodate differences in the state of the art for evaluating different types of regulations. In some cases, the quality of agency analysis varies depending on the subject matter of the regulation. Statistical analysis of scoring data from the Mercatus Center's Regulatory Report Card finds that environmental regulations tend to have slightly better analysis than other regulations and budget regulations tend to have much worse analysis than other regulations.⁴

If anything, administration of this standard under the executive order may be too flexible. Budget regulations can generate significant benefits and costs via price distortions and mandates and prohibitions attached to the spending.⁵ Nevertheless, the OMB review focuses on ensuring that the budget numbers are correct rather than assessing the (potentially substantial) benefits and costs that occur when federal spending of revenue collection alters incentives.⁶ As a result, decisions about budget regulations are made with little information about overall social benefits and costs.

It would be a mistake to conclude that the "best reasonably obtainable information" standard implemented by executive order and enforced by OIRA review is sufficient to ensure uniformly high-quality analysis. Scholarly research cited in my written testimony, including the Mercatus Center's Regulatory Report Card, finds that many regulatory impact analyses are seriously

² Ibid., 4.

³ EO 12866, §1(b)(7).

⁴ Patrick A. McLaughlin and Jerry Ellig, "Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Bush II Administration," *Administrative Law Review* 63 (2011), 179–202; Jerry Ellig, Patrick A. McLaughlin, and John F. Morrall III, "Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across U.S. Administrations," *Regulation & Governance* 7 (2013), 153–73; Jerry Ellig and Christopher J. Conover, "Presidential Priorities, Congressional Control, and the Quality of Regulatory Impact Analysis: An Application to Health Care and Homeland Security," *Public Choice* 161 (2014), 305–20.

⁵ Office of Information and Regulatory Affairs, *2009 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (2009), 18.

⁶ McLaughlin and Ellig, "Does OIRA Review Improve the Quality of Regulatory Impact Analysis?," 188.

incomplete, and their quality varies widely. Much of the variation that has survived OIRA review occurs for highly questionable reasons:

- Administrations of both parties appear to require less thorough analysis from agencies that are more central to the administration's ideology or policy priorities. The Bush administration, for example, permitted the Department of Homeland Security to proceed with a number of regulations that were accompanied by very incomplete regulatory impact analysis; the Obama administration did likewise with the first major regulations implementing the Patient Protection and Affordable Care Act.⁷ This same pattern appears to occur with other agencies.⁸ As Donald Arbuckle, who served as deputy and acting OIRA administrator, put it, "In a head-on battle between analysis and politics, politics will generally win."⁹
- "Midnight" regulations, defined as those that are finalized at the end of a presidential term between Election Day and Inauguration Day, tend to have lower-quality analysis and less extensive explanations of how the agency used the analysis in its decisions.¹⁰
- Regulations proposed during one president's term but left for the next administration to finalize tend to have lower-quality analysis and less extensive explanations of how the agency used the analysis in its decisions.¹¹
- Regulations whose OIRA review concluded under an acting OIRA administrator rather than a presidential appointee tend to have less extensive explanations of how the agency used the analysis in its decisions.¹²
- Regulations that are more politically salient tend to have lower-quality analysis.¹³

In addition, independent agencies, which are not subject to Executive Order 12866, usually produce lower-quality analysis than executive branch agencies.¹⁴ A statutory requirement with judicial review to ensure that the analysis used the best reasonably obtainable information would help eliminate low-quality analysis that occurs for questionable—often political—reasons.

Finally, I doubt that the quality of analysis needs to be diminished to tailor the analysis to the agency's authorizing statutes and decision-making authority. The statutes that authorize the

⁷ Jamie Belcore and Jerry Ellig, "Homeland Security and Regulatory Analysis: Are We Safe Yet?," *Rutgers Law Journal* (Fall 2009), 1–96; Jerry Ellig and Christopher J. Conover, "Presidential Priorities, Congressional Control, and the Quality of Regulatory Impact Analysis: An Application to Health Care and Homeland Security," *Public Choice* 161 (2014), 305–20; Christopher J. Conover and Jerry Ellig, "Rushed Regulation Reform" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, January 2012); Ellig et al., "Continuity, Change, and Priorities"; Jerry Ellig and Rosemarie Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, July 2013).

⁸ Ellig et al., "Continuity, Change, and Priorities."

⁹ Donald R. Arbuckle, "The Role of Analysis on the 17 Most Political Acres on the Face of the Earth," *Risk Analysis* 31, no. 6 (2011), 886.

¹⁰ McLaughlin and Ellig, "Does OIRA Review Improve the Quality of Regulatory Impact Analysis?"; Ellig et al., "Continuity, Change, and Priorities"; and Ellig and Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis."

¹¹ *Ibid.*

¹² Ellig and Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis."

¹³ Stuart Shapiro and John F. Morrall III, "The Triumph of Regulatory Politics: Benefit-Cost Analysis and Political Salience," *Regulation and Governance* 6 (2012), 189–206.

¹⁴ Arthur Fraas and Randall L. Lutter, "On the Economic Analysis of Regulations at Independent Regulatory Commissions," *Administrative Law Review* 63 (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.

agency and/or the regulation define the extent of the agency's decision-making authority. An econometric analysis of Regulatory Report Card data reveals that the quality of analysis does not vary based on the extent of agency decision-making authority. The quality of the analysis is no different when the statute constrains agency authority by requiring the agency to issue a regulation, mandating the form of the regulation, or mandating the stringency or coverage of the regulation.¹⁵ This suggests that any aspect of the analysis that must be tailored to the specifics of the agency's decision-making authority can be addressed without diminishing the quality of the analysis.

Has the quality of regulatory impact analysis improved over time?

A study conducted by the President's Council on Wage and Price Stability on the eve of its abolition in 1981 pointed out that agencies often produce seriously incomplete analysis of the problem a regulation is supposed to address, the options available for addressing the problem, and/or the benefits and costs of alternatives.¹⁶ The quality of analysis may have improved in some ways since then. But the Regulatory Report Card reveals that many regulations are still accompanied by deficient analysis of these topics, and quality appears to have plateaued during the past 15 years.

Several studies have assessed the quality of regulatory impact analyses during various time periods. Robert Hahn and coauthors used a numerical checklist to assess the quality of the Environmental Protection Agency's regulatory impact analyses conducted between 1982 and 1999. The analyses earned an average of 40 percent of the possible points, with no significant change over time.¹⁷ Checklist evaluations of regulations issued from 2000 to 2009 have generated average scores in the 60–64 percent range.¹⁸

The Mercatus Regulatory Report Card, a qualitative evaluation with numeric scoring, produced similar results for the 2008–2012 time period. It is not clear if the higher scores since 2000 reflect improvement in the quality of analysis or simply differences in different researchers' scoring methods. Regardless, there has been no improvement in average Report Card scores from 2008 to 2012, which does not bode well for future analysis.

What is the evidence that OIRA has helped improve the quality of agency regulatory analysis?

Empirical research finds that OIRA review is associated with higher-quality regulatory impact analysis and better explanation of how the agency used the analysis to inform its decisions. The

¹⁵ Ellig and Conover, "Presidential Priorities, Congressional Control, and the Quality of Regulatory Impact Analysis," 315. The econometric analysis is in a downloadable appendix available at <http://mercatus.org/publication/presidential-priorities-congressional-control-and-quality-regulatory-analysis>. In a paper published several years ago, I speculated that narrow delegation of authority to agencies might explain lower-quality analysis (Belcore and Ellig, "Are We Safe Yet?" 38–41). The more recent econometric analysis shows that I was wrong.

¹⁶ Thomas D. Hopkins, Benjamin Miller, and Laura Stanley, "The Legacy of the Council on Wage and Price Stability" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, August 26, 2014), <http://mercatus.org/sites/default/files/Hopkins-Wage-Price-Stability.pdf>.

¹⁷ Robert W. Hahn and Paul C. Tetlock, "Has Economic Analysis Improved Regulatory Decisions?," *Journal of Economic Perspectives* 22, no. 1 (Winter 2008), 67–84; Robert W. Hahn and Patrick Dudley, "How Well Does the Government Do Cost-Benefit Analysis?," *Review of Environmental Economics and Policy* 1, no. 2 (2007), 192–211.

¹⁸ Art 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, no. 1 (2011), 71–85; Shapiro and Morrall, "The Triumph of Regulatory Politics."

quality and use of regulatory analysis is positively correlated with the length of OIRA review time.¹⁹ OIRA's influence in the administration (measured by whether the administrator is a political appointee or acting administrator) is positively correlated with claimed use of regulatory analysis.²⁰ Prescriptive regulations, whose regulatory impact analyses receive more intensive OIRA review, tend to have higher quality analysis than budget regulations.²¹

Unfortunately, the quality of regulatory impact analysis still falls far short of the standards enunciated in Executive Order 12866 and OMB *Circular A-4*. Thus, while OIRA review has certainly helped improve agency analysis, further improvement will likely require legislation.

Do you know of any empirical research that would help predict how proposed reforms would change the quality of regulatory impact analysis or the quality of new regulations?

Proposed regulatory reforms include (1) requiring advance consultation with stakeholders, (2) requiring advance notices of proposed rulemaking for major regulations, and (3) requiring formal hearings for high-impact rules.

In a recent study using Regulatory Report Card data, Rosemarie Fike and I report several findings that shed light on the likely effects of these proposed reforms. Several types of actions that expand pre-proposal information gathering are associated with higher-quality analysis and greater claimed use of analysis in an agency's decision-making. These include a prior notice of proposed rulemaking in the same regulatory proceeding, a public request for information by the agency, and consultation with state, tribal, or local governments. In addition, when an agency commits to holding a hearing on a proposed regulation in the future, it does a better job of explaining how the analysis affected its decisions.²²

The research cited above on the effects of OIRA review implies that requiring independent agencies to conduct regulatory impact analysis, coupled with external review, would lead to better analysis by independent agencies. It also implies that providing OIRA with more staff and resources would help improve the quality of regulatory impact analysis.

Are benefits harder to estimate than costs?

The benefits of a regulation are the ultimate outcomes that improve citizens' quality of life. The costs of a regulation are the good things society must forego as a result of the regulation. Properly understood, both benefits and costs can be difficult to measure and convert into monetary terms. Whether one is more difficult than the other depends on the regulation.

Some people believe that costs of regulation are usually easier to estimate than benefits because costs are merely money spent by regulated entities, whereas benefits often involve difficult-to-value things such as clean air or the protection of endangered species. This belief confuses monetary outlays with social opportunity costs.

¹⁹ Ellig and Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis"; Stuart Shapiro and John F. Morrall III, "Does Haste Make Waste? How Long Does It Take to Do a Good Regulatory Impact Analysis," *Administration and Society* 20, no. 1 (2013).

²⁰ Ellig and Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis."

²¹ McLaughlin and Ellig, "Does OIRA Review Improve the Quality of Regulatory Impact Analysis?"

²² Ellig and Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis."

Monetary outlays for paperwork and compliance are part of the cost of regulation but by no means the entire cost. For example, the enhanced security procedures at airports in the wake of the September 11 attacks clearly had substantial economic costs. But they also increased waiting time for passengers. The value of this time is a cost of the regulation. As a result of the increased ticket prices and delays, some travelers substituted driving for flying on shorter trips, and driving is riskier than flying.²³ More generally, a regulation may be intended to reduce one type of risk, but it also increases some other type of risk; that increased risk is a cost.²⁴ Thus, correct estimation of the social cost of a regulation can require assessments of cause-and-effect relationships and monetary valuation challenges that are every bit as difficult as those involved in estimating benefits.²⁵

Would it be wasteful to eliminate or modify a regulation that businesses, states, or other regulated entities have already spent money to comply with? How could changing such a regulation be beneficial if the money to comply has already been spent?

The costs that regulated entities have already borne to comply with regulations are irrelevant to determining whether changing or repealing the regulation would be wasteful. Changing or repealing the regulation will not change the fact that these costs have already been incurred. This is why economists call them “sunk” costs. The relevant costs are the costs that changing the regulation would cause in the future. The relevant benefits are the benefits that changing the regulation would cause in the future. If the expected future benefits exceed the expected future costs, then it is efficient to change the regulation. If the expected future costs exceed the expected future benefits, then it is wasteful to change the regulation.

If a better alternative was available at the time the regulation was originally adopted, then the original decision to adopt the regulation was wasteful. High-quality regulatory impact analysis can help avoid this kind of waste.

I hope this additional information is helpful in the committee's deliberations over regulatory reform. Please feel free to contact me if I can provide any additional information.

Sincerely,

Jerry Ellig
Senior Research Fellow
Mercatus Center at George Mason University

²³ Garrick Blalock, Vrinda Kadiyali, and Daniel H. Simon, “The Impact of Post-9/11 Airline Security Measures on the Demand for Air Travel,” *Journal of Law & Economics* 50, no. 4 (November 2007), 731–56.

²⁴ Cass Sunstein, “Health-Health Tradeoffs,” *University of Chicago Law Review* 63, no. 4 (Autumn 1996), 1533–71.

²⁵ The Mercatus Center has developed a survey instrument called the Regulatory Cost Calculator that agencies and stakeholders can use to gather more accurate information about costs. For more information, see <http://mercatus.org/publication/regulatory-cost-calculator>.

WRITTEN STATEMENT OF MICHAEL MANDEL, PHD

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Senate Committee on Homeland Security and Governmental Affairs
"Toward a 21st Century Regulatory System"

February 25, 2015
10 AM

SUMMARY

How can we reduce the economic burden of regulation on innovation and growth, without losing its benefits? Since Jimmy Carter, every president has tried introducing retrospective regulatory review, with less-than-stellar results.

This statement draws extensively on work done by the Progressive Policy Institute, where I am Chief Economic Strategist. In this statement, I will first explain the reasons why retrospective regulatory review is fundamentally flawed when used by itself. I will then describe an alternative approach for lowering the regulatory burden, the Regulatory Improvement Commission, which was introduced in the previous Congress as S.1390 (Regulatory Improvement Act of 2013) and H.R.4646 (Regulatory Improvement Act of 2014).

STATEMENT

Chairman Johnson, Senator Carper, members of the committee. Thank you very much for the opportunity to address the question of how to design a “21st Century Regulatory System.” My remarks will focus on retrospective regulatory review, and alternative mechanisms for reducing the burden of regulation without losing its benefits.

My testimony is drawn from a series of policy briefs on “regulatory improvement” issued by the Progressive Policy Institute, where I am Chief Economic Strategist. I am also a senior fellow at the Mack Institute for Innovation Management at Wharton School of Business at the University of Pennsylvania. Until 2009, I served as Chief Economist at BusinessWeek, where I helped direct the magazine’s domestic and international economic coverage. I’ve written three books on uncertainty, innovation and growth, and one basic economics textbook.

As you likely know, PPI stresses the importance of growth and innovation for lifting the living standards of middle-class Americans. There are many policy levers for increasing growth and innovation, including R&D spending, education, and fiscal policy.

But we’re especially concerned with regulatory policy as an untapped tool for accelerating innovation and growth. On the one hand, technological and institutional innovation is the key force propelling sustained gains in living standards and creating jobs. On the other hand, our economy would not work without regulation. Policymakers are continually striving to find the right balance between innovation and regulation in every area of the economy—telecom, tech, biosciences. It affects both big companies and small.

Unfortunately, if policymakers allow the regulatory burden to become too heavy, innovation and

entrepreneurial energy can be suppressed. So the long-term performance and competitiveness of the American economy and the long-term growth of living standards depends on periodically lightening the regulatory load—the equivalent of scraping the barnacles off the bottom. This is a goal where Democrats and Republicans can find common ground.

As I noted in a recent essay, “Hacking the Regulatory State,” (Mandel 2014):

To lift long-term growth levels, policymakers in developed countries must consider making systematic changes in the “operating code” of regulatory institutions in order to encourage innovation and disruptive innovation in particular. Advocating deregulation per se is rarely the right answer, because consumers and workers rightfully see regulation as essential protection against profit-focused businesses. Voters widely support social goals such as clean water and air, and even businesses would not want to see government abandon the market to the law of tooth and nail.

Yet even the most regulation-minded can see how the accumulation of well-intentioned rules can have a pervasive and negative effect on innovation. One useful analogy is that of a small child idly tossing pebbles in a stream. One or two or even ten pebbles won’t make an obvious difference in the flow of the stream. Yet, accumulating gradually over the years, thousands of pebbles can make an effective dam. Or to put it into technology terms, asking a software developer to add one more feature or requirement to a program may seem like a small and innocuous request. Yet enough such ‘minor’ requests turns a simple task into a bloated, ungainly, and bug-ridden piece of code that may be virtually unusable.

Retrospective Review

One logical way to fix the regulatory system is to go back and review old rules, to find the ones that are out-of date, unnecessary, redundant, or have become excessively burdens because of technological or market changes. This process of “retrospective review” has been embraced by every president from Jimmy Carter to Barack Obama.

Administratively, retrospective review seems quite simple: Executive agencies are ordered to make a list of regulations that are candidates for reform. They then go down the list one-by-one and ask if the benefits exceed the costs. This procedure seems fool-proof.

And yet, with no exceptions, these attempts at retrospective review seem to have fallen far short of the desired result, based on any objective assessment (See, for example, GAO[2007] and Lutter [2013]). The Obama Administration's effort at retrospective review was admirable.

However, Aldy [2014] notes that:

In 2014, executive branch agencies issued 24 major rules, only two of which were identified as the products of retrospective review under Executive Order 13563. Less than one-third of the rules were issued with monetized benefits and costs, and not one regulation included a plan for retrospective review of the rule in the future.

Aldy goes on to observe that in 2013 and 2014:

...the independent regulatory agencies issued 39 major rules, none of which monetized the benefits and only eight monetized the costs of the regulatory action. None of the rules were identified as the result of retrospective review under Executive Order 13579 and none of the rules included a plan for future retrospective review of the rule.

I will argue here that retrospective review is a seriously flawed process that cannot by itself provide the answer to regulatory accumulation. There are four reasons retrospective review is so hard to do effectively.

1. Agencies that pass rules have a vested interest in justifying their original decisions.
2. Rules are often the result of Congressional mandates, which cannot be undone without legislative action
3. Changing or eliminating an existing rule is not simply a matter of a stroke of a pen. In general, the agency must go through the same lengthy process, including public comments, which the original rule required.
4. The retrospective review process is based on examining the costs and benefits of each regulation individually. However, even if every individual regulation passes a cost-

benefit test, the total accumulation of regulation can create a heavy burden on innovation. The number of regulations matter, even if individually all are worthwhile.

Let's discuss each of these flaws in turn. Clearly agencies have an incentive to defend decisions they have made in the past—that's pure bureaucratic self-interest. But if agency self-interest were the main reason for the failure of retrospective review, it would be easy to fix by closer monitoring of agencies by the White House.

More importantly, retrospective review is often limited by the interaction of Congressional mandates and executive rule-making. Regulations are the joint product of legislative action and executive authority. For that reason, the executive branch has a limited ability to achieve regulatory reform by itself. Moreover, it's important to remember that the original legislation is generally the result of an explicitly political process, not a cost-benefit analysis of what legislation would be best. As a result, contradictions and overlaps are often built into the original legislation.

Third, ironically, we must recognize that assessing the costs and benefits of an existing regulation is far more expensive and time-consuming than projecting the costs and benefits of a prospective rule. When an agency is first considering a new rule, it can use whatever limited evidence exists from academic studies and existing research. By contrast, after a major regulation has been effect for years, the amount of potentially relevant real-world data is enormous, expensive to collect, and potentially burdensome for companies.

For most regulations, it is no easy task to design a study that fairly measures what would have happened in the absence of the regulation, including technological change, investment decisions

by companies, and changes in markets. As a result, regulatory agencies do not have the financial, intellectual, or managerial resources to assess the costs and benefits of more than a small handful of existing regulations. Notes Aldy (2014)

An agency could identify a small number (e.g., two or three) rules that exceed a specified economic threshold (economically significant, or perhaps even a larger quantitative threshold) for detailed ex post analysis of efficacy, benefits, and costs.

Finally, retrospective review is inherently focused on assessing individual regulations. However, the impact of regulation on growth and innovation appears to be nonlinear and cumulative. That is, as rules pile up, they interact with each other to create more of an impediment, even if each rule makes sense on its own.

The cumulative impact of regulations has been accepted by both Democrats and Republicans. In his role as OIRA Administrator, Cass Sunstein issued a 2012 memo entitled the “Cumulative Effects of Regulations” which said, in part:

Consistent with Executive Order 13563, and to the extent permitted by law, agencies should take active steps to take account of the cumulative effects of new and existing rules and to identify opportunities to harmonize and streamline multiple rules.

However, despite the lip service paid by successive administrations to the cumulative effects of regulation, the agencies still don’t take it seriously in any way, and neither does OIRA. Aldy notes that:

The complete absence of discussion of cumulative impacts in identified regulatory actions in the semi-annual progress reports suggests that this issue does not receive substantial consideration by agencies. This reflects, in part, the standard approach to regulatory review – whether a rule is in the development stage at the agency, in its consideration in OMB coordinated interagency review, in its prospective analyses, and in this retrospective analysis effort – to focus one rule at a time

One alternative

To augment the formal process of retrospective analysis, we see the need for a low-cost, non-bureaucratic channel for improving regulations. Mandel and Carew (2013) proposed a Regulatory Improvement Commission (RIC) that would be authorized by Congress for a fixed length of time, and consist of a panel appointed by the President and by Congressional leaders of both parties. The RIC would have a limited period of time to come up with a package of regulations to be eliminated or fixed, drawing on public suggestions. The package would then be sent to Congress for an up-or-down vote, and then onto the President for signing.

A version of the RIC was introduced in the Senate and House in the last two years, with bipartisan sponsorship in both cases (S.1390, Regulatory Improvement Act of 2013, and H.R.4646, Regulatory Improvement Act of 2014). It has the virtue of embodying regulatory reform that can be embraced by both Democrats and Republicans, and conceivably be enacted even in today's tense political climate.

Let me mention several important characteristics of the RIC. First, it is specifically designed not to eliminate any Congressional prerogatives. Indeed, Congress gets two bites at the apple, once when the RIC is authorized and then again when the package of proposed rule changes comes through.

Second, and related, the RIC does not lean exclusively on a supposedly objective measure such as cost-benefit analysis. Instead, the RIC embraces the idea that regulations are a joint creation of the executive and legislative branches, with politics deeply embedded.

Finally, the RIC is about 'small steps to build trust.' Rather than big dramatic changes, the RIC is designed to show voters that Washington can get things done

Conclusion

Retrospective regulatory review sounds good, and can be unilaterally implement by the executive branch. However, in practice it falls short of expectations for fundamental reasons. We suggest that at the appropriate time, the Committee seriously considers the RIC legislation when it is re-introduced.

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Statement of Sally Katzen
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before the

Senate Committee
on
Homeland Security and Governmental Affairs

on
“Toward a 21st Century Regulatory System”

February 25, 2015

Chairman Johnson, Ranking Member Carper, Members of the Committee. Thank you for inviting me to testify today. I understand that this hearing is intended to provide an overview of the current state of the federal regulatory system, and that there will be other hearings over the next few months focused on perceived problems and specific proposed solutions. This hearing is thus designed to ensure that Members of this Committee have access to the same information and understand the different perspectives (and passions) that come to the fore when discussing these issues.

I have worked on regulatory issues during most of my career in private practice, government service, and in my teaching and writing. I served as the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) for the first five years of the Clinton Administration, then as the Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council, and then as the Deputy Director for Management of OMB. After leaving the government in January 2001, I taught administrative law courses at the University of Pennsylvania Law School, University of Michigan Law School, George Mason University Law School, and George Washington University Law School, and also taught American Government courses to undergraduates at Smith College, Johns Hopkins University, and the University of Michigan in Washington Program. Since 2011, I have been at New York University School of Law, serving as co-director of its Washington DC Clinic for third-year law students and teaching a first-year required course entitled “Legislation and the Regulatory State.” Before entering government service in 1993, I was a partner at the law firm Wilmer, Cutler & Pickering (now called

WilmerHale), specializing in regulatory and legislative issues, and among other professional activities, I served as the Chair of the American Bar Association Section on Administrative Law and Regulatory Practice (1988-89). During my government service, I was the Vice Chair (and Acting Chair) of the Administrative Conference of the United States (ACUS). Since leaving the government in 2001, I have written articles for scholarly publications and have frequently been asked to speak on administrative law in general and on rulemaking in particular.

The Regulatory System – and the rules that it develops, promulgates and enforces – is an integral component of governance. Congress makes the law but it typically does not have the time, the expertise, or sometimes the ability to identify and resolve all the details. That responsibility is usually delegated to the agencies which are expected to issue regulations that translate general statutory directives into concrete requirements or prohibitions with which the public must comply. There are appreciably more regulations than statutes: some have depicted it as a pyramid, with the Constitution, the supreme law of the land on top, hundreds of statutes enacted by Congress on the next level, and then thousands of regulations issued by the agencies.

Since the 1970's, we have heard a lot about the steady increase of regulations, and more recently we have heard that the resulting burden from these regulations (and the likelihood of more regulations in the next two years) is a drain on the economy, the reason why job growth has not been as strong as expected, and the reason why American industry is at a competitive disadvantage in the global market. This leads to one of the threshold questions for this hearing – how do you measure or evaluate regulations? More specifically, is this Administration engaged in an unprecedented (and unjustified) amount of regulatory activity? With respect, I think not.

Measuring/Evaluating Regulatory Activity

One measure frequently invoked is the number of pages in the Federal Register, with critics of regulation citing the increased size of that publication over time. But the Federal Register includes much more than new regulations. It also includes notices and other announcements published to inform the general public of activities or actions they may be interested in, such as upcoming agency meetings (including agendas), administrative hearings, notices of data availabilities, opportunities to apply for benefits (with detailed instructions), and settlement agreements. Even with respect to new rules, when a Notice of Proposed Rulemaking (NPRM) is published in the Federal Register, it is always accompanied by a “preamble” that sets forth, among other things, all the data and the analyses that the agency is relying on so as to provide interested

people a meaningful opportunity for comment. Similarly, when the final rule is published in the Federal Register, it is again accompanied by a “preamble,” which then serves as the agency’s statement of “basis and purpose” for the rule. Responding to a series of juridical decisions over the last several decades, the preamble now not only restates the history of the rulemaking and all the underlying data and analyses, but it also explains (often at great length and with specific examples) what the agency intended the rule to cover or to accomplish, and, most importantly, the agency’s response to the factual, policy and legal arguments raised during the comment period, thereby demonstrating that the agency has read and considered those comments and either agrees or disagrees with them (and why). Obviously, the more complex the subject matter, the more voluminous the data and analyses, the more extensive the comments, the longer the preamble is, regardless of the length of the actual rule. I have seen some preambles go on for several hundred pages whereas the text of the final rule itself might take only a page or two.

Another proxy for the amount of regulation is offered by a joint project of the Regulatory Studies Center at George Washington University and the Weidenbaum Center on the Economy, Government and Public Policy at Washington University in St. Louis. They use the growth in the annual federal budget and number of employees (FTEs) for selected regulatory agencies. Data on federal outlays and staffing may be interesting as a longitudinal study, but do not really tell us very much about regulatory activity. What are those employees doing? Are they all writing new rules? Some may be gathering data and undertaking the analysis underlying proposed regulatory actions; others might be deregulating. Are some of the employees providing compliance assistance? Or protecting our security? The staffing numbers shot up after 9/11 when the inspectors at the airports became federal employees of the Transportation Security Administration (TSA) (a regulatory agency) rather than private contractors. Did that mean we were being inundated with new regulations? I don’t think so.

Another commonly invoked metric is the annual cost of regulations, which by some reports increases each year. We have a pretty good handle on the expected costs of individual “major” or “economically significant” regulations from the annual OMB Report to Congress on the benefits and costs of regulations issued each year. It should be noted that often the estimated costs of regulations are overstated: when something is *proposed*, it can seem very difficult, burdensome, or costly; when it is *adopted* (and affirmed), American ingenuity can kick in and the difficulty or burden or cost is significantly reduced. It should also be noted that caution is called for when making comparisons because often the numbers are driven by a few large rulemakings. With that caveat aside, it appears from the OMB reports that, at this point, the cost of new

regulations issued by the Obama Administration is roughly comparable to the cost of those issued during George W. Bush's Administration and less than the cost of those issued during the Clinton Administration.

In any event, these data are to be distinguished from the often-cited \$2 trillion (plus) annual cost of regulations produced by Crain and Crain. The Crain and Crain studies have taken on a life of their own as supposedly unimpeachable calculations, even though highly reputable scholars and economists (and experts at the Congressional Research Service) have filled pages of print criticizing both the assumptions and the methodologies used, and it earned several Pinocchio's from Glen Kessler, the "Fact Checker," at The Washington Post. The Crain studies have been called a lot of names; perhaps the most polite is "urban legend." It is interesting that some of the proposals for "improving" the regulatory system would require agencies to submit their economic analyses to independent peer-review to ensure they are reliable. It is significant, then, that the Crain studies could not possibly survive such review.

It also bears emphasis that all of this discussion is about the costs of regulation and says nothing about benefits. Rarely do we hear that regulations save lives, prevent injuries, reduce risks to our health and safety, provide information to enable more intelligible choices for our lives, promote competition and fair practices in our markets, and protect civil rights, just to name a few obvious truths (more about this below).

Maybe the best way to measure regulatory activity would be to simply count the number of new regulations. Twice a year, the Administration publishes the Unified Agenda, a compendium of proposals in (or likely to join) the rulemaking pipeline. Apparently, some have checked that document and then announced that thousands of new regulations are on their way. Apart from the fact that some of the entries do not ever see the light of day, the total number of regulations does not really tell much about them, because all regulations are not the same. In fact, far from being a monolithic group, the rules issued by the federal agencies each year encompass a very wide variety and great diversity – both in scope and import – of regulatory activity.

One salient point is that the vast majority of the regulations issued each year are ministerial or routine – e.g., changing the day for filing income taxes to the following Monday when the 15th of April falls on a Saturday or Sunday, or setting the times for changing the locks on the St. Lawrence Seaway. Others are as noncontroversial as they are necessary – e.g., the Federal Aviation Administration's air worthiness directives generally and its rule last year prohibiting certain flights in the Simferopol (UKFV) flight region because of on-going conflicts in the Ukraine and Crimea.

Perhaps the best example of a non-controversial rule that is actually eagerly awaited by the regulated entities is the rule issued each year by the Department of Interior setting an annual quota for migratory bird hunting under the Migratory Bird Treaty; absent an implementing rule, no one could shoot game birds as they fly to or from Canada. This was identified as a favored activity during the regulatory reform debates in Congress during the Clinton Administration; as a result, hunting, fishing or camping rules were explicitly exempt from many of the federal statutes enacted in the 1990s, and their preferential status continues to be zealously guarded in some of the bills in this Congress.

There are other types of non-controversial rules, as well as rules that are actually favored by regulated entities, which are not so protected. It may be counter-intuitive, but it is not unusual for regulated entities (or segments within the affected industries) to support or even champion certain rules – such as those that level the playing field, provide needed guidance, or provide certainty or regularity for operations for the foreseeable future. For example, a few years ago, the automobile companies supported the Environmental Protection Agency (EPA)/Department of Transportation (DOT) joint rules for “Passenger Car and Light Truck Corporate Average Fuel Economy Standards for MY 2012-2016.” More recently, industry stakeholders voiced broad support for DOT’s “Inspection, Repair, and Maintenance; Driver-Vehicle Inspection Report” rule, which removed a significant information collection burden for motor carriers without adversely affecting safety; and beneficial users of coal ash supported EPA’s “Coal Combustion Residuals” final rule, which cleared the way for the continued recycling of coal ash in a variety of products.

There are also rules that specify the structure, eligibility requirements or enrollment procedures for government programs, such as the Department of Agriculture’s (USDA’s) “Agriculture Risk Coverage and Price Loss Coverage Programs,” and the Department of Veterans Affairs’ (VA’s) “Expanded Access to Non-VA Care Through the Veterans Choice Program.” Rules such as these enable the programs authorized and funded by Congress to operate as they were envisioned or modified by Congress, and the potential participants in the program often eagerly await these rules. In a similar vein, there are multiple so-called “transfer” rules (which primarily cause transfers from taxpayers to program beneficiaries as specified by Congress and do not impose any significant costs on the private sector). Recent examples include USDA’s “Rural Broadband Access Loans and Loan Guarantees,” the Department of Education’s “Federal Pell Grant Program,” and the Department of Defense’s “TRICARE: Reimbursement of Sole Community Hospitals.”

As this Committee well knows, regulatory agencies are not free agents; they can only do what Congress has authorized them to do, and often Congress is quite specific about what it wants, leaving little or no discretion to the agency. Examples of recent rules where an agency simply followed the provisions of the authorizing act – virtually no discretion was provided for, or exercised by, the agency – are the VA’s Choice rule mentioned earlier and DOT’s “Pilot Certification and Qualification Requirements” rule, which was the one rule reviewed by OIRA that had estimated costs greater than estimated benefits. In the 1990’s, I recall that the Government Accountability Office found that many of the regulations that businesses found most burdensome were required by the terms of the underlying statute; notwithstanding that information about the statutory requirements had been widely known for some time, Congress had not addressed the source of the problem, but nonetheless continued to criticize the agencies’ implementation of its mandate.

To be sure, the agencies also issue regulations where they have discretion (often substantial discretion) under the authorizing act, and each year there are several dozen such regulations that are controversial, some of which are very controversial. It is these regulations that typically produce an outcry from regulated entities, which are often quite vocal about the need for relief from proposed regulations, particularly when there are policymakers who are receptive to such pleas. During my tenure at OIRA, I often heard heartfelt claims that a proposed regulation would bring their industry to its knees or prevent them from providing a product or service that is essential to the nation’s well being. I also heard genuine concerns that the government was overreaching or going out of control. I did not doubt their sincerity, even though during my tenure, so far as I know, no industry was destroyed by the rules we issued.

But this reaction to proposed regulations is not new. In a recent book on Victorian England, I read that there was great concern when the police were given the authority to direct traffic and they created a separation between those traveling in opposite directions (e.g., northbound traffic was to stay on one side of the road; southbound traffic on the other). Contemporary reports indicated there were quite vociferous objections against the police exercising such power. And every student of American political history will recall the resistance in our own country to regulations that we now take for granted – like restrictions on child labor, standards for cleanliness in meat packaging plants, prohibitions on adulteration of foods, or requirements for safety and efficacy testing for our medicines. I recall one of the biggest pushbacks in the 1970’s and 80’s was against proposed regulations requiring passive restraints in automobiles (e.g., air bags) that the automobile companies fought at the National Highway Traffic Safety Administration, in the White House, in Congress, and all the way

to the Supreme Court. Today, many automobile companies advertise how safe their cars are by driving into brick walls (and the dummy survives thanks to the air bag).

I understand that one's view of the merits of a particular regulation may well turn on whether it comes from the perspective of the regulated entity or the intended beneficiary of the regulation. Consider, for example, the Department of Health and Human Service's rule on "Gluten-Free Labeling of Foods," or the Department of Energy's "Energy Efficiency Standards for Microwave Ovens," or the Department of Labor's "Affirmative Action and Non-Discrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans." These rules were viewed as unnecessary and burdensome by some, but by others as important to their health and safety, or consistent with our nation's long-held values.

In any event, while reasonable people may disagree about whether any or all of the above are "good" rules or "bad" rules, there is general agreement on a relatively objective tool for evaluating regulatory proposals – namely, cost/benefit analysis. When someone says "cost/benefit analysis," people tend to look away or their eyes glaze over. The analysis itself – that is, the actual work product – may be complicated, highly technical and often difficult to follow, but the concept is quite simple. It is a way to think about the consequences of a proposed action and then try to translate diverse consequences into the same metric – typically money – so we can evaluate whether the proposal is, on the whole, good for us or not. We do this every day of our lives, whether it is for something trivial (walk or take a taxi) or significant (purchase a home or launch a new business), with the extent of the analysis roughly commensurate with the importance of the decision we are trying to make.

Requirements for cost/benefit analysis to inform, or support, important regulatory proposals adopted through rulemaking have been around at least since President Nixon established a "Quality of Life Review" program for certain high-profile regulations. Beginning in 1981 with President Reagan's Executive Order 12291, all Presidents (both Republicans and Democrats) have required regulatory agencies within the Executive Branch (both Cabinet Departments and stand-alone agencies like EPA) to assess the costs and benefits of proposed actions, and, among other things, to the extent permitted by the laws that Congress has enacted, ensure that the benefits of the intended regulations justify the costs. The requirements to undertake this economic analysis and to submit it along with a draft proposed or final rule to OIRA, which are the foundational principles of President Clinton's Executive Order 12866 (reaffirmed by President Obama in Executive Order 13563), were designed to make sure that the agency has thought through, in a disciplined and rigorous way, the obvious and the less

obvious costs and benefits that are likely to occur if the proposal is adopted and has the force and effect of law. Needless to say, I strongly support cost/benefit analysis.

Over a decade ago, Congress asked OMB to compile the information it had on the costs and benefits of the major regulations issued by federal regulatory agencies in that year and for the preceding ten years, and to provide that information (on an annual basis) to the Congress. OMB's draft 2014 Report to Congress – the most recent report available to the public – provides data on the costs (\$57-\$84 billion) and the benefits (\$217-863 billion) of major rules issued by Executive Branch agencies over the most recent ten-year period (FY 2003-2013). Even if one uses the highest estimate of costs and the lowest estimate of benefits (and this is only monetized benefits), the regulations issued over the past ten years have produced *net benefits* of at least \$133 billion to our society. This cannot be dismissed as a biased report by the current administration, because OMB issued reports with similar results (benefits greatly exceeding costs) throughout the George W. Bush Administration (e.g., for FY 1998-2008, major regulations cost between \$51 and \$60 billion, with benefits estimated to be \$126 to \$663 billion dollars).

There are, of course, significant limitations to the estimates in the OMB Report, which OMB is quick to acknowledge (e.g., “[m]any rules have benefits or costs that cannot be quantified or monetized with existing information” and “[i]n some cases, quantification of various effects is highly speculative” (citing the benefits of certain disclosure requirements) or “particularly challenging” (citing protection of homeland security or personal privacy)). Nonetheless, what these data make clear is that regulations, at least over the past several decades, have generally benefitted, rather than harmed, our nation. They have improved the quality of our lives in various ways – some in trivial, some in very significant, ways. They should not, therefore, be thought of as an evil to be contained or rendered ineffective.

One more thought before leaving the subject of the number of regulations, either new regulations or total regulations. It is not as though there is some optimal number of regulations, some number that, if exceeded, in any given year or over a period of years, would be detrimental or destructive of our society and below which, we could all breathe a sigh of relief. Our society does not stand still, and neither should our protections from unexpected (or unintended) threats. A recent chemical spill in West Virginia led to a declaration of a state of emergency (including the relocation of families and warnings about drinking, bathing or cooking with tap water affecting thousand of families) as well as to calls for filling the regulatory gaps in our chemical control laws. Should those calls go unheeded and risk another spill? It is difficult to say when

something benign becomes problematic or when an emerging technology warrants the development of a sensible framework, either under existing or new legislation. Derivatives were creative and exciting until they contributed to the financial crisis at the end of the last decade. And drones were not a problem until they became one by potentially interfering with commercial airlines and falling on peoples' property. Should we draw the line on any new regulations and not address emerging problems? Or should we continue to protect ourselves but take care that when we do regulate, we do so consistent with sound regulatory policy and processes? I would choose the latter course of action.

Regulatory Impact Analyses

I mentioned earlier that under existing Executive Orders, agencies assess the costs and benefits of their regulatory proposals and, to the extent feasible, provide a quantification of those costs and benefits to ensure that the benefits of a proposed rule justify its costs. Agencies are also to consider various alternatives to achieve their objective(s), choosing the alternative that maximizes net benefits. This analysis, with the underlying data, are typically included in the Regulatory Impact Analysis (RIA), which frequently accompanies the NPRM and is an important part of the "final rule package" that is reviewed by OIRA and made available to the public with the publication of the final rule.

RIAs are very important, not only for what the final RIA says about the final rule, but also because of the value of going through the process of preparing the RIA. Gathering the relevant data and structuring the analysis help the agency staff refine its thinking in drafting the proposal; the presentation of the analysis to the agency decision-makers can reinforce existing assumptions or it can cause rethinking of conventional wisdom; the review of the analysis by the OIRA staff provides a dispassionate second opinion and quality control for the analysis; and the availability of the data and the analysis throughout the process enables the various stakeholders, their elected officials and the public generally to evaluate in a more objective way the merits of the regulatory action – what is at stake and for whom?

To be sure, the quality of the work done by these agencies –how solid or how sophisticated the economic analysis is – is mixed, with some agencies doing very good work on some rules and the same agencies or other agencies producing RIAs that are appreciably less thoughtful or less informative on other rules. Some scholars and economic experts have studied selected agencies and given them mediocre (or even failing) grades, but others have been generally complimentary while suggesting areas

for improvement. This should not be surprising because agencies are very different from one another, with different missions, different cultures, and different resources. The latter is particularly important in the case of economic analysis because thoughtful, careful, comprehensive analysis takes time and resources, and the more significant the proposed regulatory action, the more time and resources it should consume. Stated another way, this exercise is not cost free, and today many agencies are faced with straight-lined or shrinking budgets that make investment in additional serious, rigorous analysis very difficult, if not impossible.

While I do not disagree with those who say that the agencies could and should do a better job in their analyses (and particularly that the work could and should be better integrated with their decision making), I am struck by the fact that virtually all Executive Branch agencies have come a very long way from the early 1980's when they were first required to do these analyses. During my tenure at OIRA in the 1990's, some agencies were still resistant to the value of doing such an analysis; others had taken the first steps but did not yet have the expertise or experience to make much headway; and others were able and willing to learn from the guidance and advice provided by OIRA. It might surprise some of the critics, but the most serious and competent agency was EPA, which, along with DOT, probably devoted the most time and resources to the process. Today, EPA and DOT still do generally good work, and more and more agencies are becoming more and more proficient. Some might wish for greater or faster progress, but change in any large institution often comes haltingly, and, as noted earlier, improvement in this area requires resources that agencies often do not have to devote to this process, particularly in the last few years. Guidance from OIRA (e.g., Circular A-4), constructive criticism from stakeholders or others, and incentives are all useful, but, realistically, this is something that will change over time and not overnight.

Retrospective Review of Existing Rules

For as long as I have been involved in this arena, there have been complaints that there is too much red tape and too many rules, and that so many of them are obsolete, unnecessarily burdensome, unworkable, or just plain wrong. This was one of the themes President Reagan campaigned on, and, after his election, he set on a course to deregulate. President George H.W. Bush followed the same path, with his Competitiveness Council searching the existing stock of regulations for those that could be eliminated.

President Clinton, early in his administration, signed Executive Order 12866.

Section 5 of the Order was premised on the conventional wisdom: that there may be rules that “have become unjustified or unnecessary as a result of changed circumstances . . . [or are] duplicative or inappropriately burdensome in the aggregate . . .” Agencies were required “to submit to OIRA a program . . . under which [they] will periodically review existing significant regulations to determine whether any such regulations should be modified or eliminated . . .” In addition, Vice President Gore led the National Performance Review, one component of which was a retrospective review of existing regulations.

During my tenure as Administrator of OIRA and then Deputy Director of Management at OMB, we found some rules we were able to eliminate or modify. But the primary lesson I learned was that there was not a lot of low-hanging fruit and, more importantly, there were not very many candidates that would produce great savings. One of the realities is that the bulk of the costs of many regulations came in the initial implementation, and these costs had already been sunk, whether it was ten years ago or ten months ago. So if we took seat belts out of cars or scrubbers out of smokestacks (not that I favor either of those), it would cost (rather than save) industry to change the assembly line or rebuild the facility. There could be savings from curtailing on-going operating and maintenance expenses, or continuing monitoring or reporting costs, although the latter at least were being reduced significantly as most businesses transitioned from manual reporting to electronic reporting. While these potential savings were not of the magnitude envisioned, they were certainly worth pursuing.

The bottom line, however, is that we undertook a review of existing regulations and called on all the agencies to be partners in the project. And then President George W. Bush undertook a review of existing regulations. And then President Obama launched a review of existing regulations.

Having lived through several iterations of this exercise, I have the distinct impression that the current effort is being pursued much more aggressively than any of its predecessors. Like Clinton, President Obama included a review of existing rules in his regulatory review Executive Order 13563; indeed, it was a featured piece in the accompanying press release and fact sheet. And then he issued two other Executive Orders on the subject (EO 13579 for Independent Regulatory Commissions and EO 13610 for Executive Branch Agencies), and the President spoke of the importance of the initiative at a Cabinet Meeting. Meanwhile, OIRA issued guidance to the agencies and followed that up with several memoranda and data calls.

In roughly the same time period, the Administrative Conference of the United States (ACUS) picked up the subject for review and commissioned a consultant's report. (Joseph E. Aldy, *Learning from Experience: An Assessment of Retrospective Reviews of Agency Rules & the Evidence for Improving the Design and Implementation of Regulatory Policy*, Nov 2014.) At the Plenary Session in December 2014, ACUS adopted a recommendation outlining best practices for agencies to follow in reanalyzing and modifying existing regulations, with the objective of promoting "a culture of retrospective review at agencies." Among other things, it "urges agencies to plan for retrospective review when drafting new regulations; highlights considerations germane to selecting regulations for reevaluation; identifies factors relevant to ensuring robust review; and encourages agencies to coordinate with the Office of Management and Budget, other agencies, and outside entities (including stakeholders and foreign regulators) when designing and conducting retrospective reviews." Importantly, ACUS recognized the substantial cost of performing robust retrospective reviews and specifically noted that it was critical that agencies have adequate resources for the task.

To be successful, an effort such as this requires serious and persistent leadership, which the President has certainly shown. It requires methodological and analytical know-how, which both OIRA and ACUS are providing. It also needs the constructive engagement of the regulated entities – who better to identify the specific rules that are problematic? (Too often, regulated entities have complained about overregulation as a general condition but have not singled out specific rules where a strong case can be made that they can be modified or eliminated without compromising legitimate regulatory objectives.) Apparently the Administration is beginning to reach out to external stakeholders who can contribute constructively to the process, so perhaps this ingredient will no longer be missing.

Sadly, one essential element is still not there: resources. As noted above, the last few years have seen agency budgets straight-lined or decreasing, with the situation compounded by Continuing Resolutions and sequestration. But absent resources, the best intentions may not take us where we want to go.

* * * * *

As noted above, this hearing is to provide an overview of the regulatory state and future hearings will consider some of the proposed solutions to the perceived problems. I hope I am not getting ahead of myself, or you, but based on my experience in the field and what you are hearing today, I wanted to offer some general concluding

thoughts that might provide a useful framework for evaluating the various regulatory reform bills that will likely be referred to this Committee over the next few years.

I fully recognize that Congress, unlike federal agencies, is not constrained (other than by the Constitution) from enacting legislation that it deems salutary. Nonetheless, as a prudential matter, I think that before this Committee endorses a particular regulatory reform bill, it should ask (and answer) the same foundational questions that an agency should confront (and satisfy) before taking regulatory action – what is the compelling need and how significant is it, what is the particular problem that should be addressed, what is causing the problem, will the proposed action remedy the problem in an effective and efficient way, what are the other likely consequences (intended as well as unintended) of adopting the proposal, and are there available alternative ways of achieving the desired objective.

It is worth noting that Congress has imposed a series of process and analytical requirements on the federal agencies over the last 30 years, including the Paperwork Reduction Act, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, and the Unfunded Mandates Reform Act, to name just a few, without substantially increasing agency funding to carry out the tasks assigned in those statutes. Doing more with the same or less is unsustainable over the long run. Even now, it takes years rather than months for most agencies to dot all the I's and cross all the T's necessary before issuing a final rule. Adding additional requirements will undoubtedly further encumber the process, if not lead to paralysis by analysis. Perhaps before adding another set of requirements and making it more difficult for even the most desirable rules to be issued, Congress should rationalize the current set and/or provide more resources to the agencies to do what they are already required to do.

It is also important to note that Congress has available many alternatives to legislation, including hearings and other oversight tools, by which to monitor agency activity, evaluate current practices, spotlight any deficiencies, and bring public pressure to improve agency performance if that is what is called for. Among other things, you would then be able to identify the “bad actors” or the most problematic rules and explore why those situations exist. Such a targeted response would be far more efficient (and likely more effective) than some of the very broad regulatory reform proposals that will come before this Committee that apply, by their terms, across the board to all federal regulatory agencies – from the USDA and EPA to DHS and DOD – even though they have very different missions and very different resources. Clearly a one-size-fits-all proposal would have wildly disparate effects, not only on the different agencies, but also on the different types of rules that are developed by these agencies.

I have tried today to emphasize that regulations are an important and valuable force in our society and are the reason that the air we breathe and the water we drink is clean, our foods and medicines are safe, our workplaces are secure, our markets operate as advertised, and our values are embodied in both our public and private institutions. The system that has produced these regulations is the most transparent system in the world. Agencies give notice of what they intend to do, those affected are afforded an opportunity to provide input, and agency action is subject not only to congressional review but also judicial review which is subject to well established criteria for procedural fairness and substantive support. Every system has problems and can be improved, but I hope that by looking at the problems presented, you will not lose sight of the big picture – the U.S. administrative state in the envy of the world and a 21st century regulatory system should build on our progress and our successes.

Thank you again for giving me an opportunity to speak to these issues. I look forward to any comments or questions you may have.

**Post-Hearing Questions for the Record
Submitted to Douglas Holtz-Eakin, Ph.D.
From Chairman Ron Johnson**

**“Toward a 21st-Century Regulatory System”
February 25, 2015**

1. In your written testimony, you discuss several principles for regulatory reform, one of which is to "codify the current informal executive orders on cost-benefit analysis and apply those principles to every federal agency." Given the impact that regulations imposed by independent agencies have on our economy, should those principles be applied not only to Executive Branch agencies, but to the independent agencies as well?

I believe they should be applied to independent agencies and there are few compelling reasons why the U.S. should abdicate good governance principles for these agencies. For example, Dodd-Frank, with regulations mainly promulgated by independent agencies, has imposed \$20 billion in final rule costs, with more than 59.6 million paperwork burden hours. Some independent agencies have cost-benefit requirements in their authorizing statutes, but there is no reason the U.S. should have a patchwork of cost-benefit procedures across the federal government. If sound regulatory analysis and oversight are good enough for cabinet agencies, we should apply them to independent agencies as well.

2. In your written testimony, you discuss several principles for regulatory reform, one of which is to "codify the current informal executive orders on cost-benefit analysis and apply those principles to every federal agency." Given the impact that regulations imposed by independent agencies have on our economy, should those principles be applied not only to Executive Branch agencies, but to the independent agencies as well?

See response to question one above.

3. Do you think that independent agencies' proposed rules should be subject to review by OIRA? Would such review improve the independent agency rulemaking process?

Although OIRA is already understaffed, at least compared to historical norms, if these staffing issues are addressed, additional oversight of independent agencies would aid the rulemaking process. There is already research supporting the notion that rules with significant OIRA oversight generally have more complete regulatory impact analyses. By investing more work in the front-end of the process, regulators and OIRA can raise the chances that regulation actually solves the intended problem at an acceptable cost.

There are potential legal issues that Congress might need to address before extending OIRA review to independent agencies. Many scholars maintain that it would be illegal for the executive branch to force independent agencies to submit rules to OIRA currently. However, Congress can address this with specific regulatory reform language.

**Post-Hearing Questions for the Record
Submitted to Douglas Holtz-Eakin, Ph.D.
From Senator Claire McCaskill**

“Toward a 21st-Century Regulatory System”

Wednesday, February 25, 2015

In your opening statement, you discuss the costs of regulations on the economy, and note that those costs must be borne by someone. This is true, but it ignores the economic benefits that may result from regulations as well. Clean Air Act regulations, for example, required energy giant American Electric Power to hire over 1,000 people to build a pollution scrubber for one of its coal-fired power plants and an additional 40 people to monitor the scrubber.¹ PSE&G hired 1,600 people to install scrubbers at two coal plants and 24 additional people to monitor the scrubbers.² In fact, as recently as 2008, the United States had an \$11 billion trade surplus in environmental technology arguably because of environmental regulations.³

In other words, everything that Government does in some way reduces the efficiency of markets, but not necessarily the number of jobs or the non-economic benefits to society as a whole.

- 1) Should we be more focused on the net analysis to the economy of regulations, which, by some estimates reaches \$800 billion, rather than the volume of regulations or their impact to any one particular sector of the economy?

There is agreement that society should care about the net between benefits and costs of regulation. However, the need to hire and pay workers is *not* a benefit. On balance, regulations transfer employment from highly regulated industries to less regulated industries. For example, in EPA’s “Clean Power Plan,” the agency claims it will create 78,000 jobs, but at a cost of \$390,625 per job. This compares to an average household income of \$52,250 nationwide. Furthermore, if EPA’s claims of 78,800 new jobs by 2020 are true, the nation would need to spend more than \$30 billion to generate this employment growth. Those resources have to come from other parts of the economy. I don’t believe regulations should not be viewed as a jobs

¹ *Does government regulation really kill jobs? Economists say overall effect is minimal*, Washington Post (Nov. 13, 2011).

² *Id.*

³ U.S. Department of Commerce International Trade Administration, *Environmental Technologies Industries: FY2010 Industry Assessment*.

engine, but as a way to correct proven market failures at an acceptable cost. As recent history has proven, these costs are escalating.

- 2) How concerned are you that, in limiting federal regulations, we end up with a patchwork of state regulations which is less efficient and more burdensome of commerce that is increasingly conducted interstate and internationally?

The goal is to control excessive, outdated and redundant federal regulations. Doing so would generate no need for states to add regulations. Moreover, there is already a patchwork of state regulations. From an interstate commerce perspective, there are advantages to a national minimum standard, as the Constitution envisions.

Too much federal regulation, without extensive retrospective review, can create a far worse scenario: too much duplication between the federal government and local governments and within the federal government. President Obama has highlighted this duplication in the past and it was one motivating factor behind his decision to issue several executive orders on regulatory reform.



April 2, 2015

The Honorable Ron Johnson, Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Chairman Johnson:

Thank you for the opportunity to testify on February 25 at the hearing “Toward a 21st Century Regulatory System.” I’m delighted to provide answers to the post-hearing questions you posed in your letter of March 12.

1. OMB’s annual report to Congress on the benefits and costs of regulations is often used as evidence to support the conclusion that the benefits of federal regulations exceed the costs. Considering that this report examines only agency estimates of benefits and costs, how credible is this conclusion?

The annual OMB report is not a reliable guide to whether the benefits of federal regulations exceed the costs or vice versa. There are several reasons for this:

- The annual OMB report contains no information about the benefits and costs that actually occurred as a result of federal regulations. Rather, it is a compendium of agency estimates from regulatory impact analyses conducted before regulations were implemented.
- Many of these benefit and cost estimates are unreliable, because many regulatory impact analyses are seriously incomplete.
- The annual report includes only the estimated benefits and costs of regulations implemented in the previous 10 years.
- Even for major regulations, agencies do not always produce monetized estimates of benefits and costs. For example, for fiscal year 2013, the most recent year covered in the most recent OMB report, just seven out of 54 major regulations had monetized estimates of both benefits and costs.¹
- The vast majority of federal regulations are not considered in the report, because it only considers regulations classified as “major” or “economically significant.” As my colleague James Broughel noted in comments on the most recent draft report,

In the last decade, 33,982 rules issued by agencies escaped OMB review altogether, leaving roughly 92 percent of the regulatory system completely outside of the OMB’s purview. Of the 3,040 rules that the OMB reviewed, slightly less than 4 percent (116 rules) have dollar

¹ James Broughel, “OMB Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities” (public interest comment, Mercatus Center at George Mason University, Arlington, VA, 2014), 5, available at <http://mercatus.org/publication/omb-2014-draft-report-congress-benefits-and-costs-federal-regulations-and-unfunded>. Of the 54 major regulations, 30 were budget regulations. All but one of the budget regulations monetized the full amount of the income transfers.

estimates of both benefits and costs appearing in the OMB's report. It is difficult to take the figures about benefits and costs seriously when such a tiny fraction of rules are included in the report. The OMB should explicitly state in its report that it can't say for certain whether benefits exceed costs during the time frame analyzed or in any particular year.²

In the policy debate over regulation, one frequently hears that benefits are harder to estimate than costs. Some people believe that benefits of regulation are usually harder to estimate than costs because costs are merely money spent by regulated entities, whereas benefits often involve difficult-to-value things such as clean air or the protection of endangered species. This belief confuses monetary outlays with social-opportunity costs. The benefits of a regulation are the ultimate outcomes that improve citizens' quality of life. The costs of a regulation are the good things society must forego as a result of the regulation. Properly understood, both benefits and costs can be difficult to measure and convert into monetary terms. Whether one is more difficult than the other depends on the regulation.

Monetary outlays for paperwork and compliance are part of the cost of regulation but by no means the entire cost. For example, the enhanced security procedures at airports in the wake of the September 11 terrorist attacks clearly had substantial economic costs. But they also increased waiting time for passengers. The value of this time is a cost of the regulation. As a result of the increased ticket prices and delays, some travelers substituted driving for flying on shorter trips, and driving is riskier than flying.³ More generally, a regulation may be intended to reduce one type of risk, but it also increases some other type of risk, and that increased risk is a cost.⁴ Thus, the correct estimation of the social cost of a regulation can require assessments of cause-and-effect relationships and monetary valuation challenges that are every bit as difficult as those involved in estimating benefits.⁵

2. Should all agencies be held to the same standards for regulatory impact analysis, given that they have diverse missions, authorizing statutes, and decision-making authority?

All agencies should be held to the same standard enunciated in President Clinton's Executive Order 12866: "Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information regarding the need for, and consequences of, the intended regulation."⁶ If enforced consistently, this standard requires agencies to use in their analysis the best scientific, technical, economic, and other information available given the state of current research, but it also avoids requiring agencies to perform analysis that is impossible given the current state of knowledge. Any statutory requirement for regulatory impact analysis should include this standard.

The "best reasonably obtainable information" standard is flexible enough to accommodate differences in the state of the art for evaluating different types of regulations. In some cases, the quality of agency analysis varies depending on the subject matter of the regulation. Statistical analysis of scoring data from the Mercatus Center's Regulatory Report Card finds that

² Ibid., 4.

³ Garrick Blalock, Vrinda Kadiyali, and Daniel H. Simon, "The Impact of Post-9/11 Airline Security Measures on the Demand for Air Travel," *Journal of Law & Economics* 50, no. 4 (November 2007), 731–56.

⁴ Cass Sunstein, "Health-Health Tradeoffs," *University of Chicago Law Review* 63, no. 4 (Autumn 1996), 1533–71.

⁵ The Mercatus Center has developed a survey instrument called the Regulatory Cost Calculator that agencies and stakeholders can use to gather more accurate information about costs. For more information, see <http://mercatus.org/publication/regulatory-cost-calculator>.

⁶ EO 12866, §1(b)(7).

environmental regulations tend to have slightly better analysis than other regulations and budget regulations tend to have much worse analysis than other regulations.⁷

If anything, administration of this standard under the executive order may be too flexible. Budget regulations can generate significant benefits and costs via price distortions and mandates and prohibitions attached to the spending.⁸ Nevertheless, the OMB review focuses on ensuring that the budget numbers are correct rather than assessing the (potentially substantial) benefits and costs that occur when federal spending of revenue collection alters incentives.⁹ As a result, decisions about budget regulations are made with little information about overall social benefits and costs.

It would be a mistake to conclude that the “best reasonably obtainable information” standard as implemented by executive order and enforced by OIRA review is sufficient to ensure uniformly high-quality analysis. Scholarly research cited in my written testimony, including the Mercatus Center’s Regulatory Report Card, finds that many regulatory impact analyses are seriously incomplete, and their quality varies widely. Much of the variation that has survived OIRA review occurs for highly questionable reasons:

- Administrations of both parties appear to require less thorough analysis from agencies that are more central to the administration’s ideology or policy priorities. The Bush administration, for example, permitted the Department of Homeland Security to proceed with a number of regulations that were accompanied by very incomplete regulatory impact analysis; the Obama administration did likewise with the first major regulations implementing the Patient Protection and Affordable Care Act.¹⁰ This same pattern appears to occur with other agencies.¹¹ As Donald Arbuckle, who served as deputy and acting OIRA administrator, put it, “In a head-on battle between analysis and politics, politics will generally win.”¹²
- “Midnight” regulations, defined as those that are finalized at the end of a presidential term between Election Day and Inauguration Day, tend to have lower-quality analysis and less extensive explanations of how the agency used the analysis in its decisions.¹³

⁷ Patrick A. McLaughlin and Jerry Ellig, “Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Bush II Administration,” *Administrative Law Review* 63 (2011), 179–202; Jerry Ellig, Patrick A. McLaughlin, and John F. Morrall III, “Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across U.S. Administrations,” *Regulation & Governance* 7 (2013), 153–73; Jerry Ellig and Christopher J. Conover, “Presidential Priorities, Congressional Control, and the Quality of Regulatory Impact Analysis: An Application to Health Care and Homeland Security,” *Public Choice* 161 (2014), 305–20.

⁸ Office of Information and Regulatory Affairs, *2009 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (2009), 18.

⁹ McLaughlin and Ellig, “Does OIRA Review Improve the Quality of Regulatory Impact Analysis?,” 188.

¹⁰ Jamie Belcore and Jerry Ellig, “Homeland Security and Regulatory Analysis: Are We Safe Yet?,” *Rutgers Law Journal* (Fall 2009), 1–96; Jerry Ellig and Christopher J. Conover, “Presidential Priorities, Congressional Control, and the Quality of Regulatory Impact Analysis: An Application to Health Care and Homeland Security,” *Public Choice* 161 (2014), 305–20; Christopher J. Conover and Jerry Ellig, “Rushed Regulation Reform” (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, January 2012); Ellig et al., “Continuity, Change, and Priorities”; Jerry Ellig and Rosemarie Fike, “Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, July 2013).

¹¹ Ellig et al., “Continuity, Change, and Priorities.”

¹² Donald R. Arbuckle, “The Role of Analysis on the 17 Most Political Acres on the Face of the Earth,” *Risk Analysis* 31, no. 6 (2011), 886.

¹³ McLaughlin and Ellig, “Does OIRA Review Improve the Quality of Regulatory Impact Analysis?,” Ellig et al., “Continuity, Change, and Priorities”; and Ellig and Fike, “Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis.”

- Regulations proposed during one president's term but left for the next administration to finalize tend to have lower-quality analysis and less extensive explanations of how the agency used the analysis in its decisions.¹⁴
- Regulations whose OIRA review concluded under an acting OIRA administrator rather than a presidential appointee tend to have less extensive explanations of how the agency used the analysis in its decisions.¹⁵
- Regulations that are more politically salient tend to have lower-quality analysis.¹⁶

In addition, independent agencies, which are not subject to Executive Order 12866, usually produce lower-quality analysis than executive branch agencies.¹⁷ A statutory requirement with judicial review to ensure that the analysis used the best reasonably obtainable information would help eliminate low-quality analysis that occurs for questionable—often political—reasons.

Finally, I doubt that the quality of analysis needs to be diminished to tailor the analysis to the agency's authorizing statutes and decision-making authority. The statutes that authorize the agency and/or the regulation define the extent of the agency's decision-making authority. An econometric analysis of Regulatory Report Card data reveals that the quality of analysis does not vary based on the extent of agency decision-making authority. The quality of the analysis is no different when the statute constrains agency authority by requiring the agency to issue a regulation, mandating the form of the regulation, or mandating the stringency or coverage of the regulation.¹⁸ This suggests that any aspect of the analysis that must be tailored to the specifics of the agency's decision-making authority can be addressed without diminishing the quality of the analysis.

3. Has the quality of regulatory impact analysis improved over time? Is there evidence that OIRA has helped improve the quality of agency regulatory analysis?

A study conducted by the President's Council on Wage and Price Stability on the eve of its abolition in 1981 pointed out that agencies often produce seriously incomplete analysis of the problem a regulation is supposed to address, the options available for addressing the problem, and/or the benefits and costs of alternatives.¹⁹ The quality of analysis may have improved in some ways since then. But the Regulatory Report Card reveals that many regulations are still accompanied by deficient analysis of these topics, and quality appears to have plateaued during the past 15 years.

¹⁴ Ibid.

¹⁵ Ellig and Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis."

¹⁶ Stuart Shapiro and John F. Morrall III, "The Triumph of Regulatory Politics: Benefit-Cost Analysis and Political Salience," *Regulation and Governance* 6 (2012), 189–206.

¹⁷ Arthur Fraas and Randall L. Lutter, "On the Economic Analysis of Regulations at Independent Regulatory Commissions," *Administrative Law Review* 63 (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.

¹⁸ Ellig and Conover, "Presidential Priorities, Congressional Control, and the Quality of Regulatory Impact Analysis," 315. The econometric analysis is in a downloadable appendix available at <http://mercatus.org/publication/presidential-priorities-congressional-control-and-quality-regulatory-analysis>. In a paper published several years ago, I speculated that narrow delegation of authority to agencies might explain lower-quality analysis (Belcore and Ellig, "Are We Safe Yet?," 38–41). The more recent econometric analysis shows that I was wrong.

¹⁹ Thomas D. Hopkins, Benjamin Miller, and Laura Stanley, "The Legacy of the Council on Wage and Price Stability" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, August 26, 2014), <http://mercatus.org/sites/default/files/Hopkins-Wage-Price-Stability.pdf>.

Several studies have assessed the quality of regulatory impact analyses during various time periods. Robert Hahn and coauthors used a numerical checklist to assess the quality of the Environmental Protection Agency's regulatory impact analyses conducted between 1982 and 1999. The analyses earned an average of 40 percent of the possible points, with no significant change over time.²⁰ Checklist evaluations of regulations issued from 2000 to 2009 have generated average scores in the 60–64 percent range.²¹

The Mercatus Regulatory Report Card, a qualitative evaluation with numeric scoring, produced similar results for the 2008–2012 time period. It is not clear if the higher scores since 2000 reflect improvement in the quality of analysis or simply differences in different researchers' scoring methods. Regardless, there has been no improvement in average Report Card scores from 2008 to 2012, which does not bode well for future analysis.

Empirical research finds that OIRA review is associated with higher-quality regulatory impact analysis and better explanation of how the agency used the analysis to inform its decisions. The quality and use of regulatory analysis is positively correlated with the length of OIRA review time.²² OIRA's influence in the administration (measured by whether the administrator is a political appointee or acting administrator) is positively correlated with claimed use of regulatory analysis.²³ Prescriptive regulations, whose regulatory impact analyses receive more intensive OIRA review, tend to have higher quality analysis than budget regulations.²⁴

Unfortunately, the quality of regulatory impact analysis still falls far short of the standards enunciated in Executive Order 12866 and OMB Circular A-4. Thus, while OIRA review has certainly helped improve agency analysis, further improvement will likely require legislation.

4. Would it be wasteful to eliminate or modify a regulation that businesses, states, or other regulated entities have already spent money to comply with? How could changing such a regulation be beneficial if the money to comply has already been spent?

The costs that regulated entities have already borne to comply with regulations are irrelevant to determining whether changing or repealing the regulation would be wasteful. Changing or repealing the regulation will not change the fact that these costs have already been incurred. This is why economists call them "sunk" costs. The relevant costs are the costs that changing the regulation would cause in the future. The relevant benefits are the benefits that changing the regulation would cause in the future. If the expected future benefits exceed the expected future costs, then it is efficient to change the regulation. If the expected future costs exceed the expected future benefits, then it is wasteful to change the regulation.

If a better alternative was available at the time the regulation was originally adopted, then the original decision to adopt the regulation was wasteful. High-quality regulatory impact analysis can help avoid this kind of waste.

²⁰ Robert W. Hahn and Paul C. Tetlock, "Has Economic Analysis Improved Regulatory Decisions?," *Journal of Economic Perspectives* 22, no. 1 (Winter 2008), 67–84; Robert W. Hahn and Patrick Dudley, "How Well Does the Government Do Cost-Benefit Analysis?," *Review of Environmental Economics and Policy* 1, no. 2 (2007), 192–211.

²¹ Art 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, no. 1 (2011), 71–85; Shapiro and Morrall, "The Triumph of Regulatory Politics."

²² Ellig and Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis"; Stuart Shapiro and John F. Morrall III, "Does Haste Make Waste? How Long Does It Take to Do a Good Regulatory Impact Analysis," *Administration and Society* 20, no. 1 (2013).

²³ Ellig and Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis."

²⁴ McLaughlin and Ellig, "Does OIRA Review Improve the Quality of Regulatory Impact Analysis?"

5. Do you know of any empirical research that would help predict how proposed reforms would change the quality of regulatory impact analysis or the quality of new regulations?

Proposed regulatory reforms include (1) requiring advance consultation with stakeholders, (2) requiring advance notices of proposed rulemaking for major regulations, and (3) requiring formal hearings for high-impact rules.

In a recent study using Regulatory Report Card data, Rosemarie Fike and I report several findings that shed light on the likely effects of these proposed reforms. Several types of actions that expand pre-proposal information gathering are associated with higher-quality analysis and greater claimed use of analysis in an agency's decision-making. These include a prior notice of proposed rulemaking in the same regulatory proceeding, a public request for information by the agency, and consultation with state, tribal, or local governments. In addition, when an agency commits to holding a hearing on a proposed regulation in the future, it does a better job of explaining how the analysis affected its decisions.²⁵

The research cited above on the effects of OIRA review implies that requiring independent agencies to conduct regulatory impact analysis, coupled with external review, would lead to better analysis by independent agencies. It also implies that providing OIRA with more staff and resources would help improve the quality of regulatory impact analysis.

To be effective, statutory reforms must have an effective enforcement mechanism. A Mercatus Center working paper by Stuart Shapiro and Deanna Moran found that four major legislative reforms enacted after the Administrative Procedure Act largely failed to achieve their substantive goals, such as reducing regulatory burdens.²⁶ The reason is that political compromises made to secure passage gave regulatory agencies substantial discretion in interpreting and complying with the statutes, and courts gave agencies' interpretations substantial deference. The reforms allowed elected leaders to claim they were fixing an economic problem without having to implement controversial changes, but they did not lead to significant substantive changes in regulation. For these reasons, it is doubtful that legislative reforms will lead to better or less costly regulation without a strong enforcement mechanism, such as judicial review.

I hope this additional information is helpful in the committee's deliberations over regulatory reform. Please feel free to contact me if I can provide any additional information.

Sincerely,

Jerry Ellig
Senior Research Fellow
Mercatus Center at George Mason University

²⁵ Ellig and Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis."

²⁶ The four reforms are the Regulatory Flexibility Act, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the Small Business Regulatory Enforcement Fairness Act. See Stuart Shapiro and Deanna Moran, "The Questionable History of Regulatory Reform Since the APA" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, March 2015), <http://mercatus.org/sites/default/files/Shapiro-Reg-Reform-APA.pdf>.

**Responses to Post-Hearing Questions for the Record
From Dr. Michael Mandel
Chief Economic Strategist
Progressive Policy Institute**

Questions for Michael Mandel from Sen. McCaskill

During the hearing, you discussed the inability of agencies to adequately conduct retrospective review of existing regulations. But the Government Accountability Office (GAO) has found the opposite, actually. In fact, they found that when executive agencies report on the progress of their retrospective analyses, such analyses resulted in the agencies amending sections of the Code of Federal Regulations (CFR) to revise, clarify, or eliminate regulatory text over 90 percent of the time. Moreover, these changes are often considered to be additional rules themselves because they can require notice and comment periods.

- 1) Is it possible that agencies are simply not getting enough credit for the retrospective reviews that they are already conducting?
- 2) Since agencies have issue-area expertise that neither Congress nor the courts possess, should we consider establishing an office within agencies devoted to retrospective review?

Response to Question 1:

The agencies do conduct retrospective reviews as part of their ongoing business, as well as in response to President Obama's Executive Orders. They do deserve credit for these actions.

However, a recent analysis (Aldy, 2014) looked carefully at the recent history of retrospective reviews, and he found them wanting. He wrote:

In 2014, executive branch agencies issued 24 major rules, only two of which were identified as the products of retrospective review under Executive Order 13563. Less than one-third of the rules were issued with monetized benefits and costs, and not one regulation included a plan for retrospective review of the rule in the future. (page 49)

The agencies cannot be blamed for the relative weakness of their retrospective review efforts. They are dealing with tight budget constraints and other competing priorities, including creating new regulations. Moreover, doing a full scale retrospective review of a major regulation can be very expensive, often requiring the collection of original data. GAO (2014) reports that:

Seven of the nine agencies cited competing priorities, particularly in a constrained budget environment, as a significant challenge to conducting retrospective regulatory analyses. Specifically, they referred to having a limited number of staff with the needed expertise to conduct retrospective analyses and other regulatory activities that are also among their agencies' priorities.

For these reasons, I believe that we need regulatory review procedures in addition to the agency-based retrospective review. In particular, I view the Regulatory Improvement Commission, as originally proposed in Mandel and Carew (2013), and later incorporated into recent legislation, as an essential supplement to the retrospective review efforts of the agencies, not as a replacement.

Response to Question 2

Retrospective regulatory review, as currently applied in practice, is agency-specific. Each agency reviews only its own regulations. An office within each agency would help this agency-specific retrospective review.

However, as noted in the response to question 1, it is expensive for agencies to conduct internal retrospective review efforts, especially for major regulations. Such regulations require major data collection efforts. A dedicated office would not reduce the expensive of such retrospective review efforts.

Perhaps more important, setting up dedicated review offices within each agency would not address the problem of the overall regulatory burden. Currently each agency focus only on its own regulations, without worrying about whether consumers or businesses are being hit by overlapping or related regulations from other agencies. A 2012 letter from then OIRA chief Cass Sunstein (Sunstein 2012) requested that agencies consider the “cumulative effects of regulation,” but there is no evidence that any do.

That’s why it’s important for there to be a central “point of complaint”—perhaps the Regulatory Improvement Commission, perhaps OIRA—which is charged with collecting complaints about federal regulations across all agencies (including the interactions with state and local regulations) and assessing their cumulative impact. Setting up new offices within agencies dedicated to retrospective review might be beneficial, but would not solve this larger problem

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**Post-Hearing Questions for the Record
Submitted to the Hon. Sally Katzen
From Chairman Ron Johnson**

**“Toward a 21st-Century Regulatory System”
February 25, 2015**

1. When you ran OIRA, do you think federal agencies' rulemaking process benefitted from your office's review of a proposed regulation? Wouldn't the rulemaking processes of independent agencies benefit from that review as well?

A. I definitely think that Executive Branch agency rulemakings benefit from OIRA review at both the proposed and final rule stage, and I think the rulemakings of independent regulatory commissions would similarly benefit from such review.
2. Do you think independent agencies engage in the same rigorous cost-benefit analyses as the Executive Branch agencies whose regulations are subject to OIRA's review? If not, do you think that independent agencies would engage in more robust cost-benefit analyses if their rules were subject to OIRA review?

A. I think that, overall, the independent regulatory commissions do not engage in the same rigorous cost-benefit analyses in their rulemakings as Executive Branch agencies whose regulations are subject to OIRA review, and I think that the independent regulatory commissions would engage in more robust cost-benefit analyses if their rules were subject to OIRA review.
3. Based upon some of your previous writings, is it safe to assume that you would support subjecting independent agencies to OIRA's regulatory reform process?

A. I support extending the requirements for economic analysis and OIRA review to the independent regulatory commissions so long as there is a recognition in the process of the differences between the two types of agencies in terms of their structure and their relationship to the President nature and, in addition, there is an increase in resources for OIRA commensurate with such increased responsibilities.
4. What can Congress do to make clear that the Administration should subject independent agencies to OIRA's regulatory review process?

A. I believe that the President already has the authority to extend the requirements for economic analysis and OIRA review to the independent regulatory commissions, but I appreciate that there is not consensus on the issue in the legal community and that there is considerable skepticism among many Members of Congress about the President's authority to take unilateral action generally. Accordingly, I would recommend that Congress adopt a Sense of the Congress or a Joint Resolution recognizing the President's authority to extend these requirements to the independent regulatory commissions.

Alternatively, I believe the framework set out in the Portman-Warner bill of the last Congress is an appropriate and constructive measure.