

**REVIEWING THE OFFICE OF INFORMATION AND
REGULATORY AFFAIRS' ROLE IN THE
REGULATORY PROCESS**

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY AFFAIRS AND FEDERAL
MANAGEMENT

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

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REVIEWING THE OFFICE OF INFORMATION AND REGULATORY AFFAIR'S ROLE IN THE REGULATION PROCESS

WEDNESDAY, JULY 16, 2015

U.S. SENATE,
SUBCOMMITTEE ON REGULATORY,
AFFAIRS AND FEDERAL MANAGEMENT,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:34 p.m., in room SD-342, Dirksen Senate Office Building, Hon. James Lankford, Chairman of the Subcommittee, presiding.

Present: Senators Lankford, Portman, Enzi, Ernst, Sasse, and Heitkamp.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Good afternoon. It is always nice to start a hearing on government efficiency 30 minutes late. We had a series of votes and I apologize we were delayed a little bit in getting started for that.

This is the fourth in a series of hearings and roundtables in which the Subcommittee continues to examine the issues and solutions surrounding today's regulatory state. Today we will hear about the Office of Information and Regulatory Affairs (OIRA), and the essential role that it plays in the Federal regulatory process.

OIRA was created by Congress in 1980. It is an agency situated in the White House's Office of Management and Budget (OMB). At that time OIRA's primary role was to review government collections of information under the Paperwork Reduction Act (PRA). Since then, however, under various Executive Orders (EOs), OIRA's role has expanded to include reviewing drafts of significant regulations at their proposal and final stages, as well as significant guidance, documents, and retrospective review plans.

OIRA is also charged with coordinating interagency compliance with laws to better ensure the quality of information use, such a broad array of duties. One may assume OIRA's office may be as large as those agencies it oversees. After all, the office reviews between 500 and 700 rules annually. But OIRA is a very small shop with around 47 employees. Am I right on that? Those employees are highly skilled with advanced degrees in their fields and are greatly respected by Congress for what they do.

Due to its centralized role in overseeing agency rulemaking, OIRA has been called the Executive Branch's information aggregator and the gatekeeper to the regulatory process. Indeed, OIRA is uniquely positioned to ask agencies tough questions to ensure that the regulations it reviews are as nimble as possible and meet agencies objectives in the least costly manner and build consensus within the Federal Government's regulatory process.

The helm of OIRA is its Administrator, Howard Shelanski, who is here with us today. I want to welcome Mr. Shelanski. I look forward to speaking with him about OIRA's many and varied functions which prove to be integral to the efficiency and the quality of the regulatory process. First I would like to recognize Ranking Member Heitkamp for her opening remarks.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. Thank you, Mr. Chairman, and in the interest of time, I am going to ask that the text of my opening comments be submitted to the record.¹ But I want to welcome the Office of Information and Regulatory Affairs. I think you are probably one of the most important offices no one has ever heard of.

And as we in this Subcommittee begin a razor-like focus on what we can do to improve the regulatory process, the role of your agency and of your employees in making that happen will be absolutely critical. And so one of the issues that I am very concerned about and hope we can have a more extended dialogue when we get to questioning is resources, the resources of OIRA and actually being able to perform the functions that you have today and that you may have expanded under other kinds of regulatory reform provisions.

I do want to point out, just because we do this quite a bit, Chairman Lankford and I, that this might be the first time in congressional history that the only witness, and the Chairman and Ranking Member are all redheads. So we are expecting really good things, really important things. Thank you, Mr. Chairman.

Senator LANKFORD. History is being made today. [Laughter.]

At this time, we will proceed with testimony from our ginger witness, Howard Shelanski. He is the current Administrator of the Office of Information and Regulatory Affairs, a post he has held since confirmation in June, 2013. From 2009 to 2011, Mr. Shelanski served as the Deputy Director, Federal Trade Commission's Bureau of Economics, served as the Director there from 2012 to 2013.

Mr. Shelanski has also served as the Chief Economist of the Federal Communications Commission (FCC) and Senior Economist on President Obama's Council of Economic Advisers. If I remember correctly—I do not have it in your bio—he also served and clerked with one of our Justices of the Supreme Court as well, Scalia, if I remember. Is that correct?

Mr. SHELANSKI. That is correct.

Senator LANKFORD. That gives you a decent, varied background, I would say. I would like to thank Mr. Shelanski for appearing before us today. It is the custom of this Subcommittee to swear in all witnesses. I would ask that you would rise, raise your right hand.

¹ The prepared statement of Senator Heitkamp appears in the Appendix on page 33.

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

Mr. SHELANSKI. I do so swear.

Senator LANKFORD. Thank you. You may be seated. Let the record reflect the witness answered in the affirmative. We would be glad to receive your opening statement. We typically do a 5-minute time period. You have a little bit of extra time on that today, but I would like you to get as close as you can at 5 minutes and then we will pepper you with questions after that.

**TESTIMONY OF HON. HOWARD SHELANSKI,¹ ADMINISTRATOR,
OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OF-
FICE OF MANAGEMENT AND BUDGET**

Mr. SHELANSKI. Thank you very much. Chairman Lankford, Ranking Member Heitkamp, Members of the Subcommittee, it is great to be part of history today, but I am also very grateful for the invitation to appear before you today and to discuss the work of the Office of Information and Regulatory Affairs.

OIRA has a broad portfolio. For example, under the Paperwork Reduction Act, as Chairman Lankford noted, OIRA is responsible for reviewing collections of information by the Federal Government to ensure that those collections are not unnecessarily burdensome. OIRA also develops and oversees the implementation of governmentwide statistical standards and policies and has a role in international regulatory cooperation under some Executive Orders. The largest area of OIRA's work, however, is the review of regulations promulgated by Executive Branch departments and agencies.

A set of Executive Orders establishes the principles and procedures for OIRA's regulatory reviews. Executive Order 12866, implemented across Administrations of both parties, sets forth standards and analytic requirements for rulemaking by departments and agencies and calls for agencies to regulate only when the benefits of a rule justify its cost to the extent permitted by law.

OIRA works with agencies to continually improve the review process and the quality of government regulation. OIRA, first and foremost, upholds the standards of review that the Executive Orders establish while remaining mindful that unnecessary delays in reviews are harmful across the board. They are harmful to those wishing to comment on proposed rules, to those who must make plans to comply with the rules, and to those denied the benefits of regulation. Both rigor and efficiency in regulatory review are essential to improving the clarity and quality of our regulatory environment. OIRA does not review all Executive Branch regulations, nor would it make sense for the office to do so. Each year agencies issue many regulations which are minor and very technical.

OIRA review applies only to what are called significant regulatory actions. Those may include guidance documents, notices or other actions in addition to those actions formally designated as rules. The most fundamental category of significant regulations are those that are economically significant, which is to say those that

¹ The prepared statement of Mr. Shelanski appears in the Appendix on page 35.

have an annual effect on the economy of \$100 million a year or more.

And I would note that that threshold is the same one that Congress has used to define rules as major under the Congressional Review Act (CRA). There are other factors that may lead a rule to be deemed significant beyond economic impact. Under Executive Order 12866, rules are also potentially significant and subject to interagency review through OIRA if they create a serious inconsistency or otherwise interfere with an action taken or planned by another agency if they materially alter the rights or obligations related to entitlements, grants, user fees, or other kinds of government programs.

And finally, they may be significant if they raise novel legal or policy issues. Once a rule is under review, OIRA plays two basic roles. The first of those roles is to coordinate interagency review of regulations. OIRA circulates the rule to other agencies beyond the rulemaking agency around the Federal Government to ensure that other agencies whose own policies and responsibilities may be affected in some way have an opportunity to comment and to talk about that.

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

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

I would note that existing rules as well warrant scrutiny to ensure that they achieve their benefits and goals without imposing unnecessary costs. Ensuring flexibility in new regulations and looking retrospectively at existing regulations is, therefore, an important part of OIRA's function.

Retrospective review, which the President has advanced through his own series of Executive Orders, is a crucial way to ensure that our regulatory system is modern, streamlined, and does not impose unnecessary burdens on the American public. As President Obama made clear at remarks at the Business Roundtable this past December, retrospective review is a critical part of this Administration's regulatory agenda moving forward.

Finally, I would note that under Executive Order 13609, OIRA has important responsibilities related to international regulatory cooperation. We have made progress in a number of areas with our international partners through regulatory cooperation councils with Canada and with Mexico. We also further our international regulatory mission through work in coordination with the Department of State and through activities in support of the United States Trade Representative's trade negotiations.

In conclusion, regulatory activities can bring great benefits to Americans, but they also carry costs. It is critical to ensure that Federal agencies base their regulatory actions on high-quality evidence and sound analysis. Beneficial regulation must remain consistent with the overarching goals of job creation, economic growth, and public safety.

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

Senator LANKFORD. Thank you, Mr. Shelanski. I have chosen to defer my questions—Senator Heitkamp has chosen to do the same—toward the end. I recognize Senator Ernst for questions.

OPENING STATEMENT OF SENATOR ERNST

Senator ERNST. Thank you, Mr. Chairman and Ranking Member Heitkamp. Thank you very much for being here today, Mr. Shelanski. I appreciate it very much. I do think your office has a very important role in the regulatory process. Just a pretty significant question, I think. Has the Environmental Protection Agency (EPA) sent its final rule on the ozone standard to your office for review?

Mr. SHELANSKI. No, Senator. That rule has not yet reached our office for review.

Senator ERNST. And then because of that, do you expect to be given the customary 90-day review period for this rulemaking since, the EPA is under a court order to issue a final rule by October 1?

Mr. SHELANSKI. We do recognize that the court order is in place and we have been working with the EPA so that they will be able to submit this rule as quickly as possible so that we will have as much time as possible given the court order to do our review.

Senator ERNST. What are the challenges that you will have then in reviewing this rule and implications to the States?

Mr. SHELANSKI. Thank you. I think we will be able to meet the challenges of reviewing this rule. The time it takes us to review a rule is often very dependent on how high a priority the rule is with the agency. So we circulate the rule for interagency review, we assemble those comments, we do our own analysis of the agency's underlying justification for the rule, we pass back our comments, and when the agency has completion of the rule as a high priority, we tend to get fairly fast responses and the process really moves much more quickly.

Nothing sits for periods of time back at the agency. So I would expect that we will be able to conduct a high-quality and rigorous review of both the rule and the underlying evidence in the time that we have under the court order.

Senator ERNST. OK. Under the court order. Do you ever feel pressure within your agency coming from the Administration on such big rules as this?

Mr. SHELANSKI. I think there certainly is an eagerness to have us conduct our review and to keep forward progress, but I think everybody understands, and certainly in my 2 years as Administrator, I feel like I have always been given the time that I need to do a good analysis and to make sure that our office does its job.

Senator ERNST. Well, and I appreciate that, and I always am very hopeful that your views will always be impartial regardless of the pressures that are coming from the outside agencies or from the Administration as well. Would you say that is correct or that is accurate?

Mr. SHELANSKI. Yes, that is certainly accurate, Senator. The OIRA staff are a bunch of super smart and very dedicated folks who really are focused on the evidence underlying a rule, on the rule's justifications, and in carrying out the mandates of the Executive Orders.

I think that they are very good at focusing on the analytic issues. They speak truth even when it is inconvenient, and I have always found them to be people of the highest honesty and integrity and it is a pleasure to work for them and carry their message and their work forward.

Senator ERNST. OK. Well, great. I do appreciate that very much. We always want, of course, an impartial review and, of course, the utmost integrity in those reports coming forward. So I appreciate it. Thank you for your testimony today. Thank you, Mr. Chairman.

Mr. SHELANSKI. Thank you, Senator.

Senator LANKFORD. Senator Enzi.

OPENING STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Mr. Chairman, Ranking Member. Thank you, Mr. Shelanski, for being here. From your testimony, I had a couple of questions. Who determines that \$100 million threshold?

Mr. SHELANSKI. That is an excellent question. Thank you, Senator. Often we receive from the agencies their own view of whether or not a rule is economically significant accompanied by some analysis to bolster the point. But the determination in the end lies with OIRA. And so, when we receive a rule, we actually have the final word on the significance determination and we will tend to push hard when we have questions or, I might even say, suspicions that we need more evidence.

Senator ENZI. Thank you. And you mentioned that you do retrospective reviews, too. When you do the retrospective reviews, do you compare what you estimated the cost to be to what it actually comes out, or are you just looking to see if they administered the rule the way they were supposed to?

Mr. SHELANSKI. Typically the way a retrospective review is that it is carried out by the agency, and the question that is really asked is, is the rule, standing here today, still accomplishing what it was established to accomplish and do the costs and benefits going forward still make it worthwhile to keep that rule on the books?

We take a rule that is already on the books and then the agency asks whether, under current facts and circumstances, is it worth keeping a rule in place.

Senator ENZI. Do you have any capability to do anything if the cost far exceeds what you thought and the benefits are far less than what you thought?

Mr. SHELANSKI. So after we complete review of a rule, the rule goes back to the agency for publication and for implementation.

And the right place to go when the predictions underlying a rule turn out to be wrong and a rule turns out to be having harmful effects or not achieving good effects is the agency. So it is typically the agency that has those tools and is charged with undertaking that.

Senator ENZI. Thank you. You may know that the Homeland Security Committee and the Budget Committee did a joint hearing, I think it has been about a month ago now, on measuring the cost of regulation. One of the witnesses was Canada's Treasury Board member Tony Clement, and he told us how their regulatory process works and about their one-for-one policy to minimize the red tape growing in business and their mechanism for getting people to go back and look at old rules to see if they still operate.

He mentioned that the two countries have a cooperative plan for sharing approaches to reduce that regulatory burden on small businesses. Have those joint discussions resulted in anything and what do you think about that one-for-one burden reduction?

Mr. SHELANSKI. Thank you. So the joint regulatory process that we have with Canada is where agencies work together to try to come up with the elimination of unnecessary differences in regulation. We have, however, had some ongoing discussions with Canada to try to learn more about their policies and about their one-for-one.

We have some general concerns and I have some general concerns about a one-for-one policy, what is often called regulatory PAYGO. To be sure, there are some rules that need to be promulgated for the benefit of the public for health and safety. I am thinking about the Department of Transportation's (DOT) recent crude oil by rail rule, for example.

I think that it would be troublesome if such rules were delayed by the need to find a rule to cut and eliminate before the new rule could be promulgated. When we talked to Canada about that, they did suggest that they have a large number of exceptions and areas where their one-for-one rule does not apply.

Senator ENZI. They also, though, have a mechanism for going back to old ones and having a ledger credit so that when something comes up, they already have the money in place, and that is the only mechanism that I have seen for us to encourage government to look at any old rules. They really do not have much interest in that. I thought that was quite a step forward.

Now, the joint hearing also discussed the idea of a regulatory budget, and that fits in with this idea of having prior credit so you could have a carefully designed and implemented regulatory budget. They said that their scoring was all done on an internationally accepted standard. Are you familiar with their standard? Is it the same as our standard?

Mr. SHELANSKI. We are still looking into exactly how they do their scoring and their accounting. This is something we are in the process of learning more about. We have some reservations about having in place a rigorous budget of the type that they are talking about and we do not fully understand how their system works, so we are learning more from them as we continue these discussions.

I would note, though, that our retrospective review process is one that has been, I think, increasingly successful over time. Agencies

have several hundred initiatives right now that are in place and actually occurring. We are tracking a large number of those where they are going back and looking at rules on the books that are worthy of reform or even possibly repeal or, in some cases, strengthening.

So the retrospective review process is one that the Administration has emphasized quite strongly and that we are seeing good response on from the agencies. I would be very willing, however, and would find very interesting the idea of having discussions with any of your offices about ways to improve or strengthen that process or ways to provide stronger incentives on the agencies. I think we can always do better than we are doing.

Senator ENZI. Thank you. My time is expired.

Senator LANKFORD. Senator Enzi, thank you for that. Let me just pick up where Senator Enzi was leaving off on that, and that is with respect to retrospective review and this issue. How do you ensure agencies are periodically doing a retrospective review that is thorough and is rigorous?

The reason I can give you this example, this Committee has started asking the question of several agencies to say, How do you pick what you are going to do a retrospective review on? For instance, the Department of Labor (DOL) has 676 rules. They are doing four retrospective reviews this year.

So we are just asking the question, How did you pick the four out of 676 rules that are out there? I understand some of them are going to be significant. That is going to eliminate some of them. So let us get past the significant issue. How do you make sure that the agencies are actually doing this in a rigorous way?

Mr. SHELANSKI. Thank you, Chairman Lankford. I think that is a very important issue, to try to get the agencies to properly prioritize the retrospective review efforts. One of the things that we have been working with the agencies on doing is developing a more robust and thorough outreach process so that they hear from stakeholders, the people who actually have to comply with rules, or the State and local partners who have to operate rules on the ground, and from the folks who are supposed to benefit from rules so that they can hear what is working and what is not working.

And we indeed at OIRA have been holding outside stakeholder meetings with different groups of folks, whether it is State and local governments, or business groups or advocacy groups, labor unions, folks like that.

Senator LANKFORD. So what is the standard then? Is the standard then for the review of a rule, if they get a lot of complaints or a lot of praise on something, that they may try to do the review at that time? Is there a certain standard based on the length of time or the size and the significance to rules? What is the basic standard of which rules they should pick and the order that they should go through this and be able to do the priority for the review?

Mr. SHELANSKI. What we would like to see the agencies do is look at those rules where the greatest savings and the greatest benefit from the retrospective review and for what results. And so trying to get them to rank and prioritize rules based on what will

give—to use a colloquial term—the biggest bang for the buck would be the first principle.

Senator LANKFORD. What would you expect that they would do? What percentage or number that you would expect that they would do on a regular basis or is there a certain age to look at it and say, This rule is 30 years old and maybe it needs to be reevaluated? There does not seem to be a standard. It just seems to be an Executive Order saying, We believe that this should be done, but we cannot find a pattern for how it is being done in agencies nor a requirement that it really is done.

It just seems to be a suggestion and I am not sure, and you can answer this question if you choose to on it. I am not sure that OIRA has the authority to step into an agency and say, Hey, you did one regulatory review this year. Maybe you should do at least two. You are really not being thorough in this.

Mr. SHELANSKI. The way that agencies have to prioritize their resources leaves them overwhelmingly to focus on the rules and the policies, the new rules and policies that they have to implement going forward. They have a number of new problems that come up that they have to address. They have a number of statutory obligations in terms of rulemaking, court-ordered obligations.

So that is typically, especially in a period of time when agencies' resources are very tight, where they are going to prioritize, and retrospective review that looks at rules on the book is very often going to take a backseat. In some sense, that is warranted.

What we have learned from a lot of our stakeholder groups is the 30-year-old rules, they may not be doing much good, but there is not much value in repealing them either. There may be a lot of rules that we could look at that have piled up that are sitting on the shelf not terribly functional, but either they are not costing anybody anything or, we have heard often from stakeholders, once they fully absorb the cost of complying with the rules, those kind of costs, repealing the rule or removing the rule might not do them a lot of good.

So it is hard to come up with sort of a systematic criterion like rules of a certain age or something like that should be reviewed. That is why the outside stakeholder process is so important.

Senator LANKFORD. Do you feel like you have the authority to be able to step into an agency and say, This is really important, this has to be done, or do you feel like that needs to be someone else or it is just really the agency that is going to make that call on their own?

Mr. SHELANSKI. Right now I feel like we do have that authority. In fact, we have a very clear mandate from the Administration.

Senator LANKFORD. So if an agency does not do a retrospective review, you feel like you can come in and compel them to do that?

Mr. SHELANSKI. We cannot compel them, but what we can do is push them to explain why they have not done more, and often they have good explanations for that. But they do not deny us an answer.

Senator LANKFORD. Right. So the challenge of this—and I understand that budgets are tight on it and so it is difficult for agencies to prioritize their budgeting to go do a retrospective review because they are working on new rules on it.

The problem is the companies that they regulate, their budgets are tight as well and they are raising their hand and saying, Because your budget is tight, you are not reviewing a rule, we are suffering waiting for you to review this rule, and our budgets are tight on it across the entire country.

And so, somehow we have to be able to balance that out, and if there is a need for additional authority or responsibility, we have discussed 12866. That is been an Executive Order for 20-plus years at this point and it may be time to codify some of those things and say, Congress believes in what Multiple Administrations have done on this and to step in and say, Some of these things actually need to be put in statute rather than into Executive Order suggestions.

Mr. SHELANSKI. We at OIRA think that we have the tools that we need under the Executive Orders to achieve what we need to achieve. I do think one of the things that would help and one of the reasons we focus a lot on pushing agencies not just to give us lists, but to conduct formalized and further developed outreach projects is so that we can get the specific suggestions from the very companies you say who have tight budgets and who have to comply with rules to get constructive suggestions about where to look for good retrospective review efforts.

Senator LANKFORD. Right. And we are trying to help with that process as well. Senator Heitkamp.

Senator HEITKAMP. I would defer my time to Senator Portman if he has someplace else he needs to be.

Senator LANKFORD. Where else would you rather be at?

Senator HEITKAMP. Right. Well, that is a good question.

OPENING STATEMENT OF SENATOR PORTMAN

Senator PORTMAN. There is no place I would rather be, but I want to thank my colleague from North Dakota for giving me the chance to speak. I do have a flight to catch, as I am sure she does, and others, and she kindly asked me that.

First of all, it is great to have this hearing. Thank you, Mr. Chairman and Senator Heitkamp, for encouraging us to keep focus on this regulatory issue. There is so much that can and should be done. We have already had some of these discussions in the process of your confirmation, Mr. Administrator, and I appreciate you coming back.

One thing we talked about in your confirmation hearing is what is the role of independent agencies, and the fact that there are more and more major rules coming from the independent agencies and they are not subject to the same cost-benefit analysis that the Executive Branch agencies are, and I, at the time, talked to you about the fact that a number of your former OIRA colleagues have come out strongly in favor of providing this kind of cost-benefit analysis for the independent agencies as well.

In fact, Democrat and Republican alike have called for extending 12866 to independent agencies. Senator Warner, Senator Collins, and I have introduced legislation again this year to do that. Former OIRA Administrator Cass Sunstein, one of your immediate predecessors, said in a column before he became Administrator, The commitment to cost-benefit analysis under 12866 has become too

narrow. It should be widened through efforts to incorporate independent regulatory commissions within its reach.

By the way, so does the American Bar Association, the Administrative Conference, the President's Jobs Council believe that. All of them have recommended extending cost-benefit analysis for review and independent agencies. As you know, our proposal does that. It does not go as far as some of us would like to go, frankly. It does give you an important role and yet, it ultimately gives the responsibility to the independent agencies by saying that OIRA would have the ability to review, but would not have the power to stop and return regulations. So you would have more transparency, more public scrutiny, more accountability.

When I asked you about this in your confirmation hearings, you said you needed some time to think it over. You have had some time now. You say you look forward to better understanding what the costs and benefits are of bringing, very clever, independent agencies under OIRA type of mandates would be. So can you tell us where you are on that now and whether you are willing to help us on this legislation to codify much of what the President himself has said he is for?

Mr. SHELANSKI. Thank you very much, Senator Portman. I have had a couple of years to think about the issue and after thinking about it, I still have some reservations about extending OIRA review to independent agencies. I would separate two issues, however. One is the requirement for independent agencies to undertake cost-benefit analysis, something that the President has encouraged them to do in his Executive Orders and whether it is OIRA who should review the way that they undertake that cost-benefit analysis.

I think cost-benefit analysis is a very healthy thing for a regulatory system and that goes for independent agencies and Executive Branch agencies alike. My concern is more with OIRA as the reviewer of those determinations. I have worked at two independent agencies. I really have some appreciation for the value of how those agencies function for the value of the independence and the way they are set up as independent agencies.

I do worry about an Executive Branch review process that could interfere with that independence and possibly interfere with their functions under their authorizing statutes. That said, you asked if I would be willing to work with your offices to think further about this topic and to find a way that there might be a way to push cost-benefit analysis more into independent agency rulemaking and the answer is absolutely yes.

Senator PORTMAN. Well, I hope you will take a look at the legislation more carefully because I think it does precisely what you are saying. Here is the backdrop, just so we all know, and I know you know this. One quarter of the new major rules are now issued by independent agencies, and for our constituents, those are some of the toughest rules and we hear about it a lot. There is a broad consensus that there is not the kind of quantitative analysis that we need.

In 2013, none of the 18 major rules, none of them, issued by the independent agencies was based on a complete analysis of best costs and benefits. In 2012, not one of the 21 major rules had a

complete cost-benefit analysis. According to the Administrative Conference of the United States, only one rule was supported by even a partial attempt to quantify benefits in 2012.

So there is a huge gap here. Again, our legislation does not say that OIRA takes it over. It says that OIRA does provide advice, cannot require the independent agencies to follow it. But I would think your expertise you have at OIRA is badly needed and you should embrace this idea. With that, Mr. Chairman, I appreciate the time and I look forward to continuing to work with you, Mr. Administrator.

Mr. SHELANSKI. Thank you, Senator.

Senator LANKFORD. Senator Heitkamp.

Senator HEITKAMP. Thank you, Mr. Chairman. We keep talking about major rule, which is defined as having an impact of over \$100 million on the economy, but it was adopted, that \$100 million standard, was adopted in 1981. What would that \$100 million be today if we were going to adjust for inflation?

Mr. SHELANSKI. That is a good question. I have not actually run that calculation. I would be happy to get back to you on that, but it would be substantially higher.

Senator HEITKAMP. Well, I mean, you think about it. The early 1980s especially were a period of dramatic inflation, and so we want to kind of put this in light because we talk about the growth and major rules, but if we index this or if we adjusted it for inflation, we might find out that there are—I share the concern that Senator Portman has about independent agencies.

But I just wanted to kind of lay down a marker on what is a major rule. That standard being set in 1981 at \$100 million, obviously that would be much more significant in 1981 than a \$100 million rule today.

But back to kind of my opening comments, if we back up. One of the major concerns that I have with this whole process, and we saw it a little bit with the DOT tank car rule, is that Congress consistently kind of kicks the can down the road and says, OK, some of these details are just too tough to get to. We are just going to throw this to rulemaking and we will see what they can come up with, and frequently the devil is in the details.

But yet, that standard is out there, that requirement is out there. So a lot of times when we talk about these major rules, it is Congress that has initiated the major rules, congressional enactment. In fact, it should be that in all cases. So now we have Congress making these decisions on what the agencies are going to do. The agencies being understaffed in terms of developing the rules. We take away the potential for bias. And then we say, we want you to do more.

And that is a problem because we cannot keep saying we want you to do more, which I think you might be surprised that we are going to send you more work if some of the initiatives that we are talking about are going to happen. What is a reasonable response when Congress puts more on you? How could you communicate better to us in terms of what the resource needs are?

Mr. SHELANSKI. Thank you, Senator Heitkamp. It is an important question. I think we at OIRA, like I would say every office at OMB, has a heavy lift to perform and often it is a lift that is grow-

ing heavier, both because of Executive Orders and because of statutes from Congress. So to do our job well we would love to have more resources.

I think we have been doing the job that we have chartered to do quite well. Staff really work hard. They are eager to dig into their work and they do a great job. But of course, as we have more work to do, as we have broader mandates, if it were to happen that independent agencies were to be brought, even on a discretionary basis, under our jurisdiction, that would pose a resource challenge.

Again, I want to emphasize, I do not think it is a resource challenge that is any greater than that faced by any of the other component offices at the Office of Management and Budget, but it is a challenge.

Senator HEITKAMP. And it is a concern of mine as we kind of look at moving forward and designing perhaps a better retrospective package, a better path forward for increased oversight, on cost-benefits, that we may in fact be doing something we do not want to do which is delaying a rule, like the tank car rule, which was clearly involved in some pretty dramatic safety discussions.

So, I want to just make sure that we are all on the same page. And I want to encourage you, as we, the Committee, and as Congress moves forward with regulatory reform and potentially providing more oversight and more responsibility to OIRA, that OIRA is able to say, We can do this in a timely fashion if we are given the resources and these are the resources we believe we need.

And so, I just want to encourage you to ask because frequently we say Well, there was not enough resources. Well, you are not silent. You need to let us know. And with that, I am going to kind of stop this conversation and move to the next page.

Senator LANKFORD. Mr. Shelanski, how we have done traditionally in this Subcommittee is the second round of questions is open. Any Member can ask any question at any time. There is more open colloquy here on the dais as well as with you, so there are no turns at this point so there will be more of an open dialogue and conversation.

Let me step in to one of the things that Senator Portman was talking about as well just for the independent agencies. OIRA has a responsibility to be able to work with the agencies to say, This regulation that you are proposing has an effect or is connected to another regulation in another agency or one that they are planning.

If the independent agencies are not included, how can OIRA help this agency in the Executive Branch stay away from doubling up on something that an independent agency is doing, just the basic awareness of that and then also the cost-benefit analysis? I come back to that as well. This agency may have a rule that they are creating that may be a \$100 million rule plus this other agency that is an independent agency may create another one that is \$75 million, but the cumulative effect of that is pretty profound, to say the least, on it. If there is not coordination, how do we get that if they are not included in this conversation with OIRA?

Mr. SHELANSKI. Thank you, Senator. The independent agencies, while we do not review their rules, can be brought into interagency discussions.

Senator LANKFORD. Can they? Because that is different. We are trying to find out if they are always brought in and are always being considered.

Mr. SHELANSKI. When we at OIRA believe that an independent agency has an equity or something to say or regulates in a similar area, we do ask that they review the rule and comment on it. We cannot compel them to comment, we cannot compel anybody to comment, but we do afford them that opportunity.

Senator LANKFORD. So what happens when SECRETARY or the Commodity Futures Trading Commission (CFTC) or some other independent agency is working on a rule and you have other banking rules that are happening simultaneously? Community banks are trying to figure out because they see two different sets of rules happening that are pretty similar. Who is being the referee in the middle of all that to make sure that they are going to get consistent rules and they are not having to fight a battle on two fronts?

Mr. SHELANSKI. So when we know that an Executive Branch agency is issuing a regulation in an area where an independent agency is also working, we do ask that Executive Branch agency—and here we do have the authority to really push an answer—for an explanation of how their rule interrelates, what the cumulative burdens will be, whether there is duplication and or whether they are really doing something different from what the—

Senator LANKFORD. So in the pecking order, then, the independent agency is going to be on the top and the Executive agency is going to have to wait on the independent agency to be able to finish that out?

Mr. SHELANSKI. I do not think that is necessarily the case. A dialogue can result that can lead to a decision about who will regulate where. I do not know that there is any pre-established pecking order, but we do require the Executive Branch agency to answer the question.

Senator LANKFORD. Right. But there is a lot of authority there with the Executive Branch is where you have the ability to be able to have that dialogue where with the independent agencies it is only if they choose to come in and participate, and hopefully most of them do choose to participate.

But multiple places, whether they be hospitals, whether they be banks, especially smaller community banks, all struggle with these multiple regulators stepping in and a lot of overlap. There may be four rules that all have serious effects on them coming down in a 3-month time period and they are trying to catch up with these different rules. Sometimes they are conflicting, most of the time they are not. Most of the time it is just another layer that they are still trying to catch up from the previous one. Does that make sense?

Mr. SHELANSKI. Where OMB has authority is to bring the independent agencies into the discussion. In terms of authority over approving or not approving the rule, that lies in the Executive Branch, not with the independent agencies. You are correct on that.

Senator LANKFORD. Go ahead. It is all open.

Senator ENZI. Thank you, Mr. Chairman. I have had a lot of questions on if these costs and benefits calculations are available

to anyone, even us. We have seen some things, some rules come through and we wondered how they got to those particular costs. What is the rule on transparency on those things?

Mr. SHELANSKI. Thank you, Senator Enzi. When a rule goes out from our office, when a rule is published, the regulatory impact analysis on an economically significant rule is part of the record. So for example, if it is a proposed rule that goes out for public comment, it is not just the rule text and preamble that go out. It is also the underlying rule with accompanying tables and appendices. These studies and these impact analyses are often very long and we try to make sure that there is as much transparency as possible about the calculations, the underlying data and exactly how the agencies reached their conclusions, and those are available to the public.

Senator ENZI. OK. Are they published in the Register at the time?

Mr. SHELANSKI. Yes. They are part of the rule package the agency releases publicly. Whether they will always be published in the Register with the rule, they are always made available. It can be in the agency docket, on the agency website, but they are part of the administrative record of that rule and they are publicly available.

Senator ENZI. And if somebody questions those, what do they do?

Mr. SHELANSKI. So when it is a proposed rule, we actually want people to question those. In fact, we very often, both in the rules that go out for public comment, the proposed rules, we specifically ask for questions about the underlying analysis. And then when the rule comes back in final form, we make sure that the agency has addressed those concerns.

Senator ENZI. Thank you.

Senator HEITKAMP. I want to kind of get some information based on your experience, and I understand no two agencies are alike and that you are working with a lot of diverse subject matter. But some of the process pieces, you may see commonality and mistakes. You may see things that go where you go, Here they go again, the same thing.

I am wondering if there are steps in the current rulemaking framework kind of across the board that have a tendency to trip up agencies as they are drafting these rules. Do we have any institutionalized kind of hiccups in the process that we could smooth out to make this process more responsive?

Mr. SHELANSKI. Thank you, Senator. There is no doubt that there is unevenness across the Federal Government in the experience and the resources that agencies have to conduct these analyses. Some agencies are excellent and have large teams that are always doing these kinds of analyses. So we tend to have relatively few hiccups. We may have disagreements with them over aspects of the analysis, but they tend to know what they are doing.

We have other agencies that have very little experience and sometimes a new area of rulemaking pursuant to statute or some public emergency may push an agency with limited experience into having to do kinds of analysis that they are not used to doing. In those cases, we tend to provide a lot of technical assistance. My staff, the OIRA staff, are really quite skilled at showing agencies

and finding solutions to their analytic problems. Sometimes they subcontract to experts.

Senator HEITKAMP. Do you think people would have more faith in cost-benefit analysis if they were done by an independent agency and not an internal group within the subject matter?

Mr. SHELANSKI. I can see certain reasons that intuitively one might see benefits to having some level of independent performance of those analyses, but I also think they are real drawbacks. Cost-benefit analysis is certainly not a one-size-fits-all kind of exercise. There is not a set of algorithms or equations that one would always use in cost-benefit analysis.

How one calculates particular costs or what particular benefits would be often require a lot of technical expertise that tend to be in the hands of the agencies. I would worry that a generalist kind of body to perform those analyses would not have that and would miss key areas of costs.

Senator HEITKAMP. But you are a generalist kind of agency that is reviewing the cost benefit.

Mr. SHELANSKI. And so we review them. The agencies perform those analyses and what we get to do is ask a lot of hard questions and come back to them and say, Why did you use this evidence? What about these studies?

Senator HEITKAMP. Do you not think, though, there is some commonality in terms of best practices in doing that kind of analysis?

Mr. SHELANSKI. There is. And indeed, we have tried to capture a lot of those best practices in a guidance document that is really the foundational guidance document for all regulatory impact analyses.

Senator LANKFORD. Which one is that?

Mr. SHELANSKI. That is Circular A-4.

Senator LANKFORD. OK.

Mr. SHELANSKI. And Circular A-4 really covers a large number of topics that are common, that will typically arise in regulatory impact analyses and we try to set parameters and bounds in particular subject areas that must be covered so that agencies have a pretty fair guide in what they need to do.

Senator HEITKAMP. And not to belabor this, but have we ever gone back and done a look-back after we do all this analysis and say, Boy, we learned something about evaluating costs because costs could be higher costs, could be lower? It is a target. And then when we look at benefits, and I will give you the example which is on the conflict minerals regulation, which I hear about in North Dakota all the time, which is that the requirements that a lot of people work, a lot of things could have conflict minerals, it is really difficult for people to know or not know.

We have done a supply drain kind of analysis. That means I better know what is in this before I buy it kind of thing. I am going to have to report it. But have we ever stopped anybody from buying conflict minerals?

And that is the challenge that we have which is a good intention. No one wants us to be participating in human slavery. But by the same token, does that rule really accomplish anything? As frustrated as we get talking to our people, if we could say, Well, yes, but, because of that rule, we have shut down five mines in Africa

that are engaged in producing conflict minerals. It probably happened.

Mr. SHELANSKI. We learn a lot from the past experience with regulations and it helps us at OIRA, when we review the analyses that agencies provide, because these experiences, things we learn through the retrospective review process, or from stakeholders who come in whether to the agency or to OIRA in meetings under the Executive Orders that we are required to accept, we learn a lot about what the experience has been with rules that are on the ground.

And that enables us to ask hard questions when we see something that is similar in a rule that is being developed. One of the things that we do when we review an agency's analysis is ask hard questions about how they got to their benefit determinations and actually the fit between the rule itself and how it will operate on the ground and the benefits that are projected.

It is something we try to look at very closely, and in looking at that, we can be informed by what stakeholders tell us about past experiences. Is this going to be like this other rule where it has a similar structure, there was not a lot of benefit, but it ended up being very costly.

One of the reasons it is great to have a retrospective review process is it allows those of us to identify such rules for an agency to go back and look at, but it also helps us prospectively with identifying areas where the benefits may not be well predicted given the way the rule is actually structured.

Senator LANKFORD. Yes, and I know Senator Enzi is about to ask a question on this, too, but let me just give you an analogy of this same issue on, for instance, the conflict minerals, because there is more than just the cost and the benefit. It is also the gains to the agency as far as leverage that is gained with a regulation to say they have an amount of authority.

I have a company in Oklahoma that did not turn in their form to say they do not have any conflict minerals. So they did not have any conflict minerals so they did not turn the form in to say they have none, and they were fined \$1 million because they did not have a form to say they did not have to turn in a form. They ended up negotiating that with an agency who then dropped it down to only \$100,000 fine, but it is a tremendous amount of leverage that an agency gains from someone who was saying, Why am I turning in a form to say I have nothing to turn in?

There is this other piece that is out there as well that is a part of our own government relating to the citizens that run us that is a dynamic that is in this as well. I know Senator Enzi wanted to be able to make a comment on that, too, or on a different issue.

Senator ENZI. Well, not necessarily different, a different cost thing, I think, and maybe more general than that. Is there any relationship between the time for the costs and the time for the benefits? A person can do something that is an immediate cost to the business and then that they can say, if they drag it out enough years, 50 years to the general public, it can be a great advantage. But it was an immediate cost and no immediate benefit. How do you work those things?

Mr. SHELANSKI. Thank you. That would be a very worrisome kind of manipulation in a regulatory impact analysis and we are certainly on the lookout for that kind of thing. One can always put out an amortization schedule for the costs that are required to comply that would be very long to make the annual costs look low. If that has nothing to do with the actual investment cycle and the way people really run their business, that is not a helpful cost estimate.

One of the things we do is to ensure that agencies and guidance we provide in Circular A-4, makes sure that agencies do not get the alignment between the cost period and the projected benefit wrong.

Senator ENZI. One of the areas we are concerned about in Wyoming is sent the regional haze requirement, which blames all of it on coal-fired power plants, not on the Canadian forest fires that we have been experiencing recently.

They seem to think that if you cleanup—if you eliminate the coal-fired power plants, that that eliminates the problem, but it does not. The way that the cost is, it is an up-front cost for any plant to do it. There are also some difficulties over how long they can depreciate the thing which is forcing them all into a different kind of mechanism for taking care of the problem than would be logical.

But the benefits, of course, accrue over a long period of time, but if you extend that period of time out there long enough, there is always a tremendous benefit even if it is not realistic to the problem. So I am just mentioning that as something you might look at in the future and we will have some more specific questions on that.

Senator LANKFORD. Can I followup on that same question? What you are saying is, is there a one-for-one ratio? For instance, we are going to do the costs over the next 5 years and also the benefit over the next 5 years and lay those side-by-side, or is there a time the cost really is determined over this and the benefit is determined over 5 or 10 years? Is it always one-for-one?

Mr. SHELANSKI. No, it is not always one-for-one.

Senator LANKFORD. OK. So what is the ratio that is typically accepted?

Mr. SHELANSKI. It depends on the circumstances. Under different circumstances, you might get a different timeframe in which there really are going to be benefits accruing and you might not want to align the costs with that. That could actually be a disadvantage for the analysis and for businesses by making it look like the annualized costs are—

Senator LANKFORD. Well, most of the costs of businesses in a heavily capitalized intensive business will probably be in the first 5 years.

Mr. SHELANSKI. Yes.

Senator LANKFORD. But if the benefits are not for 20 years or for 30 years, I think that is the heart of Senator Enzi's question. What is the formula? Again, since we do not see it, we need to know how is that figured?

Mr. SHELANSKI. So the first thing I would say is in any regulatory impact analysis, you actually can see what the assumptions

are as to time and when those costs and benefits will accrue. So that is something that can be commented on.

Typically we look at the underlying evidence, what makes sense as a timeframe to measure costs and is there is solid evidence. What our concern is, is when benefits without good underlying evidence are projected infinitely into the future so that you get this massive accumulation of benefits. So we are very careful to make sure that any benefits that are——

Senator LANKFORD. Right, but there are multiple ways to do that. I do not mean to interrupt you, but it is the same thing, if, for instance it is a 10-year cost-benefit analysis on this, that is going to figure different than if it is 20, because again, for most businesses, the first 5 years are going to be the most capital intensive and then there is not going to show a lot of costs, and so it really shows that regulation is inexpensive for the last 15, but it may be 15 years from now when there is an actual benefit that kicks in.

So whoever sets the parameter for the number of years that will be included in the study really sets how it is going to come out. So even if you said we are going to look at the next 10 years, or the next 5 years, or 50 years, it may go side-by-side, but the costs and the benefits come in at different times.

So I guess that is where we are trying to get on some of the assumptions. Who sets that parameter? Is that you, is that the agency because you could figure it three different ways, take it 5 years, 10 years, 15 years and you are going to get three different sets of answers at which one has the greater cost, which one has the greater benefit.

Mr. SHELANSKI. So we will typically look at a typical kind of window that—we would look at for both costs and benefits is a 20-year period and we would ask at what point you have reached the fully realized costs and the fully realized benefits and try to make a measurement over of that period. For different kinds of rules, rules that take place in an industry with fast-changing technology or where the circumstances may change, shorter time periods can be warranted. It really depends on the particular circumstances.

Senator LANKFORD. But in a 20-year window, I would just say almost always the people that are paying the capital up-front are going to lose. It is very difficult, because their cost is really the first few years and then you really are racking up benefits over two decades to try to catch up for the cost that is initially in 2 years, if it is a 20-year window, if that is what is typical.

Mr. SHELANSKI. Well, there has to be real evidence about what those forward-looking benefits are and that those cost investments will continue to have that payoff.

Senator LANKFORD. Is that 20-year window, is that typical? Has that been OIRA's history since 1980 to do that or has that changed?

Mr. SHELANSKI. Well, I would have to look back and see. I mean, it is really going to vary very much from rule to rule what is an appropriate timeframe to look over. But to come back to your point about the capital-intensive fixed costs, we try to make sure that the accounting for those costs is accurate.

If it is the case that they are going to be up-front costs that are likely to put an industry out of business, that would be something that we would take very substantially into account, because you are not going to get those benefits, if the engine for those benefits, if you will, is not going to be around to produce them.

Senator LANKFORD. You might want to check on some of the regulations coming down in the coal industry then because that has been a pretty rapid acceleration, some of the call issues and the number of jobs that have been lost on that one. But, that is a different issue. But that is a big part of this.

I would ask one other question related, and I do not want to hog all the time here because we have a lot of other questions. When you do the cost-benefit analysis, do you always include direct costs, direct benefit, and indirect cost and indirect benefit? Are those always included in a major or significant rule so there is never a time that there is indirect benefits done without indirect costs also being included? Are both always included?

Mr. SHELANSKI. What we always ask for is the best evidence on the cost side and on the benefit side. But if, for example, there were only evidence of direct costs and we knew that there was probably going to be some indirect costs but we did not have the evidence, we would not simply discount of those to zero.

We do not require that all costs and all benefits be rigorously quantified. We ask an agency to be rigorous on identifying what the categories of costs or benefits are and to do their best in quantifying those. But one always has to be careful of a mismatch of the kind that you described.

Senator LANKFORD. And that is what I am trying to figure out. Would there ever be a rule that we could look at and say indirect benefits were counted, but indirect costs were not, that an agency would say, we cannot tell what the indirect costs are going to be, but we can tell what the indirect benefits are going to be?

Mr. SHELANSKI. So often there is better evidence for one than the other. I would add, there is almost always better evidence for the costs than the benefits, at least when it comes to quantified benefits. So the bias, in that sense, that I have seen at least in my 2 years as Administrator, has typically been against the benefits because cost data tends to be a little bit easier to come upon.

But if we think there is good reason to believe there is a category of indirect costs but they are just hard to measure, we will push the agency to talk about those, to talk about ways that they might be accounted for and how they might relate to the benefits of the rule.

Senator HEITKAMP. I have a question, and just bear with me on the example. Let us say, as we all know, that there is some pretty stringent, whether it is ozone or whether it is CO₂, regulations coming down the track and now you have them on your desk. Just imagine that happens. And the end result—I mean, you are calculating what it may cost to retrofit power plants, what it may—implementation of this rule, what that would cost to basically develop the technology to meet the standard in the new rule. But let us say what actually happens is we then switch to renewables that have a higher cost to consumers. Would the higher cost to consumers be included as an indirect cost of that rule?

Mr. SHELANSKI. The higher cost to consumers, if there is a good case to be made that that will occur and one can come up with an analysis to show what that cost would be, would absolutely be something that we would ask to be included.

Senator HEITKAMP. Because these regulations frequently have opportunity costs, the ones that are harder to quantify and will result in change in behavior which will then have consequences of its own. I think one of the concerns that we obviously have is that when the reviewer or the calculator of the cost benefit appears to have a bias, that maybe some of that is not calculated the way it ought to be calculated.

And so, let us say that I could make a pretty persuasive case to you that if we switch to a different fuel source currently not right now with natural gas but maybe down the road and if you looked historically—let us say we are switching to natural gas as a fuel source and I could show you historic data that showed the average price of natural gas runs about \$7, even though we are at a historic low, or probably at a historic low at this point if you adjust for inflation, and we can anticipate over a period of time the life of that power plant, that in fact you will have a dramatic increase cost to consumers. Is that something that ever gets considered?

Mr. SHELANSKI. We would be very concerned by an analysis that simply carried forward a current state of the marketplace without good justification and good analysis showing that that was a reasonable assumption.

Senator HEITKAMP. Well, that is good to know, and then we obviously are going to be taking a look at that. I want to switch gears just a little bit because I have something that I call prospective retrospective. I just think it is kind of fun to say it that way.

What this is, is the idea that we have this big mess, and I will call it a big mess, of regulation with no real structure for retroactive review or retrospective review on those. And kind of a cajoling but not any kind of mandate.

So the idea would be from this point forward when we promulgate new rules, as an essential part of that new rulemaking, you have to embed a retrospective review. You have to basically say—and issue that as part of the rule that then would be subject to comment on time period, comment on a number of things. What would be your reaction to a change in the regulatory process that would embed a prospective retrospective review process?

Mr. SHELANSKI. I think this is an interesting idea and one that we would be very interested in discussing with you going forward.

Senator HEITKAMP. Well, I hope I get a better answer than Senator Portman. You come back and you say, What a great idea.

Mr. SHELANSKI. Well, I think that accountability is one of the really important things in any regulatory system and I think asking an agency to account for how its rule has actually operated and whether it is achieving its goals is an important objective. I think the devil again is going to be in the details, which is why I would welcome the chance to have further discussions with you on it.

Senator HEITKAMP. We would not be setting any parameters. What we would be doing is requiring the agency to actually say, This is what we think we want to do, allowing stakeholders and people who are currently involved in that rulemaking process to

say 10 years is not right. You need to go back to 5 years and make that part of the notice and comment procedure so that we are not one-size-fits-all, but we are requiring that it be part of the deliberation and the discussion.

Mr. SHELANSKI. One of the things that we have been encouraging agencies to do where appropriate is to put in place a provision where they will review, at some point in the future, what the effect of the rule has been. We have actually done that on a NAA regulation involving ship strikes and right whales. OK. You put in place that regulation. Can you come back in 5 years and tell us what the effect of this rule has been?

Senator LANKFORD. Did you set an actual date like that? I think that is part of the issue. It would just say do it at some future point instead of just saying 5 years.

Mr. SHELANSKI. I want to be careful because I am not sure I remember that specific detail—I believe we put a time period in there.

Senator LANKFORD. OK.

Mr. SHELANSKI. But again, what would be required specifically and what the consequences would be are things that I think are important details. One of the concerns I would have and that I think would have to be resolved is anything that suggested to those who must comply with the rule, that in 5 years there could be a review that has the rule not take effect, I think, would have a real effect on compliance and we would have to think about what the compliance incentives are. We want people to comply with the rule, for the rule to be able to take effect, so that the agency could do a meaningful assessment of whether it was working.

Senator HEITKAMP. Just to clarify, I do not think that if we would embed the requirement that the rule would evaporate. What we are simply saying is that we are going to require that with every new rulemaking, you actually consider how you are going to review this rule and how you are going to provide stakeholders with an opportunity to comment at time certain on the effectiveness and the benefit. And it also has the added benefit of doing a look back on cost-benefit analysis with true data.

Mr. SHELANSKI. This is something I would like to take back and talk to the team about and think more about, but we would welcome a further discussion on this topic.

Senator LANKFORD. Great. Can I come back to the cost-benefit issues again? In retrospective review, we have multiple issues that we still want to be able to talk about. Let me just give you a hypothetical situation. Let us just say there was a Supreme Court case called Michigan versus EPA, just hypothetically.

Senator HEITKAMP. Never heard of it.

Senator LANKFORD. And there was a conversation about this term of appropriate and necessary and whether cost-benefit should be analyzed in that. EPA came out and said that they do not feel like they have to consider cost, that that was not necessarily in the appropriate and necessary. That came through OIRA to the process, gets to the Supreme Court, and they say, Of course you have to evaluate costs on it.

Two questions, I guess. One is, obviously, that came through OIRA at some point and I do not know if it was while you were

sitting there or not. So one is, why did OIRA not catch that say, No, you have to do a cost-benefit analysis here. And the second one is, how does that change the process for OIRA in the future?

Mr. SHELANSKI. There can be difficult legal issues underlying a statute. The way that the EPA did the analysis was the subtle legal understanding at the time. It obviously had to go to the Supreme Court to be clarified. So I do not think that it would be OIRA's position to second-guess—

Senator LANKFORD. But the position has been that there has to be some kind of cost-benefit analysis. EPA basically said, That is not our responsibility. We do not have to do that on a cost-benefit analysis on something that was very significant and it ends up being a very costly rule at the end of the day.

But their position was, We do not have to do that. That is what I am trying to figure out. How often does that occur, that OIRA would say to an agency, No, we concur, you do not have to do a cost-benefit analysis on this though it looks like a very significant rule?

Mr. SHELANSKI. There are certain statutes, I think only one or two that I can think of, that appear to bar the agency from taking costs into account. Those would be the only cases where OIRA would give a free pass to the agency, and the Clean Air Act (CAA) is one of the statutes that was often held up by a number of authorities as a place where cost-benefit analysis was not something that could be mandated.

The Executive Orders, of course, require a cost-benefit unless prevented by law. So those are very rare occurrences. So even where agencies think that their rule is of borderline economic significance or would rather not do the cost-benefit analysis, we do not give them a free pass.

Senator LANKFORD. Well, you and I, a couple of years ago, had a protracted conversation about social cost of carbon right when it was being released as well, which is obviously a very significant decision, came out in a microwave oven rule, if I recall correctly. The first time it was released it was kind of slipped into the middle of that and the implication was it is going to kind of go into every rule just a little bit at a time. And then it came back and was reviewed and has gone through a process, has recently gone through that again.

You had mentioned the Circular A-4 earlier as that is kind of the standard on it, but the social cost of carbon, if I remember correctly, did not use that same standard that was set in there at the discount rate of how you evaluate the long-term effects. It changed the number a little bit. Do you happen to know why, on that particular rule, when you said that the A-4 is kind of the gold standard there, why in that particular social cost of carbon rule the discount rate that is in A-4 was not used?

Mr. SHELANSKI. Thank you, Senator. To clarify, the social cost of carbon is not a rule. The social cost of carbon is an input into—

Senator LANKFORD. It is an estimate, correct.

Mr. SHELANSKI. Yes. It is an input that agencies can use where appropriate in a cost-benefit analysis.

Senator LANKFORD. But it is obviously extremely important because when you are looking at cost and benefit, it is one of those

factors that goes in that if it is not right, again when you look at a 20-year window or a 50-year window, it changes pretty dramatically.

Mr. SHELANSKI. Right. So the interagency body that came up with the cost, the social cost of carbon estimate, based their analysis on publicly available, independently developed, peer-reviewed models, used inputs that one would suggest were appropriately chosen, actually, under Circular A-4. Circular A-4 does not mandate that in every case a particular discount rate or discount range could be used.

It gives guidance as to what we thought, at least at the time that the circular was last revised, that a good range of discount rates were from 3 to 7 percent, but which one is appropriate in a particular context will depend very much on the circumstances.

The judgment was reached in the social cost of carbon and I was not there when the original estimate was developed.

Senator LANKFORD. Right, but you have been there during the revision.

Mr. SHELANSKI. I have been there during the revision. I think that what the revisions have done is to review whether we think we have the right inputs. We have actually been generally criticized on the outside for having a discount rate that is too high in that.

And what we are doing next in the social cost of carbon process, which I might add that the Government Accountability Office (GAO) commented, I think favorably on, what we are doing now is moving forward in a process that we have recently announced with the National Academies, will develop again a very robust estimate that will go out for public comment and for peer review.

Senator LANKFORD. And then how long is the look as far as the benefits on social cost of carbon? How far does it go out?

Mr. SHELANSKI. I think we have a range that we look over and we have both the short and long-range estimates. So there is a range that will come out in that guidance.

Senator LANKFORD. So give me the guess here. Is it a 5-year range, 10-year range, 20-year range? As you mentioned, most of those rules are 20 years in cost and benefit. Does it go out to the farthest extreme to 20 years?

Mr. SHELANSKI. I am sure it does. I would have to go back and look and see.

Senator LANKFORD. But it does not go farther than 20 years as far as benefits?

Mr. SHELANSKI. I would have to go back and check how far out we are looking. The real question is under the circumstances given what we are trying to achieve what is an appropriate timeframe and some can be quite a long timeframe.

Senator LANKFORD. So how do you do the indirect benefits as well as indirect costs when you deal with something like the social cost of carbon? Just take a microwave oven, for instance, where it all started there. There is a benefit to saying actually the food was cooked faster, it did not use other fuels, did not use other types of electricity or whatever it may be. How are you figuring that in as well as the cost that goes into it as well?

Mr. SHELANSKI. Well, the social cost of carbon would only be one input into that regulatory—

Senator LANKFORD. But it is a pretty significant input.

Mr. SHELANSKI. It is, but equally significant would be other kinds of—for example, the benefits of using the microwave, the savings in time to people, the convenience, the cost savings that people might have from cooking more food at home because it is more convenient rather than going out. These are the kinds of things that we would ask the agency to consider as well.

Senator LANKFORD. So back to the 7 percent versus 5 percent decision on social cost of carbon, can you help us understand how that decision was made?

Mr. SHELANSKI. Well, I think that when you look at—and I cannot comment as to what the interagency deliberations were at the time, I was not there. But I would simply note this. If you used a 7 percent discount rate for the social cost of carbon, we would effectively be saying that environmental damage from carbon, just far enough forward for grandchildren to be becoming adults, would not matter at all to us. We would put a value of zero on that.

And since what we are trying to achieve through the social cost of carbon is some accounting for the cost to society going forward to the cost of a well functioning economy, to the cost involving our health and safety, what that is going forward into the future, such a high discount rate would be inappropriate because—

Senator LANKFORD. That seems a get outside of that 20-year window we were talking about.

Mr. SHELANSKI. Well, the actual calculations of the costs rather than what we think is an appropriate benefits range is something, as I said, I would be happy to go back and look at those and re-engage you.

Senator LANKFORD. Because again, let me just try to clarify that. But if you are doing that 7 percent and you are looking at the effects on our grandchildren, then now that our costs and our benefits are not side by side equal on that, now we have a long window for one and a short window for another one.

Mr. SHELANSKI. And again, it would depend on the particular circumstances of the rule in which the social cost of carbon was being used. What the social cost of carbon does is it says, What are the costs to the economy, to society of putting an additional ton of carbon into the atmosphere.

Senator LANKFORD. How far out though?

Mr. SHELANSKI. Again, we had some different calculations because you get different numbers depending on—

Senator LANKFORD. Right, but I am trying to get back to this 20-year amount that you say is what is typical. It goes beyond that 20 years though?

Mr. SHELANSKI. As I said, I need to go back and double check our technical support document and get back to you on what our timeframes are.

Senator LANKFORD. Yes, because I want to us to be able to help clarify this because this is important to us, to feel like there is a sense of fairness. If one side of the cost-benefit analysis is 20 years and the other side may go out 60, that is literally putting your thumb on the scale on one side and there is not a perception of

fairness in between the two. To say if we do this, this will have this long-term affect out there on the horizon.

Mr. SHELANSKI. I think that it is a question of economics and of evidence, not of perceived fairness. It may be that you can incur a cost in one year that will lead to benefits that go out quite a bit farther.

Senator LANKFORD. Right.

Mr. SHELANSKI. The question is, is that a correct economic analysis on the cost side and do you have adequate evidence on the benefits side.

Senator LANKFORD. And that is what a lot of our conversation last time was, social cost of carbon, because the rule is promulgated and then, if I remember, 3 years later, maybe it was 4 years later, it went up 50 percent, which is a pretty dramatic shift in the model, and then has been re-evaluated again and came back \$1,000, if I recall correctly.

Mr. SHELANSKI. Came down about a dollar ton, yes.

Senator LANKFORD. So the shift is what is interesting, I guess. If it is a reliable model and 3 years later you have to adjust it 50 percent, it causes all of us to raise our hand and say, Why is that a reliable model if you had to change it 3 years later by 50 percent when you are looking at modeling that may go out over the next hundred years. So 3 years ago, your hundred-year model was that bad.

Mr. SHELANSKI. Well, I am not sure it was that bad. In fact, it understated the costs. So in that sense, the bias worked in favor of those who would not want regulatory costs imposed. I think what we are trying to do with the social cost of carbon is to use the best economics and science available as to what the benefits will be to our society of keeping a ton of carbon out of the atmosphere.

We made clear in 2010 when the original estimate came out that this would be an ongoing process because the models are constantly updated by those who develop them. New scientific evidence is coming in. Now, we do have to ask a fundamental question, whether there is a minimum threshold of reliability and credibility to the underlying science that it is worth the enterprise. We believe that there is.

One of the reasons that we are engaging the National Academies, one of the reasons that we look to all of the international bodies that are deeply engaged in this, is to make sure that the science is sound and that we are keeping up with the latest science and economics.

Senator LANKFORD. OK.

Senator HEITKAMP. If I could just switch gears here a little bit and talk about process. I think those of us who work on issues every day and who are here because we are interested in public policy, we tend to fall in love with our ideas. Right? We think, Oh, that is such a good idea, I think it should be a law.

And one of the concerns that we have is that an agency, not wanting to be biased, gets out ahead, makes a proposal, and then becomes a defender of the proposal as opposed to a promulgator of an unbiased rationally based rule.

And so, we have been talking a lot about advanced notice of proposed rulemaking so that we do not have an embedded bias in that original drafting for which people hunker down and go into defense mode. Do you believe that if agencies engaged earlier with stakeholders in the process and actually have that comment before they begin to finalize their own thinking about the rules that we might have a more harmonious regulatory process and have greater use of advanced notice of proposed rulemaking?

Mr. SHELANSKI. I think we have a shared view that early engagement with the whole range of stakeholders is important and beneficial to a rule. And if an agency does come forward with a proposed rule before they have gathered the evidence and the input, that could lead to real problems because the starting point for the rule, as you say, could be something that is not well grounded in the evidence or the reality of the world in which the rule is actually going to operate.

So I think agencies, by and large, are quite good at doing notices of inquiry or the advanced notice of proposed rulemaking (ANPRMs) that will help them gather the necessary evidence. And I think they are good even when they are not doing that process to have a long development process for a notice of proposed rulemaking where they are gathering stakeholder input.

Whether it is during the process of a notice of proposed rulemaking (NPRM) or through an ANPRM, I fully agree that an agency should not proceed with a rule without a good basis for understanding.

Senator HEITKAMP. So you would agree that this would be a best practice in rulemaking generally?

Mr. SHELANSKI. I think having the evidence and the understanding of, for lack of a better term, the marketplace in which the rule will operate, is a necessary baseline for doing a good rulemaking. What the particular procedural vehicle is could vary, but we certainly encourage agencies in that direction.

Senator HEITKAMP. Do you think we should mandate agencies in that direction?

Mr. SHELANSKI. I think requiring agencies to have a sound basis for proceeding is a fine idea. The particular way that we would put that in place is something I would welcome discussions on. I would also add, though, that I think our system has pretty good incentives for agencies to do that as things stand.

Agencies do have to justify their rules on the record ultimately, when they are Executive Branch rules before us at OIRA when we review them; when they are not, for any rule under the Administrative Procedure Act (APA) before a court. There has to be public notice and comment in most cases, not all cases. But in almost every case, the rule is judicially reviewable and if the agency does not have a good record and looks like it is acting—

Senator HEITKAMP. So would you not agree that judicial review is a pretty cumbersome and expensive process and results? Let us take a look at waters of the United States. I am sure it is something that you have never had to deal with. And let us look at all the various attempts to do jurisdictional water determinations and what has happened.

I mean, when you end up with a court case that is 441, that is not particularly a good way to get guidance on how we are going to get certainty on what is jurisdictional waters under the Clean Water Act. And so, obviously lots of debate over that rule. I just use these as illustrations. I am not asking you to comment on the efficacy of the rule or whatever, but I use it as an illustration of where the process seems to have gone horribly wrong in terms of ships passing in the night.

We need to have a definition so there is certainty to American businesses and American landowners, but yet we keep throwing more uncertainty at it. And so, it seems to me that the more input we can get on the front end, the more we can force a dialogue and collaboration, the less set people are. This is one of those examples that I think maybe proves the need to have more collaboration on the front end.

Mr. SHELANSKI. I think the point about judicial review is we certainly would rather have rules that people do not feel the need to litigate and feel like there are good rules and ones that they can live with. But what judicial review does is provides an incentive. Agencies want to avoid it, just as litigants want to avoid it, but the mere knowledge that it exists and will happen in some cases, and it does happen frequently, is a notice to the agency, We really need to get our ducks in a row.

So my suggestion is that it provides good incentives under the existing system for agencies to engage in outreach, but I think agencies, in many cases, could benefit from additional contact with the parties that are going to benefit and bear the cost from their rules and undergo preliminary steps, as I said, whether part of NPRM or through an ANPRM to create the rule on a more informed environment.

Senator HEITKAMP. When you do your review—and we will go back to the renewable fuel standard (RFS). We held a hearing on that whole process and the justification for the authority to do that rule was very interesting to me because this was really about infrastructure even though historically and under our mandate here, the ability to review the rule based on infrastructure to accommodate the marketplace was taken out, and a clear sign, in my understanding of statutory interpretation, when it is in and it is taken out, might be an indication that it was not intended that you could use that.

So bootstrapping another provision to do exactly that seems to me to be an extension, and an inappropriate extension, of authority. I mean, this is not news to you, I am sure, but it raised the question to me on what kind of review you do on the legality of the rule. Never mind the cost benefit or the appropriate process, but the fundamental legal authority to actually do a rule.

Mr. SHELANSKI. We focus overwhelmingly on the analytics of the rule and how well the rule will function, but we are not blind to the legal issues. They are not primarily in OIRA as a bailiwick. They would line up in the first instance with the agency.

But part of the interagency review process, and a critical one, is that both internal to the Executive Office of the President and external through other Executive Branch agencies, there is legal review of the rule. So we would expect, through the interagency re-

view process, White House counsel and the Justice Department to alert us if there were legal concerns and we do require those concerns to be resolved.

We do not act as an independent court. At any given day, there might not be a single lawyer in OIRA. I happen to have a law degree. A couple of people in my office happen to have law degrees, but it has not been unknown for there not to be a single lawyer in OIRA.

Senator HEITKAMP. But in the history, there has never been a rule rejected for lack of legal authority to promulgate it?

Mr. SHELANSKI. During the time that I have been Administrator, that has not been a basis on which we have asked an agency not to do a rule. Others have, but not us.

Senator LANKFORD. Can I ask a couple of rapid fire questions here? On the retrospective review, can you ask, is there a better way to do this rather than what we have done? You had mentioned before some of the cost issues and everything. Is it permissible to say 10 years later, 20 years later, this is how we are regulating a retrospective review? Can it include the question, is there a better way, is there additional flexibility that would still accomplish the same thing?

Mr. SHELANSKI. Absolutely.

Senator HEITKAMP. OK. So that can be included in the conversation on a retrospective review?

Mr. SHELANSKI. Yes.

Senator LANKFORD. Is it typical?

Mr. SHELANSKI. Yes, it is quite typical.

Senator LANKFORD. Let me ask a question that is just, frankly, obvious. So it screams just obviously an easy question. What time is midnight when you are talking about midnight regulations?

Mr. SHELANSKI. I guess the way I would answer that is that is that more important to me than midnight is when is 10 p.m.

Senator LANKFORD. Sure. I can say 2008, that was prospective rule is June 1, final rule is finished by November 1.

Mr. SHELANSKI. Right. So what I have asked agencies to do is to prioritize their rulemakings. We do not pick their priorities for them. But get your ducks in a row because what we care about at OIRA is having time to review the significant rules and to do a good and rigorous evaluation under the Executive Orders. And I cannot do that if I am getting rules too late in the day.

Senator LANKFORD. So that the hard question is, can you commit to us you will follow through on Executive Order 12866 in 2016 and even in the rush to try to get some rules done at the end, we are still going to do due diligence at OIRA?

Mr. SHELANSKI. I can commit, Senator Lankford, that I will do my darndest to make sure that OIRA gets every opportunity to review all the rules that come through. I will do everything in my power to ensure that. We have started that work today with regular—I mean, today? We started it months ago, but it keeps going today and will continue through the remainder of the Administration to have ongoing prioritization meetings with agencies to make sure that we are getting the rules through in a cadence that allows us to do that review. I can commit to doing my darndest.

Senator LANKFORD. Will there be a setting of a time and a date to say, must be done prospective by this date, must be done final by this date to make sure that we are not cramming at the end so that agencies are aware in advance?

Mr. SHELANSKI. I am not sure when that conversation would happen or whether such firm dates are necessary, but we are already letting agencies know what kind of time we need to review.

Senator LANKFORD. I would suggest those kind of dates are necessary so that every agency sees the deadlines that are coming. Otherwise, it does get sloppy at the end. Every Legislative Branch, whether it be State or Federal, always knows how sloppy things get at the end as well as every agency. So setting the times early would be helpful to everyone in the process.

Let me ask another quick question on this as well. In 2014 GAO found that 72 percent of the significant OIRA rules reviewed included no language to explain why the rule was designated as significant. Help us to understand that. How can we get better transparency, that if a rule is declared significant we understand why it was declared significant.

Mr. SHELANSKI. I think typically when a rule is economically significant, for that category of significance, I think it is obvious, because we list the rule as economically significant. I think the other reasons are so varied. I would say the most common one, it usually is not stated because maybe it just seems evident on the process, is that another agency wants the opportunity to comment on what the rule issuing agency is doing. So I would say interagency equities are probably the biggest reason that we pull a rule in.

Senator LANKFORD. But is there a way to be able to just say that so that people can see it and are aware of that? This is deemed significant because of this. It is the same thing when changes are made. When OIRA recommends something as a change to a regulation back to the agency, that is also supposed to be transparent on it and we are not getting that, I do not think, sometimes. Sometimes we are seeing the change in rules, but we do not see the OIRA recommendation.

So these are just basic transparency aspects of it, to know why that was deemed significant, to know what OIRA was recommending, that an agency said you are right and we are making that change, would be helpful.

Mr. SHELANSKI. Thank you. I will take that back and look at ways that we might be able to provide more insight into the basis for the significance determinations.

Senator LANKFORD. OK. Senator Heitkamp.

Senator HEITKAMP. As long as we are going rapid fire, I have one more question and that is about codifying Executive Order 12866 and 13563. Obviously we rely on the good judgment of whoever sits in the Oval Office to make sure that these Executive Orders are continued Administration to Administration.

We have proven kind of bipartisan support for that type of regulation or that type of oversight, that type of structure. Why should we not codify those two Executive Orders?

Mr. SHELANSKI. I think we would be very open to exploring the ways in which you might be considering doing such a thing to talking about those with you. We feel right now that the Executive Or-

ders are on very solid ground having stayed firm and really only been reaffirmed across Administrations of both parties.

So we do not feel particularly vulnerable in that regard at OIRA. On the other hand, there may be aspects of the Executive Orders that we would be interested in hearing your thoughts on as you consider reform.

Senator LANKFORD. So you are saying that of all 25 candidates for President out there, you are confident that all 25 of them will continue the same process?

Mr. SHELANSKI. I looked in all of their platforms and some of them simply do not have an OIRA plank.

Senator LANKFORD. That is our thought as well, is that maybe there is a need to codify some of these things because it is a possibility that someone may be elected that does not—

Senator HEITKAMP. They do not even know who you are.

Mr. SHELANSKI. I would like to keep it that way. [Laughter.]

Senator LANKFORD. I appreciate you being here. I appreciate the ongoing dialogue. The transparency part of it is extremely important. What you are doing is extremely important in OIRA. We do want to make sure the cost-benefit, that the retrospective reviews are actually happening. Cost-benefit is clear and it is happening. Things like the Michigan versus EPA case do cause alarm to us to say that there is an ongoing conversation somewhere out there where someone is saying maybe there is not a need for it. Waters of the United States had the same kind of issue to try to evaluate whether the cost is out there. So there are other things that raise our attention as well.

To make sure that OIRA stays on top of some of these things, that the American people are kind of staying on top of, and to make sure that there is fair between cost-benefit analysis, and that it is very clear and consistent across the board. So appreciate the ongoing work. We will maintain this conversation in the days ahead.

I am allowing seven additional days for any individual to be able to submit questions or statements for the record. With that, we are adjourned.

[Whereupon, at 4:05 p.m., the hearing was adjourned.]

A P P E N D I X

OPENING STATEMENT FOR SEN. HEIDI HEITKAMP

Regulatory Affairs and Federal Management Subcommittee hearing, July 16, 2015: **“Reviewing the Office of Information and Regulatory Affairs’ Role** **in the Regulatory Process”**

Thank you Chairman Lankford for organizing this hearing. Everyone here should take note, I may be wrong, but this is probably the first time in the history of our Nation that the Chairman, Ranking Member and Witness have all been redheads.

As I have said before, regulations underpin almost everything our nation and our citizens do. Regulations keep our products and food safe. Regulations work to prevent fraud and keep our economy and Americans working. Regulations are one of the most important parts of our federal government, even if they are not always well understood.

For our nation to be successful and safe, for our citizens to be able to work hard and provide for their families, we need an effective and efficient regulatory process that works for American businesses and families. OIRA, while unknown to most Americans, plays a very large role in ensuring that we have such a system.

Performing proper oversight of the regulatory process is one of the most important tasks of this little known office within OMB. The Office of Information and Regulatory Affairs performs this oversight every day. The work that Mr. Shelanski and his staff perform ensures that agencies are held to the standards set forth by this body and Presidential Executive Orders.

OIRA’s mission is expansive, and the work they perform ensures that American businesses and families are not overly burdened by everything from paperwork requirements to the compliance costs associated with regulations. OIRA ensures that agency rulemaking is necessary, that the benefits justify the costs, and that the agencies do not take liberties not afforded them. It is important then, that from time to time we discuss the oversight performed to ensure that we are only issuing those rules that stand up to scrutiny as they are implemented.

A theme you will hear me talk about today is how retrospective review can be further used to improve our regulatory process. Today, in compliance with Executive Orders issued by President Obama, agencies are required to engage in retrospective review. However, as with any executive order, it only takes a lack of action on the part of a future administration to lose this important action.

Technology improves by the minute, and regulations have to do a better job of keeping up with those changes. In the year 1995, receiving email, reading the newspaper, and watching some SportsCenter highlights on your cell phone was the stuff of dreams. Today, many people couldn’t function without a computer that fits in their pocket that allows them to manage their money, contain their address book and allow them to surf the Internet.

A regulation, written in 1995, could still be necessary, but it might not fully take into account all the technological or other changes of the past 20 years. Just as industries have changed with technology, so must the regulations which the businesses are subjected to. I know that many of these regulations can simply be removed. Others may need a small tweak to make it easier on small businesses. If we don't look back, we can't see improvements.

Some may say retrospective review focuses on the past, but I see it as forward looking. We must make sure that our regulatory process can adjust to the future and ensuring retrospective review works and is meaningful can help achieve that goal. That's why I am exploring legislative initiatives focused on retrospective review to ensure our regulatory process continues to improve.

It is critical that any discussion about improving the regulatory process bring with it an honest discussion of the resources needed to execute that strategy. Our nation needs workable solutions, not another layer of administrative burden.

With that, I look forward to hearing from Mr. Shelanski and speaking with him about his thoughts on the regulatory state. Thank you.

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**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
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**TESTIMONY OF HOWARD SHELANSKI
ADMINISTRATOR FOR THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENT AFFAIRS
SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT
UNITED STATES SENATE**

July 16, 2015

Chairman Lankford, Ranking Member Heitkamp, and members of the Subcommittee:

Thank you for the invitation to appear before you today. I am pleased to have this opportunity to discuss the role of the Office of Information and Regulatory Affairs (OIRA) in regulatory review.

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

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

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

OIRA works with agencies to continually improve the review process and the quality of Government regulation. First and foremost, OIRA upholds the standards of review that the Executive Orders establish, while remaining mindful that unnecessary delays in review are

harmful across the board: to those wishing to comment on proposed rules, to those who must make plans to comply with rules, and to those denied the benefits of regulation. Both rigor and efficiency in regulatory review are essential to improving the clarity and quality of our regulatory environment.

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

OIRA does not review all Executive Branch regulations, and nor would it be efficient for the office to do so. Each year agencies issue thousands of rules, many of which are minor and technical. OIRA review applies only to “significant” regulatory actions, which may include guidance documents, notices, or other actions in addition to rules that have regulatory effect. The most fundamental category of significant regulations are those that are “economically significant,” the threshold for which under E.O. 12866 is “an annual effect on the economy of \$100 million or more.” That threshold is the same one Congress has used to define rules as “major” under the Congressional Review Act.

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

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

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

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

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

Existing rules, too, warrant scrutiny to ensure that they achieve their benefits and goals without imposing unnecessary costs. Retrospective review, which the President has advanced through E.O. 13563 and E.O. 13610, is a crucial way to ensure that our regulatory system is modern, streamlined, and does not impose unnecessary burdens on the American public. Even regulations that were well crafted when first promulgated can become unnecessary or excessively burdensome over time and with changing conditions. The Administration's retrospective review efforts to date will yield savings of over \$20 billion over the next five years. Moving forward, and as President Obama made clear in remarks at the Business Roundtable this past December, it is a critical part of this Administration's regulatory agenda that we do an even better job of finding and reforming regulations that are unduly burdensome or missing their mark.

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

Finally, under E.O. 13609 OIRA has important responsibilities related to international regulatory cooperation. We have made progress in a number of areas with our international partners

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

In conclusion, regulation activities can bring great benefits to Americans but also carries costs. It is critical to ensure that Federal agencies base their regulatory actions on high-quality evidence and sound analysis. Beneficial regulation must remain consistent with the overarching goals of job creation, economic growth, and public safety. We look forward to continuing our efforts to meet these challenges.

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

60 PLUS FOUNDATION James L. Martin, President
200 North Pickett St. #1603 Alexandria, VA 22304

James Lankford, Chairman Heidi Heitkamp, Ranking Member
Subcommittee on Regulatory Affairs and Federal Management

July 23, 2015

My name is Jim Martin. As President of the 60 Plus Foundation and speaking on behalf of senior citizens across the Nation, I welcome the spirit and commitment to bipartisan leadership you and Senator Heitkamp have undertaken in your roles as Chairman and Ranking member of the newly established Subcommittee on Regulatory Affairs and Management of the Committee on Homeland Security and Government Affairs.

A government-wide federal regulatory process with integrity is vital and necessary to the management of all of the Federal Government's agency actions and to the modicum of trust or more that needs to exist between the Executive and Legislative branches of Government if there is to be a successful and accountable conduct of these actions. We commend your and the full Committee's focus upon this value which finds its premises in Article I and II of the Constitution and is at the heart of today's Administrative State.

60 Plus is mindful of the Committee's legacy as a premier Committee within the Congress for oversight of the Executive Office of the Presidents's role to manage a federal regulatory process. It is aware that the Administrator of OIRA, the Office of Information and Regulatory Affairs, was created by statute in the 1980 Paperwork Reduction Act as a result of a Presidential request to delegate to his

Executive office authority he did not have under the Constitution, and that the Administrator of OIRA was first established as a Presidential appointment with Senate Confirmation in the 1986 Paperwork Reduction Act when bipartisan leadership from this Committee responded to President Reagan's direct request to resolve a zeroing of appropriations to the Office of Information and Regulatory

Affairs (OIRA) within the Executive Office of the President. We are aware as well that leadership of this Committee was responsible for the passage of the Paperwork Reduction Act of 1995, legislation which overturned a Supreme Court decision (*Dole vs. U.S. Steelworkers*) and passed the Congress on roll call votes without dissent in either body. WE KNOW OF NO LEGISLATIVE ACCOMPLISHMENT OF THIS BIPARTISAN FEAT IN BOTH BODIES SINCE!

At the close of last week's hearing with the Administrator of OIRA Chairman Lankford indicated he would allow additional days for any individual to be able to submit questions or statements for the record. I want to thank Chairman Lankford and Ranking Member Heitkamp for an opportunity to participate in its ongoing efforts to enable more effective oversight of the federal regulatory process.

Last December 1, 2014, in my other role as Chair of the 60 Plus Association, an organization I founded 20 years ago to give seniors another voice on Capitol Hill, I submitted comments to the EPA on the Clean Power Plan. Our observation then, as now, is that the EPA rulemaking illustrates that the Federal Regulatory Process is broken. We noted after sponsoring and submitting results from a study that the EPA proposal did not account for the disproportionate impact of detrimental health effects of raising electricity prices for senior citizens. We also asserted in our comments that EPA's rulemaking violated certain procedural requirements of certain Presidential Executive Orders and statutory law cited in the preamble to the rule.

As the Committee has observed, the Clean Power Plan rulemaking is over at OIRA for ostensibly final review pursuant to Executive Orders 12866 and 1356. The Administrator of OIRA has commented that a part of that final review on behalf of the President is to review the rulemakings adherence to the law. We recommend

the Subcommittee consider asking the Administrator to respond to the following questions in order to better understand OIRA's role in the regulatory process:

1. The agency declared in its rulemaking that "this proposed action does not contain a federal mandate that may result in expenditures of \$100 million or more for state, local and tribal governments in the aggregate, or the private sector."

Accordingly, the Clean Power Plan proposal does not involve the threshold amounts needed to trigger the Unfunded Mandates Reform Act [UMRA] .

Is this determination subject to OIRA review now during the present review, or was this particular agency action final after OIRA's initial review of the EPA proposal? Should the determination be made that the Clean Power Plan does contain a federal mandate that exceeds \$100 million for purposes of the Unfunded Mandates Reform Act, how would the Clean Power Plan rulemaking accommodate this different determination ?

2. The EPA Administrator certified, as required by law, that "After considering the impacts of this proposed rule on small entities, I certify this action will not have a significant impact on a substantial number of small entities."

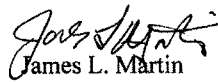
Is this certification required by law and asserted in the preamble to the rulemaking subject to OIRA's review in the ongoing final review of the rulemaking? Should the determination be made that a substantial number of small entities are significantly impacted how would the Clean Power Plan rulemaking accommodate the need for a different certification ?

3. There will be millions of senior citizens impacted by the Clean Power Plan and its impact on electricity prices. There is a substantial senior citizen community dependent primarily on social security and are considered low income. The Agency concluded and stated in the preamble to the Clean Power Plan pursuant to its responsibilities under Executive Order 12898 regarding Environmental Justice concerns that it is not practicable to determine whether there would be *disproportionately* high and adverse human health or environmental effect on minority, low income, or indigenous populations from this proposed rule. Should the determination that this conclusion was not merited by the comments received

how would this concern for environmental justice for the low income senior citizen community be address and accommodated in the rulemaking?

4. What aspects of the information required by the state plan both initially and on a continuing basis are subject to the scope of the Public Protection Section of the Paperwork Reduction Act (44USC3512)? Will this question of the scope of the Paperwork Reduction Act and its relationship to the Clean Power Plan be reviewed by OIRA in its present review?

On behalf of America's aging population, thank you for your consideration.


James L. Martin

President

60 Plus Foundation

Submitted via Regulations.Gov

December 1, 2014

Docket ID No. EPA-HQ-OAR-2013-0602

Administrator Gina McCarthy
U.S. EPA, Mail Code 2822T
1200 Pennsylvania Ave. NW.
Washington, DC 20460

Dear Administrator McCarthy:

60 Plus respectfully submits these comments on the proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Stationary Sources: Electric Utility Generating Units (CPP).

60 Plus represents 7.2 million senior citizens.

As we learned this past winter, the United States electrical energy infrastructure was stretched to the brink...and the projected shuttering of additional coal plants as a result of EPA regulations is going to make things even worse. Of special concern to me, and the seniors I represent, is the artificially high price of electricity most Americans are paying. Any increase in the price of electricity or natural gas is harmful to the seniors. Seniors on fixed or diminishing incomes pay a disproportionate share of their modest income for utilities. I believe our nation must preserve and grow the contribution of coal-based electricity... the surest and most reliable way to deflate electricity prices.

As you know, Madame Administrator, during times of brutal cold and heat, tragedies abound of people dying in their homes, unable to pay their utility bill. While EPA is using "co-benefits" to justify the rule, it has ignored the pre-mature deaths due to loss of discretionary income. The Americans most affected are nearly always the elderly. EPA should be promoting, not destroying, projects that create an abundance of reliable and affordable electric generating capacity for our nation's seniors.

60 Plus filed comments on the new power plant greenhouse gas proposal in May. This new proposal is doubling down on bad policy. EPA has foreclosed the opportunity to build new coal plants and now is proposing to shut down existing coal power plants.

We strongly oppose the existing plant rule for several reasons:

1. The existing EPA rules are already driving up the costs of natural gas and electricity prices. The new proposal will add even more unacceptable costs.

An article on April 29, 2014 provided a bleak picture of our future under EPA regulations:

<http://dailycaller.com/2014/04/29/epa-regulations-set-to-increase-natural-gas-prices-by-150-percent/>

Environmental Protection Agency policies resulting in the shutdown of coal-fired power plants will contribute to a 150 percent price hike for natural gas, accompanied by a 7 percent rise in electricity prices, according to government data.

The U.S. Energy Information Administration (EIA) projects that the accelerating rate of coal plant retirements will cause natural gas prices to rise from \$3.44 per million British thermal units (Btu) in 2012 to \$5.91 per million Btu in 2025. This would boost retail electricity rates for households and businesses from 9.8 cents per kilowatthour to 10.5 cents per kilowatthour — a 7 percent price jump by 2025.

Gas and power prices are driven even higher by 2040 as more coal plants are shuttered. Natural gas prices will increase 150 percent over 2012 levels and retail power prices will rise 22 percent over 2012 levels as more coal plants are retired.

As you know, there is a real cost in lives when the cost of energy rises. EPA has used the calculation of one pre-mature death for every \$10M in lost disposable income. EPA must provide a full analysis of the costs of its proposal, especially as it relates to seniors.

2. The new rule will have costs far exceeding the estimates provided by EPA.

We commissioned an analysis of the EPA proposal (**attached**) that shows the substantial impact on seniors. Below is a summary of the analysis:

- The Census Bureau reports that the median pre-tax household income of 65+ households in America was \$33,848 in 2012, 41% below the \$57,353 median income of younger households.

- More than 40% of America's 65+ households had gross annual incomes below \$30,000 in 2012, with an average pre-tax household income of \$17,032, or \$1,419 per month.

- **The prices of all essential consumer energy products – electricity, home heating fuels, and gasoline- have increased at rates exceeding both the CPI and Social Security COLAs for the past decade, and these trends are expected to continue.**

- The average annual electric bill for 65+ households, \$1,164 in 2009, represented 61% of total residential energy bills.

- Energy costs are adversely impacting lower-income seniors afflicted by health conditions, leading them to forego food for a day, reduce medical or dental care, fail to pay utility bills, or become ill because their home was too cold. (APPRISE, 2009).

- **EPA projects 5.9% to 6.5% average retail electric price increases for the proposed CPP rule in 2020, with increases as high as 10% to 12% in some regions (CPP RIA Table 3-21).** This projection is highly uncertain because it assumes that states will follow

EPA's prescribed "building blocks" approach to emission reductions. **EPA's projections for the CPP rule are in addition to a 3.1% average national price increase in 2015 for compliance with EPA's 2011 Mercury and Air Toxics Standards rule (EPA MATS RIA, Table 3-12).**

- A new NERA analysis of the proposed CPP indicates potential delivered electric price increases averaging 12% to 17% over the period 2017 to 2031, depending upon the degree of implementation flexibility. Total consumer energy costs could rise by \$366 to \$479 billion in net present value (NERA/ACCCE *et al.*, October 2014).

- EPA projects that the CPP will lead to further increases in delivered natural gas prices of 7.5% to 11.5% in 2020 (CPP RIA, June 2014). U.S. DOE projects that the price of natural gas delivered to electric utilities will increase at a compound annual rate of 3.1% above the rate of inflation between 2012 and 2040, the highest rate of real price increase for any delivered fuel in any sector of the economy (DOE Annual Energy Outlook 2014).

- The CPP will cause the retirement of 30 to 49 Gigawatts of coal generating capacity by 2020 (CPP RIA, Table 3-12). This is in addition to more than 50 Gigawatts of coal capacity expected to be shuttered over the next few years as a consequence of compliance with EPA's 2011 MATS rule, low natural gas prices, and other factors (DOE/EIA AEO 2014).

- The additional base-load generation capacity projected to retire due to the CPP would increase the risks of brownouts, load curtailments, and other power disruptions in regions affected by these retirements.

- A new ozone air quality standard could dramatically increase energy costs for all American consumers and businesses. EPA's planned revision to the 2008 National Ambient Air Quality Standard for ozone, currently set at a level of 75 parts per billion (ppb), in December 2015. A July 2014 analysis of a potential new ozone standard set at a level of 60 ppb indicates that such a standard could impose \$348 billion in annual compliance costs.

3. The science justification for the new rule is severely flawed.

On March 19, 2014, the Senate Committee on Environment and Public Works Minority issued the report:

"EPA's Playbook Unveiled: A Story of Fraud, Deceit, and Secret Science"

This report documents the extremely disturbing 20 year saga of the use of severely flawed particulate matter (PM) and ozone science. This is the same science that was crucial in the 2009 Endangerment Finding and the 2010 / 2013 Social Cost of Carbon. This science has been used to justify this rule

The House Science, Space and Technology Committee conducted a thorough two year

investigation of the use of secret science by EPA that resulted in an August 2013 subpoena of you.

<http://science.house.gov/press-release/smith-subpoenas-epa-s-secret-science>

Excerpt:

Chairman Smith: *"In September 2011, the EPA's then-Assistant Administrator Gina McCarthy committed to make the data sets available to the Committee. Even though Ms. McCarthy now leads the agency, she has yet to provide the promised data to the Committee.*

"This subpoena could have been avoided. Unfortunately, we've been put in this position by an agency that willfully disregards congressional requests and makes its rules using undisclosed data. After two years of failing to respond, it's clear that the EPA is not going to give the American people what they deserve—the truth about regulations.

"The EPA should not base its regulations on secret data. By denying the Committee's request, the agency prevents Congress from fulfilling its oversight responsibilities and denies the American people the ability to verify EPA's claims. The EPA's lack of cooperation contributes to the suspicion that the data sets do not support the agency's actions. The American people deserve all of the facts and have a right to know whether the EPA is using good science."

In your March 2014 response, you admitted that EPA does not have the data.

<http://science.house.gov/sites/republicans.science.house.gov/files/documents/EPA%20letter%20to%20Smith%20March%207%202014%20%282%29.pdf>

How can EPA continue to hide behind secret science for new regulations like the current proposal? You must withdraw the current proposal and re-propose every regulation or finding that used the secret science.

4. EPA's rulemaking violates procedural requirements of certain Presidential Executive Orders and statutory law cited in Section XI. of the its preamble. 60 plus observes the rulemaking is a symbolic example that the federal regulatory is broken and lacks integrity.

[A.] E.O. 12866 and E.O 1356. The EPA's use of the 2013 *Technical support Document for the Social Cost of Carbon for Regulatory Impact Analysis (SCC)* under E.O. 12866 is foundational and unacceptably flawed. The disproportionate impact of

detrimental health effects and morbidity of raising electricity prices for senior citizens in ignored in assessing social costs.

The SCC is an "agency action" the use of which will not be changed by EPA in this rulemaking. By itself the SCC document is a "rule" as that term is defined by 5USC551(4) of the Administrative Procedure Act.

Given EPA's usage of the SCC, we intend to recommend to the new Congress that it use the Congressional Review Act (CRA) to enable effective oversight of the SCC. The CRA explicitly establishes that it is the Congress, without interference from the Executive or the Judiciary that determines the scope of its provisions to rules.

We further note the Department of Defense (DoD) and the Department of Health and Human Services (HHS) were omitted by the EPA led interagency committee that developed the SCC. Given the expertise these Department's can contribute to the social cost of carbon estimates, these exclusions contribute to the lack of transparency, secrete, and flawed character of the SCC's development. Among other aspects, the DoD's role in the 500 billion a year procurement program, wherein the cost of carbon has significant consequences touching upon our National Security, raise the questions: Why was DoD expertise excluded? Can the SCC be trusted to serve as such a foundational basis for this rulemaking or others?

[B.] Paperwork Reduction Act (PRA) (44USC35). Section 3507 (a) reads in part: "*An agency shall not conduct or sponsor the collection of information ...*" unless it comports with procedural requirements of the Act.

Section 3512 Public Protection reads in part: "*Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply...*" unless the Acts procedural requirements are fulfilled and an approval is obtained by the assignment of an OMB control number by the Director of the OMB.

60 plus observes that the EPA notice of PRA applicability disregards procedural requirements of the Act. The rulemaking raises the specter of what significant aspects of the reporting and recordkeeping involved with State plan development and ongoing use subject to EPA's discretionary approval are within the scope of the PRA's Public Protection provision.

EPA does not mention that the rule cannot be made final until final approval from OMB pursuant to its responsibilities under the PRA. EPA noted that OMB must make a decision within thirty to sixty days after June 18, 2014. The sixty days have passed. With its extension of the comment period until after the elections, EPA has not, to our knowledge, informed the public of the status of the OMB decision.

Moreover, no mention is made of whether EPA analysis has determined, as it is required by the law to do, or how States can determine what aspects of the State submission and EPA's discretionary approval of State plans mandate collections of information which

are federally sponsored due to their discretionary and conditional approval by EPA. EPA appears to misguidedly assume that collection of information by the States which may be already collected for State purposes is not considered "federally sponsored" if it provided as a requirement element of a State plan. This is contrary to the statute.

Such an interpretation does more than distort cost implications, even if they are expressed in minimum and maximum range assessments. Such EPA assumptions are significant because the standard of review for EPA and OMB under the PRA is "necessity, including practical utility as opposed to "reasonableness" subject to judicial review under the APA.

Secondly, federally sponsored collections of information are required to be approved every three years are legally unenforceable and fall within the scope of Section 3512 Public Protection.

EPA obfuscates by not delineating EPA ICR numbers from OMB control numbers. This hinders the public participation required by the PRA and intended to accomplished concurrently with the opportunity to comment via on the rulemaking. A bland observation that OMB control numbers can be viewed in the Federal Register without indicating which control numbers are associated with State plan requirements adds to this lack of transparency and clarity.

The EPA approach to its legal responsibilities under the PRA lacks common sense. We join what we suspect is all Governors who represent tens of millions of senior citizens in doubting the creditability of EPA's labor cost estimate of some 44.8 million dollars for the whole country to provide the necessary federally sponsored collections of information which underpin State plans. Properly interpreted we believe the labor costs, among other burdens, is at least five times greater.

We recommend EPA stop flouting the requirements of law, and start following the law.

[C.] Regulatory Flexibility Act The Administrator certifies: "After considering the impacts of this proposed rule on small entities, I certify this action will not have a significant impact on a substantial number of small entities." She goes on to state that it State requirements, presumably subject to her ongoing discretionary approval of State plans that could potentially impact small entities.

She cites an unrelated 1999 Circuit Court decision to support her certification. [*American Trucking Assoc. v. EPA*, 175F.3d 1029,104-45 (D.C. Cir.1999)]

The opinion does not preclude the EPA undertaking an analysis as contemplated by the Act to address the rising prices of electricity prices upon small businesses that will result. Millions of senior citizens are engaged in attempts to supplement social security income by becoming small business owners and participants. Despite the Administrator's professed efforts to gather in small entity inputs, the lack of sensitivity to how small governments must struggle to meet the needs of its senior citizen populations merits

attention.

The certification is an final agency action which is a rule by itself and will not be changed during the rulemaking.

Given EPA's approach, we intend to join small business communities in recommending to the Congress it provide oversight of this certification under the procedures of the Congressional Review Act. As noted before, the CRA explicitly establishes the Congress may determine what rules are subject to the scope of the Act's provisions, without interference from the Executive or Judiciary.

[D.] Unfunded Mandates Reform Act. [UMRA] The EPA declares that "This proposed action does not contain a federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments in the aggregate, or the private sector in any one year."

The EPA insinuates that "apart from the requirements for states to develop State plans" the rulemaking does not impose direct compliance costs upon the States. It then observes the seriously flawed estimates generated discussed in its PRA discussion demonstrate that costs are below 100 million. They do not reach threshold amounts to trigger the UMRA's requirements.

The EPA acknowledges the expenses incurred by States to develop state plans will be paid for by the Federal Government.

This incredible declaration by the EPA is an attempt to flout the purpose and requirements of the UMRA. It is a agency action and determination that is a rule and will not be changed by the rulemaking.

Given EPA's approach we intend to join interested Governors to recommend to the Congress that they provide oversight of this determination by using procedures of the Congressional Review Act. As noted, the CRA establishes that the Congress may determine what rules are subject to its procedures without interference from the Executive or the Judiciary.

[J] Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. On one hand, the EPA states "The EPA has concluded that it is not practicable to determine whether there would be disproportionately high and adverse human health or environmental effects on minority, low income, or indigenous populations from this propose rule. " On the other hand, EPA asserts it will take into account "environmental justice" considerations in its individual permitting decisions.

We would like to bring to the EPA's attention that the health of millions of low income senior citizens are disproportionately harmed by its deliberate actions to raise electricity prices. The lack of sensitivity to millions of senior citizens who face this circumstance,

and to elected officials of all levels of government, much less private institutions, who deal with low income senior citizen activities is breathtaking.

We recommend the EPA consider the environmental justice senior citizens merit by its actions which will raise electricity prices .

Submitted via Regulations.Gov

December 1, 2014

Docket ID No. EPA-HQ-OAR-2013-0602

Administrator Gina McCarthy
U.S. EPA, Mail Code 2822T
1200 Pennsylvania Ave. NW.
Washington, DC 20460

Dear Administrator McCarthy:

60 Plus respectfully submits these comments on the proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Stationary Sources: Electric Utility Generating Units (CPP).

60 plus observes this EPA rulemaking illustrates that the Federal regulatory process is broken.

We oppose the existing plant rule because EPA's rulemaking violates procedural requirements of certain Presidential Executive Orders and statutory law cited in its preamble. [XI. A-J]

[A.] E.O. 12866 and E.O. 13563. The EPA's use of the 2013 *Technical support Document for the Social Cost of Carbon for Regulatory Impact Analysis* (SCC) under E.O. 12866 is foundational and unacceptably flawed. **The disproportionate impact of detrimental health effects of raising electricity prices for senior citizens is ignored in assessing social costs of greenhouse gas emissions.**

The SCC is an "agency action" as that term is defined by 5 USC 551(13) of the Administrative Procedure Act. EPA states as much in its rulemaking. By itself, it can be considered a "rule" as that term is defined by 5 USC 551(4). Its use by EPA will not be changed in this rulemaking.

Given EPA's usage of the SCC, we intend to recommend to the new Congress that it use procedural mechanisms of the Congressional Review Act (CRA) to enable effective oversight of the SCC.

The CRA explicitly establishes that it is the Congress that determines the scope of its provisions to rules, not EPA, and that it may do so without interference from the Executive or the Judiciary.

The CRA can enable deliberation by both Houses of Congress and floor votes on identifiable rules by way of joint resolutions of disapproval. Filibusters in the Senate may be avoided. While such resolutions may be approved or vetoed by the President, the

respective floor votes may be used by the Congress in its deliberations over what appropriations may or may not be used by corresponding agency actions to administer and enforce the respective rule. It can be effectively used as a Congressional oversight tool for any regulatory "action" that impacts the public.

We further note the Department of Defense (DoD) and the Department of Health and Human Services (HHS) were omitted by the EPA led interagency committee that developed the SCC. Given the expertise these Departments can contribute to the social cost of carbon estimates, these exclusions contribute to the lack of transparency, secrecy, and flawed character of the SCC's development.

Noteworthy is that the science based claims of the SCC avoided the scientific expertise in DoD. Among other aspects, the DoD's role in the some 500 billion a year Federal procurement program , wherein the accounting for the cost of carbon in Federal buying programs has significant consequences touching upon our National Security, raise the questions: **Why was DoD expertise excluded? Can the SCC be trusted to serve as such a foundational basis for this rulemaking or others? We think not.**

[B.] Paperwork Reduction ACT (PRA) (44 U.S.C. 35). Section 3507 (a) of the Act reads in part: "*An agency shall not conduct or sponsor the collection of information ...*" unless it comports with procedural requirements of the Act.

Section 3512 Public Protection reads in part: "*Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply...*" unless the Act's procedural requirements are met and an approval is obtained by the assignment of a valid OMB control number by the Director of the OMB. The control number must be publicly displayed.

60 plus observes that the EPA notice of PRA applicability reflects a disregard for the procedural requirements of the Act. Among other things, the rulemaking does not respond in any meaningful way to the important inquiry concerning what significant aspects of the burden associated with the reporting and recordkeeping involved with State plan development, submission, and ongoing use subject to EPA's discretionary approval are within the scope of the PRA's Public Protection provision.

Neither does EPA clarify for the public's understanding that the entire rulemaking cannot be made final until final approval from OMB pursuant to EPA's and OMB's responsibilities under the PRA. EPA noted that OMB must make a decision within thirty to sixty days after June 18, 2014. The sixty days have passed. With its extension of the comment period until after the elections, EPA has not, to our knowledge, informed the public of the status of the OMB decision, including to what extent the public could comment on the proposed collection of information specifically contained in the rulemaking. The public, including State governing bodies, have a right to know.

Moreover, no mention is made of whether EPA analysis has determined, as it is required by the law to do, of how States can determine what aspects of the State submission and

EPA's discretionary approval of State plans mandate collections of information which are federally "sponsored". Due to the discretionary and conditional approval by EPA of State plan elements the fruits of all collection of information provided to EPA by a State for EPA's use to determine approval should be considered "federally sponsored". EPA appears to misguidedly assume that collection of information by the States which may be already collected for State purposes is not considered "federally sponsored" if it is in turn provided as part of a required element of a State plan. This is contrary to the statute's meaning for "sponsored" collections of information.

Such an interpretation does more than pass-thru unaccounted for burdens and distort cost implications, even if they are expressed in minimum and maximum range assessments. **Such EPA assumptions are significant because the standard of review for EPA and OMB under the PRA is "necessity, including practical utility" [44 USC 3508] as opposed to "reasonableness" subject to judicial review under the APA.**

Secondly, **federally sponsored collections of information are required to be re-approved every three years.** Opportunity for public comment in the re-review is to be provided. **They are otherwise legally unenforceable.** Moreover, they fall within the scope of the public protections provided in Section 3512.

EPA obfuscates by not delineating EPA ICR numbers from OMB control numbers. This hinders the public participation required by the PRA and intended to be accomplished concurrently with the opportunity to comment on related provisions in the rulemaking. A bland observation that OMB control numbers can be viewed in the Federal Register without indicating which OMB control numbers are associated with State plan requirements adds to this lack of transparency and clarity. A crosswalk could be easily accomplished and explained to the public if EPA so chose to do so.

EPA's assertion that "These recordkeeping and reporting requirements are "specifically" authorized by CAA section 114 (42 U.S.C.7414) " further obfuscates and confuses the public. The content and substance of what is contained in the reporting and recordkeeping requirements the Administrator may discretionarily prescribe is not specifically contained in the language of the cited authorizing provision. The collections of information which flow from the Administrator's discretion is subject to the PRA's required procedures and the scope of the Public Protection section. EPA gives the appearance of flouting the law and seeking an exemption from its statutory responsibilities by its use of the word "specifically" in this context.

The EPA approach to its legal responsibilities under the PRA lacks common sense. We join what we suspect is all Governors who represent tens of millions of senior citizens in doubting the creditability of EPA's high-end labor cost estimate of some 44.8 million dollars for the whole Country to provide the necessary "federally sponsored" collections of information which underpin State plans. This estimate is not realistic or meaningful. Properly interpreted we believe the labor costs, among other burdens, is at least five times greater.

Questions for the Record
Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on Regulatory Affairs and Federal Management

“Reviewing the Office of Information and Regulatory Affairs’ Role in the Regulatory Process”

SENATOR RON JOHNSON

- 1. In your testimony, you explained that cost-benefit analyses of potential agency rules are performed by OIRA, but that costs and benefits are not always measured using the same timeframe. For example, a rule’s costs may only be considered in a short-term of five years, while benefits may be calculated over a period of twenty years. On June 2, I wrote to your office regarding OIRA’s review of the EPA’s Waters of the United States (“WOTUS”) rule. What cost-benefit analyses did OIRA complete relating to WOTUS?**

OIRA does not perform cost-benefit analysis of regulatory actions. We review cost-benefit analyses prepared and submitted by agencies when promulgating rules. For the interagency review of the Clean Water Rule under Executive Order 12866, OIRA reviewed an Economic Analysis prepared by EPA and the Army Corps of Engineers that included quantified estimates and qualitative discussions of expected costs and benefits

- 2. In your testimony, you explained that cost-benefit analyses of potential agency rules are performed by OIRA, but that costs and benefits are not always measured using the same timeframe. For example, a rule’s costs may only be considered in a short-term of five years, while benefits may be calculated over a period of twenty years. On June 2, I wrote to your office regarding OIRA’s review of the EPA’s WOTUS rule. What time period was used to calculate and measure costs of the WOTUS rule by OIRA?**

OIRA reviewed an Economic Analysis that was prepared by EPA and the Army Corps of Engineers. In their Economic Analysis, the promulgating agencies looked at available historical data, such as recent CWA jurisdictional determinations, to prepare an illustrative analysis of how the new rule would impact historical practices. This served as a baseline for calculating how the rule was expected to affect the costs and benefits of specific Clean Water Act programs. The agencies conducted this analysis for a representative future year, thus the costs and benefits of the rule were meant to represent what the impacts of the rule would be in a typical year in the future, following promulgation.

- 3. In your testimony, you explained that cost-benefit analyses of potential agency rules are performed by OIRA, but that costs and benefits are not always measured using the same time-frame. For example, a rule’s costs may only be considered in a short-term of five years, while benefits may be calculated over a period of twenty years. On June 2, I wrote to your office regarding OIRA’s review of the EPA’s WOTUS**

rule. What time period was used to calculate and measure benefits of the WOTUS rule by OIRA?

Please see answer to Question 2.

- 4. In your testimony, you explained that cost-benefit analyses of potential agency rules are performed by OIRA, but that costs and benefits are not always measured using the same time-frame. For example, a rule's costs may only be considered in a short-term of five years, while benefits may be calculated over a period of twenty years. On June 2, I wrote to your office regarding OIRA's review of the EPA's WOTUS rule. What justification was given by OIRA for the cost and benefit time periods used during its analyses, respectively?**

The basic benefit-cost analysis principles in OMB's Circular A-4 provides direction on how agencies should analyze the likely effects of regulations. Agencies are directed to consider time horizons used in the analyses to incorporate important anticipated benefits and costs. Due to difficulties in forecasting, the timelines tend to center around 10-20 years, though many regulations employ time horizons that are longer or shorter than that.

When dealing with long-term environmental effects, it may appear that agencies are using two different time horizons for benefits and costs when they are not. Like many investments, up-front costs in the first few years that a rule is effective may generate benefits much further in the future. In these cases, Circular A-4 gives guidance on how to discount costs and benefits from different time periods in order to make them comparable.

- 5. In reference to my June 2 letter, I asked whether OIRA agreed that the EPA's online outreach efforts to generate "support" for WOTUS violated the Anti-Lobbying Act. Additionally, I asked what steps OIRA will take to ensure compliance with the Anti-Lobbying Act in the future. Although your response to my June 2 letter stated that OIRA merely "develops general regulatory policies," your testimony before the Subcommittee indicates that OIRA should have been open to reviewing issues of inadequate legal authority presented during the inter-agency review process. Were any issues related to legal justification for the WOTUS rule raised during OIRA's review process? If so, how did OIRA address those issues? Please explain.**

During its review of the final Clean Water Rule, OIRA conducted 30 meetings with over 100 individual stakeholder organizations. These were conducted under the formal external review process outlined in the E.O. 12866 and lists of attendees and copies of the materials provided to OIRA are available online. During those meetings OIRA heard a variety of comments some of which raised legal concern while others offered legal support for the rule. In general, as I have mentioned before, the legal basis for an agency's rulemaking is a legitimate subject of interagency review, and legal issues were among those considered during the interagency review.

- 6. In your testimony before the Subcommittee, you stated that while OIRA is "not blind" to legal issues and authorities behind proposed agency rules, that most issues**

are highlighted through the inter-agency review process by offices such as the White House Office of General Counsel and the Department of Justice. In addition, you testified that under your leadership, not a single rule has been rejected on grounds of inadequate legal authority. Given the opportunities for conflicts of interest and exertions of inappropriate influence in relation to an administration's policy goals and executive agency rulemaking initiatives, do you believe greater independence is warranted while analyzing the legal authorities behind executive agency rulemaking? Please explain.

Legal considerations are referenced in several places under the Principles of Regulation in E.O. 12866. Agencies must be cognizant of their respective legal jurisdictions in setting regulatory priorities and strive to minimize the potential for uncertainty and litigation. Regulations that may raise novel legal (or policy) issues are deemed to be "significant," and subject to review under E.O. 12866.

OIRA has an inclusive and robust process for the review of rules, including their legal implications. OIRA typically functions as a coordinator for the discussion of legal issues, relying on our colleagues in other Executive branch offices. For these reasons, I do not believe greater independence is warranted.

- 7. During the Subcommittee's hearing, you and Members of the Subcommittee discussed issues of early engagement between the agency and stakeholders when promulgating rules and the importance of the agency serving as a neutral decision-maker in the rulemaking process. Do you believe the EPA's social media campaign to generate support for its WOTUS rule compromised the agency's role as a neutral decision maker? Please explain.**

I will defer to EPA's previous responses on this issue.

- 8. In regard to your discussion before the Subcommittee relating to the Michigan v. EPA decision, you stated that the EPA was not required to perform a cost-benefit analysis during OIRA's review of the regulation because the Clean Air Act is a statute often held "by a number of authorities as a place where cost-benefit analysis is not something that can be mandated." In light of the Supreme Court's decision requiring agencies to engage in "reasoned decision-making" and consider all relevant factors, including costs, in rulemaking proceedings, do you anticipate requiring cost-benefit analyses for all reviews conducted by OIRA? Please explain.**

EPA did conduct a Regulatory Impact Analysis for their Electric Utility Mercury and Air Toxics Standard that included an estimate of the costs and benefits of both the proposed and final rule. Michigan v. EPA focused on a particular regulatory finding (an "appropriate and necessary" finding) that was very specific to a particular section of the statute. The extent to which EPA consider costs and other balancing factors in their rulemakings under the Clean Air Act (CAA) is very specific to the section of the CAA under which EPA is regulating.

Questions for the Record
Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on Regulatory Affairs and Federal Management

“Reviewing the Office of Information and Regulatory Affairs’ Role in the Regulatory Process”

CHAIRMAN JAMES LANKFORD

Transparency of OIRA Determinations and Feedback in Agency Dockets

1. In 2009, GAO found that agencies used various methods to document OIRA’s reviews, but the transparency of this documentation could be improved.¹ In particular, attribution of changes made during the OIRA review period was uneven and interpretations regarding which changes are “substantive” and thus require documentation differed. GAO recommended that OIRA “define in guidance what types of changes made as a result of the OIRA review process are substantive and need to be publicly identified to more consistently implement the order’s [12866] requirement to provide information to the public ‘in a complete, clear, and simple manner.’” What action has OIRA taken in response to this recommendation?

OIRA has worked with agencies to help them with their Executive Order (EO) disclosure requirements, and we are aware of several agencies that have provided guidance to their program offices on how to docket changes that take place during OIRA review.

2. In 2014, GAO recommended that OMB explain its reason for any changes to an agency’s initial assessment of a regulation as non-significant and encourage agencies to clearly state in the preamble of final significant regulations the section of Executive Order 12866’s definition of a significant regulatory action that applies to the regulation.² In a March 3, 2015 hearing with the House Committee on Oversight and Government Reform, Mr. Shelanski stated when questioned about the recommendation that OIRA was “in the process of discussing the GAO’s report.” In our hearing you responded, “[O]f the most common [reasons why rules are designated significant] that usually isn’t stated because maybe it just seems evident on the process is that another agency wants the opportunity to comment on what the rule-issuing agency is doing.”
 - a. Such determinations are often not “evident” to many shareholders; will OIRA take steps to make available its determination of significance is due to, as you put, “interagency equities”?
 - b. What actions has OIRA taken in response to this recommendation?

¹ U.S. GOV’T ACCOUNTABILITY OFFICE FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS THE TRANSPARENCY OF OMB REGULATORY REVIEWS, GAO-09-205 (April 20, 2009).

² U.S. GOV’T ACCOUNTABILITY OFFICE FEDERAL RULEMAKING: AGENCIES INCLUDED KEY ELEMENTS OF COST-BENEFIT ANALYSIS, BUT EXPLANATIONS OF REGULATIONS’ SIGNIFICANCE COULD BE MORE TRANSPARENT, GAO-14-714 (Sept. 11, 2014).

In the response letter to this study sent in May 2015, OMB Director Donovan stated that OMB agreed with some of the report recommendations. In particular, we agree that OIRA should be clear with agencies on the reasons why we determine a rule is significant under the Executive Order, and I asked my senior management to emphasize this to staff. With regards to public disclosure of a significance determination, we also pointed out that nothing in EO 12866 prevents an agency from disclosing this information, and that a designation of a rule as economically significant under Section 3(f)(1) of the Executive Order has a very specific monetary threshold. We believe the significance determination process is transparent and well understood by the agencies and the public.

On Waters of the US

3. **Correspondence discussed in a House Science, Space, and Technology committee hearing with Administrator McCarthy on July 9th, 2015 suggested OIRA pushed back on EPA that they consider the Waters of the U.S. rule economically significant due to indirect cost. Ultimately, the final rule was considered economically significant. Executive Order 12866 and Circular A-4³ requires that an agency conduct a Regulatory Impact Analysis (RIA) for economically significant rules, but we see no evidence that EPA conducted an RIA. The final rule states that EPA's economic analysis "was done for informational purposes only, and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information in the economic analysis." Why did EPA not complete a regulatory impact analysis if the rule was considered economically significant?**
 - a. Does OIRA consistently require agencies to consider indirect benefits when determining whether rules are economically significant? Please explain.
 - b. How does OIRA ensure that agencies consider indirect costs as consistently as they consider indirect benefits?

EPA and the Army Corps of Engineers conducted an economic analysis that did explore the costs and benefits of a potential increase in jurisdictional waters. In general, OMB guidance requires agencies to consider whether there are significant indirect benefits or costs of a chosen regulatory approach, and indirect impacts may be a subject under discussion during OMB's review of rules under Executive Order 12866.

4. **The Administrative Conference of the United States has recommended that OIRA consider formulating a guidance document that highlights considerations to agency retrospective analyses.⁴ Please comment on any actions OMB has taken or plans to take in response to this recommendation beyond the current executive orders and**

³ 58 Fed. Reg. 51735 (Oct. 4, 1993) and OMB Circular A-4, https://www.whitehouse.gov/omb/circulars_a004_a-4/ (last accessed July 21, 2015).

⁴ Admin. Conference of the United States, *Retrospective Review of Agency Rules*, Recommendation 2014-5 (December 9, 2014).

accompanying guidance— would something like Circular A-4 be helpful for agencies as they attempt to introduce heightened rigor to their retrospective reviews?

OIRA works closely with agencies to ensure retrospective review remains a high priority. We have not yet provided any formal guidance of the level of Circular A-4. We would emphasize, however, that the analytical principles of Circular A-4 are just as relevant to the analysis of a potential reform to a current regulation as they are to a new regulation.

5. **In 2014, GAO recommended that OIRA (1) update its guidance to agencies, where needed, to improve the reporting of outcomes on agency retrospective review, (2) improve how retrospective reviews could be used to help inform assessments of progress towards agency priority goals, and (3) monitor the extent to which agencies have implemented guidance on retrospective review and confirm that agencies have identified how they will assess performance of regulations in the future.⁵ What action has OIRA taken in response to these recommendations?**

OIRA has adopted several of the recommendations of this report. For example, the report suggested the agency retrospective review plans were hard to find on their websites, and that we consider posting the reports on a central OMB site. We have adopted that recommendation. We also have worked closely with OMB's performance management leads to track the progress of retrospective reviews in a manner similar to other priority goals. OIRA's goal is to institutionalize retrospective review as a standard activity routinely conducted by the agencies.

6. **In M-11-19, OIRA directed agencies that "future regulations should be designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses. To the extent consistent with law, agencies should give careful consideration to how best to promote empirical testing of the effects of rules both in advance and retrospectively."⁶**

- a. **How has OIRA incorporated this principle in its review of proposed regulations?**
- b. **Beyond the NOAA example mentioned by Administrator Shelanski in his testimony, to what extent, if at all, have agencies complied with this OMB directive? Please explain.**

OIRA regularly asks agencies to consider the incorporation of a retrospective review planning component in forward-looking regulations. For example, to date, several DOT rules have discussed plans for looking back at their effectiveness in the future.

⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, REEXAMINING REGULATIONS: AGENCIES OFTEN MADE REGULATORY CHANGES, BUT COULD STRENGTHEN LINKAGES TO PERFORMANCE GOALS, GAO-14-269 (Apr. 11, 2014).

⁶ Memorandum from Cass Sunstein, Admin'r, OIRA, to the Heads of Executive Departments and Agencies (Apr. 25, 2011)(M-11-19). The memorandum directed agencies, to the extent consistent with law, to give careful consideration to how best to promote empirical testing of the effects of rules both in advance and retrospectively.

On Social Cost of Carbon

7. During the course of the hearing, you and I discussed the social cost of carbon (SCC) estimates. Specifically, I asked you why the Interagency Working Group on the Social Cost of Carbon (Working Group) did not use OMB Circular A-4's suggested range discount rates in arriving at their 2010 and 2013 SCC estimates. You responded that "Circular A-4 doesn't mandate that in every case a particular discount [] range ... be used ... A good range of discount rates were from 3 to 7 percent, but which one is appropriate in a particular context would depend very much on the circumstances." You go on to say that the 2013 revision has "review[ed] whether we think we have the right inputs ... And what we're doing next in the social cost of carbon process, which I might add the GAO commented I think favorably on, what we are doing now is moving forward in the process that we recently announced with the national academies development—again a very robust estimate that will go out for public comment and for peer review."
- a. Were you referring to the July 2014 GAO report on "Development of Social Cost of Carbon Estimates" (GAO-14-663)?⁷
- b. GAO-14-663 states that "GAO did not evaluate the quality of the working group's approach."⁸ Based on this statement, could you clarify what you meant by "GAO commented [] favorably on" the Working Group's approach?

Yes, I was referring to the GAO report from July 2014 (GAO-14-663). The report has a favorable review of the process undertaken to generate the estimates of the Social Cost of Carbon (SCC), though it did not go further to evaluate the accuracy of those estimates. The GAO Report states that the Working Group's approach is "consistent with the control activities standard in the federal standards for internal control" (p. 11). The Report further states that "interagency working groups use a variety of mechanisms to implement interagency collaborative efforts, including temporary working groups, and that not all collaborative arrangements, particularly those that are informal [which the Working Group was], need to be documented through written guidance and agreements." (p. 11) However, the Report notes that "OMB staff and EPA officials stated that all major issues discussed during working group meetings are documented in the Technical Support Document and its 2013 update." (p. 11) The Report finds that the Working Group's processes and methods employed the following three principles: (1) Used consensus-based decision making; (2) Relied on existing academic literature and models; and (3) Took steps to disclose limitations and incorporate new information. The Report does not evaluate the merits of specific modeling choices or other analytic assumptions in

⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, DEVELOPMENT OF SOCIAL COST OF CARBON ESTIMATES, GAO-14-663 (July 2014).

⁸ *Id.* (Highlights page).

developing the SCC. The Working Group is in the process of seeking advice from the National Academies on a wide range of technical issues related to future updates of the SCC.

8. **At the hearing, I expressed concerns about the effects of using inputs like the SCC in creating analytical asymmetries in the regulatory impact analyses or cost-benefit analyses in which SCC is used. Specifically, my concern is that the SCC estimates allow agencies to weigh 300 years of benefits accrued globally,⁹ on the one hand (and without otherwise considering costs) against costs of a particular regulation, incurred over 10-20 years¹⁰ and borne by much smaller groups of consumers and manufacturers, on the other.**

Intuitively, comparing vastly different time frames over vastly different populations seems to put the proverbial thumb on the scale in favor of promulgating the regulatory policy at issue. Further, it seems inconsistent with basic cost-benefit analysis principles, as articulated in OMB's RIA Primer. For example, the primer directs agencies to "cover a period long enough to encompass all the important benefits and costs likely to result from the rule."¹¹ How is the inclusion of SCC modeling into a rule with a 10- or 20-year cost horizon consistent with the best practice of estimated accrued costs and benefits over a single time period?

The basic benefit-cost analysis principles in OMB's Circular A-4 provides specific guidance for analyzing the likely effects of regulations. Agencies are directed to select appropriate time horizons in their analyses so that important anticipated benefits and costs are captured. Due to difficulties and uncertainties in forecasting, the timelines tend to center around 10-20 years, though many regulatory impact analyses employ time horizons that are longer.

When dealing with long-term environmental effects, it may appear that agencies are using two different time horizons for benefits and costs when they are not. Like many investments, up-front costs in the first few years that a rule is effective may generate benefits much further in the future. In these cases, Circular A-4 gives guidance on how to discount costs and benefits from different time periods in order to make them comparable.

Likewise, the Technical Supporting Document on SCC provides monetized estimates of damages associated with CO₂ emissions in years 2010 through 2050. When agencies monetize the value of CO₂ emission reduction, the agencies must estimate the level of reductions in specific years and apply the appropriate SCC estimates. Consistent with standard economic theory and practice, the SCC represents the present value of the stream of damages associated with forgone emissions in a given year, accounting for the long-lived nature of greenhouse gases. The

⁹ See, e.g., Interagency Working Group on Social Cost of Carbon, U.S. Gov't, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (Feb. 2010).

¹⁰ The White House, Regulatory Impact Analysis: Frequently Asked Questions (FAQs) 4 (Feb. 7, 2011) ("For most agencies, a standard time period of analysis is 10 to 20 years, and rarely exceeds 50 years).

¹¹ The White House, Regulatory Impact Analysis: A Primer 5 (undated), https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf (emphasis added).

damages that result from a ton of CO₂ emitted in the year 2020, for example, accrue over time, and focusing only on the year of the CO₂ emissions change—or the subset of years covered by the rulemaking—would be inconsistent with standard economic theory and practice as it would fail to account for a substantial portion of the benefits associated with the emissions reduction.. Correspondingly the benefit-cost analysis should provide the costs associated with producing those reductions. The timelines for CO₂ emission reductions and costs to produce such reductions tend to correspond well.

The rationale for the use of a global SCC rather than domestic SCC is laid out in the Technical Support Document. We recognize that the science underpinning the methodology in the Technical Support Document is rapidly evolving and we are committed to updating the SCC as appropriate.

On Midnight Regulations

9. **Throughout the hearing, we discussed the importance of OIRA’s advisory role in providing agencies guidance for best practices including, for example, direction on conducting thorough regulatory impact analyses. If guidance results in improved agency best practices, why would OIRA decline to issue clear guidance on rulemaking during the “midnight” period if agencies should, as you testified, “prioritize the rulemakings... [and] get your ducks in a row because what we care about at OIRA is having time to review the significant rules, and to do good and rigorous evaluation of the executive orders. And I can’t do that if I’m getting rules too late in the day”?**

My priority as OIRA Administrator is making sure that regulations are carefully reviewed by this office and are in compliance with our governing executive orders and OMB circulars. I am determined to ensure that OIRA’s standards for review will not diminish as we get closer to the end of the Obama administration. As I mentioned in my testimony, OIRA is making a similar effort to ensure that the rulemaking process remains orderly over the next 16 months. We are currently engaging with the agencies in an effort to help them set priorities for rulemaking, and we place a high priority in preserving the ability for OIRA and the interagency community to have sufficient time to develop and review proposed and final rules.

On OIRA Reviewing Legal Issues

10. **Executive Order 12866 reads in part, “The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency’s regulatory actions are consistent with applicable law...”¹² Yet, when asked if OIRA reviews the legality of rules under review, you testified, “We focus overwhelmingly on the analytics of the rule and how well it is functioning,” and remarked “a couple of people in my office happen to have law degrees, but it’s not been unknown for there not to be a single lawyer in OIRA.” Although you said you are not “blind” to legal questions, “they would lie in the first instance with the agency...” You also said that White House counsel and the**

¹² Exec. Order 12866 Sec. 6(b), 58 Fed. Reg. 51735 (Oct. 4, 1993).

Justice Department would “alert us if there were legal concerns, and we do require those concerns to be resolved.”

- a. How do you reconcile Executive Order 12866’s mandate with the lack of formalized OIRA legal review?
- b. Even if OIRA does not undertake a legal analysis of its own, does the office ensure that the legal office of the promulgating agency, White House counsel, or the Justice Department has conducted a legal analysis of the rule and concluded that the rule does not present statutory or constitutional concerns? If so, please explain. If not, why not?

OIRA has an inclusive and robust process for the review of the legal implications of rules. Regulations that may raise novel legal issues are deemed to be “significant,” and subject to review under E.O. 12866. Although OIRA does not conduct its own formal legal review, OIRA typically functions as a coordinator for the discussion of legal issues, relying on our colleagues in other Executive branch offices to understand any legal uncertainty the rule creates for regulated entities.

When Independent and Executive Branch Agency Agendas Conflict

11. On questioning from Senator Portman about OIRA’s role in independent agency review, in light of one-quarter of major rules coming from independent agencies, you testified that “I still have some reservations about extending OIRA review to independent agencies... My concern is [] with OIRA as the review of those [cost-benefit] determinations. I have worked at two independent agencies. I really have some appreciation for the value of how those agencies function, for the value of the independence, and the way they are set up... and I do worry about an executive branch review process that could interfere with that independence and possibly interview with their functions under their authorizing statutes.”

In response to Senator Lankford’s follow-up hypothetical where an independent agency and executive branch agency share overlapping jurisdiction (or purport to do so), you testified that “[W]e do ask that executive branch agency—and here, we do have the authority to really push an answer—for an explanation of how the rule interrelates, what the cumulative burdens will be, whether there’s been duplication or whether they’re really doing something different from what the independent agencies [are doing].” You pushed back against my characterization of a “pecking order” only so much as to say that that’s not “necessarily the case. A dialogue can result... I don’t know that there’s any pre-established pecking order, but we do require the executive branch agency to answer questions.”

- a. How can OIRA, without additional authorities, make independent agencies come to the table with executive branch agencies, on equal footing, to discuss duplicative or conflicting rules when their rulemaking jurisdictions overlap

- and when the OIRA review process, by its very structure, subjects executive branch agencies to far more scrutiny than independent agencies?**
- b. How does OIRA ensure that independent agencies do not promulgate rules that are within the proper jurisdiction of executive branch agencies?**

In July 2011, the President issued Executive Order 13579, which encouraged independent agencies to follow the same regulatory principles that executive agencies must follow. I believe this balanced approach continues to protect the unique status that independent agencies have within the Executive Branch.

Additionally, Executive Order 12866 requires that Executive agencies avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies, including independent agencies. Any executive agency regulation that may create a serious inconsistency or otherwise interfere with an action taken or planned by another agency would be considered a “significant regulatory action” under E.O. 12866 and therefore be subject to OIRA’s centralized regulatory review. This would include circulation of the rule to independent agencies that may have similar or conflicting regulations.

Similarly, independent agencies are encouraged to consult and coordinate with executive branch agencies if any of their regulations have the potential to overlap executive agency regulations. However, under E.O. 12866, OIRA does not play a role in coordinating these consultations on behalf of independent agencies.

Questions for the Record
Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on Regulatory Affairs and Federal Management

“Reviewing the Office of Information and Regulatory Affairs’ Role in the Regulatory Process”

SENATOR HEIDI HEITKAMP

- 1. Congressman Peter DeFazio, Ranking Member of the House Transportation and Infrastructure Committee, recently submitted a question to the Pipeline and Hazardous Materials Safety Administration with respect to PHMSA’s delay in the finalizing the proposed hazardous liquid pipelines rule.**

This is his question verbatim:

“The Department of Transportation’s (DOT) website states the proposed rule has been with the Office of Information and Regulatory Affairs since May 2014. Executive Order 12866 issued by President Clinton in September 1993 and still in effect states that the review by the Office of Information and Regulatory Affairs (OIRA) should be completed within 90 days but that the reviews may be extended by the Director of OMB for 30 days or at the request of the agency head. Has OIRA requested an extension and if so, how many times? Since OIRA received the rule, has anyone in DOT requested an extension of the OMB review and if so, how many times? Did OIRA require an informal review of the rule prior to formal submission? Did OIRA require DOT to get OIRA approval before formal submitting the rule?”

This is the response he received:

“The review of this rule at OIRA has been a collaborative effort to identify all available data, in order to produce the strongest possible analysis, which can then inform the decision on what provisions should be proposed to provide the greatest safety benefit to the public. We are continuing to work closely with OIRA to publish our NPRM as soon as possible.”

That is not an answer. Why is there no transparency in terms of what happens to a proposed rule once provided to OIRA, the communication between OIRA and the agency during review, and why OIRA refuses to give a substantive answer when it misses deadlines prescribed under Executive Order 12866?

With regard to the duration of interagency review, it can take a substantial amount of time to complete the review of a complex rule. I believe it is more important to get the rule done right than it is to get it done quickly. Having said that, I can assure you that my staff is working diligently with PHMSA’s staff to complete review as soon as possible.

2. In 2011, the rail car industry proactively petitioned the Administration to develop a rule for rail car safety. They were willing to build new cars to a tougher standard to reduce the risk of moving hazardous materials. Yet not until 2013 after the Quebec rail car accident that killed 47 people did the Department propose a rule. The rule was not finalized until May of this year.

This is a rule that the industry wanted, were willing to take on costs to implement, and yet it took four years for the final rule to be released. In the interim, OIRA and the agencies were unresponsive to Congressional inquiries about reasons for delay.

- a. Why does OIRA refuse to provide substantive answers to Congress about a proposed rule's status?
- b. What Executive Order or law does OIRA follow in terms of non-disclosure to Congress?

OMB's interagency review of both the proposed and final High-Hazard Flammable Train rules took less than the normative 90 day review period established in Executive Order 12866. I can't speak to the state of the rulemaking prior to my term as Administrator; however, I can assure you that developing a strong and timely final rule enhancing tank car safety was one of our highest priorities. In addition to rail car standards, the recently issued final rule included speed restrictions, braking standards, emergency response and notification procedures, and an extensively thought out phase-in period that was responsive to significant industry concern about feasibility. In addition, our final standards were closely coordinated with rail car standards simultaneously announced by Canada, which was important to avoid disruption on the integrated rail system.

OMB's and agency disclosure procedures are governed by Executive Order 12866. In terms of timing, agencies are required under the Executive Order to provide a timeline for all their rulemakings in the semi-annual regulatory agenda.

3. Further, the industry, safety advocates and other stakeholders requested the rule mandate rail cars have thermal blankets, which cost approximately \$3000 per car. When the proposed rule was submitted to OIRA, it included the thermal blanket requirement. Yet when the final rule was approved by OIRA, the thermal blanket requirement was absent. What reasoning did OIRA use for removing a safety device that stakeholder groups, including industry, wanted?

Neither the proposed nor final rule submitted to OIRA for interagency review included a design requirement for thermal blankets. Both the proposed and final rules submitted for review included a performance standard that a tank car's thermal protection system be capable of preventing a release of lading (except through the pressure release device) when subject to a pool fire for 100 minutes and a torch fire for 30 minutes. That standard did not change during interagency review of either the proposed or final rules.

The final rule contained a performance standard that allows industry flexibility and does not preclude the use of thermal blankets. DOT expects that industry will likely choose to utilize thermal blankets to meet the final rule's performance standard.

Questions for the Record
Committee on Homeland Security and Governmental Affairs
Senate Subcommittee on Regulatory Affairs and Federal Management

“Reviewing the Office of Information and Regulatory Affairs’s Role in the Regulatory Process.”

SENATOR ROB PORTMAN

1. **On June 30, 2015, the U.S. Environmental Protection Agency promulgated a new National Emission Standards for Hazardous Air Pollutants (NESHAP) air regulation (80 Fed. Reg. 37366) applicable to the U.S. production of ferroalloys, an essential ingredient in the manufacturing of steel. It is my understanding that for one of the affected U.S. companies, EPA has found that the new regulation will cost at least \$25 million in capital costs over the next two years, with millions more per year in increased operating costs. This U.S. company already has a difficult time competing with foreign ferroalloy producers, and the asymmetrical costs of production imposed by the new NESHAP air regulation could challenge its ability to remain in business.**

Did OIRA review the regulation to determine if it would have any negative material impact on productivity, competition, the economy, or jobs? If so, please describe your assessment. If not, please explain why not.

OIRA determined that EPA’s National Emissions Standards for Hazardous Air Pollutants applicable to U.S. Ferroalloys production was not a “significant regulatory action” under the criteria established under Executive Order 12866 and therefore did not review the regulation. OIRA reviews approximately 500-700 regulations per year that meet the significance criteria in Executive Order 12866, out of about 6,500 regulations issued each year by U.S. Federal agencies. We would defer to EPA on further questions about this rulemaking.

2. **The George W. Bush administration acknowledged the historical tendency of outgoing administrations to issue a flood of regulations before the new administration takes office. In May 2008, in an effort to control the rush of midnight regulations, John Bolton issued a memo to the heads of federal agencies that set deadlines for the proposal and issuance of rules that were to be finalized before President Bush left office.**

Does the Obama administration plan to take similar action?

My priority as OIRA Administrator is making sure that regulations are robustly reviewed by this office and are in compliance with our governing Executive Orders and OMB circulars. I am determined to ensure that OIRA’s standards for review will not diminish as we get closer to the end of the Obama administration. As I mentioned in my testimony, OIRA is making a similar

effort to ensure that the rulemaking process remains orderly over the next 16 months. We are currently engaging with the agencies in an effort to help them set priorities for rulemaking, and we will continue to place a high priority in preserving the ability for OIRA and the interagency community to have sufficient time to develop and review proposed and final rules.