

REVIEWING THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY AFFAIRS AND FEDERAL
MANAGEMENT

OF THE

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HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
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REVIEWING THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS

THURSDAY, APRIL 12, 2018

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 10:21 a.m., in room 342, Dirksen Senate Office Building, Hon. James Lankford, Chairman of the Subcommittee, presiding.

Present: Senators Lankford, Portman, Heitkamp, Hassan, and Harris.

OPENING STATEMENT OF SENATOR LANKFORD¹

Senator LANKFORD. Good morning, everyone. Welcome to today's Subcommittee hearing on Reviewing the Office of Information and Regulatory Affairs' (OIRA) role in reviewing agency rulemaking. Today we will review Federal regulations primarily through the eyes of the ultimate regulator, that is the Office of Information and Regulatory Affairs, or as I like to say, the most important agency no one has ever heard of. In this hearing today, we hope to get a better understanding of OIRA's accomplishments during the first year of this administration.

We also have with us today the Treasury Department, who is here to discuss their longstanding exemption from OIRA's oversight and their obligations for basic regulatory practices.

Created by Congress in 1980, OIRA performs the essential role of reviewing proposed regulations before they bind the American people. Over the years, OIRA's responsibilities have grown to include implementing numerous Executive Orders (EO) to ensure all Federal agencies comply with basic regulatory steps, such as cost benefit analysis, consideration of regulatory alternatives, and fair public consultation. OIRA's role continues to expand under this administration.

Ten days after the President took office, he issued an Executive Order, directing Executive Branch agencies to remove at least two regulations for each newly issued regulation, and, most importantly, the order directed any added regulatory costs must be offset by the removal of existing regulatory costs. I look forward to hear-

¹ The prepared statement of Senator Lankford appears in the Appendix on page 29.

ing how agencies have fared during the first year of this Executive Order and the outlook going forward.

Properly issued guidance is necessary and helpful in clarifying regulatory requirements, but when abused, agencies circumvent congressionally mandated procedure and pursue their agenda without the input of the American people. Under both Republican and Democrat administrations, OIRA has proven to be a neutral gatekeeper and a check on Executive Branch agencies. However, under a long-standing agreement, Internal Revenue Service (IRS) regulations have not gone through centralized review like every other Executive branch agency.

In 1983, when this agreement was signed, OIRA was a new office with limited scope. Since then, the nature of both OIRA and the IRS has changed. OIRA's mission goes far beyond the review of information collection under the Paperwork Reduction Act (PRA) and the IRS does a lot more than simply apply the tax code. They determine issues as varied as religious exemptions to the implementation of the Affordable Care Act (ACA).

All Executive Branch agencies must comply with OIRA review, Regulatory Flexibility Analysis (RFA), and the Congressional Review Act (CRA). But for decades the IRS has been exempted from these checks put in place to protect the American people.

In 2016, the IRS proposed a rule regarding the valuation of interest in closely held partnerships or corporations for a estate gift and generation-skipping transfer taxes. As the Small Business Office of Advocacy outlined in a comment letter, the IRS failed to perform an Initial Regulatory Flexibility Analysis (IRFA) and they certified the rule would not have a significant economic impact on small businesses, despite applying almost exclusively to the small businesses.

The rule was so deeply flawed that this administration withdrew the rule last fall. Absent a change in administrations, taxpayers would likely be bound by a regulation that did not receive economic analysis or input from those small businesses who would have been most affected by the rule.

Another rule, issued in 2016, regarding corporate tax inversion, was labeled as "temporary" and completely ignored the Administrative Procedures Act (APA) notice and comment requirement because it was considered temporary. Last year, a Federal court found the rule to be legislative, and struck it down for being arbitrary and capricious.

The point of the Administrative Procedures Act, the Regulatory Flexibility Act, and the Congressional Review Act is to ensure rules are thoroughly scrutinized and reviewed by a third party and Congress before they bind the American people. It is unacceptable for taxpayers to have to wait for a change in administration or judicial review to overturn a rule that could have been addressed by OIRA prior to it ever being promulgated.

The Government Accountability Office (GAO), former OIRA Administrators, and administrative law experts have called on Treasury and OIRA to reconsider this agreement. I understand a new agreement has been reached to ensure IRS regulations are held to the same standard as other agencies. I look forward to hearing the details of the agreement, particularly how IRS plans to handle the

requirements under the Regulatory Flexibility Act and the Congressional Review Act.

With that I would recognize Ranking Member Heitkamp for her opening remarks.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. Thank you, Mr. Chairman, and thank you for starting the hearing. I want to thank Mr. McIntosh and the Administrator for joining us today. I always appreciate our chance to check in with OIRA. OIRA has been called many things—a gatekeeper, a dispassionate and analytical second opinion, and even one of Washington’s most powerful offices, and I would add to that that no one has ever heard of.

OIRA plays a critical role in ensuring that Federal agencies develop rules the right way. Administrator Rao, I have a lot to ask about your first year on the job, but also would like to say I am very disappointed that the Department of Labor (DOL) did not decide to join us today. I was very much looking forward to hearing from Labor about the decisions they have made in developing the tip rule under the Fair Labor Standards Act. I have been assured that my questions on the subject can be answered today, and I very much hope that this is the case. I also have questions for the Administrator regarding OIRA’s role in that development.

Again, I look forward to your testimony. I thank you both for appearing today. I think that we always kind of point out that a lot of really important work gets done in these Subcommittee hearings, but yet not a lot of attention, and running government is really an important job, and understanding the nuts and bolts and making sure that that people are playing the right role is a critical component of that. And I want to thank the Administrator, I want to thank Mr. McIntosh for coming, and I look forward to the hearing.

Senator LANKFORD. At this time we will proceed with testimony from the witnesses. The Honorable Neomi Rao is the Administrator of the Office of Information and Regulatory Affairs. Prior to her confirmation, Administrator Rao served as professor of structural constitutional law, administrative law, and legislation and statutory interpretation at the Scalia Law School at George Mason University (GMU), where she founded the Law School’s Center for the Study of the Administrative State. She has served Associate Counsel and Special Assistant to President George W. Bush and is Counsel to the U.S. Senate Committee on the Judiciary. Thank you for being here.

The Honorable Brent McIntosh is the General Counsel (GC) for the Department of the Treasury and serves as the head of the Treasury Legal Division. Prior to his confirmation, Mr. McIntosh was a partner in the law firm of Sullivan & Cromwell, where he was a member of the firm’s litigation and financial services practice groups and co-led the firm’s cybersecurity practice. From 2006 until 2009, Mr. McIntosh served as the Associate Counsel to President George W. Bush, first as Deputy Assistant to the President and as Deputy Staff Secretary.

Thank you both for being here, and all the preparation and the work that has gone into leading up even to this conversation today.

It is a custom of the Subcommittee, as I am sure both of you are aware, that we swear in all the witnesses before they appear before us, so if you would please stand and raise your right hand.

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

Ms. RAO. I do.

Mr. MCINTOSH. I do.

Senator LANKFORD. Thank you. Please be seated. Let the record reflect both witnesses have answered in the affirmative.

We are using a timing system today, but this is a conversation between both of you and all of the Committee, so we will try to be able to honor that time. You will have a 5-minute countdown clock on it. If you go a couple of seconds past it we will not protest. But we do want to be able to leave plenty of time for dialogue and conversation in the moments ahead.

Ms. Rao, you are first.

TESTIMONY OF THE HONORABLE NEOMI RAO,¹ ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Ms. RAO. Thank you very much. Chairman Lankford, Ranking Member Heitkamp, and Members of the Committee, thank you for the opportunity to appear before you today to discuss the activities of the Office of Information and Regulatory Affairs, and our efforts in implementing regulatory reform.

The administration's reform efforts have focused on developing a lawful, fair, and limited regulatory system that allows the economy to grow and innovation to flourish. We look first to private market solutions and trust in ordinary Americans to make decisions that will result in greater prosperity through ingenuity and hard work.

The success of our economy depends, at least in part, on a regulatory system that does not stand in the way of progress. And, speaking of progress, just last night the Office of Management and Budget (OMB) and the Treasury Department signed a memorandum of agreement (MOA) for significant tax rules to go through the process of centralized regulatory review at OIRA.

President Trump directed OMB and Treasury to reconsider the scope of an exemption for certain tax regulations that dates back to 1983. The Executive Order focused on reducing the burdens of tax regulations in order to provide tax relief and useful, simplified tax guidance. The agreement that we signed brings tax regulatory actions into the same framework for regulatory review as other agencies while also providing for some expedited review and a definition of economic significance that recognizes the revenue-raising function of Treasury.

In this administration, OIRA has led the charge to eliminate unnecessary regulatory burdens. The process of centralized regulatory review provides an important check to ensure that agencies take actions that yield meaningful benefits to the American people and that impose the least possible burdens.

¹ The prepared statement of Ms. Rao appears in the Appendix on page 31.

Even tax relief regulations may be improved by consideration of the costs and benefits of alternatives, and the OIRA process is well suited to help Treasury promote, in the words of the President, “a tax system that is simple, fair, efficient, and pro-growth.” We look forward to working with Treasury on this transition to improve tax regulatory policy in a manner that provides timely guidance to taxpayers.

With respect to the administration’s broader regulatory reform agenda, one of the primary vehicles for reform has been Executive Order 13771, which addresses the problem of accumulated regulatory burdens. In administrations of both parties, regulations have piled on top of regulations, without a systematic consideration of which regulations are no longer effective. To reduce this burden, EO 13771 requires that agencies eliminate two regulations for each new one, and for fiscal year (FY) 2017, to keep new regulatory costs to zero. And as the administration’s central regulatory office, OIRA has worked closely with agencies to meet the President’s very ambitious goals in a manner that is consistent with legal requirements.

Across the government, we have achieved very substantial success. Through the end of fiscal year 2017, agencies have issued 67 deregulatory actions and 3 significant regulatory actions, a ratio of better than 22 to 1.

Moreover, these deregulatory actions have led to meaningful cost savings of over \$8 billion in fiscal year 2017. This represents the first time an administration has imposed any type of regulatory budget. The regulatory budget provides an important backstop to make sure that deregulatory actions are not just paper revisions and repeals but actions that generate real cost savings for the American people.

Looking ahead to fiscal year 2018, agencies have projected a ratio of at least 3-to-1 deregulatory-to-regulatory actions and cost savings of over \$10 billion.

OIRA continues to work with agencies to ensure that regulatory and deregulatory actions are consistent with law, have benefits that outweigh the costs, and that are promoting the President’s priorities. Importantly, all deregulatory actions have to meet the same standards as regulatory actions. Deregulatory actions must result in net benefits for the public and so agencies are only repealing those regulations that are not working.

While the reforms are new, OIRA continues to apply long-standing principles for regulatory review rooted in Executive Order 12866. In our already highly regulated society, the public can often realize substantial benefits from lifting unnecessary burdens in the form of outdated regulations, guidance documents, and paperwork requirements.

OIRA’s regulatory reform initiatives have also focused on promoting the rule of law through improving fair notice, public participation, and due process. In coordination with the White House Counsel’s Office, OIRA has directed a regulatory policy that emphasizes the rule of law. At the outset, we carefully consider whether an agency has authority for a proposed action, in this respect, the law-making power of Congress. OIRA also ensures that agencies are following the correct statutory procedures for rule-

making, because, indeed, much of the legitimacy of the administrative action derives from notice and comment rulemaking that allows for meaningful participation by the public.

In light of these principles, we have cabined the inappropriate use of guidance and stressed that agencies should not use guidance to impose new obligations on the public. As part of reducing burdens, OIRA encourages and incentivizes agencies to identify guidance that can be repealed, modified, or reissued through a rulemaking. By rolling back regulatory burdens and following the rule of law, the administration's reform benefits the American people by promoting individual liberty and by encouraging economic growth, job creation, and innovation.

Thank you again for inviting me to participate in this hearing. I look forward to your questions.

Senator LANKFORD. Thank you. Mr. McIntosh.

**TESTIMONY OF THE HONORABLE BRENT J. MCINTOSH,¹
GENERAL COUNSEL, U.S. DEPARTMENT OF THE TREASURY**

Mr. MCINTOSH. Chairman Lankford, Ranking Member Heitkamp, Members of the Subcommittee, thank you for the opportunity to discuss Treasury's role in advancing one of the administration's chief policy priorities, regulatory reform.

Let me begin, though, by touching on another of the President's chief policy priorities, tax reform. Treasury has, of course, played a leading role in advancing the once-in-a-generation tax reform pass late last year. The new law contains hundreds of provisions to provide relief to American families and make American businesses more competitive. Swift and successful implementation of tax reform, through prompt, straightforward rules and guidance is critical to unlocking the full benefits of the law and carrying out the will of Congress.

Consistent with the President's regulatory reform agenda, Treasury's goal in implementing tax reform is to provide timely and necessary clarity that alleviates the burden of uncertainty for taxpayers without imposing needless regulatory costs or delays.

Yesterday, Treasury and OMB adopted a new framework for review of proposed tax regulations that will allow us to continue doing just that. We are extremely pleased with this new framework, which brings the review of tax regulations back in line with the original intent of the Reagan era agreement. Our new framework enhances review and analysis of the subset of tax regulations most likely to impose undue costs, while fully preserving Treasury's ability to issue clear, timely rules and guidance that taxpayers need.

Any tax regulation that adds major new compliance costs will now undergo cost benefit analysis as well as centralized review, exactly as it should be. On the other hand, tax regulations that do not meaningfully alter the cost of laws they implement will not undergo this time-consuming analysis.

Critically, all of this will be done in an efficient timeframe, as American taxpayers demand. OMB has committed to review most proposed tax regulations in 45 days or less, and when expedited re-

¹ The prepared statement of Mr. McIntosh appears in the Appendix on page 36.

view is appropriate, OMB will complete its review in 10 business days or less.

Because this new framework is smartly tailored to tax regulations, Treasury is confident that it will enable us to continue to successfully implement the historic tax reform legislation enacted by Congress while advancing the President's regulatory reform agenda.

Tax reform is far from the only regulatory reform effort Treasury has undertaken to advance the President's priorities. Under Secretary Mnuchin, Treasury has identified more than 300 regulations to eliminate, in whole or in part. On the other side of the ledger, Treasury has issued exactly zero regulatory actions within the 1-in, 2-out framework set forth in the President's Executive Order 13771.

Treasury has also produced reports setting forth more than 250 specific recommendations for reducing regulatory burdens and advancing the administration's core principles for regulation of capital markets, banks and credit unions, and the insurance and asset management industries. Those recommendations have addressed issues ranging from alleviating the burdens on community banks, simplifying the extraordinarily complex Volcker Rule, and bringing much-needed accountability to the Consumer Financial Protection Bureau (CFPB).

Thank you for the opportunity to testify today, and I look forward to members' questions.

Senator LANKFORD. Thank you, and thank you both for your preparation on the work leading up into this. I recognize Senator Portman. Senator Heitkamp and I are going to defer our questions to the end.

OPENING STATEMENT OF SENATOR PORTMAN

Senator PORTMAN. First of all, I thank the Chair for doing that. It is his style and I always appreciate it, and I try to reciprocate. We have got three hearings going on at once in this place, but this is a really important one and I thank you for holding the hearing on OIRA, and specifically on this issue of tax regulations being subject to OIRA review.

It is a tricky issue, and, you know, I come at this as someone who believes in regulatory reform. In fact, Senator Heitkamp and I are co-authors of the Regulatory Accountability Act, which goes right at some of these regulatory reform issues that were talked about broadly, and the Chairman has been very involved in these issues. But also as someone who was a strong advocate of tax reform and understands the need for us to give guidance quickly, and so that the pro-growth aspects of tax reform are actually implemented, as you have noted.

In my role at OMB, I found that OIRA was a critical agency to try to avoid problems, you know, by giving agencies a heads-up as to potential issues, and so I do think there is an appropriate role there. And, by the way, I am told that Treasury Department does subject a lot of what they do to OIRA. I think the average, in the agencies, is about 8 percent of their rules that have come in for OIRA. I think your average is, what, Mr. McIntosh, about 5.7 percent?

Mr. MCINTOSH. It is between 5 and 6 percent, as long as you do not include Office of Comptroller of Currency, whose regulations we at main Treasury do not control.

Senator PORTMAN. Yes. So it is not that nothing gets to OIRA, but there is a difference, and this memorandum or understanding (MOU) that was put together back in the 1980s, has been the guidance we have all used. I do think it needed to be updated. And I want to thank you all, because my understanding is despite the fact that you are sitting far apart this morning—I think your chairs were placed before they knew you were going to come together—you can now be closer.

And to Mr. McIntosh and to Administrator Rao, thanks for rolling up your sleeves and trying to figure this out, because it is complicated. I see Brian Callanan is behind you, too, your deputy. I know he played a big role in this. We talked a lot about it. And it sounds like you have come up with something that I can support, and that does walk that fine line between having the oversight but also being able to get things out.

I would like to, if I could, Mr. Chairman, submit for the record a letter by the Alliance for Competitive Taxation (ACT).¹ This is a group of businesses and employees, millions of people, probably, overall, but certainly thousands in each of our States, and they were critical to getting tax reform across the line. Without objection, I would like to have that submitted to the record.

Senator LANKFORD. Without objection.

Senator PORTMAN. This letter states that they are concerned about being sure that any changes to the MOU recognize the need for immediate interpretive guidance implementing the Tax Cuts and Jobs Act (TCJA), and I think that is a legitimate concern. They sent it to Secretary Mnuchin, your boss, and they sent it to OMB Director Mulvaney, and I think probably the line that is most important is “the growth impact of the legislation will not be fully realized if businesses are uncertain about how the tax cut legislation will be implemented, thus delay in issuing guidance would impose a cost on taxpayers and the American economy.”

So I think there is a balance here to be reached. Obviously, important for regulations, implementing a tax reform to be implemented as soon as possible for the pro-growth elements of the bill to actually work, particularly the regulations surrounding the international provisions, which are incredibly complicated, and companies have to respond very quickly, and that we made the tax reform legislation immediately applicable and enforceable.

And I would say the second one probably is the small business deduction. That is one that is very difficult for some companies to understand.

So I guess my first question would be to Mr. McIntosh. Can you guarantee that the revised MOU will not lead to any unnecessary delays in the regulations that are implementing the tax reform legislation?

Mr. MCINTOSH. Senator, thanks for that question. It is obviously an urgent one for us and a terribly important one for us.

¹ The Alliance for Competitive Taxation letter appears in the Appendix on page 39.

We do not believe it will lead to undue delays. There will obviously be some amount with regard to some of these regulations, that there will be some amount of additional analysis. But we have committed, in the memorandum of understanding, or memorandum of agreement, as we phrased it, to expedited review on a particular set of regulations. So, for example, we would expect that those you discussed, that are necessary to implement the tax reform bill, would be subject to designation as expedited and a 10-business-day review at OIRA.

Senator PORTMAN. Let me be specific. Right away you got the withholding tables out. More accurately, I guess the IRS got the withholding tables out, which was very helpful to my constituents, because they were hearing all these different things about how this was going to affect them. The proof is in the paycheck, and until you see actually what happens to your own paycheck you really do not know. And I think it was important for human resources (HR) executives all over the country and small businesses to be able to have that information. That is one example.

Another would be deemed repatriation, because, as you know, that went into effect and companies, including Apple, was one that has been before this Committee. You know, they had to make decisions right after the passage of the legislation. With those two, deemed repatriation and the withholding tables being altered, would those have been able to have been done as quickly as they were if the new MOU that you all now put together were in effect?

Mr. MCINTOSH. Senator, I think we probably could have gotten them out as quickly as we did, assuming that OIRA would have worked with us to expedite the review. Obviously, those were things, in particular on the deemed repatriation, that had to be done very rapidly, and I believe the guidance came out something like 7 days after the law was passed. Obviously, I am confident OIRA would work with us very carefully to expedite those, and I know Administrator Rao is committed to that.

On the withholding tables those were obviously important to get those out quickly and they were very well received, and businesses and individuals were very happy to see them get out, and I believe that under the MOU that they could have been put out very substantially about the same time that they came out. I believe that OIRA would have expedited its review on those as well.

Senator PORTMAN. So Administrator Rao, how would you answer those two questions? Do you agree or disagree?

Ms. RAO. Yes, I would agree, Senator Portman. Part of the compromise that was struck in the memorandum of agreement is that we would have an opportunity to review and add value to make sure that the regulations were going in the right direction and consistent with law, and meeting our standards. But, when appropriate, we can do that very quickly. We have committed to a 10-business-days turnaround for subsets of rules that are particularly important or sensitive. So we believe that we can accomplish that goal.

Senator PORTMAN. We look forward to seeing more about the agreement you all reached last night. Again, I commend you for that, and it sounds like we have reached, from what I understand

from the briefing that I got this morning, a balance in, again, a tricky area, but a really important area.

And thank you, Mr. Chairman, for your indulgence. Thank you, guys, for being here.

Senator LANKFORD. Thank you. Senator Hassan.

OPENING STATEMENT OF SENATOR HASSAN

Senator HASSAN. Well, thank you, Mr. Chair, and Ranking Member Heitkamp, and thank you both for being here today and for your work. I know it takes a lot to prepare for a hearing like this, in addition to everything else you do, so thank you.

Administrator Rao, I wanted to start with a couple of questions for you.

As public officials, we often have disagreement about policy issues, but I would like to think that we are all committed to making sure we have the best information available to us when we are evaluating and discussing those issues. That is why I was concerned to read reports about the process by which the Department of Labor rolled back the 2011 tipped wage rule last year.

Fortunately, Congress has largely blocked the worst effects of this rollback, but I still have concerns about the agency process. The Department provided the public with no quantitative economic analysis of its proposed changes, stating that it actually lacked data. But reports have since come out that the Department of Labor did conduct this quantitative analysis and found that the proposed change would result in workers losing billions of dollars. Instead of making that information public, the Department reportedly chose to bury the analysis and propose the changes to the 2011 rule while stating that the uncertainties were too great to conduct such an analysis.

My understanding is that OIRA was a part of that process. Can you explain how this happened?

Ms. RAO. Thank you, Senator Hassan, for that question. So we were reviewing the tip pooling rule from the Department of Labor, and it was always our view that should that rule be finalized that there would be a full quantitative analysis in the final rule.

Senator HASSAN. OK. So reports I have seen suggest that you, yourself, tried to stop the Labor Department from proposing these changes without those quantitative estimates, but that you were overridden. Can you speak to that?

Ms. RAO. I cannot speak to the internal deliberative process surrounding the rule, but at OIRA we are, you know, very committed to having quantitative analysis, whenever possible, for a rule. Secretary Acosta has said, in some of his hearings to Congress, that he believed that the data that was available was not sufficient, it might be misleading to be put forward in the proposed rule. And he was also committed to having a full quantitative analysis in the final rule.

Senator HASSAN. Well, I understand your point about the deliberative process. I am concerned, because I think the public, in a proposed rule, deserves to understand what information the Department has and what happened here.

So let me ask you something more general, and I think you have begun to answer it. Do you think it is important to include quan-

titative analyses when issuing regulations, if it is possible to conduct them?

Ms. RAO. Yes, I do.

Senator HASSAN. Then why would not the Labor Department issue these proposed changes without including that quantitative analysis that it had?

Ms. RAO. I believe that the Secretary made a determination that the data that was available was not sufficient, as part of that process, and was concerned about releasing information that might be misleading. And I think they were also hampered by the fact that the 2011 rule that was proposing to be repealed also lacked a quantitative analysis, so there was not really a starting point for this new rule.

Senator HASSAN. And I have a couple of more questions that I want to get to. I understand that point but I actually do not think it is particularly relevant whether the 2011 had enough quantitative analysis. We are talking about money in the pockets of people who really need it, of working people who often are working at very low-level wages, sub-minimum wage because they are expected to get tips, and I think it was a real mistake, and I think it showed a disregard for quantitative analysis. And I hope very much that OIRA will continue to stand up for the importance of quantitative analysis, which I hear you commit to. But in this particular instance I am very concerned that what seems to many of us political considerations overtook appropriate quantitative analysis, in a really important regulation to millions of working people in our country.

So I look forward to continuing to work with you on that, and I hope OIRA will stand up for quantitative analysis, even in proposed rules, where appropriate.

I wanted to move on to another issue, which, again, goes to kind of what kind of information we are basing our regulations on. Do you think it is important to have the best available evidence inform decisions that agencies make about regulatory and deregulatory actions?

Ms. RAO. Yes, I do. I think having proper scientific and other economic analysis is very important to the rulemaking process.

Senator HASSAN. Do you think that during your time as Administrator agencies have used the best available evidence to make these kinds of decisions?

Ms. RAO. We have certainly sought to work with agencies to ensure that that occurs.

Senator HASSAN. Environmental Protection Agency (EPA) Administrator Scott Pruitt is reportedly considering a proposal that would prevent the EPA from using a scientific study unless it is perfectly replicable and all the underlying raw data is released to the public. That is problematic for a whole host of reasons. For example, it could require the release of confidential medical information, which, in turn, may reduce participation in studies. But it would also prevent the EPA from considering some of the best evidence we have available to us when making regulatory and deregulatory decisions.

Have you and your office provided any input to Administrator Pruitt on this proposal?

Ms. RAO. Thank you, Senator. The questions about information quality are very important to us, and that is something that my staff has been working with EPA on, to develop best practices in that area.

Senator HASSAN. Thank you. Do you think such a proposal, as the one I just described, the one from the EPA, that would limit the information agencies can use by preventing them from considering best available evidence makes sense?

Ms. RAO. Well, I think we want to make sure that we do have the best available evidence. I think it is also important for the public to have notice and information about the types of studies which are being used by agencies for decisionmaking. So I think that there is a balance to be struck there, and I think that is something that the EPA is working toward.

Senator HASSAN. Would you generally support agencies changing their procedures in ways that prevent them from using the best available evidence when making these decisions?

Ms. RAO. No, I would not.

Senator HASSAN. I am very glad to hear that, because one of the concerns about the EPA proposal is that it seems like basic common sense to use best evidence that make decisions. But what we are looking at is the agency really describing a move away from the scientific process. There is not perfect data or perfect science. Scientific evaluation and data and analysis is an ongoing process.

As you know, we have talked about one of my priorities is the response to the opioid crisis in my State and across this country. If we wait for so-called perfect science we are not going to have evidence-based practices out there that are saving lives. And so I think it is critically important that we continue to honor scientific process and make sure that we are using best available data when we make policy.

Thank you, Mr. Chair, for letting me go over.

Senator LANKFORD. Thank you. Ranking Member Heitkamp.

Senator HEITKAMP. Thank you, Mr. Chairman. Administrator, let us just kind of go back to what you said. Is there any opportunity for the public to comment after a rule is final?

Ms. RAO. After a rule is final, no.

Senator HEITKAMP. Well, then, why would we wait until a rule was final to provide quantitative analysis?

Ms. RAO. Well, while we definitely believe that it is the best practice to provide the quantitative analysis with the proposed rule there may be circumstances in which an agency determines that that information is not available.

Senator HEITKAMP. Do you think that you can give a proper notice without giving that quantitative analysis on the front end? Because I would like to comment on it if I were an interested party. I would like to see all the evidence that went into it. It does not help me to get it at that stage, does it?

Ms. RAO. Well, I do think it is better if reliable quantitative analysis is available at the proposed rulemaking stage. I think there is a balance between providing that information and ensuring that it is robust enough to support the comments.

I mean, one of the utilities of having a proposed rulemaking process, of course, is that the agency brings in information from the

public which will help inform their analysis going forward, and if they receive a lot of comments that affect their analysis they could go out with another proposed rule.

Senator HEITKAMP. Yes. Great. And one of my great criticisms of the Waters of the United States rule was that they did not take into consideration that additional information, reissue a proposed rule, and allow for comment.

Ms. RAO. Yes.

Senator HEITKAMP. I think, back to Senator Hassan's point, this is the difference of whether people can put food on the table.

Ms. RAO. Yes.

Senator HEITKAMP. This is not some ethereal academic study that we are talking about here. This is about what goes into the purse at the end of the night, that helps people live. And yet the attitude seems to be fairly cavalier about this rule. And, we understand, and, I said in my front comment, the Department of Labor did not want to come today, for whatever reason. I am pretty sure I know why they did not want to come today. So you are stuck sitting there, defending what the Department of Labor did. I get it.

But this is not any way to run the railroad, and we need to lay down a marker right now, that we are going to be watching for this kind of backhanded, ham-handed, irresponsible kind of rulemaking process, especially when it hits some of the hardest-working Americans that we know. And so I am deeply concerned.

And, you and I have had long discussions about the administration's attitude toward rulemaking, and I have been probably one of the most interested people in the Democratic caucus in reforming that process, getting rid of unnecessary regulation. But I have assured my colleagues that this is going to be done professionally, and it is hard to take a look at this rule and say this was done professionally. And it is hard to say this is not a political rule, this was not a political process. And I know you are cut in the middle of it, and I regret that for you because I know this is not how you would do it.

But we need to make a statement right now, and you need to be able to go back to other agencies that want to take this kind of shortcut, and tell them, "I do not want to go in front of that committee unless you are going to be with me. Do not try and do it."

Ms. RAO. Well, I appreciate that sentiment, Senator Heitkamp, and I can tell you that I am very committed to having full notice to the public in rulemakings and providing as much analysis as possible for the rulemaking process to be as robust as it can be.

Senator HEITKAMP. So I understand that we are kind of through this now, there was some corrective action taken by Congress. It should not take Congress to take that corrective answer. But I am not going to belabor this point any more.

But I do want to ask you about the policy of OIRA when it comes to productions of cost benefit analysis that does not comport with deregulation goals. And by that I mean I believe there needs to be a robust cost benefit analysis for any major rule, or any major deregulation, and I tend to see if you are going to promulgate a rule, we want this robust process, but if you are going to deregulate, just throw up your hands and not go through the process. I mean, how are you impressing up on agencies that, when they are amending

or engaging in a deregulation process, you expect the same kind of robust analysis that you would expect had they been proposed a new rule?

Ms. RAO. Yes, thank you, Senator Heitkamp. We have been very clear in our guidance and our interactions with the agencies that the deregulatory rules need to meet the same standards. I think that is one of the reasons that some of the most significant deregulatory actions are still underway, agencies are working on developing robust analysis, gathering data following the appropriate notice and comment rulemaking period.

And so we have really been working with agencies to ensure that those standards are met for deregulatory as well as regulatory actions.

Senator HEITKAMP. Yes. And one thing you and I have also talked about is transparency, and I think we have maybe a little different perspective, because you understand that your ability to work with agencies, if everything that you tell them becomes public it may limit your ability to do your job. I think at a time when there is an incredible amount of distrust about what is happening, especially in the regulatory environment, transparency is better than no transparency.

Can you talk a little bit about the role of transparency here, to the regulated community and to the American public, and where you think those boundaries are?

Ms. RAO. Thank you. So I consider transparency to be very important and really an essential part of good regulatory practices. I think the centralized review process at OIRA is one of the most transparent processes currently in the Executive Branch. At the end of a rulemaking process, members of the public are able to obtain a copy of the rule as it was proposed by the agency, as well as the final rule. They can compare the difference and understand that the review process is what happened in between. So I think that is very transparent.

We have also, with respect to our regulatory reform efforts, sought to be very transparent. On our website, Reginfo.gov, we have listed all of our deregulatory and regulatory actions. We have listed how the agencies have done their cost allocations. So we have really sought to be as transparent as possible in our reform efforts.

Senator HEITKAMP. And that leads to maybe another area that is not as comfortable, and that is the Bloomberg stories under the tip rule. Basically the administration's position was that that was false reporting, fake news once again. But yet I think it is pretty fair to say that if it was, indeed, a false news story we would not have had to have an agreement in the omnibus to fix it.

And so according to their series on this proposed rule, you, your agency, attempted to stop the publication of the notice of proposed rulemaking without the quantitative data. In all seriousness, I would say, thank you. But I want to say I appreciate your willingness to stand up and say this is wrong, and I respect your courage, but it does not help when one agency is saying, look, we put the brakes on this. We tried to stop this. Bloomberg is not exactly known for a bias in news reporting. And the answer to that kind of reporting on a rule, which is critical to transparency, is fake news, nothing to see here, walk away.

And so I think it is really important that we look at transparency not only in terms of what is available but also commenting and being honest with our First Amendment friends in the press, to make sure that we are telling the public exactly what is happening. And so I am curious about any comment you have about the Bloomberg story, about the reporting that this was somehow fake news or false reporting, and what role you think the press has in all of this.

Ms. RAO. Thank you, Senator. It is hard for me to comment on the deliberative process that takes place around a rulemaking, but I can tell you that I, in my role as the OIRA Administrator, am very committed to ensuring that this type of analysis is available to the public, and I will continue to endeavor—

Senator HEITKAMP. But the truth—when issues are raised about the process, and issues are raised about how did this happen—

Ms. RAO. Yes.

Senator HEITKAMP [continuing]. The public has a right to know that this is maybe where it went across the rails. And that public accountability leads to a greater accountability, and that is the concern that I have, and the reason why I am focused on the tip rule, in part, because you guys came to an agreement on the rest of this. But the reason why I am focused is that this is the first kind of major examination of this relationship that you have with other agencies, or in the process of doing things, that I might agree with, as a substantive matter. But that process has to be accountable, and the media has to have access to information so they can fairly report to the public. And it does not help us to say it is false reporting or fake news.

And so I just want to make that point. I know that did not come from you, but I wanted that point on the record.

Thank you, Mr. Chairman.

Senator LANKFORD. Thank you. Senator Harris.

OPENING STATEMENT OF SENATOR HARRIS

Senator HARRIS. Thank you. Administrator Rao, I want to discuss with you the Paperwork Reduction Act, and it stipulates that OMB, as you know, must review and approve Federal collections of information before they are conducted. So, specifically, I want to discuss with you the 2020 Census. We had a separate hearing regarding that.

After reviewing the agency request, OMB, as you know, may approve or disapprove a request or define conditions that must be met for approval of any question that goes out.

Ms. RAO. Yes.

Senator HARRIS. The Census Bureau submitted to OMB a proposal to combine race and ethnicity, to combine the two questions on the 2020 Census, which years of testing and research have showed would likely increase an accurate count of minority populations with a specific emphasis on Latino populations.

Were you involved at all in the review of this proposal?

Ms. RAO. The End-to-End Test for the Census was submitted to our office for approval, yes.

Senator HARRIS. And on this specific subject?

Ms. RAO. Well, that was one of the questions in the test that was proposed by the Department of Census.

Senator HARRIS. And was there an affirmative decision by you or Director Mulvaney or any other OMB official to not include a combined race-ethnicity question on the Census?

Ms. RAO. Well, Senator Harris, the race and ethnicity collections by the government are governed by a 1997 OMB directive——

Senator HARRIS. Yes.

Ms. RAO [continuing]. Statistical directive on race and ethnicity standards, and the End-to-End Test, the format of that question followed those long-standing standards. So it was consistent with existing policy for how race and ethnicity questions would be worded on government collections.

Senator HARRIS. And so on this issue, was there an affirmative decision by you or Director Mulvaney or any other OMB official to not include the combined race and ethnicity question?

Ms. RAO. No. I mean, the Census used the format that is required under the current directives on race and ethnicity standards.

Senator HARRIS. So is it your opinion, then, that OMB did not have to review the decision and affirm the decision or deny it?

Ms. RAO. Well, we reviewed the End-to-End Test but that particular question is just consistent with the existing standards so there was no need to make a specific determination on how that question was phrased.

Senator HARRIS. So you made a decision, then, that it did not need to be changed. Is that it? I am a bit confused. What is the decision that you made on the issue of the race and ethnicity?

Ms. RAO. We reviewed the test, the End-to-End Test, to ensure that it complied with the requirements of our statistical directives and the Paperwork Reduction Act, and it did satisfy those standards, and so the Census was allowed to move forward with that End-to-End Test.

Senator HARRIS. OK. And was there any memo or documentation of this finding in the analysis that led to this finding?

Ms. RAO. I do not believe there was, no.

Senator HARRIS. Can you check, and if there was, supply it to us?

Ms. RAO. I would be happy to look into that.

Senator HARRIS. Thank you. And, additionally, Commerce Secretary Ross announced the addition of a citizenship question to the full 2020 Census, and there, I am sure you know, have been major concerns expressed about raising that, and bringing that question up, especially without proper testing and vetting. And the concern is that it will decrease the responses to the Census, which, of course, we do only ever 10 years and we make a lot of decisions based on the numbers that are produced. So it is critically important that it is accurate.

What role, if any, did OIRA have regarding this decision?

Ms. RAO. We did not play any role in that decision.

Senator HARRIS. And is it your opinion that you do not have a role to play in affirming or reviewing that decision?

Ms. RAO. The decision about what questions would go on the Census and be submitted to Congress was a decision made by the Department of Commerce. When those questions are finalized,

after review by Congress, we expect to receive the entire package of questions for the Census as part of the Paperwork Reduction Act process, and that collection will come to us, likely, we expect, sometime in the fall of this year. So we will review the collection at that time.

Senator HARRIS. So I am clear on the system and the process—

Ms. RAO. Yes..

Senator HARRIS [continuing]. So are you saying, then, that you do not have a responsibility to review it before it comes to Congress?

Ms. RAO. That is correct.

Senator HARRIS. And then after it comes to Congress, you will review it, and then what is the purpose of your review at that point?

Ms. RAO. Well, the purpose of that review is the same time, it is the same purpose of any Paperwork Reduction, the Census is essentially a very significant information collection.

Senator HARRIS. Sure.

Ms. RAO. And so it has to go through our ordinary process under the Paperwork Reduction Act, and it will do so after they have been submitted to Congress.

Senator HARRIS. And what is the purpose of your process?

Ms. RAO. I think the purpose of our process is to make sure that we are gathering reasonable information from the public and we are doing it in a way that has integrity and serves the underlying purpose of the collection.

Senator HARRIS. OK, great. Well I think—

Ms. RAO. And follows—

[Overlapping speakers.]

Senator HARRIS [continuing]. Those are very important purposes. And so I look forward to hearing from you once you receive it, on those questions that I have presented, and those changes that we are making to the Census for 2020.

Ms. RAO. Yes.

Senator HARRIS. I know that Senator Hassan asked you some questions earlier, and just in follow up to the reference that she made to the tips rule, have there been any other instances where agency heads have gone around OIRA in seeking regulatory approval?

Ms. RAO. Senator, I am not sure I would characterize it that way. We have a process where OIRA works closely with the agencies and others around the EOP to resolve these issues.

Senator HARRIS. OK. So you are not concerned that there are other instances?

Ms. RAO. I am not.

Senator HARRIS. OK. Great. Thank you very much. I have no further questions.

Senator LANKFORD. Thank you, Senator. Kind of walk through a few things with us, just in trying to be able to pull some things together from this memorandum of agreement, and to be able to get some definitions here. The three areas are very typical on the scenario where a tax regulation would be subject to OIRA review.

The first one, create a serious inconsistency or otherwise interfere with an action taken, or planned by an action by another agency. Who determines that, whether that moves? Is that Treasury

that determines that or is that OIRA determines that? Because sometimes finding that it interferes with another agency cannot be seen by single agency. It has to be seen by OIRA to know someone else is doing something similar or this may interfere. Who does that determination?

Mr. MCINTOSH. Senator, I am happy to address that. In the first instance, Treasury identifies all of its proposed regulatory actions to OIRA. The ultimate decision on that is made by the OIRA Administrator.

Senator LANKFORD. OK. Talk to me about the speed of that. How quickly can they get an answer back? Is that within this 45- and 10-day window, or does it take longer because that is a larger batch that is going to them to say, hey, we need to know whether we need to even go through this process?

Mr. MCINTOSH. That is a different process from the 10- and 45-day window, which is upon designation as significant for OIRA review. The process for determining whether OIRA should review under the criteria of Paragraph 1 of last night's memorandum of agreement is one where Treasury submits, periodically, a notice informing OIRA of the review, and OIRA then has the ability to designate things that it believes would hit the 1A criteria that you just described.

Senator LANKFORD. So what is Treasury's expectation of how quickly they get an answer back before it needs to go through this longer process or before they can move forward?

Mr. MCINTOSH. I do not know how long it takes to get that answer back.

Senator LANKFORD. Well, let us ask OIRA, shall we? What is a good expectation for a time period, because clearly, as we have discussed before, and Senator Portman brought up, there is no goal here of trying to slow down the process with IRS, because many people need answers to questions quickly as they are going through the tax process. Especially this week, of all weeks, people are interested in rapid answers, to be able to get everything in.

So the question is, how quickly can they expect an answer back on some of these things?

Ms. RAO. We make significance determinations often, just within a couple of days. As long as we have sufficient information from the agency about what the rule hopes to accomplish we can make those determinations. And I would say usually that determination, as we have worked with other agencies, is fairly uncontroversial. Agencies often flag things they believe are significant and usually we accept their designations. Sometimes there may be disagreement, which we can usually work out pretty expeditiously.

Senator LANKFORD. OK. Great. So do not anticipate any kind of slowdown in the process or anything that would be atypical. How far in advance would you anticipate that they would need to submit this to make sure that there is no slowdown in the process?

Ms. RAO. I think it just depends on the rule, the size of the rule. The agreement provides for kind of a quarterly process, so we have some anticipation of the rules that are coming up, and then significance determinations can be made as they have further information about the rules that they plan.

Senator LANKFORD. OK. I had brought up, in my opening statement, a couple of examples that we have seen, that I think if this process would have been in place would have been picked up by OIRA earlier, would have gone through some review and had some opportunity for conversation.

And let me just reiterate what Senator Heitkamp was saying as well. We do anticipate that OIRA is forward leaning, that when an agency is trying to go faster or to circumvent the process, or not using complete information, we anticipate that OIRA is going to lean in and is going to say back to an agency head, publicly or privately or both, "You need to slow down. We need better information." This will have a court challenge and cost the taxpayers millions of dollars, so let us get it right the first time rather than us go through millions of dollars on the taxpayer, or this will cause a lot of turmoil in the economy. We need to be able to resolve it earlier rather than later. That is why we like you being in that spot, to be in that role.

So I mentioned a couple of examples earlier that I thought would have been picked up. Are there examples that you can already see now to think, in the future, these are things that I think are going to go through this process? Obviously it was just settled last night, but are there any examples you can think of with Treasury or IRS that would go through this process you see in the coming days?

Mr. MCINTOSH. Mr. Chairman, thanks for that question. We do have anticipation that certain of the rules we have to promulgate under the tax reform bill will go through this process. I can give you specific examples. I would note, though, that whether they end up going through the process or not will depend on the regulatory choices that Treasury proposes to make. If, for example, Treasury proposes to hew very closely to the text of a statute, and so does not create any additional compliance costs, or very *de minimis* additional compliance costs, then one of the rules I cite here may not end up triggering the economically significant test here. It might still trigger one of the other prongs of the new MOA.

So, for example, I think we think that some of the pass-through guidance would presumably hit these triggers. We think some of the guidance on the base erosion and anti-abuse provisions would hit it. The limitation on interest expense deductions could conceivably hit it, depending on the choices Treasury makes in promulgating those rules.

Senator LANKFORD. OK. I can see it, by the way, and part of the OIRA process is helping think through, back and forth, and having someone outside of the entity thinking through what are other alternatives, which is exceptionally important in this process, to say this is the way this will be implemented, to think what else, how else could it be done and why. Why is that the best one? Why is that the easiest one to be able to implement? Is there a better way to do it?

OK. Thank you. Any other ideas on that?

Mr. MCINTOSH. I actually have a list here, but most of them are references to sections that would, I think, not probably be interesting to the listener in this hearing. But I am happy to come back—

Senator LANKFORD. I am quite confident someone that is listening to this hearing would be exceptionally interested in that.

Mr. MCINTOSH. So we think that, for example—I referenced the 199(a) regulations. We think the 100 percent bonus depreciation under 168(k) probably would, depending on the judgments made.

Senator LANKFORD. Can I do a quick pause? The 199, is that the one that came to the omnibus, with the original one, or both? Because there was a revision of that, that happened in the omnibus vote as well.

Mr. MCINTOSH. I do not know the answer to that, Mr. Chairman. I will have to take that—

Senator LANKFORD. Hopefully the last one, because that was cleaning up the mess from the first one, but that is a whole different issue. OK. Go ahead.

Mr. MCINTOSH. Yes. So I think we think that, for example, the 512(a), the regulations under 512(a), which deal with investments in partnerships, and the unrelated business taxable income being separately computed for each trade of business activity could conceivably, depending on the regulatory choices that are hit.

I mentioned the 163(j) limitation on interest expense deduction. Conceivably, Section 59(a), which is the base erosion anti-abuse that I referenced earlier. Conceivably, 951(a), which is what we call the global, intangible, low-tax income (GILTI) provisions could conceivably hit these triggers. There are others beyond that.

Senator LANKFORD. OK. All right. That is extremely helpful to get the context on this.

This determination on a rule having a revenue effect on the economy of \$100 million or more, is that something Treasury will have the responsibility to be able to examine, or is that part of this early review process that you would anticipate happens?

Mr. MCINTOSH. Mr. Chairman, if you are talking about the question of whether something hits the economic significance threshold that we have set forth in the memorandum of understanding, Treasury, in the first instance, would be obliged to make that calculation and provide it to OIRA, and OIRA would review that, and the ultimate decision would be the administrators.

Senator LANKFORD. OK. So that is in this advance process, before you determine whether it goes in at all.

Mr. MCINTOSH. That is correct, Mr. Chairman.

Senator LANKFORD. All right. Which, by the way, is a very reasonable process on this.

One of the things that Senator Heitkamp and I have had a lot of conversations about, dealing with the regulatory issues, is small business and how that actually works. One of the concerns that I have is the Small Business Advocate—it is my understanding, whatever year that that was, stopped sending issues over to IRS, basically saying they are not responding back to us anyway, they are not hearing us out. And even things like on estate tax and things that clearly hit small business, IRS has, in the past, said, well, this does not really apply and so we are going to keep moving.

How are you going to get input from small business on these things when regulations actually do affect small businesses, and obviously multiple of these regulations will hit them disproportionately?

Mr. MCINTOSH. Mr. Chairman, I think you are talking about the requirements of the Regulatory Flexibility Act?

Senator LANKFORD. I am.

Mr. MCINTOSH. So although you cited an instance in which IRS apparently got that calculation wrong, according to the Small Business Administration (SBA), the IRS Chief Counsel Manual, in Part 32.1, actually sets forth a regulatory flexibility checklist that IRS is obliged to undertake for every regulation it promulgates, and go through and determine whether it actually is subject to the Regulatory Flexibility Act calculations analysis or not.

And so while that the IRS got it wrong in a prior year, there is a provision of the Chief Counsel Manual that is required to be applied to every rule.

Senator LANKFORD. So how is there input back and forth between small business and IRS on things that affect small business?

Mr. MCINTOSH. Mr. Chairman, I do not have the specifics of those interactions. I would be happy to take that back.

Senator LANKFORD. Yes. Let us talk about that. This may be an ongoing conversation with Small Business Administration and others that just want to be able to have people at the table, to make sure when rules are promulgated that affect them directly they are able to raise their hand and say, "Have you considered this?" That is a reasonable part of it. They are going to see the same statute come out and think when the regulation is promulgated on that there will be issues, and in our particular business we want to make sure it is correct.

We believe it is reasonable for those individuals to be able to be at the table so that when the regulation is made, it is consistent with law, but obviously consistent with common sense for application as well, and that only happens when you have people that are affected at the table, in that conversation, especially on the small business side, because it is so unique for that type of business trying to be able to operate under statute. Senator Heitkamp.

Senator HEITKAMP. I want to just follow on. When you do not pay attention to small business, we do not get the information we need to make the corrections. And we can classify a lot in tax, appropriately so, based on big and small business. And so this is not just about being responsive in following the current law. It is getting that information to us about impacts on small business so we can respond appropriately. And so, obviously, I am very concerned.

I just want to kind of make a point. You are outgunned, Mr. McIntosh. Not you, personally. The IRS is outgunned. There are literally thousands and thousands of thousand-dollar-an-hour lawyers right now combing through this new tax bill, and what they are looking for is those glitches and these glitches, and you are down 20,000 employees at the IRS. Twenty thousand people have left since 2010. You are outgunned, and I am deeply concerned.

That is their job. I am not criticizing \$1,000 tax lawyers. I am not criticizing that. I was the tax commissioner in North Dakota. I know how this goes.

But we will have an impact on the debt and deficit in this country unless you get this right, unless you fulfill—I mean, I will tell you that—we can debate. You opened it up, bragging about the tax bill. We can debate a trillion-dollar deficit over 10 years, which is

where this thing is headed if you believe some of our analysis. I know you do not agree with that analysis. Let us put that aside.

This bill has the potential of having a Mack truck driven through it, in terms of revenue, because of the changes, because those changes were not vetted in a meaningful way here. They are going to have to be analyzed there. And the speed to which you do it and help us identify those loopholes, that will be loopholes that were unintended, is absolutely critical moving forward.

I mean, Congress has spoken. This bill has passed. We know what the legislative history and the intent of this is. I am deeply concerned, like the problem with 199(a), that we are going to see more and more glitches. In fact, they have been reported. And so if the language—this, probably is more appropriate for a Finance Committee hearing—but if the language of this bill provides the ambiguity that gets you in litigation over various deductions, various exemptions, various transfers, we need to know so that we can react here.

And so I cannot impress upon you enough how important it is to staff up, even if it means you rob from Peter to pay Paul. We cannot let the IRS just prioritize these things based on what they think is the biggest mess, allowing a major loophole or a major problem on the back door. And the pass-through stuff is complicated, and I am deeply concerned about what is going to happen with the potential for revenue loss that goes beyond what was intended here with pass-through entities and with transfers. I am deeply concerned about what could happen with multinational allocations.

And so just know that we need to know, as an oversight body on regulation, if you do not have enough people. We need to go make that argument, because no one wants this to be a bigger deficit problem than what we currently have, a bigger debt problem.

And so I am concerned about the lack of staffing at IRS to implement this statute. And Senator Portman raised the withholding tables. Good. I hope they are right, because people who usually get, \$2,000 or \$3,000 of withholding, of refund, they are not going to be very happy if, in April, their refund is only \$200.

So this is critically important that this get done right. And, I am not saying that is going to happen. I am not saying—it could be that they double their refund. I do not know. But it is really important that we stay on top of this rulemaking process, and it is really important that you rely on your counterpart, and that is why I am grateful for the solution that you guys worked out. I think it is important.

But we are going to be monitoring that, because it is just not enough for your eyes to be on this stuff. Her eyes need to be on it. And it is a plus multiplier for the IRS to be able to use that excellent staff that we have at OIRA to help you guys implement this huge bill.

So I just want to make that comment that we are on your team. Ask for help if you need it. Identify things that you go, “Whoa, whoa, whoa, that was not intended. We need a fix.” Even though this was a highly partisan process—I am not commenting either way—the fixing it should not be partisan if, in fact, we run into those problems. So we are very interested in what can happen in

oversight and very interested in how we can help you fix unintended consequences in this bill.

Senator LANKFORD. Let me ask some specific questions on this. On the memorandum of agreement that you settled last night, in the last part of it, this MOA will have immediate effect except that Paragraph 2(b) will take effect on the earlier of 12 months from the date of this agreement or when Treasury obtains reasonably sufficient resources, with the assistance of OMB, to perform the required analysis.

Help me understand that part, especially the part about "with the assistance of OMB." What is the agreement at this point about trying to get you assistance faster than 12 months, or do you anticipate it will take 12 months to be able to actually rule this out? Where will those individuals be housed? Will they be at OMB, that Treasury will tap on, or will they be at Treasury that OMB will help facilitate?

Mr. MCINTOSH. Mr. Chairman, this was a provision that was carefully crafted between the Administrator and myself because of the importance of getting this right.

Our expectation will be able to go into effect before 12 months. Our concern is it takes a certain set of economists to produce a regulatory impact analysis. We have one pending before OIRA right now where the primary author spent over 1,000 hours on the impact analysis. And it is, perhaps, a good thing that Treasury does not have economists sitting around with nothing to do. We deploy them as best we can.

Senator LANKFORD. They are dangerous people when they have nothing to do. Yes.

Mr. MCINTOSH. I have no comment on that. [Laughter.]

So we are going to need, and want to bring in additional resources to bear, to produce these regulatory impact analyses. And in terms of what is the agreement between Treasury and OMB on getting those more resources, it is essentially what is on the page here. We need to work on it, we both recognize we need to work on it, and we hope to solve that problem in the very near future.

Senator LANKFORD. So help me understand, from OMB's perspective, what this section means and where the staffing will go. Treasury needs to add additional people. Will OMB and OIRA need to add additional people as well? What does that mean?

Ms. RAO. We will need to add additional people. We have been looking into that. We have actually recently brought on Kristin Hickman, who is a professor at the University of Minnesota, as a Special Assistant to the Administrator. She is one of the Nation's leading tax and administrative law experts who will help us with this transition.

I think this provision also recognizes the fact that there are things that both OIRA and Treasury need to learn about the process, since we have not been doing this type of work together, and to figure out what types of analysis we need to meet our standards for economically significant rules. And, so we want to do that in a way that is responsible, and understanding the kind of work they are already doing, what type of additional work may be required.

But I would also just highlight that in the meantime, for rules, Treasury will still be providing us with analysis of costs and bene-

fits, just not a full regulatory impact assessment, which kind of has a particular meaning. So we will still be receiving analysis from Treasury while we work out the details of these more elaborate requirements for economically significant rules.

Senator LANKFORD. Do you anticipate it will take a year?

Ms. RAO. I certainly hope it will not.

Senator LANKFORD. OK. So how many staff do you think you will have to add? Is this 100? Is this 5?

Ms. RAO. Probably somewhere between those two.

Senator LANKFORD. There is a lot between those two.

Ms. RAO. I think it would be great for the review of Treasury rules if we could have maybe 10 additional staffers. I think that would be reasonable as a start depending on the volume, which was something that we will need to work out as we go along.

Senator LANKFORD. OK. What about Treasury? How many people do you think you will add?

Mr. MCINTOSH. I think we are in about the same—

Senator LANKFORD. Ten-ish?

Mr. MCINTOSH [continuing]. Same area, Mr. Chairman, although I do not want to speak for our Offices of Tax Analysis, which would have much greater expertise on that.

Senator LANKFORD. I get that. No, I am not going to hold you to it, as we are going through some of the possibilities for review. It is early to be able to determine how many things will be affected by that, so I am not going to try to hold you to every single one of those. But it is helpful to be able to get some context on the things you are already looking at.

How is that—and do you anticipate this will have a gain to the taxpayer? When we are talking about adding 20 people in the process to be able to review this, what do you think is the gain to the taxpayer?

Mr. MCINTOSH. We would expect that it would be beneficial to the taxpayer, Mr. Chairman. We clearly believe that there are a set of rules that have not gone through OIRA review that ought to. We do not think it is the majority of tax rules.

Senator LANKFORD. Right.

Mr. MCINTOSH. We think it is something along the lines of what other agencies send through OIRA, and I believe the Administrator agrees with that.

But the tax code has changed over the past 40 years, since this agreement was first struck. The tax code is now used for some things that are not primarily designed to raise revenue. They are designed to incentivize conduct by imposing a tax. So, for example, certain of the ACA regulations that are promulgated are not primarily about raising revenue to bolster the fisc. And so those are the sorts of things where we think there is a clear role for OIRA to review.

The things that are just—

Senator LANKFORD. There is a wide variety of how those things can be imposed, and it will make a tremendous difference.

Mr. MCINTOSH. We agree—

Senator LANKFORD. Just going through the alternatives will make a significant difference of the least burdensome but most effective methods.

Mr. MCINTOSH. We agree completely, Mr. Chairman. We also think there is a set of things that are pure—I will not say boring tax rules, but do not impose significant costs on the regulation itself, does not impose significant incremental costs beyond what the statute does, and they are not being used in this sort of conduct-inducing way that I described. And so for those we do not think there would be an advantage, and so that is reflected in the way we set forward the prongs under Paragraph 1 of the new MOA.

Senator LANKFORD. Talk to me about the Congressional Review Act and the engagement with Treasury and IRS on the CRA and what it will take, obviously that can slow the process down significantly. What areas will IRS still be engaged in CRA requirements?

Mr. MCINTOSH. Mr. Chairman, I am afraid I am a little baffled by a lot of the reporting about the Congressional Review Act. IRS actually over-complies with the Congressional Review Act. Whether a rule goes through OIRA review—I am sorry, IRS over-complies. I hope I did not misspeak there. Whether a rule goes through OIRA review or not does not determine whether we at Treasury comply with the Congressional Review Act.

In addition to all rules, we submit all notices, all revenue procedures, and other guidance from IRS to Congress and to the Comptroller General so as to comply with the Congressional Review Act.

The determination by OIRA as to whether a rule is major or not has a timing effect on when it can go into effect. But in terms of, for example, the concern that rules might hang out there for years and then be repealed by a Congress many Congresses away, that is actually—the over-compliance of IRS with the Congressional Review Act should prevent that. Makes it an impossibility, actually.

Senator LANKFORD. OK. Additional elements that need to be addressed in this memorandum of agreement that are unaddressed, is where in the process, this was resolved last night, are there additional outstanding elements still yet to be resolved, that you would anticipate continuing on the negotiations on in the days ahead?

Mr. MCINTOSH. Mr. Chairman, I do not think anything from the terms of the memorandum of understanding, or memorandum of agreement. I do think that—I would commend to you a column by Adam Looney at Brookings today, or maybe it was yesterday, where he explained that there is going to need to be some work between Treasury and OIRA to have the analysis conformed to what OIRA does, and have OIRA's analysis conform to what tax rules do, because tax rules are not easily analyzed under the usual cost benefit analysis, because they do impose costs, and they do raise revenue, and often there is no cognizable non-revenue benefit.

And so the normal cost benefit analysis, people who are tax economists think it does not map on well, and I think we and OIRA are both cognizant of the fact that we are going to need to work with OIRA to get that to conform the review we do and the specifics of tax regulations, and confirm OIRA's analysis of those things to the specifics of the Internal Revenue Code.

Senator LANKFORD. Which, by the way, I do not think you are getting any disagreement from us on that. We understand that completely. That is the nature of it. But there are times that regu-

lations are promulgated that there are variations of how they can be implemented that do affect people dramatically. Small businesses, corporations overseas, individuals, there is a great variety in how things are actually implemented—timing, focus. Those decisions are wild cards in the decision, and everyone is trying to think through the right way to be able to do it. It is helpful to be able to get a second opinion and to be able to say this is a very significant rule; what are the other options and how are they actually implemented? How will this affect small businesses? Those conversations, I think, are beneficial.

We do understand the cost benefit analysis a different dynamic, other than the way that it is actually being implemented, if that makes sense. So we understand that.

Other things that you want to add into the agreement?

Ms. RAO. No, I would agree with Mr. McIntosh, and I would also just add that our career economists and staffs have been working together during this process while we have been talking about the MOA, and, we believe that there is a lot of common ground in the analysis that Treasury is already conducting. And so those are questions that will have to be worked out as we go along, and we learn more about the work that each agency is doing and how that comes together.

But we are quite confident that we can do this in a way that is expeditious.

Senator LANKFORD. The issue about an interpretive rule and whether something is economically significant, saying this is what the statute said and so we are just implementing that, so this is really not a regulation, it is really not a economically significant, that is an area that I would see that the two of you are going to have to spend a lot of time talking and trying to figure out what is this. Because you are right. There are some areas of tax code, a tax table coming out, it is just, that is what the statute says and you are following right through with it. But there are other times it is economically significant. There were other options in the decisionmaking process that will require some back-and-forth to be able to make sure that is done.

So what I do not want to have is a time, 2 years from now, when we are talking about saying, well, we do not have any options to be able to put out because they are all just the statute. Every agency could say that, that our regulations are just the statute. But when there are options and variables, there needs to be some outside conversation on it. Senator Heitkamp.

Senator HEITKAMP. I just want to add to that, because I think it is critically important, once you issue one of these rules, the reliance on a rule, the reliance on an interpretation pretty much cements it, and that is why it is so critical that you come back to Congress if it is not clear. That is why it is so critical that we know when the interpretations are not clear, when you need clarification, because if you get out there with an interpretation, we are looking at litigation, we are looking at reliance. It is possible to roll that back after the interpretation, and that is why it is so critical that we have an ongoing dialogue, especially as it relates to implementation of the new tax law.

Final comments from either one of you.

Mr. MCINTOSH. Nothing from me, Mr. Chairman. Thanks for holding the hearing.

Senator LANKFORD. No. Thanks for being here.

Ms. RAO. Yes, thank you, Mr. Chairman. Thank you.

Senator HEITKAMP. Thank you.

Senator LANKFORD. We appreciate you being here and doing the hard work. You all have done a lot of work behind the scenes to be able to get to this point, to be able to do this, and we do appreciate it. This will be helpful long term for everyone going through tax policy, which is everyone's favorite subject.

May I remind everyone that there is only days left until filing. Would that be helpful to you, to be able to get that done?

Mr. MCINTOSH. We appreciate the notice, all the notice we can get, Mr. Chairman.

Senator LANKFORD. As that approaches, all Americans are thinking about tax policy now. We just want to be able to make it as clear and as accurate as we can, from the IRS coming out to the American people, to be able to make sure that there is the least amount of ambiguity.

That concludes today's hearing. I do want to thank both of you for your participation and your engagement in this. The hearing record will remain open for 15 days until the close of business on April 27, for the submission of statements and questions for the record.

This hearing is adjourned.

[Whereupon, at 11:38 a.m., the Subcommittee was adjourned.]

A P P E N D I X



Opening Statement

Hearing before the Regulatory Affairs And Federal Management Subcommittee

Thursday April 12th at 10:00 AM

Good morning and welcome to today's Subcommittee hearing entitled "Examining the Office of Information and Regulatory Affairs' Role in Reviewing Agency Rulemaking." Today we will review federal regulations, primarily through the eyes of the "ultimate regulator," that is the Office of Information and Regulatory Affairs' – or OIRA. In this hearing today, we hope to get a better understanding of OIRA's accomplishments during the first year of this administration.

We also have with us today the Treasury Department, who is here to discuss their long-standing exemption from OIRA oversight and their obligations for basic regulatory practices.

Created by Congress in 1980, OIRA performs the essential role of reviewing proposed regulations before they bind the American people.

Over the years, OIRA's responsibilities have grown to include implementing numerous executive orders to ensure all federal agencies comply with basic regulatory steps, such as cost-benefit analysis, consideration of regulatory alternatives, and fair public consultation.

OIRA's role continues to expand under this administration.

10 days after the President took office, he issued an executive order directing executive branch agencies to remove at least two regulations for each newly issued regulation, and most importantly, the order directed any added regulatory cost must be offset by the removal of existing regulatory costs.

I look forward to hearing how agencies have fared during the first year of this executive order and the outlook going forward.

Properly issued guidance is necessary and helpful in clarifying regulatory requirements. But when abused, agencies circumvent congressionally mandated procedure and pursue their agenda without the input of the American people.

Under both Republican and Democrat administrations, OIRA has proven to be a neutral gatekeeper and check on executive branch agencies; however, under a long-standing agreement, IRS regulations have not gone through centralized review like every other executive branch agency.

In 1983, when this agreement was signed, OIRA was a new office with a limited scope. Since then, the nature of both OIRA and the IRS has changed.

OIRA's mission goes far beyond review of information collection under the Paperwork Reduction Act, and the IRS does more than simply apply the tax code – they determine issues such as who receives religious exemptions and implementation of the Affordable Care Act.

All Executive branch agencies must comply with OIRA review, Regulatory Flexibility Analysis, and the Congressional Review Act, but for decades the IRS exempted themselves from these checks put in place to protect the American people.

In 2016, the IRS proposed a rule regarding the valuation of interests in closely held partnerships or corporation for estate, gift, and generation-skipping transfer taxes.

As the Small Business Administration Office of Advocacy outlined in a comment letter, the IRS failed to perform an Initial Regulatory Flexibility Analysis and they certified the rule would not have a significant economic impact on small businesses despite applying almost exclusively to small businesses.

The rule was so deeply flawed, this administration withdrew the rule last fall. Absent a change in administrations, taxpayers would likely be bound by a regulation that did not receive economic analysis or input from those small businesses, whom would have been the most affected by the rule.

Another rule, issued in 2016, regarding corporate tax inversion was labeled as “temporary” and completely ignored the Administrative Procedure Act’s notice-and-comment requirement.

Last year, a federal court found the rule to be “legislative” and struck it down for being “arbitrary and capricious.”

The point of the Administrative Procedure Act, the Regulatory Flexibility Act, and the Congressional Review Act is to ensure rules are thoroughly scrutinized and reviewed by a third-party and Congress before they bind the American people.

It is unacceptable for taxpayers to have to wait for a change in administration or judicial review to overturn flawed rules that should have been corrected by analysis every other agency is required to perform.

The Government Accountability Office, former OIRA Administrators, and administrative law experts have called on Treasury and OIRA to reconsider this agreement.

I understand a new agreement has been reached to ensure IRS regulations are held to the same standard as other agencies. I look forward to hearing the details of the agreement. Particularly how the IRS plans to handle the requirements under the Regulatory Flexibility Act and the Congressional Review Act.

With that, I recognize Ranking Member Heitkamp for her opening remarks.

Testimony of Neomi Rao

Administrator of the Office of Information and Regulatory Affairs
 Before the Senate Committee on Homeland Security and Governmental Affairs,
 Subcommittee on Regulatory Affairs and Federal Management
 April 12, 2018

Chairman Lankford, Ranking Member Heitkamp, and Members of the Committee, thank you for the opportunity to appear before you to discuss the activities of the Office of Information and Regulatory Affairs (OIRA) in implementing the regulatory reform efforts of this Administration.

The Administration's reform efforts focus on developing a lawful, fair, and limited regulatory system that allows the economy to grow and innovation to flourish. We look first to private market solutions and trust ordinary Americans to make decisions that will result in greater prosperity through ingenuity and hard work. The success of our economy depends, at least in part, on a regulatory system that does not stand in the way of progress.

As President Trump explained, "We've begun the most far-reaching regulatory reform in American history." Pursuant to a series of executive orders, OIRA has worked closely with agencies to achieve meaningful reform and to implement a regulatory budget resulting in significant regulatory cost savings in fiscal year 2017. In addition to revising and repealing unnecessary regulatory actions, OIRA continues to work on structural reforms related to eliminating the inappropriate use of sub-regulatory guidance, improving transparency, and promoting good regulatory practices.

Regulatory Reform and Executive Orders 13771 and 13777

At OIRA, we start with longstanding principles for regulatory review, ideas rooted in Executive Order (EO) 12866.¹ We respect private markets and look to regulate only when necessary, such as due to a substantial market failure. Regulation should not be a solution in search of a problem. In our already highly regulated society, the public can often realize substantial benefits when the federal government lifts unnecessary burdens from ineffective and outdated regulations, guidance documents, and paperwork requirements.

Soon after taking office President Trump initiated significant regulatory reform through a series of executive orders directing agencies to tackle regulatory burdens and to reconsider and revise regulations in specific sectors such as energy, the environment, tax, and labor. As noted in Executive Order 13771,² "[I]t is essential to manage the costs

¹ "Regulatory Planning and Review," Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

² "Reducing Regulation and Controlling Regulatory Costs," Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

associated with the governmental imposition of private expenditures required to comply with Federal regulations.”³

Executive Order 13771 focused attention on the problem of accumulated regulatory burdens by requiring agencies to eliminate two regulations for each new one and, for fiscal year 2017, to keep the net costs of new regulations to zero. These two simple directives pushed against the inertia favoring more regulation by requiring agencies to consider the revision or repeal of unnecessary regulatory actions. As the Administration’s central regulatory office, OIRA works closely with agencies to implement EO 13771 and to achieve the President’s ambitious goals in a manner consistent with legal requirements.

Across the government, we achieved substantial success. Through the end of fiscal year 2017, agencies issued 67 deregulatory actions and 3 significant regulatory actions, a ratio of 22 to 1. In guidance issued in April 2017, OIRA indicated that it would count as deregulatory a range of different actions, such as the repeal of regulations, guidance documents, and paperwork burdens.⁴ This guidance sought to incentivize agencies to eliminate regulatory burdens of all types, and it used lessons learned in the United Kingdom and Canada, which have successfully implemented similar deregulatory requirements.

Moreover, these deregulatory actions led to meaningful cost savings of \$8.1 billion dollars in fiscal year 2017, substantially exceeding EO 13771’s requirement to keep net regulatory costs to zero. This also represents the first time an administration imposed any type of regulatory budget. The regulatory budget provides an important backstop to make sure deregulatory actions are not just paper revisions and repeals, but actions that generate real regulatory cost savings for the American public. In a memorandum, OIRA explained the process of setting cost allocations and called on agencies to set a negative cost allocation for fiscal year 2018.

The success of these reforms is reflected in the Fall 2017 *Unified Agenda of Regulatory and Deregulatory Actions*. In the *Unified Agenda*, OIRA publishes rulemakings anticipated by agencies for the upcoming year. For fiscal year 2018, agencies project a ratio of at least three to one, deregulatory to regulatory actions, and cost savings of over \$10 billion. In the spring update to the *Unified Agenda*, currently being compiled, OIRA continues to work with agencies to ensure they are on track to meet their regulatory reform goals. Agencies have identified potential reforms through the regulatory reform task forces established by EO 13777,⁵ regular public engagement, requests for information, public listening sessions, and meetings with stakeholders.

The process of implementing these new requirements has represented a tremendous effort for OIRA, which has used existing staff to encourage serious and systematic reform,

³ *Id.* § 1.

⁴ Office of Mgmt. & Budget, “Guidance Implementing Executive Order 13771” (Apr. 5, 2017).

⁵ “Enforcing the Regulatory Reform Agenda,” Exec. Order No. 13777, 82 Fed. Reg. 12285 (Mar. 1, 2017).

set new cost allocations, track agency progress, and make publicly available the results of these developments. The career policy officials and economists at OIRA have done an excellent job thinking through the complexity of these tasks, solving problems of measurement and analysis, and promoting transparency, all in a short period of time. For the spring update to the *Agenda*, OIRA continues to advance improvements such as enhanced transparency and search capabilities. For example, the *Agenda* now is searchable by whether an action is regulatory or deregulatory; and agencies have withdrawn or postponed hundreds of rules, providing a more accurate depiction of rules likely to be issued in the coming year.

OIRA also remains committed to longstanding principles and requirements of EO 12866 and OMB Circular A-4. Executive Order 12866 states that “The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth.”⁶ OIRA helps to promote and develop such a regulatory system.

Through the process of centralized review, OIRA ensures that regulatory and deregulatory actions are consistent with law, have benefits that outweigh the costs, and are promoting the President’s priorities. Importantly, all deregulatory actions have to meet the same standards as regulatory actions, which means that agencies must demonstrate that a proposed deregulatory action produces more benefits than costs. Deregulatory actions must result in net benefits for the public, and so agencies are eliminating only those regulations that are not working.

Requiring agencies to generate regulatory cost savings has also placed greater emphasis on retrospective review of regulations. Previous administrations have consistently advocated for more systematic retrospective review. When a regulation is issued an agency can only predict the likely costs and benefits, but after the rule is in place, agencies can gather information about the actual costs and benefits, and such analysis might suggest the need to revise or repeal the rule. By requiring the elimination of two regulatory actions for each new regulation and also the offsetting of regulatory costs, EO 13771 provides a strong incentive for retrospective review to identify regulations that impose unnecessary and unjustified burdens.

Guidance and the Rule of Law

OIRA’s regulatory reform initiatives have also focused on promoting the rule of law through improving fair notice, public participation, and due process. In coordination with the White House Counsel’s Office, OIRA has directed a regulatory policy that emphasizes

⁶ Exec. Order No. 12866 pmbl.

the rule of law in several ways. At the outset, we carefully consider whether an agency has authority for a proposed action—we ensure that regulatory and deregulatory actions are consistent with the best reading of the law. This respects the lawmaking power of Congress to set parameters for regulatory action.

In addition, OIRA ensures that agencies follow the correct statutory procedures for rulemaking. Much of the legitimacy of administrative action derives from notice and comment rulemaking that allows for meaningful participation by stakeholders. Agencies rarely have the information they need to understand the effects of regulation without input from the public and stakeholders.

In light of these principles, we have cabined the inappropriate use of guidance and stressed that agencies should not use guidance to impose new obligations on the public. Guidance can play an important role when it truly provides guidance about an existing regulatory or statutory obligation. Agencies, however, have sometimes used guidance to impose new legal obligations. When reviewing a guidance document that purports to impose new obligations, OIRA counsels agencies to follow the appropriate process, for instance, by issuing a notice of proposed rulemaking. This allows the public an opportunity to comment and ensures that agencies are taking regulatory action with a fuller understanding of the consequences. Proper administrative procedures protect values of fair notice and provide essential due process.

As part of our reform efforts, OIRA encourages and incentivizes agencies to identify guidance that can be repealed, modified, or reissued through a rulemaking. We have also prompted agencies to begin identifying existing guidance documents and to start making such documents more readily available to the public, such as on agency websites. The identification process can be a first step to eliminating outdated or unnecessary guidance and streamlining existing requirements.

Department of the Treasury and Executive Order 13789

Under Executive Order 13789,⁷ President Trump directed the Office of Management and Budget and the Department of the Treasury to “review, and if appropriate, reconsider the scope and implementation of the existing exemption for certain tax regulations from the review process set forth in Executive Order 12866 and any successor order.” Those exemptions were initially set forth in a Memorandum of Agreement of April 29, 1983, and reaffirmed in a letter exchange in November and December of 1993. OMB and Treasury continue to work together on a new process for review of tax regulations.

As the President recognized in EO 13789, “Immediate action is necessary to reduce the burden existing tax regulations impose on American taxpayers and thereby to provide tax

⁷ “Identifying and Reducing Tax Regulatory Burdens,” Exec. Order No. 13789, 82 Fed. Reg. 19317 (Apr. 21, 2017).

relief and useful, simplified tax guidance.”⁸ In this Administration, OIRA has led the charge to eliminate unnecessary regulatory burdens. The process of centralized regulatory review provides an important check to ensure that agencies take actions that yield meaningful benefits to the American people and impose the least burdens. Even regulations that have a deregulatory focus may be improved by a consideration of the costs and benefits of alternatives. The OIRA process is well-suited to help promote a tax system that is “simple, fair, efficient, and pro-growth.”⁹

The Administration remains committed to responsible and comprehensive regulatory reform that benefits the American people by promoting individual liberty and by encouraging economic growth, job creation, and innovation. Thank you for the opportunity to testify here today.

⁸ *Id.* § 1.

⁹ *Id.*

Statement of
Brent J. McIntosh
General Counsel
United States Department of the Treasury
before the
Senate Committee on Homeland Security and Government Affairs
Subcommittee on Regulatory Affairs and Federal Management
April 12, 2018

Chairman Lankford, Ranking Member Heitkamp, and Members of the Committee, thank you for the opportunity to discuss the Treasury Department's role in advancing one of the Administration's chief policy priorities—regulatory reform.

Under Secretary Mnuchin's leadership, Treasury's regulatory reform efforts have significantly advanced the President's priorities. As you know, the President issued Executive Order 13771—entitled "Reducing Regulation and Controlling Regulatory Costs"—just days after Inauguration. As the Office of Management and Budget has explained, this Executive Order requires two regulations to be eliminated for every one new regulation deemed significant under Executive Order 12866. Executive Order 13771 also requires that an agency's regulatory actions during Fiscal Year 2017 impose zero incremental cost.

Treasury has taken several deregulatory actions under Executive Order 13771. Additionally, pursuant to the policies stated in Executive Orders 13777 and 13789, Treasury issued one Notice of Proposed Rulemaking to eliminate 298 "deadwood" regulations that are ineffective, unnecessary, or out of date. Treasury has taken zero new regulatory actions within the meaning of Executive Order 13771. And Treasury reduced the total number of regulations that appeared on its Fall 2017 Regulatory Agenda by approximately 100 regulations, on net, from its Fall 2016 Regulatory Agenda.

The President has also advanced his regulatory reform agenda through Executive Orders specifically directed to Treasury. On February 3, 2017, the President issued Executive Order 13772, instructing the Secretary to report on the extent to which existing financial regulations promote the Administration's "Core Principles" of financial regulation, which include empowering Americans to make independent financial decisions, save for retirement, and build wealth; prevent taxpayer-funded bailouts; promote American competitiveness at home and abroad; and make regulation efficient, effective, and appropriately tailored. In response to the President's Executive Order, Treasury has issued a series of reports setting forth more than 250 specific recommendations for reducing regulatory burdens and advancing the Core Principles.¹ Those recommendations have addressed issues ranging from alleviating the burdens on

¹ See Department of the Treasury, *A Financial System That Creates Economic Opportunities: Banks and Credit Unions*, available at <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf> (June 12, 2017); Department of the Treasury, *A Financial System That Creates Economic Opportunities: Capital Markets*, available at <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf> (Oct. 6, 2017); see Department of the Treasury, *A Financial System That Creates Economic Opportunities: Asset Management and Insurance*, available at https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf (Oct. 26, 2017).

Embargoed until Thursday, April 12, 2018 at 10:00 a.m. ET

community financial institutions, simplifying the extraordinarily complex Volcker Rule, bringing accountability to the Consumer Financial Protection Bureau, and ensuring competitive U.S. engagement in international standard setting bodies. And we have been pleased to see concrete progress on many fronts already.

On April 21, 2017, the President issued Executive Order 13789—“Identifying and Reducing Tax Regulatory Burdens.” This Executive Order mandated a retrospective review of all significant tax regulations Treasury had issued since January 1, 2016 through its Office of Tax Policy or the IRS. It ordered Treasury to identify any such regulations that impose an undue financial burden on taxpayers; add undue complexity to the Federal tax laws; or exceed the statutory authority of the Internal Revenue Service. In a report to the President on October 2, Treasury identified eight such regulations for modification or revocation.² One such regulation under Section 2704 of the Internal Revenue Code would have hurt family-owned and operated businesses by making it more costly to transfer a business to the next generation. Another proposed regulation under Section 103 would have imposed new requirements on municipalities that issue tax-exempt municipal bonds. Treasury withdrew both of these proposed regulations in October.

Executive Order 13789 also directed the Secretary and the Director of the Office of Management and Budget to review and, if appropriate, reconsider the exemption of certain tax regulations from the OMB review process under a Reagan-era agreement entered into in 1983. Treasury has actively engaged in that review with OMB. Throughout the process, Treasury and OMB have prioritized two of the President’s chief policy objectives—ensuring appropriately-tailored regulation and successfully implementing the once-in-a-generation tax reform bill to deliver all the benefits the new law promises the American economy.

In addition to these efforts in support of the President’s regulatory reform agenda, Treasury has of course played a leading role in advancing tax reform. The Tax Cuts and Jobs Act contains hundreds of provisions designed to provide relief to American families and make American businesses more competitive. Swift and successful implementation of tax reform through guidance is critical to unlocking the full economic benefits of the law and carrying out the will of Congress. As one major business coalition recently observed, “the growth impacts of the [President’s tax reform] legislation will not be fully realized if businesses are uncertain about how the [legislation] will be implemented. Thus, delay in issuing guidance will impose a cost on taxpayers and the American economy.”

That is why implementing the new law in a timely fashion is one of the Department’s highest priorities. Taxpayers and their advisors rely on timely guidance from Treasury for certainty and clarity in managing their family budgets and business affairs. The U.S. Taxpayer Advocate—our nation’s statutory voice for taxpayers—has said that prompt publication of regulatory guidance is “very taxpayer-friendly, reflecting the IRS’s effort to offer advance

² See Department of the Treasury, *Second Report to the President on Identifying and Reducing Tax Regulatory Burdens*, available at https://www.treasury.gov/press-center/press-releases/Documents/2018-03004_Tax_EO_report.pdf (Oct. 2, 2017).

guidance on a complex law, well before many provisions even take effect. Simply put, advance guidance enables taxpayers and businesses to plan.”³

We at Treasury agree. As just one example, Treasury and IRS had to begin issuing guidance about taxation of unrepatriated earnings and profits only seven days after the law was passed in order to provide companies and individuals with certainty for purposes of their year-end financial statements. In addition, in early January the IRS released new withholding tables to reflect the changes made by the tax reform legislation so that individual taxpayers could begin to see the impacts of the new law in their paychecks. The new withholding tables were designed to work with the Forms W-4 that people had already filed with their employers to claim withholding allowances. This was done to minimize burden on taxpayers and employers. Since then Treasury and IRS have continued to produce a steady stream of guidance to assist taxpayers in understanding the new tax law and the benefits available thereunder. This work will continue.

Consistent with the President’s regulatory reform agenda, Treasury’s goal in implementing tax reform is to provide timely and necessary clarity that alleviates the burden of uncertainty for taxpayers, without imposing needless regulatory costs and delays. Thank you for the opportunity to testify today, and I look forward to the Subcommittee’s questions.

³ See IRS: Enforcing Obamacare’s New Rules and Taxes: Hearing before the Committee on Oversight and Government Reform, House of Representatives, 112th Cong. at 6 (2012), *available at* https://www.irs.gov/pub/tas/testimony_house_oversight_aca_080212.pdf.



Member Companies

3M
 Abbott Laboratories
 Alcoa Corporation
 Bank of America Corp.
 Boston Scientific Corp.
 Caterpillar Inc.
 The Coca-Cola Company
 Danaher Corporation
 The Dow Chemical Company
 DuPont
 Eli Lilly and Company
 Emerson Electric Co.
 Exxon Mobil Corporation
 General Electric Company
 General Mills Inc.
 Google, Inc.
 Honeywell International Inc.
 IBM Corporation
 International Paper Company
 Johnson & Johnson
 Johnson Controls, Inc.
 JPMorgan Chase & Co.
 Kellogg Company
 Kimberly-Clark Corp.
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 Morgan Stanley
 Oracle Corporation
 PepsiCo, Inc.
 Procter & Gamble Co.
 Prudential Financial Inc.
 S&P Global Inc.
 State Street Corporation
 Texas Instruments, Inc.
 United Parcel Service, Inc.
 United Technologies Corporation
 Verizon Communications Inc.
 The Walt Disney Company

April 5, 2018

The Honorable Steven Mnuchin
 Secretary of the Treasury
 U.S. Department of the Treasury
 1500 Pennsylvania Avenue, N.W.
 Washington, D.C. 20220

The Honorable Mick Mulvaney
 Director
 Office of Management and Budget
 725 17th Street, N.W.
 Washington, D.C. 20503

Dear Secretary Mnuchin and Director Mulvaney:

The Alliance for Competitive Taxation (ACT), a coalition of leading American companies from a wide range of industries, strongly supported the enactment of the Tax Cuts and Jobs Act (Public Law 115-97). Since President Trump signed the legislation into law, ACT members have been engaged in analyzing the legislation, identifying the issues requiring regulatory guidance from the Treasury Department, and preparing to implement the legislation. To that end, ACT has filed comments with Treasury identifying a number of issues and areas where immediate regulatory guidance is urgently needed, and we are continuing to work on further comments.

As you know, this important legislation fundamentally restructures the corporate income tax system. It includes several entirely new provisions such as Global Intangible Low-Taxed Income, Foreign Derived Intangible Income, and the Base Erosion and Anti-Abuse Tax, for which the Treasury Department now has the massive task of issuing comprehensive and timely guidance so that taxpayers can comply with the new law.

As most provisions of TCJA took effect on January 1, 2018, taxpayers urgently need guidance to comply with the new law. In addition, the growth impacts of the legislation will not be fully realized if businesses are uncertain about how the TCJA will be implemented. Thus, delay in issuing guidance will impose a cost on taxpayers and the American economy.

Recent press reports indicate changes are being considered to the 1983 Memorandum of Agreement (MOA) between the Treasury Department and the Office of Management and Budget that was agreed to in the Reagan administration (and followed by each successive administration) regarding the review procedures for Treasury regulations and rulings under Executive Order (EO) 12291 (and reaffirmed under EO 12866).

The MOA exempts *interpretive* regulations from EO review; however, Treasury is responsible for notifying OMB of any regulation for which EO review is waived. There is no exemption under the MOA for “major” *legislative* regulations.

The OMB plays an important role in the regulatory process through its efforts to minimize the regulatory burden and eliminate unnecessary paperwork burdens. In the context of the tax laws, however, any regulatory burden generally flows directly from the statute itself and not from Treasury regulations implementing the statute, except in the case of “major” legislative regulations, such as the section 385 regulations promulgated in 2016. As a general matter, Treasury regulations are interpretive and provide the guidance taxpayers need in order to comply with the tax laws.

ACT members believe it is prudent to review and periodically update longstanding procedures and appreciate the Treasury Department and OMB taking on the task of reviewing the MOA. As the Treasury Department and OMB consider changes to the MOA, ACT members urge that recognition be given to the urgent need for immediate interpretive guidance implementing the new provisions of TCJA.

In that regard, we believe it is important to recognize the MOA has functioned well for more than three decades by striking a reasonable balance that provides OMB the opportunity to review major legislative regulations while allowing Treasury to issue important and much needed interpretive regulations in a timely manner.

Moreover, regardless of the timeline for issuing guidance, taxpayers must comply with the law. In ACT members’ view, it would be unfortunate if changes to the long-standing MOA had the effect of slowing the issuance of the TCJA guidance they need to comply with the new law.

As House Ways and Means Chairman Kevin Brady has stated, the Treasury Department is well prepared to provide interpretive guidance on the new law given the deep tax policy expertise and experience of its staff and its substantial involvement with Congress throughout the legislative process. ACT members share that view.

To the extent another layer of review slows the guidance process and diverts resources that would otherwise be committed to drafting guidance, then that additional review is likely to impede the smooth and timely implementation of the TCJA and risk blunting the pro-growth impacts of this historic legislation.

We would be pleased to meet with you to discuss changes to the MOA and the need for TCJA guidance.

Yours sincerely,

Alliance for Competitive Taxation

cc:

The Honorable Paul Ryan, Speaker of the House
 The Honorable Kevin Brady, Chairman, House Ways and Means Committee
 The Honorable Mitch McConnell, Senate Majority Leader
 The Honorable Orrin Hatch, Chairman, Senate Committee on Finance



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 11, 2018

The Honorable Thomas R. Carper
United States Senate
Washington, DC 20510-0803

Dear Senator Carper:

Thank you for your letter about several regulatory and information collection policy concerns. Your letter raised questions about the role of the Office of Information and Regulatory Affairs (OIRA) in setting government-wide regulatory and information policy and about OIRA's role in the implementation of Executive Order (EO) 13771. Please find responses to your questions below.

1. What specific role do you believe OIRA should play with regard to regulations promulgated by independent agencies such as the Securities and Exchange Commission or the Nuclear Regulatory Commission?

All agencies should ensure that regulations are based on sound analysis and robust engagement with affected stakeholders. The Administration is considering the issue of whether to review the rules of traditionally independent agencies. OIRA currently interacts with independent agencies through major determinations under the Congressional Review Act (CRA), information collection review under the Paperwork Reduction Act (PRA), and small business review panels pursuant to the Small Business Regulatory Enforcement Fairness Act (SBREFA). Moreover, independent agencies participate in the Unified Agenda of Regulatory and Deregulatory Actions under EO 12866.

2. Do you agree that OIRA must maintain complete analytic integrity and continue to rely on evidence-based methodologically excellent analysis notwithstanding any competing objectives sought by other elements of the Executive Office of the President?

OIRA is committed to objective and robust analysis based on long-established principles reflected in statutes, executive orders, and OMB guidance.

3. Do you agree that benefits from regulations that may not be necessarily monetizable should be taken into account when reviewing regulations?

Yes. Executive Order 12866 and OIRA's longstanding guidance make clear that qualitative benefits can be taken into account in regulatory analysis.

- 4. Since the beginning of this Administration, President Trump has issued a series of Executive Orders, seemingly aimed at reducing and eliminating the "costs" of federal regulations across the board. For example, agencies are required to identify two regulations for repeal for every one regulation that is promulgated, set a regulatory budget, and establish regulatory review teams to identify regulations for repeal.**

What do you envision as OIRA's role in these efforts? How do you plan to ensure that these orders do not interfere with the need for agencies to follow the direction of Congress and the courts in establishing rules that protect the health and safety of all Americans? Further, how do you plan to ensure that the benefits, economic and otherwise, are accounted for when reviewing regulations for repeal? Do you agree that regulations that are mandated by statute, including those that are required by statute to be promulgated once a scientific or other determination by an Executive branch agency is made, should be exempted from being subject to the "two for one" Executive Order?

OIRA works closely with agencies to implement EO 13771 and to achieve the President's ambitious goals in a manner consistent with legal requirements. Executive Order 13771 does not prevent agencies from implementing statutory mandates. To the contrary, the requirements of EO 13771 apply only to the extent permitted by law. As stated in OMB guidance issued in April 2017, EO 12866 remains the primary governing executive order regarding regulatory planning and review.¹ Nothing in EO 13771 prevents an agency from issuing regulations mandated by statute. OIRA has implemented EO 13771 with flexibility, in recognition of legal requirements and public need. For example, agencies may seek waivers from the requirements of EO 13771, offset new regulatory costs with carryover cost savings from previous fiscal years, or offset the costs of a regulation in a future year.

- 5. Do you agree that agencies whose mandate is to collect data in support of providing statistical and other data-dependent analyses must continue to be permitted to independently propose and obtain access to information needed to perform their mission? Will you commit to ensure that these agencies such as the Census Bureau have the resources, support, and independence needed to perform their missions?**

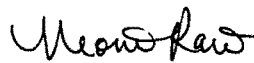
OIRA supports the work of statistical agencies through a branch dedicated to Statistical and Science Policy, headed by the Chief Statistician of the United States. OIRA has long

¹ Office of Mgmt. & Budget, Memorandum No. M-17-21, "Guidance Implementing Executive Order 13771" (Apr. 5, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

worked with statistical agencies and programs to ensure that they comply with the Paperwork Reduction Act, OMB statistical policy directives, and information quality guidelines. Specifically, OIRA is committed to upholding the existing guidance outlined in OMB's statistical policy directives and is responsible for coordinating with the budget side of OMB to ensure funding for the statistical agencies sufficient to meet their missions.

Thank you again for sharing your important perspective on rulemaking and information policy. If you or your staff have any questions, please contact the Office of Management and Budget's Legislative Affairs office at LegislativeAffairs@omb.eop.gov.

Sincerely,



Neomi Rao
Administrator
Office of Information and Regulatory Affairs

Post-Hearing Questions for the Record
“Reviewing the Office of Information and Regulatory Affairs”
From Senator Thomas R. Carper

On April 24, 2018, EPA announced that it was requesting public comments to a policy that would drastically change the way EPA uses scientific information. The proposed new policy will require EPA to use only data that are public and reproducible. The new policy is very similar to Congressional efforts to require that all raw data from scientific studies is available to the public before EPA can use it to act. Those efforts were previously embodied in two failed bills: the HONEST Act and its predecessor the Secret Science Act. Reports from 2017 also indicate that EPA’s leadership prevented analysis conducted by EPA career staff analysts of the HONEST Act from being transmitted to the Congressional Budget Office. That staff analysis found that the HONEST Act would cost \$250 million per year to implement.

During the hearing on April 12, 2018, Senator Hassan asked whether “you and your office provided any input to Administrator Pruitt” on EPA’s anticipated proposal. You responded:

“You know, the questions about information quality are very important to us, and that is something that my staff has been working with EPA on, to develop best practices in that area. . . . Well, I think we want to make sure that we do have the best available evidence. I think it is also important for the public to have notice and information about the types of studies that are being used to--which are being used by agencies for decision-making. So I think that there is a balance to be struck there, and I think that is something that the EPA is working towards.”

1. It is unclear from your response whether you and your staff provided specific input to EPA on the proposal. Did you or your staff provided input to EPA on that proposal? Did you review the proposal at any stage of its development? If so, please provide all documents (including emails, comments, memos, white papers, meeting minutes and correspondence) containing any discussions between EPA and the Office of Information and Regulatory Affairs (OIRA) regarding the proposed policy.

Answer: OIRA reviewed the notice of proposed rulemaking (NPRM) for EPA’s “Strengthening Transparency in Regulatory Science” as a significant regulatory action pursuant to Executive Order (EO) 12866. The version of the NPRM that EPA originally submitted to OIRA is available at <https://www.regulations.gov/document?D=EPA-HQ-OA-2018-0259-0001>, as is the final document on which OIRA concluded review.

2. What is your understanding of how EPA will be able to comply with both this policy and the Administrative Procedure Act’s mandate that EPA consider and respond to every study submitted to it through notice and comment?

Answer: The NPRM would not limit EPA’s consideration of such studies. Agencies are currently required, under the Information Quality Act, to consider the quality of any

submitted studies. The proposed rule discusses a variety of ways in which data can be made public while still protecting sensitive and confidential information. If EPA concludes that the data cannot be made public consistent with those obligations, the proposed rule would allow the EPA Administrator to grant an exemption.

3. Do you believe the rigorous peer review process that is currently used in the scientific community to vet scientific studies is adequate for agency reliance on those studies? If not, why not?

Answer: The Office of Management and Budget (OMB) 2005 Information Quality Bulletin for Peer Review¹ sets out requirements for peer reviews for “scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.” The Bulletin requires additional procedures because journal peer review varies in rigor and transparency and does not always address the questions relevant to regulatory policymaking. The Bulletin explains:

[T]he intensity of peer review is highly variable across journals. There will be cases in which an agency determines that a more rigorous or transparent review process is necessary. For instance, an agency may determine a particular journal review process did not address questions (e.g., the extent of uncertainty inherent in a finding) that the agency determines should be addressed before disseminating that information. As such, prior peer review and publication is not by itself sufficient grounds for determining that no further review is necessary.

We continue to endorse the longstanding additional procedures laid out in the 2005 Bulletin for Peer Review for the proper use of scientific information in public policymaking.

4. Generally, does EPA consult with you and your staff about its various deregulatory and regulatory actions before publicly announcing its intention to take those actions? For the period January 20, 2017 to the present, please provide a complete list of every regulatory or deregulatory EPA action for which OIRA has provided substantive input prior to EPA publicly announcing its intention to take that action.

Answer: OIRA consults with EPA about deregulatory and regulatory actions through EPA’s submissions to the Unified Agenda of Regulatory and Deregulatory Actions (Agenda), which is published twice each year. The Agenda lists the regulatory and deregulatory actions that each agency anticipates taking in the coming year. OIRA’s pre-publication review of the Agenda submissions provides an opportunity to discuss with

¹ Office of Mgmt. & Budget, Memorandum No. M-05-03, “Final Information Quality Bulletin for Peer Review” (Dec. 16, 2004), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2005/m05-03.pdf>.

agencies their upcoming regulatory actions. EPA's Spring Agenda can be found at this link, <https://www.reginfo.gov/public/do/eAgendaMain>.

Last November, EPA Administrator Scott Pruitt proposed to repeal emission standards for called "glider" vehicles. See 82 FR 53,442 (Nov. 16, 2017). New glider trucks are often referred to as "zombie trucks" because, while they look new on the outside, on the inside they have old, dirty diesel engines that, according to the EPA's own 2017 estimates, can emit up to 450 times the particulate matter of a modern truck. (There is no mention of this in the notice of proposed rulemaking.) On March 12, 2018, Senator Udall and I sent a public letter to Administrator Pruitt urging him to withdraw rule. Among many other concerns, our letter noted that Administrator Pruitt appeared to have made his initial decision to revisit the glider rules based on a potentially fraudulent academic study financed by the glider industry.

5. In your opinion, should agencies generally avoid making regulatory decisions based on scientific studies that have been withdrawn pending the completion of an official university investigation into research misconduct? If not, why not?

Answer: In general, agencies should make use of the best available science in rulemaking. Assessing the best available science may include evaluating the integrity of scientific studies.

6. According to documents posted to the rulemaking docket, draft versions of the repeal had labeled it an "economically significant" rule pursuant to E.O. 12866.² Interagency commenters expressed concerns that the rule did not adequately discuss costs and benefits, including as they relate to small businesses that will compete for sales with polluting glider vehicles. Instead of developing a cost-benefit analysis of the proposed economically significant rule, a track-changes file in the rulemaking docket shows that, in the afternoon the day before Administrator Pruitt signed the proposal, the word "not" was added before "economically significant."³ As a result of these changes, the rule was no longer required to comply with E.O. 12866,⁴ or with E.O. 13045, "Protection of Children from Environmental Health Risks and Safety Risks."⁵

- a. As the OIRA Administrator, were you personally aware that the rule would be downgraded from "economically significant"? If yes, when?

Answer: OIRA works with each agency as early as possible to discuss EO 12866 significance designations of rules. During the EO 12866 interagency review process, additional information may be shared bearing on that designation. In

² <https://www.regulations.gov/document?D=EPA-HQ-OAR-2014-0827-2406>.

³ <https://www.regulations.gov/document?D=EPA-HQ-OAR-2014-0827-2402>.

⁴ See *id.* (showing a 12:05pm, 11/8/2017 change from "an economically significant regulatory action" to merely "a significant regulatory action").

⁵ See *id.* (showing a 12:16pm, 11/8/2017 change in characterization of the proposal from "an economically significant regulatory action" to "not an economically significant regulatory action").

some circumstances that information leads to a change in designation between submission and conclusion of a regulatory action.

- b. Under your leadership at OIRA, is it common practice to make decisions the day before signature on whether a rule is economically significant?

Answer: Designation decisions involve extensive discussions between OIRA and other Federal agencies during the period of EO 12866 review. Changes in the text reflect decisions and edits made over the course of the review period, even though they may be compiled and posted on a single date.

- c. Are you aware of any other instances in which the economic significant of a rule was downgraded the day before signature? If so, please list and briefly describe each of them.

Answer: While in most cases it is clear at the time of submission whether a rule is economically significant, sometimes this determination changes during interagency review of the rule. In addition, the designation sometimes changes between the proposed and final rule based on public comments.

- d. As you know, under E.O. 12866, “economically significant” regulatory actions include those having an annual effect on the economy, environment, or public health and safety of at least \$100 million. In 2016, EPA estimated that unrestricted glider vehicles impose \$6 to \$14 billion in annual costs on society. *See* 81 FR at 73,943. The proposed repeal would exempt new glider vehicles from Clean Air Act regulation. On what basis did EPA and/or OIRA determine that the proposed rule is not an economically significant regulatory action under E.O. 12866?

Answer: The estimate referenced above provides a range of air quality benefits that assumed all glider vehicles were required to comply with the new standards; however, not all glider vehicles were required to comply with the 2016 final rule. In section 12.4 of EPA’s Regulatory Impact Analysis for the 2016 final rulemaking, the agency states that the vast majority of the glider manufacturers would qualify as small businesses. Small businesses were granted exemptions from the new glider standards up to a certain production number. As EPA did not have accurate numbers for the production of gliders by small businesses who would be exempted, the agency did not separate the estimated costs and benefits for the glider portion of the rulemaking.

- e. Because the original Phase 2 Rule was itself deemed economically significant, EPA evaluated that rule’s impact on the environmental health risks and safety risks to children, pursuant to E.O. 13045. *See* 81 FR at 73966–67. Among many other things, that analysis discussed how children’s physiology, breathing rates, brain and body development, and behavior increase their susceptibility to air pollution compared to adults. For example, infants breathe five times faster than

adults, breathe more through their mouths, and have less ability to remove pollutants inhaled through their nasal passages, a larger fraction of the soot and other pollutants they inhale is deposited in their lungs. *Id.* at 73967. Children are more susceptible to developing cancer tumors than adults are, and early-life exposure to carcinogenic vehicle pollution puts them at a higher risk of developing cancer later in life. *Id.* Children who live by the roadways these unregulated glider vehicles would travel are more likely to develop asthma and, after that, more likely to suffer asthma attacks when they literally struggle to breathe—a frightening feeling for anyone, all the more for a small child. On top of that, children’s susceptibility is further increased because they spend more time outdoors. *Id.* In the notice of proposed repeal of emission standards for glider vehicles, the section on E.O. 13045 merely asserts, without any further analysis or apparent concern, that “Some of the benefits for children’s health as described in the [Phase 2 Rule] would be lost as a result of this action.” As if highlighting the total lack of concern for human health, the next (and final) paragraph talks about criteria pollution reduction under *the Clean Power Plan* — most likely a sloppy copy/paste job that illuminates the level of concern with which your office reviewed this notice. Under your leadership at OIRA, would this analysis have been adequate to satisfy E.O. 13045 if the rule had remained economically significant?

Answer: For economically significant rules that may have a disproportionate impact on health and safety risks to children, agencies are required to conduct a meaningful analysis of those risks. In the 2016 rule, EPA concluded that it was justified to exempt many glider kits from the emissions requirements. Agencies often conduct a more thorough and detailed analysis of impacts at the final rule stage, after they have received comments from the public.

7. The Phase 2 Heavy Duty rule established regulations emission standards under Clean Air Act section 201. On August 8, 2017, EPA announced “its intent to revisit provisions of the Phase 2 Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines”—specifically, the “updated standards” as applied to “gliders.”⁶ EPA reiterated this message in a press release accompanying Administrator Pruitt’s signature of the proposed repeal on November 9, 2017.⁷ Clean Air section 317 provides that, before publishing a proposed rule revising “any regulation establishing emission standards under section [201 of the Clean Air Act] and any other regulation promulgated under that section,”⁸ the Administrator “shall prepare an economic impact assessment respecting such standard or regulation”⁹ Not only must that economic impact assessment be placed in the rulemaking docket, but the “[n]otice of proposed

⁶ <https://www.epa.gov/newsreleases/epa-announces-intent-revisit-provisions-phase-2-heavy-duty-rules>.

⁷ <https://www.epa.gov/newsreleases/administrator-pruitt-advances-effort-keep-epa-within-regulatory-lane-proposed-repeal>.

⁸ 42 U.S.C. § 7617(a)(5).

⁹ 42 U.S.C. § 7617(b).

rulemaking” itself must “include notice of [the] availability” of that assessment and “an explanation of the extent and manner in which the Administrator has considered the analysis contained in such an economic impact assessment in proposing the action.”¹⁰ The rulemaking docket includes a memorandum purporting to contain the analysis required under CAA section 317 titled, “Assessment of Economic Factors Associated with the Proposed Repeal of Emissions Requirements” for gliders.¹¹

- a. The memorandum is dated November 16, 2017. The Administrator signed the proposal on November 9, 2017. Was OIRA aware of this memorandum prior to the Administrator signing the proposal?
- b. The memorandum states, “In many rulemakings promulgated under Section 202, EPA would address the above topics in the Draft Regulatory Impact Analysis (RIA) document prepared to support a Notice of Proposed Rulemaking. However, EPA is not including a Draft RIA for this proposed rule.” Why did EPA not develop a Draft RIA for the proposed repeal of glider requirements? How does your office decide whether a Draft RIA should be developed for a proposed rule?
- c. Where is this memorandum cited in the “notice of proposed rulemaking,” as required by Clean Air Act section 317? Given that OIRA’s role is to ensure that agencies comply with legally required economic analyses, will you ensure that EPA fixes this legal defect does not finalize the proposed repeal based on a legally defective proposal?
- d. Extraordinarily, the memorandum’s perfunctory economic assessment states that while EPA considered information submitted as part of the original Phase 2 rulemaking, “EPA did not, however, consider this economic impact assessment itself in proposing this action.”¹² Does OIRA typically encourage agencies to prepare economic assessments of proposed rulemakings that the agency will “not consider” when proposing the action? Absent a statutory command to ignore costs, why would EPA assess the economic impacts of a proposed rule but ignore the substance of that assessment?

Answers a-d: OIRA will review with the agency how best to address the need for appropriate economic analysis in any final rulemaking.

8. Last year, the Department of Labor proposed a rule to weaken beryllium exposure standards for workers in a subset of industries otherwise regulated by the rule. *See* 82 FR 29182. In its notice, the Department of Labor made clear that although it was exempting two industrial standards from the rule, it was still required to go through the Paperwork Reduction Act (PRA) process because revocation of the rule would revoke the rule’s requirement to collect information from those industries. The Department of Labor explained that, “Under the PRA, a Federal agency cannot conduct or sponsor a collection of information unless OMB approves it, and the agency displays a currently valid OMB control number (44 U.S.C. 3507).” Accordingly, OSHA submitted a revised Information

¹⁰ *Id.*

¹¹ <https://www.regulations.gov/document?D=EPA-HQ-OAR-2014-0827-2407>.

¹² *Id.* at 2.

Collection Request to OMB, and solicited comment on a number of topics related to “the removal of the collection of information requirements.” That rule was proposed on June 27, 2017, before you were confirmed as OIRA Administrator.

- a. The Phase 2 Rule included a number of reporting and recordkeeping requirements, which OMB approved pursuant to the PRA. *See* 81 FR at 74155. As with OSHA’s partial repeal of beryllium standards for a subset of regulated industries, the proposed repeal of the glider requirements would repeal the Phase 2 standards for a subset of regulated industries. Despite that, the proposed glider repeal asserts that the requirements of the PRA do not apply. *See* 81 FR at 53448. For Paperwork Reduction Act purposes, what is the substantive or legal difference between these two rules?

Answer: The Paperwork Reduction Act requirements apply to the Heavy Duty Phase 2 rulemaking. The information collection requirements in the Phase 2 final rule were pending review at the time of the reconsidered proposal on glider kits. EPA chose to withdraw the collections in light of the new proposal.

- b. Has OIRA’s policy regarding PRA approval changed since you became OIRA Administrator? If so, did you order that change? If so, why?

Answer: No, OIRA’s policy regarding PRA approval has not changed since I became Administrator.

9. On July 13, 2017 I wrote to you with a series of questions regarding your view on OIRA’s role in several regulatory and information collecting policy matters.¹³ To date, I have not received a response to this letter. Please provide an update on the status of the response to this letter.

Answer: Please find a response attached.

¹³ Senator Tom Carper to Administrator Neomi Rao, July 13 2017.

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Comments on Draft Language under 12866 Interagency Review. Subject to Further Policy Review.***

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 1037

[EPA-HQ-OAR-2014-0827; FRL-xxxx-xx-OAR]

[RIN 2060-AT79]

Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to repeal the emission standards and other requirements for heavy-duty glider vehicles, glider engines, and glider kits based on a proposed interpretation of the Clean Air Act (CAA) under which glider vehicles would be found not to constitute “new motor vehicles” within the meaning of CAA section 216(3), glider engines would be found not to constitute “new motor vehicle engines” within the meaning of CAA section 216(3), and glider kits would not be treated as “incomplete” new motor vehicles. Under this proposed interpretation, EPA would lack authority to regulate glider vehicles, glider engines, and glider kits under CAA section 202(a)(1).

DATES:

Comments: Comments on all aspects of this proposal must be received on or before [INSERT DATE 30 DAYS AFTER THE PUBLIC HEARING].

Comment [A1]: Commenters request EPA to provide additional discussion in the preamble concerning the following topics: small business impacts/SBIEFA; standards for gliders upon repeal; benefit/cost analysis in various sections; comparing new vs used vehicle costs.

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Public Hearing: EPA will hold a public hearing on the following date: [INSERT DATE 15 DAYS AFTER PUBLICATION]. The hearing will be held [REDACTED]. To attend the hearing, individuals will need to show appropriate ID to enter the building. The hearing will start at 10 a.m. local time and continue until 5 p.m. or until everyone has had a chance to speak. More details concerning the hearing can be found at <https://www.epa.gov/regulations-emissions-vehicles-and-engines/petitions-reconsideration-phase-2-ghg-emissions-and-fuel>.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2014–0827, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www.epa.gov/dockets/commenting-epa-dockets>.

Docket: All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material,

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such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the following location:

Air and Radiation Docket and Information Center, EPA Docket Center, EPA/DC, EPA WJC West Building, 1301 Constitution Ave., N.W., Room 3334, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT:

SUPPLEMENTAL INFORMATION

Does this Action Apply to Me?

This action relates to a previously promulgated Final Rule that affects companies that manufacture, sell, or import into the United States glider vehicles. Proposed categories and entities that might be affected include the following:

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Category	NAICS Code ^a	Examples of Potentially Affected Entities
Industry	336110	Motor Vehicle Manufacturers, Engine Manufacturers, Engine Parts Manufacturers, Truck Manufacturers, Automotive Parts and Accessories Dealers
	336111	
	336112	
	333618	
	336120	
	441310	

Note:

^a North American Industry Classification System (NAICS).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely covered by these rules. This table lists the types of entities that we are aware may be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your activities are regulated by this action, you should carefully examine the applicability criteria in the referenced regulations. You may direct questions regarding the applicability of this action to the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

I. Introduction

The basis for the proposed repeal of those provisions of the Final Rule entitled Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles – Phase 2 (the Phase 2 rule)¹ that apply to glider vehicles, glider engines, and glider kits is EPA’s proposed interpretation of CAA section 202(a)(1) and sections 216(2) and 216(3), which is discussed below. EPA is proposing to interpret those statutory provisions as not authorizing the Agency (1) to treat glider vehicles as “new motor vehicles,” (2) to treat glider engines as “new

¹ 81 FR 73478 (Oct. 25, 2016).

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motor vehicle engines,” or (3) to treat glider kits as “incomplete” new motor vehicles. Under this proposed interpretation, EPA would thereby lack authority to regulate glider vehicles, glider engines, and glider kits under CAA section 202(a)(1).

This proposed interpretation is a departure from the position taken by EPA in the Phase 2 rule, in which the Agency interpreted the statutory definitions of “new motor vehicle” and “new motor vehicle engines” in CAA section 216(3) as including glider vehicles and glider engines, respectively. The proposed interpretation correspondingly departs from EPA’s position in the Phase 2 rule that CAA section 202(a)(1) authorizes the Agency to treat glider kits as “incomplete” new motor vehicles.

It is settled law that EPA has inherent authority to reconsider, repeal, or revise past decisions to the extent permitted by law so long as the Agency provides a reasoned explanation. This authority exists in part because EPA’s interpretations of the statutes it administers “are not carved in stone.” *Chevron U.S.A. Inc. v. NRDC, Inc.* 467 U.S. 837, 863 (1984). Rather, an agency, if it is to “engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.” *Id.* at 863–64. This is true when, as is the case here, review is undertaken “in response to ... a change in administration.” *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005). As has been observed, a “change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations,” and so long as an agency “remains within the bounds established by

Comment [A2]: Suggest including some type of cost/benefit analysis to support this statement.

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Congress,” the agency “is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.” *Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Insurance Co.*, 463 U. S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

After reconsidering the statutory language, EPA proposes to adopt a reading of the relevant provisions of the CAA under which the statutory terms “new motor vehicle” and “new motor vehicle engine” would not include glider vehicles and glider engines, respectively. Further, glider kits would not be treated as “incomplete” new motor vehicles. Under this proposed reading, EPA would lack authority under CAA section 202(a)(1) to impose requirements on glider vehicles, glider engines, and glider kits and therefore proposes to remove the relevant rule provisions.

II. Background

A. Factual Context

A glider vehicle (sometimes referred to simply as a “glider”) is a truck that utilizes a used (and typically refurbished) powertrain (including the engine, the transmission, and usually the rear axle) but which has new body parts. When these new body parts (which generally include the tractor chassis with frame, front axle, brakes, and cab) are put together to form the “shell” of a truck, the assemblage of parts is referred to collectively as a “glider kit.”² The final manufacturer of the glider vehicle, *i.e.*, the entity that takes the assembled glider kit and

² Because a glider kit lacks an engine, it is neither capable of self-propulsion nor does it emit any air pollutants.

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combines it with the used powertrain salvaged from some other “donor” truck, is most often a different manufacturer than the original manufacturer of the glider kit. See 81 FR 73512-13.

Comments submitted to EPA during the Phase 2 rulemaking state that gliders are approximately 25% less expensive than new trucks,³ which makes them popular with small businesses and owner-operators.⁴ For those businesses and drivers who cannot afford to purchase a new truck, a glider provides an attractive alternative to the continuing use of an older vehicle. In contrast to the older vehicle, a glider requires less maintenance and thus yields less downtime. Having the same braking, lane drift devices, dynamic cruise control, and blind spot detection devices that are found on current model year heavy-duty trucks, the glider is also a safer vehicle to operate, compared to the older truck that it is replacing.

B. Statutory and Regulatory Context

Section 202(a)(1) of the CAA directs that “EPA shall by regulation prescribe,” in “accordance with the provisions” of section 202, “standards applicable to the emission of any air pollutant from any . . . new motor vehicles or new motor vehicle engines.” 42 U.S.C. § 7521(a)(1). Section 216(2) defines “motor vehicle” to mean “any self-propelled vehicle designed for transporting persons or property on a street or highway.” 42 U.S.C. § 7550(2). In turn, a “new motor vehicle” is defined in section 216(3) to mean a “motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser.” 42 U.S.C. § 7550(3) (emphasis added). Similarly, a “new motor vehicle engine” is defined as an “engine in a new motor

Comment [A3]: Was EPA able to confirm this with NHTSA?

³ See Response to Comments for Joint Rulemaking, EPA-426-R-16-901 (August 2016) at 1846.

⁴ Doc. EPA-HQ-OAR-2014-0827-1964.

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vehicle” or a “motor vehicle engine the equitable or legal title to which has never been transferred to the ultimate purchaser.” *Id.*⁵

In issuing the Phase 2 rule, EPA found that it was “reasonable” to consider glider vehicles to be “new motor vehicles” under the definition in CAA section 216(3). *See* 81 FR 73514. Likewise, the Agency found that the previously owned engines utilized by glider vehicles are properly considered to be “new motor vehicle engines” within the statutory definition. Based on these interpretations, EPA determined that it had authority under CAA section 202(a) to subject glider vehicles and glider engines to the standards of the Phase 2 rule and to impose on them certain other requirements. As for glider kits, EPA found that if glider vehicles are new motor vehicles, then the Agency was authorized to regulate glider kits as “incomplete” new motor vehicles. *Id.*

C. Petition for Reconsideration

Following promulgation of the Phase 2 rule, EPA received from representatives of the glider industry a joint petition requesting that the Agency reconsider the application of the Phase 2 rule to glider vehicles, glider engines, and glider kits.⁶ In their petition, the representatives of the glider industry warned that the Phase 2 rule “would significantly curtail American manufacturing” and “effectively shut down the glider industry and the nearly 20,000 jobs it supports across the nation.” Petition at 2. For example, the Fitzgerald company represented that

⁵ Further, with “respect to vehicles or engines imported or offered for importation,” CAA section 216(3) provides that “new motor vehicle” and “new motor vehicle engine” mean a “motor vehicle and engine . . . manufactured after the effective date of a regulation issued under section 7521 of this title which is applicable to such vehicle or engine (or which would be applicable to such vehicle or engine had it been manufactured for importation into the United States).” 42 U.S.C. § 7550(3).

⁶ *See* Petition for Reconsideration of Application of the Final Rule Entitled “Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles – Phase 2 Final Rule” to Gliders, from Fitzgerald Glider Kits, LLC; Harrison Truck Centers, Inc.; and Indiana Phoenix, Inc. (July 10, 2017) (Petition). Available at <https://www.epa.gov/sites/production/files/2017-07/documents/hd-ghg-fr-fitzgerald-recons-petition-2017-07-10.pdf>.

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it was “currently responsible for 1,600 direct and indirect jobs” in the states of Tennessee and Kentucky alone, and “several thousand more associated with suppliers across the country.” *Id.* at 2. Fitzgerald further represented that, with the Phase 2 rule in effect, by the end of 2017 the company would be “forced to cut production and its workforce by 90%.” *Id.*

The petitioners made three principal arguments in support of their petition. First, they argued that CAA section 202(a)(1) does not authorize EPA to regulate glider kits, glider vehicles, or glider engines. Petition at 3-4. Second, the petitioners contended that in the Phase 2 rule EPA “relied upon unsupported assumptions to arrive at the conclusion that immediate regulation of glider vehicles was warranted and necessary.” *Id.* at 4. Third, the petitioners asserted that reconsideration was warranted under Executive Order 13783. *Id.* at 6.

Regarding their second contention, the petitioners took particular issue with what they characterized as EPA’s having “assumed that the nitrogen oxide (“NOx”) and particulate matter (“PM”) emissions of glider vehicles using pre-2007 engines” would be “at least ten times higher than emissions from equivalent vehicles being produced with brand new engines. Petition at 5, citing 81 FR at 73942. According to the petitioners, EPA had “relied on no actual data to support this conclusion,” but had “simply relied on the pre-2007 standards.” *Id.* In support, the petitioners included as an exhibit to their petition a letter from the President of the Tennessee Technological University (“Tennessee Tech”), which described a study recently conducted by Tennessee Tech. This study, according to the petitioners, had “analyz[ed] the NOx, PM, and carbon monoxide . . . emissions from both remanufactured and OEM engines,” and “reached a contrary conclusion” regarding glider vehicle emissions. Petition at 5.

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Petitioners maintained that the results of the study “showed that remanufactured engines from model years between 2002 and 2007 performed roughly on par with OEM ‘certified’ engines,” and “in some instances even out-performed the OEM engines.” *Id.* The petitioners further claimed that the Tennessee Tech research “‘showed that remanufactured and OEM engines experience parallel decline in emissions efficiency with increased mileage.’” *Id.*, quoting Tennessee Tech letter at 2. Based on the Tennessee Tech study, the petitioners asserted that “glider vehicles would emit less than 12% of the total NOx and PM emissions for all Class 8 heavy duty vehicles . . . not 33% as the Phase 2 Rule suggests.” *Id.*, citing 81 FR at 73943.

Further, the petitioners complained that the Phase 2 rule had “failed to consider the significant environmental *benefits* that glider vehicles create.” Petition at 6 (emphasis in original). “Glider vehicle GHG emissions are less than those of OEM vehicles,” the petitioners contended, “due to gliders’ greater fuel efficiency,” and the “carbon footprint of gliders is further reduced by the savings created by recycling materials.” *Id.* Regarding this latter point, the petitioners represented that “[g]lider assemblers reuse approximately 4,000 pounds of cast steel in the remanufacturing process,” including “3,000 pounds for the engine assembly alone.” *Id.* The petitioners pointed out that “[r]eusing these components avoids the environmental impact of casting steel, including the significant associated NOx emissions.” *Id.* This “fact,” the petitioners argued, is something that EPA should have been considered but was “not considered in the development of the Phase 2 rule.” *Id.*

Comment (A4): It would be helpful if EPA could expand their discussion with some analysis of this topic.

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EPA responded to the glider industry representatives' joint petition by separate letters on August 17, 2017, stating, among other things, that the petition "raises significant questions regarding the EPA's authority under the Clean Air Act to regulate gliders."⁷ EPA further indicated that it had "decided to revisit the provisions in the *Phase 2 Rule* that relate to gliders," and that the Agency "intends to develop and issue a Federal Register notice of proposed rulemaking on this matter, consistent with the requirements of the Clean Air Act."

III. Basis for the Proposed Repeal

A. Statutory Analysis

EPA is proposing to conclude that the statutory interpretations on which the Phase 2 rule predicated its regulation of glider kits, glider vehicles, and glider engines were incorrect. EPA is proposing to interpret the relevant language of the CAA as excluding glider vehicles from the statutory term "new motor vehicles" and glider engines from the statutory term "new motor vehicle engines," as both terms are defined in section 216(3). Consistent with this interpretation of the scope of "new motor vehicle," EPA is further proposing that it has no authority to treat glider kits as "incomplete" new motor vehicles under CAA section 202(a)(1). Based on these proposed interpretations, EPA is proposing to find that it has no authority under CAA section 202(a)(1) to set standards for, or otherwise to regulate or to impose requirements on, glider vehicles, glider engines, and glider kits.

⁷ See, e.g., Letter from E. Scott Pruitt, EPA Administrator, to Tommy C. Fitzgerald, President, Fitzgerald Glider Kits (Aug. 17, 2017). Available at <https://www.epa.gov/sites/production/files/2017-08/documents/hd-ghg-phase2-ttma-ltr-2017-08-17.pdf>.

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Under EPA's proposed interpretation, the statute is clear that EPA has no authority to regulate glider kits under CAA section 202(a)(1). If glider vehicles are not "new motor vehicles," which is the interpretation of section 216(3) that EPA is proposing here, then the Agency entirely lacks authority to regulate glider kits as "incomplete" new motor vehicles. Furthermore, given that a glider kit lacks a powertrain, a glider kit does not even meet the definition of "motor vehicle," which, in relevant part, is defined to mean "any *self-propelled* vehicle." 42 U.S.C. § 7550(2) (emphasis added). EPA is further proposing therefore that the Phase 2 rule was incorrect when it interpreted CAA section 202(a)(1) as giving the Agency authority to regulate glider kits as "incomplete" motor vehicles *See* 81 FR at 73514.

CAA section 202(a)(1) provides as follows:

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of *new motor vehicles* or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to *such vehicles* and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether *such vehicles* and engines *are designed as complete systems* or incorporate devices to prevent or control such pollution.

42 U.S.C. § 7521(a)(1) (emphases added). At issue here is the second sentence of paragraph (a)(1), including, specifically, the words: "[s]uch standards shall be applicable to such vehicles . . . whether such vehicles . . . are designed as complete systems." 42 U.S.C. § 7521(a)(1). In the Phase 2 rule, EPA took the position that the words "whether such vehicles . . . are designed as complete systems" can be interpreted as authorizing the Agency to regulate glider kits as

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“incomplete vehicles.” *See* 81 FR at 73515 (“[I]t is evident that . . . glider kits should be treated as vehicles, albeit incomplete ones.”). The Agency had reasoned that a glider kit “is not a few assembled components; rather, it is an assembled truck with a few components missing.” *Id.* Of course, among those “few” missing components is the powertrain, which enables self-propulsion and which is responsible for the emission of air pollutants.

In any event, the phrase “such vehicles” from the second sentence of clause (a)(1) is a reference back to the first sentence of clause (a)(1), which states that the Administrator “shall by regulation prescribe (and from time to time revise) . . . standards applicable to the emission of any air pollutant from any class or classes of *new motor vehicles*.” 42 U.S.C. § 7521(a)(1) (emphasis added). Because an engine-less glider kit, incapable of self-propulsion, does not explicitly fit within the definition of a “motor vehicle,” the fact that the second sentence of clause (a)(1) makes reference to “whether *such* vehicles” [*i.e.*, “new motor vehicles”] . . . are designed as complete systems” cannot support the claim that EPA is authorized to regulate glider kits as “incomplete” motor vehicles. The assertion that CAA section 202(a)(1) authorizes the regulation of glider kits as “incomplete” vehicles is based solely on the presupposition that glider kits *are* “such vehicles” – *i.e.*, “new motor vehicles.” But a glider kit does not meet the definition of “motor vehicle,” much less “new motor vehicle.” Accordingly, EPA is here proposing to determine that the Phase 2 rule wrongly construed this language from CAA section 202(a)(1) when it interpreted that language as giving EPA authority to regulate them as “incomplete” vehicles. EPA solicits comment on this interpretation.

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With respect to glider vehicles – *i.e.*, a glider kit in which a previously owned powertrain has been installed – EPA is proposing to interpret the definition of “new motor vehicle” in CAA section 216(3) as not including glider vehicles. The principal components of a glider vehicle (*i.e.*, the powertrain elements, including the engine and the transmission) are components that have been previously owned and, typically, rebuilt. Therefore, the “equitable or legal title” to the most significant parts of the glider vehicle – and the components that actually produce air pollutant emissions – have previously been “transferred to an ultimate purchaser,” *i.e.*, the original owner of the donor truck. For this reason, EPA is proposing to find that glider vehicles should not be considered to be “new,” and that the statutory language in CAA § 216(3) does not include glider vehicles.⁴

In taking the contrary position, the Phase 2 rule is effectively claiming that the act of installing a *previously owned* powertrain into a glider kit – *i.e.*, something that is not itself a “motor vehicle” – results in the creation of a *new* “motor vehicle.” This counterintuitive result, at a minimum, suggests that, in defining “new motor vehicle” generally to mean a “motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser,” Congress did not intend that a glider vehicle, comprised of a new outer shell conjoined to a previously owned powertrain, should be treated as a “new” vehicle, due solely to fact that a glider vehicle may be

⁴Underscoring the fact that this is the natural understanding of the terms that Congress used to define “new motor vehicle” is that, for their part, the National Highway Traffic Safety Administration’s regulations establish that a truck is not considered to be “newly manufactured” if the “engine, transmission, and drive axle(s) (as a minimum) of [an] assembled vehicle are not new” and at least two of those three components come from the same donor vehicle. See 49 C.F.R. § 571.7(c). And while it may be the case that some glider manufacturers have marketed their products as being like “new trucks,” see 81 FR at 73514, the relevant consideration is the text of the CAA itself, which precludes a truck from being deemed “new” where title has already been transferred to an “ultimate purchaser.”

Comment (AS): Commenter suggests the footnote be removed as this footnote could create unnecessary confusion regarding the different ways that NHTSA and EPA treat gliders.

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assigned a new title following the assembly of components, some of which are new and some of which were previously owned.

Where the “traditional tools of statutory construction” allows one to “ascertain[] that Congress had an intention on the precise question at issue,” that “intention is the law and must be given effect.” *See Chevron*, 467 U.S. at 843 n.9. At the same time, where “Congress has not directly addressed the precise question at issue,” and the “statute is silent or ambiguous with respect to the specific issue,” it is left to the agency charged with implementing the statute to provide an “answer based on a permissible construction of the statute.” *Id.* at 843. In this case, EPA proposes to interpret the relevant statutory language as authorizing the Agency to exclude glider vehicles from being treated as “new motor vehicles.”

Regarding glider engines, EPA proposes that, since a glider vehicle does not meet the statutory definition of a “new motor vehicle,” it follows that a glider engine is not a “new motor vehicle engine” within the meaning of CAA section 216(3). Under that provision, a motor vehicle engine is considered “new” in either of two circumstances: (1) the engine is “in a new motor vehicle,” or (2) the “equitable or legal title” to the engine has “never been transferred to the ultimate purchaser.” The second of these circumstances can never apply to a glider engine, which is invariably an engine that has been previously owned.

As to the first circumstance, a glider engine is installed in a glider kit, which in itself is not a “motor vehicle.” A glider kit becomes a “motor vehicle” only after an engine (and the balance of the powertrain) has been installed. But while adding a previously owned engine to a glider kit

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may result in the creation of a “motor vehicle,” the assert that the previously owned engine thereby becomes a “*new* motor vehicle engine” within the meaning of CAA section 216(3), due to the engine’s now being in a “new motor vehicle,” reflects circular thinking. It *presupposes* that the installation of a (previously owned) engine in a glider kit creates not just a “motor vehicle” but a “new motor vehicle.” This is not the case. EPA is proposing to interpret the relevant statutory language in a manner that rejects the Agency’s prior reliance on the view that (1) installing a previously owned engine in a glider kit transforms the glider kit into a “new motor vehicle,” and (2) that, thereafter, the subsequent presence of that previously owned engine in the supposed “new motor vehicle” causes that engine to become a “new motor vehicle engine” within the meaning of CAA section 216(3).

EPA believes that its proposed interpretation is the correct reading of the relevant statutory language, and that its proposed determination, based on this interpretation, that regulation of glider vehicles, glider engines, and glider kits is not authorized by CAA section 202(a)(1) is reasonable. Comments submitted in the Phase 2 rulemaking docket leads the Agency to understand that a glider vehicle is a suitable and affordable option for those small businesses and independent operators who cannot afford to purchase a truly new vehicle, but who otherwise wish to replace an older vehicle with a vehicle that is equipped with up-to-date safety features and, as well, may produce fewer emissions than the older vehicle. In other words, EPA considers that at issue here is not so much whether the availability of glider vehicles will result in fewer new trucks being purchased but, rather, whether limiting the availability of glider vehicles will simply result in older, less safe, more-polluting trucks remaining on the road that much longer. EPA seeks comment on this understanding of the situation.

Comment [A6]: Recommend finding a more straightforward way of asking for comment on this issue. Simply put, the question is how much discretion truck owners have over when they replace their vehicles? The answer would need to consider useful life of the vehicle, accident rates in the U.S., etc. If EPA has already considered this question and analyzed relevant data, the comments should be on the validity of EPA’s prior analysis.

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EPA welcomes comments on its proposed interpretation. The Agency also seeks comment on the matter of the anticipated purchasing behavior on the part of the smaller trucking operations and independent drivers if the regulatory provisions at issue were to be repealed. Further, EPA seeks comment on the relative expected emissions impacts if the regulatory requirements at issue here were to be repealed or were to be left in place.

EPA also solicits comment on whether, in lieu of regulation under CAA section 202(a)(1), it might be reasonable for EPA to establish standards for glider kits, glider vehicles, and glider engines pursuant to authority the Agency may have under other provisions of the CAA, such as CAA section 202(a)(3)(D), which authorizes EPA to “prescribe requirements to control rebuilding practices” with respect to heavy duty engines. See 42 U.S.C. § 7521(a)(3)(D).

B. Conclusion

EPA has a fundamental obligation to ensure that the regulatory actions it takes are authorized by Congress, and that the standards and requirements that it would impose on the regulatory community have a sound and reasonable basis in law. See *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”). EPA is now proposing to find that the correct reading of the relevant provisions of the CAA, including CAA section 202(a)(1), 216(2), and 216(3) is that glider vehicles should not be regulated as “new motor vehicles,” that glider engines should not be regulated as “new motor vehicle engines,” and that glider kits should not be regulated as “incomplete” new motor vehicles. Based on this proposed interpretation, EPA is proposing to

Comment [A7]: Please provide background information on what is the scope of EPA's authority here.

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repeal those provisions of the Phase 2 rule applicable to glider vehicles, glider engines, and glider kits.

IV. Public Participation

We request comment by [INSERT DATE 30 DAYS AFTER THE PUBLIC HEARING] on all aspects of this proposal. This section describes how you can participate in this process.

Materials related to the Heavy-Duty Phase 2 rulemaking are available in the public docket noted above and at <https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-greenhouse-gas-emissions-commercial-trucks>.

1. How Do I Prepare and Submit Information?

Direct your submittals to Docket ID No. EPA–HQ–OAR–2014-0827. EPA’s policy is that all submittals received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the submittal includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Do not submit information to the docket that you consider to be CBI or otherwise protected through www.regulations.gov. The www.regulations.gov web site is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your submittal. If you submit an electronic submittal, EPA recommends that you include your name and other contact information in the body of your submittal and with any disk or CD–ROM you submit. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA’s public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

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EPA will hold a public hearing on the date stated in the DATES Section. The hearing will be held at . To attend the hearing, individuals will need to show appropriate ID to enter the building. The hearing will start at 10 a.m. local time and continue until 5 p.m. or until everyone has had a chance to speak. More details concerning the hearing can be found at <https://www.epa.gov/regulations-emissions-vehicles-and-engines/petitions-reconsideration-phase-2-ghg-emissions-and-fuel>.

2. Submitting CBI

Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

3. Tips for Preparing Your Comments

When submitting comments, remember to:

Identify the action by docket number and other identifying information (subject heading, Federal Register date and page number).

Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

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- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified in the DATES section above.

V. Statutory and Executive Order Reviews

(1) Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is an economically significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

Comment [A2]: Will EPA explain how they arrived at this suggested designation under EO 12866? We would request the agency to include additional benefit/cost analysis in the proposed rule to support the suggested significance determination.

(2) Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This proposed rule is expected to be an Executive Order 13771 deregulatory action. This proposed rule is expected to provide meaningful burden reduction by eliminating regulatory requirements for glider manufacturers.

Comment [A3]: Request the agency to include more analysis in the preamble to describe/estimate any burden reduction.

(3) Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities. It would only eliminate regulatory requirements for glider manufacturers.

Comment [A10]: EPA should revise this section to reference the OMB control number associated with the heavy-duty GHG rule collection as well as the estimated burden reduction from this regulatory action. As EPA would be changing the number of affected respondents by eliminating gliders, the collection would need to be submitted as a revision for OMB review.

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(4) Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. Small glider manufacturers would be allowed to produce glider vehicles without meeting new motor vehicle emission standards. We have therefore concluded that this action will have no adverse regulatory impact for any directly regulated small entities.

(5) Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments.

(6) Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

(7) Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This proposed rule will be implemented at the Federal level and affects glider manufacturers. Thus, Executive Order 13175 does not apply to this action.

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**(8) Executive Order 13045: Protection of Children from Environmental Health Risks
and Safety Risks**

Comment [A11]: Flagged for further
discussion.

This action is subject to Executive Order 13045 because it is an economically significant regulatory action as defined by Executive Order 12866. The Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits was anticipated to lower ambient concentrations of PM_{2.5} and some of the benefits of reducing these pollutants may have accrued to children. Our evaluation of the environmental health or safety effects of these risks on children is presented in Section XIV.H. of the HD Phase 2 Rule.⁹ Some of the benefits for children's health as described in that analysis would be lost as a result of this action.

In general, current expectations about future emissions of pollution from these trucks is difficult to forecast given uncertainties in future technologies, fuel prices, and the demand for trucking. Furthermore, the proposed action does not affect the level of public health and environmental protection already being provided by existing NAAQS and other mechanisms in the CAA. This proposed action does not affect applicable local, state, or federal permitting or air quality management programs that will continue to address areas with degraded air quality and maintain the air quality in areas meeting current standards. Areas that need to reduce criteria air pollution to meet the NAAQS will still need to rely on control strategies to reduce emissions. To the extent that states use other mechanisms in order to comply with the NAAQS, and still achieve the criteria pollution reductions that would have occurred under the CPP, this proposed rescission will not have a disproportionate adverse effect on children's health.

⁹ 81 FR 73478 (October 25, 2016).

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(9) Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

(10) National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

(11) Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations, and Low-Income Populations

The EPA believes that this action may have disproportionately high and adverse effects on some minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). EPA’s evaluation of human health and environmental effects on minority, low-income or indigenous populations for the HD Phase 2 Rule is presented in preamble Section XIV.K.¹⁰ We have not evaluated the specific impacts on minority, low-income or indigenous populations of the emission increases that would occur as a result of the proposed action to rescind emissions standards for heavy-duty glider vehicles and engines.

We also have not considered how cost savings to the trucking industry are passed on to consumers. To the extent trucking becomes cheaper and these costs savings translate into lower cost consumer goods, the purchasing power of low income and minority populations increases. Also expected, as a result of the Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, were shifts in regional workforces and involuntary unemployment impacts, particularly in the Glider Vehicle and Engine sector. While employment effects are not

¹⁰ 81 FR 73478 (October 25, 2016).

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experienced uniformly across the population and may be offset by new opportunities in different sectors, localized impacts could have adversely affected individuals and their communities.

Workers losing jobs in regions or occupations with weak labor markets would have been most vulnerable. With limited re-employment opportunities, or if new employment offered lower earnings, then unemployed workers could face extended periods without work, or permanently reduced future earnings. In addition, past research has suggested that involuntary job loss may increase risks to health, of substance abuse, and even of mortality. These adverse impacts may be avoided with the proposed repeal of the Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits Consistent with the proposed determination that EPA lacks statutory authority to establish requirements for glider vehicles and glider engines, the agency also believes it does not have discretionary authority to address any potential associated environmental justice effects.

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Repeal of Emission Requirements for Glider Vehicles

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List of Subjects in 40 CFR Part 1037

Environmental protection, Administrative practice and procedure, Air pollution control,
Confidential business information, Incorporation by reference, Labeling, Motor vehicle
pollution, Reporting and recordkeeping requirements, Warranties.

Dated: _____.

E. Scott Pruitt,
Administrator.

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For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as set forth below.

**PART 1037—CONTROL OF EMISSIONS FROM NEW HEAVY-DUTY MOTOR
VEHICLES**

1. The authority for part 1037 continues to read as follows:

Authority: 42 U.S.C. 7401—7671q.

Subpart B – [Amended]

2. Section 1037.150 is amended by revising paragraph (t) to read as follows:

§1037.150 Interim provisions.

* * * * *

(t) [Reserved]

* * * * *

Subpart G – [Amended]

§1037.635 [Removed]

3. Remove §1037.635.

Subpart I – [Amended]

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4. Section 1037.801 is amended by removing the definitions “glider kit” and “glider vehicle” and revising the definitions of “manufacturer” and “new motor vehicle” to read as follows:

§ 1037.801 Definitions.

* * * * *

Manufacturer has the meaning given in section 216(1) of the Act. In general, this term includes any person who manufactures or assembles a vehicle (including a trailer or another incomplete vehicle) for sale in the United States or otherwise introduces a new motor vehicle into commerce in the United States. This includes importers who import vehicles for resale.

* * * * *

New motor vehicle has the meaning given in the Act. It generally means a motor vehicle meeting the criteria of either paragraph (1) or (2) of this definition. New motor vehicles may be complete or incomplete.

(1) A motor vehicle for which the ultimate purchaser has never received the equitable or legal title is a new motor vehicle. This kind of vehicle might commonly be thought of as “brand new” although a new motor vehicle may include previously used parts. Under this definition, the vehicle is new from the time it is produced until the ultimate purchaser receives the title or places it into service, whichever comes first.

(2) An imported heavy-duty motor vehicle originally produced after the 1969 model year is a new motor vehicle.

* * * * *

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EO12866 Repeal of Emission Requirements for Gliders 2060-AT79 NPRM

FRN 201711082.docx

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6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part ~~Parts~~ 1037 and 1068

[EPA-HQ-OAR-2014-0827; FRL-~~xxxx-xx~~9970-61-OAR]

{RIN 2060-AT79}

Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to repeal the emission standards and other requirements for heavy-duty glider vehicles, glider engines, and glider kits based on a proposed interpretation of the Clean Air Act (CAA) under which glider vehicles would be found not to constitute “new motor vehicles” within the meaning of CAA section 216(3), glider engines would be found not to constitute “new motor vehicle engines” within the meaning of CAA section 216(3), and glider kits would not be treated as “incomplete” new motor vehicles. Under this proposed interpretation, EPA would lack authority to regulate glider vehicles, glider engines, and glider kits under CAA section 202(a)(1).

DATES:

Comments: Comments on all aspects of this proposal must be received on or before ~~[INSERT DATE 30 DAYS AFTER THE PUBLIC HEARING]~~ January 5, 2018.

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Public Hearing: EPA will hold a public hearing on the following date: ~~[INSERT DATE 15 DAYS AFTER PUBLICATION]~~ Monday, December 4, 2017. The hearing will be held ~~at EPA's Washington, DC campus located at 1201 Constitution Avenue, NW, Washington, DC.~~ To attend the hearing, individuals will need to show appropriate ID to enter the building at EPA's Washington, DC campus located at 1201 Constitution Avenue, NW, Washington, DC. The hearing will start at 10:00 a.m. local time and continue until 5:00 p.m. or until everyone has had a chance to speak. More details concerning the hearing can be found at <https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-greenhouse-gas-emissions-commercial-trucks> ~~https://www.epa.gov/regulations-emissions-vehicles-and-engines/petitions-reconsideration-phase-2-ghg-emissions-and-fuel.~~

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2014–0827, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www.epa.gov/dockets/commenting-epa-dockets>.

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Docket: All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the following location:

Air and Radiation Docket and Information Center, EPA Docket Center, EPA/DC, EPA WJC West Building, 1301 Constitution Ave., N.W., Room 3334, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

~~FOR FURTHER INFORMATION CONTACT:~~

~~_____~~

FOR FURTHER INFORMATION CONTACT: Julia MacAllister, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: 734-214-4131; email address: hearing_registration-asd@epa.gov.

SUPPLEMENTAL SUPPLEMENTARY INFORMATION:

Does this Action Apply to Me?

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This action relates to a previously promulgated ~~Final-final Rule-rule~~ that affects companies that manufacture, sell, or import into the United States glider vehicles. Proposed categories and entities that might be affected include the following:

Category	NAICS Code ^a	Examples of Potentially Affected Entities
Industry	336110	Motor Vehicle Manufacturers, Engine Manufacturers, Engine Parts Manufacturers, Truck Manufacturers, Automotive Parts and Accessories Dealers
	336111	
	336112	
	333618	
	336120	
	441310	

Note:

^a North American Industry Classification System (NAICS).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely covered by these rules. This table lists the types of entities that we are aware may be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your activities are regulated by this action, you should carefully examine the applicability criteria in the referenced regulations. You may direct questions regarding the applicability of this action to the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

I. Introduction

The basis for the proposed repeal of those provisions of the ~~Final-final Rule-rule~~ entitled Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty

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Engines and Vehicles – Phase 2 (the Phase 2 rule)¹ that apply to glider vehicles, glider engines, and glider kits is EPA’s proposed interpretation of CAA section 202(a)(1) and sections 216(2) and 216(3), which is discussed below. EPA is proposing interpret those statutory provisions as not authorizing the Agency. Under this proposed interpretation: (1) to treat glider vehicles would not be treated as “new motor vehicles,” (2) to treat glider engines would not be treated as “new motor vehicle engines,” or (3) to treat glider kits would not be treated as “incomplete” new motor vehicles. Under Based on this proposed interpretation, EPA would ~~thereby~~ lack authority to regulate glider vehicles, glider engines, and glider kits under CAA section 202(a)(1).

This proposed interpretation is a departure from the position taken by EPA in the Phase 2 rule, ~~in which the Agency.~~ There, EPA interpreted the statutory definitions of “new motor vehicle” and “new motor vehicle engines” in CAA section 216(3) as including glider vehicles and glider engines, respectively. The proposed interpretation ~~correspondingly~~ also departs from EPA’s position in the Phase 2 rule that CAA section 202(a)(1) authorizes the Agency to treat glider kits as “incomplete” new motor vehicles.

It is settled law that EPA has inherent authority to reconsider, revise, or ~~repeal, or revise~~ past decisions to the extent permitted by law so long as the Agency provides a reasoned explanation. This authority exists in part because EPA’s interpretations of the statutes it administers “are not carved in stone.” *Chevron U.S.A. Inc. v. NRDC, Inc.* 467 U.S. 837, 863 (1984). ~~Rather,~~ If an agency, ~~if it~~ is to “engage in informed rulemaking,” it “must consider varying

¹ 81 FR 73478 (Oct. 25, 2016).

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interpretations and the wisdom of its policy on a continuing basis.” *Id.* at 863-64. This is true when, as is the case here, review is undertaken “in response to ... a change in administration.” *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005). ~~As has been observed, a~~ “change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive ~~agency’s~~ agency’s reappraisal of the costs and benefits of its programs and regulations,” and so long as an agency “remains within the bounds established by Congress,” the agency “is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.” *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U. S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

After reconsidering the statutory language, EPA proposes to adopt a reading of the relevant provisions of the CAA under which the statutory terms “new motor vehicle” and “new motor vehicle engine” would not include glider vehicles and glider engines, respectively. Further, glider kits would not be treated as “incomplete” new motor vehicles. Under this proposed reading, ~~EPA~~ Agency would lack authority under CAA section 202(a)(1) to impose requirements on glider vehicles, glider engines, and glider kits and therefore proposes to remove the relevant rule provisions. At the same time, under CAA section 202(a)(3)(D), EPA is authorized to “prescribe requirements to control” the “practice of rebuilding heavy-duty engines,” including “standards applicable to emissions from any rebuilt heavy-duty engines.” 42 U.S.C. § 7521(a)(3)(D).² If the interpretation being proposed here were to be finalized, EPA’s authority

² EPA has adopted regulations that address engine rebuilding practices. *See, e.g.*, 40 CFR 1068.120. EPA is not proposing in this action to adopt additional regulatory requirements pursuant to 42 U.S.C. § 7521(a)(3)(D) that would apply to rebuilt engines installed in glider vehicles.

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to address heavy-duty engine rebuilding practices under CAA section 202(a)(3)(D) would not be affected.

II. Background

A. Factual Context

A glider vehicle (sometimes referred to simply as a “glider”) is a truck that utilizes a used (and typically refurbished) previously owned powertrain (including the engine, the transmission, and usually the rear axle) but which has new body parts. When these new body parts (which generally include the tractor chassis with frame, front axle, brakes, and cab) are put together to form the “shell” of a truck, the assemblage of parts is referred to collectively as a “glider kit.”³ The final manufacturer of the glider vehicle, *i.e.*, the entity that takes the assembled glider kit and combines it with the used powertrain salvaged from some other a “donor” truck, is most often typically a different manufacturer than the original manufacturer of the glider kit. *See* 81 FR 73512-13; (October 25, 2016).

Comments submitted to EPA during the Phase 2 rulemaking state that gliders are approximately 25% less expensive than new trucks,⁴ which makes them popular with small businesses and owner-operators.⁵ For those businesses and drivers who cannot afford to purchase a new truck, a glider provides an attractive alternative to the continuing use an older vehicle. In contrast to the older vehicle, a glider requires less maintenance and thus yields less downtime. Having the same braking, lane drift devices, dynamic cruise control, and blind spot detection devices that are

³ Because a glider kit lacks an engine, it is neither capable of self-propulsion nor does it emit any air pollutants.

⁴ See Response to Comments for Joint Rulemaking, EPA-426-R-16-901 (August 2016) at 1846.

⁵ Doc. EPA-HQ-OAR-2014-0827-1964.

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found on current model year heavy-duty trucks, the glider is also a safer vehicle to operate, compared to the older truck that it is replacing.

B. Statutory and Regulatory Context

Section 202(a)(1) of the CAA directs that “EPA ‘shall by regulation prescribe,’ in ‘accordance with the provisions’ of section 202, ‘standards applicable to the emission of any air pollutant from any . . . new motor vehicles or new motor vehicle engines.’” 42 U.S.C. § 7521(a)(1).

~~Section~~CAA section 216(2) defines “motor vehicle” to mean “any self-propelled vehicle designed for transporting persons or property on a street or highway.” 42 U.S.C. § 7550(2). In turn, ~~a~~ “new motor vehicle” is defined in CAA section 216(3) to mean, as is relevant here, a “motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser.” 42 U.S.C. § 7550(3) (emphasis added). Similarly, ~~a~~ “new motor vehicle engine” is similarly defined as an “engine in a new motor vehicle” or a “motor vehicle engine the equitable or legal title to which has never been transferred to the ultimate purchaser.” *Id.*⁶

~~In issuing~~Comments submitted to EPA during the Phase 2 rulemaking stated that gliders are approximately 25% less expensive than new trucks,⁷ which makes them popular with small businesses and owner-operators.⁸ In contrast to an older vehicle, a glider requires less

⁶ Further, with “respect to vehicles or engines imported or offered for importation,” CAA section 216(3) provides that “new motor vehicle” and “new motor vehicle engine” mean a “motor vehicle and engine . . . manufactured after the effective date of a regulation issued under section 7521 of this title which is applicable to such vehicle or engine (or which would be applicable to such vehicle or engine had it been manufactured for importation into the United States).” 42 U.S.C. § 7550(3). The definitions of both “new motor vehicle” and “new motor vehicle engine” are contained in the same paragraph (3), reflecting the fact that “[w]henver the statute refers to ‘new motor vehicle’ the phrase is followed by ‘or new motor vehicle engine.’” *See Motor and Equipment Manufacturers Ass’n v. EPA*, 627 F.2d 1095, 1102 n.5 (D.C. Cir. 1979). As Title II currently reads, the term “new motor vehicle” appears some 32 times, and in all but two instances, the term is accompanied by “new motor vehicle engine,” indicating that, at the inception of Title II, Congress understood that the regulation of *engines* was essential to control emissions from “motor vehicles.”

⁷ Response to Comments for Joint Rulemaking, EPA-426-R-16-901 (August 2016) at 1846.

⁸ EPA-HQ-OAR-2014-0827-1964.

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maintenance and yields less downtime.⁹ A glider has the same braking, lane drift devices, dynamic cruise control, and blind spot detection devices that are found on current model year heavy-duty trucks, making it a safer vehicle to operate, compared to the older truck that it is replacing.¹⁰

Some commenters questioned EPA’s authority to regulate glider vehicles as “new motor vehicles,” to treat glider engines as “new motor vehicle engines,” or to impose requirements on glider kits. Commenters also pointed out what they described as the overall environmental benefits of gliders. For instance, one commenter stated that “rebuilding an engine and transmission uses 85% less energy than manufacturing them new.”¹¹ Another commenter noted that the use of glider vehicles “improves utilization and reduces the number of trucks required to haul the same tonnage of freight.”¹² This same commenter further asserted that glider vehicles utilizing “newly rebuilt engines” produce less “particulate, NOx, and GHG emissions . . . compared to [a] worn oil burning engine which is beyond its useful life.”¹³

In the Phase 2 rule, EPA found that it was “reasonable” to consider glider vehicles to be “new motor vehicles” under the definition in CAA section 216(3). See 81 FR 73514, (October 25, 2016). Likewise, the AgencyEPA found that the previously owned engines utilized by glider vehicles are properly should be considered to be “new motor vehicle engines” within the statutory definition. Based on these interpretations, EPA determined that it had authority under CAA

⁹ EPA-HQ-OAR-2014-0827-1005.

¹⁰ *Id.*

¹¹ EPA-HQ-OAR-2014-0827-1964.

¹² EPA-HQ-OAR-2014-0827-1005.

¹³ *Id.*

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section 202(a) to subject glider vehicles and glider engines to the ~~standards~~requirements of the Phase 2 rule ~~and to impose on them certain other requirements~~. As for glider kits, EPA found that if glider vehicles are new motor vehicles, then the Agency was authorized to regulate glider kits as “incomplete” new motor vehicles. *Id.*

C. Petition for Reconsideration

Following promulgation of the Phase 2 rule, EPA received from representatives of the glider industry a joint petition requesting that the Agency reconsider the application of the Phase 2 rule to glider vehicles, glider engines, and glider kits.¹⁴ ~~In their petition, the representatives of the glider industry warned that the Phase 2 rule “would significantly curtail American manufacturing” and “effectively shut down the glider industry and the nearly 20,000 jobs it supports across the nation.”~~ Petition at 2. ~~For example, the Fitzgerald company represented that it was “currently responsible for 1,600 direct and indirect jobs” in the states of Tennessee and Kentucky alone, and “several thousand more associated with suppliers across the country.”~~ *Id.* at 2. ~~Fitzgerald further represented that, with the Phase 2 rule in effect, by the end of 2017 the company would be “forced to cut production and its workforce by 90%.”~~ *Id.*

The petitioners made three principal arguments in support of their petition. First, they argued that EPA is not authorized by CAA section 202(a)(1) ~~does not authorize EPA~~ to regulate glider kits, glider vehicles, or glider engines. Petition at 3-4. Second, the petitioners contended that in the Phase 2 rule EPA “relied upon unsupported assumptions to arrive at the conclusion that

¹⁴ See Petition for Reconsideration of Application of the Final Rule Entitled “Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles – Phase 2 Final Rule” to Gliders, from Fitzgerald Glider Kits, LLC; Harrison Truck Centers, Inc.; and Indiana Phoenix, Inc. (July 10, 2017) (Petition). Available in the rulemaking docket, EPA-HQ-OAR-2014-0827, and at <https://www.epa.gov/sites/production/files/2017-07/documents/hd-ghg-fr-fitzgerald-recons-petition-2017-07-10.pdf>.

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immediate regulation of glider vehicles was warranted and necessary.” *Id.* at 4. Third, the petitioners asserted that reconsideration was warranted under Executive Order 13783. *Id.* at 6.

~~Regarding their second contention, the~~ The petitioners took particular issue with what they characterized as EPA’s having “assumed that the nitrogen oxide (“NO_x”)(‘NO_x’) and particulate matter (“PM”)(‘PM’) emissions of glider vehicles using pre-2007 engines” would be “at least ten times higher than emissions from equivalent vehicles being produced with brand new engines.” Petition at 5, *citing* 81 FR at 73942. According to the petitioners, EPA had “relied on no actual data to support this conclusion,” but had “simply relied on the pre-2007 standards.” *Id.* In support, the petitioners included as an exhibit to their petition a letter from the President of the Tennessee Technological University (“Tennessee Tech”), which described a study recently conducted by Tennessee Tech. This study, according to the petitioners, had “analyz[ed] the NO_x, PM, and carbon monoxide . . . emissions from both remanufactured and OEM engines,” and “reached a contrary conclusion” regarding glider vehicle emissions. Petition at 5.

~~Petitioners~~ The petitioners maintained that the results of the study “showed that remanufactured engines from model years between 2002 and 2007 performed roughly on par with OEM ‘certified’ engines,” and “in some instances even out-performed the OEM engines.” *Id.* The petitioners further claimed that the Tennessee Tech research “showed that remanufactured and OEM engines experience parallel decline in emissions efficiency with increased mileage.” *Id.*, *quoting* Tennessee Tech letter at 2. Based on the Tennessee Tech study, the petitioners asserted that “glider vehicles would emit less than 12% of the total NO_x and PM emissions for all Class 8 heavy duty vehicles . . . not 33% as the Phase 2 Rule suggests.” *Id.*, *citing* 81 FR at 73943.

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Further, the petitioners complained that the Phase 2 rule had “failed to consider the significant environmental *benefits* that glider vehicles create.” Petition at 6 (emphasis in original). “Glider vehicle GHG emissions are less than those of OEM vehicles,” the petitioners contended, “due to gliders’ greater fuel efficiency,” and the “carbon footprint of gliders is further reduced by the savings created by recycling materials.” *Id.* Regarding this latter point, the petitioners represented that “[g]lider assemblers reuse approximately 4,000 pounds of cast steel in the remanufacturing process,” including “3,000 pounds for the engine assembly alone.” *Id.* The petitioners pointed out that “[r]eusing these components avoids the environmental impact of casting steel, including the significant associated NOx emissions.” *Id.* This “fact,” the petitioners argued, is something that EPA should have been considered but was “not considered in the development of the Phase 2 rule.” *Id.*

EPA responded to the glider industry representatives’ joint petition by separate letters on August 17, 2017, stating, among other things, that the petition “~~raises~~had “raise[d] significant questions regarding the EPA’s authority under the Clean Air Act to regulate gliders.”¹⁵ EPA further indicated that it had “decided to revisit the provisions in the *Phase 2 Rule* that relate to gliders,” and that the Agency “intends to develop and issue a Federal Register notice of proposed rulemaking on this matter, consistent with the requirements of the Clean Air Act.”¹⁶

III. Basis for the Proposed Repeal

¹⁵ See, e.g., Letter from E. Scott Pruitt, EPA Administrator, to Tommy C. Fitzgerald, President, Fitzgerald Glider Kits (Aug. 17, 2017). Available in the rulemaking docket, EPA-HQ-OAR-2014-0827, and at <https://www.epa.gov/sites/production/files/2017-08/documents/hd-ghg-phase2-ttma-ltr-2017-08-17.pdf>.

¹⁶ *Id.*

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A. Statutory Analysis

EPA is proposing to conclude that the statutory interpretations on which the Phase 2 rule predicated its regulation of glider kits, ~~glider vehicles~~, glider engines, and glider engines kits were incorrect. EPA is ~~proposing to interpret~~ proposes an interpretation of the relevant language of the CAA as ~~excluding~~ under which glider vehicles are excluded from the statutory term “new motor vehicles” and glider engines are excluded from the statutory term “new motor vehicle engines,” as both terms are defined in CAA section 216(3). Consistent with this interpretation of the scope of “new motor vehicle,” EPA is further proposing that it has no authority to treat glider kits as “incomplete” new motor vehicles under CAA section 202(a)(1). ~~Based on these proposed interpretations, EPA is proposing to find that it has no authority under CAA section 202(a)(1) to set standards for, or otherwise to regulate or to impose requirements on, glider vehicles, glider engines, and glider kits.~~

Under EPA’s proposed interpretation, the statute is clear that EPA has no authority to regulate glider kits under CAA section 202(a)(1). ~~If glider vehicles are not~~ As was noted, a “new motor vehicles,” which is the interpretation of section 216(3) that EPA is proposing here, then the Agency entirely lacks authority to regulate glider kits as “incomplete” new motor vehicles. Furthermore, given that a glider kit lacks a powertrain, a glider kit does not even meet the definition of “motor vehicle,” which is defined by CAA section 216(3) to mean, in relevant part, is defined to mean “any *self-propelled vehicle*.” 42 U.S.C § 7550(2) (emphasis added). EPA is further proposing therefore that the Phase 2 rule was incorrect when it interpreted CAA section 202(a)(1) as giving the Agency authority to regulate glider kits as “incomplete” motor vehicles. *See* 81 FR at 73514.

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CAA section 202(a)(1) provides as follows:

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of *new motor vehicles* or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to *such vehicles* and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether *such vehicles* and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

~~42 U.S.C. § 7521(a)(1) (emphases added)~~—At issue here is the second sentence of paragraph (a)(1), including, specifically, the words: “[s]uch standards shall be applicable to such vehicles . . . whether such vehicles . . . are designed as complete systems.” 42 U.S.C. § 7521(a)(1). In the Phase 2 rule, EPA took the position that the words “whether such vehicles . . . are designed as complete systems” can be interpreted as authorizing the Agency to regulate glider kits as “incomplete vehicles.” See 81 FR at 73515 (“[I]t is evident that . . . glider kits should be treated as vehicles, albeit incomplete ones.”). The Agency had reasoned that a glider kit “is not a few assembled components; rather, it is an assembled truck with a few components missing.” *Id.* Of course, among those “few” missing components is the powertrain, which enables self propulsion and which is responsible for the emission of air pollutants.

In any event, the phrase “such vehicles” from the second sentence of clause (a)(1) is a reference back to the first sentence of clause (a)(1), which states that the Administrator “shall by regulation prescribe (and from time to time revise) . . . standards applicable to the emission of any air pollutant from any class or classes of *new motor vehicles*.” 42 U.S.C. § 7521(a)(1) (emphasis

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added). Because an engine-less glider kit, incapable of self-propulsion, does not explicitly fit within the definition of a “motor vehicle,” the fact that the second sentence of clause (a)(1) makes reference to “whether *such* vehicles” [*i.e.*, “new motor vehicles”] . . . are designed as complete systems” cannot support the claim that EPA is authorized to regulate glider kits as “incomplete” motor vehicles. The assertion that CAA section 202(a)(1) authorizes the regulation of glider kits as “incomplete” vehicles is based solely on the presupposition that glider kits *are* “such vehicles” — *i.e.*, “new motor vehicles.” But a glider kit does not meet the definition of “motor vehicle,” much less “new motor vehicle.” Accordingly, EPA is here proposing to determine that the Phase 2 rule wrongly construed this language from CAA section 202(a)(1) when it interpreted that language as giving EPA authority to regulate them as “incomplete” vehicles. EPA solicits comment on this interpretation.

With respect to glider vehicles — *i.e.*, a glider kit in which a previously owned powertrain has been installed — EPA is proposing to interpret the definition of “new motor vehicle” in CAA section 216(3) as not including glider vehicles. The principal components of a glider vehicle (*i.e.*, the powertrain elements, including the engine and the transmission) are components that have been previously owned and, typically, rebuilt. Therefore, the “equitable or legal title” to the most significant parts of the glider vehicle — and the components that actually produce air pollutant emissions — have previously been “transferred to an ultimate purchaser,” *i.e.*, the original owner of the donor truck. For this reason, EPA is proposing to find that glider vehicles

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should not be considered to be “new,” and that the statutory language in CAA § 216(3) does not include glider vehicles.¹⁷

In taking the contrary position, the Phase 2 rule is effectively claiming that the act of installing a previously-owned powertrain into a glider kit—*i.e.*, something that is not itself a “motor vehicle”—results in the creation of a new “motor vehicle.” This counterintuitive result, at a minimum, suggests that, in defining “new motor vehicle” generally to mean a “motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser.” 42 U.S.C.,” Congress did not intend that § 7550(3). In basic terms, a glider vehicle, comprised consists of athe new outer shell conjoined to components that make up a glider kit, into which a previously owned powertrain, should be treated as has been installed. Prior to the time a “new” completed glider vehicle, due solely to fact is sold, it can be said that the vehicle’s “equitable or legal title” has yet to be “transferred to an ultimate purchaser.” It is on this basis that the Phase 2 rule found that a glider vehicle may be assigned a new title following the assembly fits within the definition of components, some of which are new and some of which were previously owned: “new motor vehicle.” 81 FR 73514 (October 25, 2016).

EPA’s rationale for applying this reading of the statutory language was that “[g]lider vehicles are typically marketed and sold as ‘brand new’ trucks.” 81 FR 73514 (October 25, 2016). EPA took note of one glider kit manufacturer’s own advertising materials that represented that the

¹⁷ Underscoring the fact that this is the natural understanding of the terms that Congress used to define “new motor vehicle” is that, for their part, the National Highway Traffic Safety Administration’s regulations establish that a truck is not considered to be “newly manufactured” if the “engine, transmission, and drive axle(s) (as a minimum) of [an] assembled vehicle are not new” and at least two of those three components come from the same donor vehicle. *See* 49 C.F.R. § 571.7(e). And while it may be the case that some glider manufacturers have marketed their products as being like “new trucks,” *see* 81 FR at 73514, the relevant consideration is the text of the CAA itself, which precludes a truck from being deemed “new” where title has already been transferred to an “ultimate purchaser.”

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company had “mastered the process of taking the ‘Glider Kit’ and installing the components to work seamlessly with the new truck.” *Id.* (emphasis added in original). EPA stated that the “purchaser of a ‘new truck’ necessarily takes initial title to that truck.” *Id.* (citing statements on the glider kit manufacturer’s website). EPA rejected arguments raised in comments that “this ‘new truck’ terminology is a mere marketing ploy.” *Id.* Where the “traditional tools of statutory construction” allows. Rather, EPA stated, “it obviously reflects reality.” *Id.*

In proposing a new interpretation of the relevant statutory language, EPA now believes that its prior reading was not the best reading, and that the Agency failed to consider adequately the most important threshold consideration: *i.e.*, whether or not Congress, in defining “new motor vehicle” for purposes of Title II, had a specific intent to include within the statutory definition such a thing as a glider vehicle – a vehicle comprised both of new *and* previously owned components. *See Chevron*, 467 U.S. at 843 n.9 (Where the “traditional tools of statutory construction” allow one to “ascertain[] that Congress had an intention on the precise question at issue,” that “intention is the law and must be given effect.” *See Chevron*, 467 U.S. at 843 n.9. At the same time, where.”). Where “Congress has not directly addressed the precise question at issue,” and the “statute is silent or ambiguous with respect to the specific issue,” it is left to the agency charged with implementing the statute to provide an “answer based on a permissible construction of the statute.” *Id.* at 843. In this case, EPA proposes to interpret the relevant statutory language as authorizing the Agency to exclude glider vehicles from being treated as “new motor vehicles.”

— Regarding

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Focusing solely on that portion of the statutory definition that provides that a motor vehicle is considered “new” prior to the time its “equitable or legal title” has been “transferred to an ultimate purchaser,” a glider vehicle would appear to qualify as “new.” As the Supreme Court has repeatedly counseled, however, that is just the beginning of a proper interpretive analysis. The “definition of words in isolation,” the Court has noted, “is not necessarily controlling in statutory construction.” See *Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006). Rather, the “interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute,” and “consulting any precedents or authorities that inform the analysis.” *Id.* Similarly, in seeking to “determine congressional intent, using traditional tools of statutory construction,” the “starting point is the language of the statute.” See *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) (emphasis added) (internal citation omitted). At the same time, “in expounding a statute,” one is not to be “guided by a single sentence or member of a sentence,” but is to “look to the provisions of the whole law, and to its object and policy.” *Id.* (internal citations omitted).

Assessed in light of these principles, it is clear that EPA’s reading of the statutory definition of “new motor vehicle” in the Phase 2 rule fell short. First, that reading failed to account for the fact that, at the time this definition of “new motor vehicle” was enacted, it is likely that Congress did not have in mind that the definition would be construed as applying to a vehicle comprised of new body parts and a previously owned powertrain. The manufacture of glider vehicles to salvage the usable powertrains of trucks wrecked in accidents goes back a number of years.¹⁸ But

¹⁸ EPA-HQ-OAR-2014-0827-1964.

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only more recently – after the enactment of Title II – have glider vehicles been produced in any great number.

Furthermore, the concept of deeming a motor vehicle to be “new” based on its “equitable or legal title” not having been transferred to an “ultimate purchaser” appears to have originated with an otherwise unrelated federal statute that predated Title II by a few years – i.e., the Automobile Information Disclosure Act of 1958, Pub. L. No. 85-506 (Disclosure Act).¹⁹ The history of Title II’s initial enactment and subsequent development indicates that, in adopting a definition of “new motor vehicle” for purposes of the Clean Air Act, Congress drew on the approach it had taken originally with the Disclosure Act.

Among other things, the Disclosure Act requires that a label be affixed to the windshield or side window of new automobiles, with the label providing such information as the Manufacturer’s Suggested Retail Price. See 15 U.S.C. § 1232 (“Every manufacturer of *new automobiles* distributed in commerce shall, prior to the delivery of any *new automobile* to any dealer, or at or prior to the introduction date of new models delivered to a dealer prior to such introduction date, securely affix to the windshield, or side window of *such automobile* a label”) (emphases added). The Disclosure Act defines the term “automobile” to “include[] any passenger car or station wagon,” and defines the term “new automobile” to mean “an automobile the equitable or legal title to which has never been transferred by a manufacturer, distributor, or dealer to an ultimate purchaser.” See 15 U.S.C. § 1231(c), (d).

¹⁹ The provisions of the Disclosure Act are set forth at 15 U.S.C. §§ 1231-1233.

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In 1965, Congress amended the then-existing Clean Air Act, and for the first time enacted provisions directed at the control of air pollution from motor vehicles. See Clean Air Act Amendments of 1965, Pub. L. 89-272 (1965 CAA). Included in the 1965 CAA was a brand new Title II, the “Motor Vehicle Air Pollution Control Act,” the structure and language of which largely mirrored key provisions of Title II as it exists today. Section 202(a) of the 1965 CAA provided that the “Secretary [of what was then the Department of Health, Education and Welfare] shall by regulation, giving appropriate consideration to technological feasibility and economic costs, prescribe . . . standards applicable to the emission of any kind of substance, from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause or contribute to, or are likely to cause or to contribute to, air pollution which endangers the health or welfare of any persons” Pub. L. 89-272, 79 Stat. 992 (emphasis added).

Section 208 of the 1965 CAA defined “motor vehicle” in terms identical to those in the CAA today: “any self-propelled vehicle designed for transporting persons or property on a street or highway.” Pub. L. 89-272, 79 Stat. 995. The 1965 CAA defined “new motor vehicle” and “new motor vehicle engine” to mean, as relevant here, “a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser; and the term ‘new motor vehicle engine’” to mean “an engine in a new motor vehicle or a motor vehicle engine the equitable or legal title to which has never been transferred to the ultimate purchaser.” *Id.* Again, in relevant part, the 1965 CAA definitions of these terms were identical to those that currently appear in CAA section 216(3).

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While the legislative history of the 1965 CAA does not expressly indicate that Congress based its definition of “new motor vehicle” on the definition of “new automobile” first adopted by the Automobile Information Disclosure Act of 1958, it seems clear that such was the case. The statutory language of the two provisions is identical in all pertinent respects,²⁰ and there appears to be no other federal statute, in existence prior to enactment of the 1965 CAA, from which Congress could have derived that terminology.

Subsequently, the statutory language from the 1965 CAA, defining the terms “motor vehicle,” “new motor vehicle,” “new motor vehicle engine,” “ultimate purchaser,” and “manufacturer” was incorporated verbatim in the Air Quality Act of 1967 (1967 AQA). See Pub. L. No. 148, 81 Stat. 503. The Clean Air Act Amendments of 1970 (1970 CAAA) did not change those definitions, except to add the language regarding “vehicles or engines imported or offered for importation” that currently appears in CAA section 216(3). See Pub. L. No. 91-604, 84 Stat. 1694, 1703.²¹

The fact that Congress, in first devising the CAA’s definition of “new motor vehicle” for purposes of Title II, drew on the pre-existing definition of “new automobile” in the Automobile Information Disclosure Act of 1958 serves to illuminate congressional intent. As with the Disclosure Act, Congress in the 1965 CAA selected the point of first transfer of “equitable or

²⁰ Further, the 1965 CAA’s definition of “ultimate purchaser,” as set forth in section 208(5), for the most part tracks the Disclosure Act’s earlier-enacted definition: “The term ‘ultimate purchaser’ means, with respect to any new automobile, the first person, other than a dealer purchasing in his capacity as a dealer, who in good faith purchases such new automobile for purposes other than resale.” Compare 1965 CAA section 208(5), Pub. L. 89-272, 79 Stat. 995 with 15 U.S.C. § 1231(g). Such is the case, too, with respect to the 1965 CAA’s definition of “manufacturer.” Compare 1965 CAA section 208(1), Pub. L. 89-272, 79 Stat. 994-995 with 15 U.S.C. § 1231(a).

²¹ The legislative history of both the 1967 AQA and 1977 CAAA is silent with respect to the origin of Title II’s definitions of “new motor vehicle,” “new motor vehicle engine,” “ultimate purchaser,” and “manufacturer,” which further underscores that Congress had originally derived those definitions from the Disclosure Act.

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legal title” to serve as a bright line – *i.e.*, to distinguish between those “new” vehicles (and engines) that would be subject to emission standards adopted pursuant to CAA section 202(a)(1) and those existing vehicles that would not be subject. Insofar as the 1965 CAA definition of “new motor vehicle” was based on the Disclosure Act definition of “new automobile,” it would seem clear that Congress intended, for purposes of Title II, that a “new motor vehicle” would be understood to mean something equivalent to a “new automobile” – *i.e.*, a true “showroom new” vehicle. It is implausible that Congress would have had in mind that a “new motor vehicle” might also include a vehicle comprised of new body parts and a previously owned powertrain.

Given this, EPA does not believe that congressional intent as to the meaning of the term “new motor vehicle” can be clearly ascertained on the basis of an isolated reading of a few words in the statutory definition, where that reading is divorced from the structure and history of the CAA as a whole. Based on that structure and history, it seems likely that Congress understood a “new motor vehicle,” as defined in CAA § 216(3), to be a vehicle comprised entirely of new parts and certainly not a vehicle with a used engine. At a minimum, ambiguity exists. This leaves EPA with the task of providing an “answer based on a permissible construction of the statute.”

Chevron, 467 U.S. at 843.

1. Glider vehicles

EPA is proposing to interpret “new motor vehicle,” as defined in CAA § 216(3), as not including glider vehicles. This is a reasonable interpretation – and commonsense would agree – insofar as it takes account of the reality that significant elements of a glider vehicle (*i.e.*, the powertrain elements, including the engine and the transmission) are previously owned components. Under the Phase 2 rule’s interpretation, in contrast, the act of installing a previously owned powertrain

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into a glider kit – *i.e.*, something that, as is explained further below, is not a “motor vehicle” as defined by the CAA – results in the creation of a *new* “motor vehicle.” EPA believes that Congress, in adopting a definition of “new motor vehicle” for purposes of Title II, never had in mind that the statutory language would admit of such a counterintuitive result.

In other words, EPA now believes that, in defining “new motor vehicle,” Congress did not intend that a vehicle comprised of a new outer shell conjoined to a previously owned powertrain should be treated as a “new” vehicle, based solely on the fact that the vehicle may have been assigned a new title following assembly.²² In this regard, insofar as Title II’s regulatory regime was at its inception directed at the emissions produced by new vehicle *engines*,²³ it is not at all clear that Congress intended that Title II’s reach should extend to a vehicle whose outer parts may be “new” but whose engine was previously owned.

2. . . . Glider engines

EPA proposes to find that, since a glider vehicle does not meet the statutory definition of a “new motor vehicle,” it necessarily follows that a glider engine is not a “new motor vehicle engine” within the meaning of CAA section 216(3). Under that provision, a motor vehicle engine is ~~considered~~ deemed to be “new” in either of two circumstances: (1) the engine is “in a new motor vehicle,” or (2) the “equitable or legal title” to the engine has “never been transferred to the ultimate purchaser.” The second of these circumstances can never apply to a glider engine, which is invariably an engine that has been previously owned.

²² Further confirming that this is not a natural reading of the terms that Congress used to define “new motor vehicle” is that, for their part, the National Highway Traffic Safety Administration’s regulations, in a subsection entitled “Combining new and used components,” establish that a truck is not considered to be “newly manufactured” if the “engine, transmission, and drive axle(s) (as a minimum) of [an] assembled vehicle are not new” and at least two of those three components come from the same donor vehicle. See 49 CFR 571.7(e).

²³ See footnote 3, *supra*.

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As to the first circumstance, a glider engine is installed in a glider kit, which in itself is not a “motor vehicle.” A glider kit becomes a “motor vehicle” only after an engine (and the balance of the powertrain) has been installed. But while adding a previously owned engine to a glider kit may result in the creation of a “motor vehicle,” the ~~assert~~assertion that the previously owned engine thereby becomes a “*new* motor vehicle engine” within the meaning of CAA section 216(3), due to the engine’s now being in a “new motor vehicle,” reflects circular thinking. It presupposes that the installation of a (previously owned) engine in a glider kit creates not just a “motor vehicle” but a “new motor vehicle.” ~~This is not the case.~~ EPA is proposing to interpret the relevant statutory language in a manner that rejects the Agency’s prior reliance on the view that (1) installing a previously owned engine in a glider kit transforms the glider kit into a “new motor vehicle,” and (2) that, thereafter, the subsequent presence of that previously owned engine in the supposed “new motor vehicle” ~~causes~~transforms that engine to ~~become~~become into a “new motor vehicle engine” within the meaning of CAA section 216(3).

3. Glider kits

Under EPA’s proposed interpretation, EPA would have no authority to regulate glider kits under CAA section 202(a)(1). If glider vehicles are not “new motor vehicles,” which is the interpretation of CAA section 216(3) that EPA is proposing here, then the Agency lacks authority to regulate glider kits as “incomplete” new motor vehicles. Further, given that a glider kit lacks a powertrain, a glider kit does not explicitly meet the definition of “motor vehicle,” which, in relevant part, is defined to mean “any *self-propelled* vehicle.” 42 U.S.C § 7550(2) (emphasis added). It is not obvious that a vehicle without a motor could constitute a “motor vehicle.”

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4. Issues for which EPA seeks comment

EPA believes that its proposed interpretation is the ~~correct~~most reasonable reading of the relevant statutory language, and that its proposed determination, based on this interpretation, that regulation of glider vehicles, glider engines, and glider kits is not authorized by CAA section 202(a)(1) is ~~reasonable~~. Comments submitted in the Phase 2 rulemaking docket leads the Agency to understand that a glider vehicle is a suitable and affordable option for those small businesses and independent operators who cannot afford to purchase a truly new vehicle, but who otherwise wish to replace an older vehicle with a vehicle that is equipped with up-to-date safety features and, as well, may produce fewer emissions than the older vehicle. In other words, EPA considers that at issue here is not so much whether the availability of glider vehicles will result in fewer new trucks being purchased but, rather, whether limiting the availability of glider vehicles will simply result in older, less safe, more polluting trucks remaining on the road that much longer. EPA seeks comment on this understanding of the situation~~also reasonable~~. EPA seeks comment on this interpretation.

~~EPA welcomes comments on its proposed interpretation. The Agency~~Comments submitted in the Phase 2 rulemaking docket lead EPA to believe that a glider vehicle is often a suitable option for those small businesses and independent operators who cannot afford to purchase a new vehicle, but who wish to replace an older vehicle with a vehicle that is equipped with up-to-date safety features. EPA solicits comment and further information as to this issue. EPA also solicits comment and information on whether limiting the availability of glider vehicles could result in older, less safe, more-polluting trucks remaining on the road that much longer. EPA particularly

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seeks information and analysis addressing the question whether glider vehicles produce significantly fewer emissions overall compared to the older trucks they would replace.

EPA also seeks comment on the matter of the anticipated purchasing behavior on the part of the smaller trucking operations and independent drivers if the regulatory provisions at issue were to be repealed. Further, EPA seeks comment on the relative expected emissions impacts if the regulatory requirements at issue here were to be repealed or were to be left in place.

EPA also solicits comment on whether, in lieu of regulation under CAA section 202(a)(1), it might be reasonable for EPA to establish standards for glider kits, glider vehicles, and glider engines pursuant to authority the Agency may have under other provisions of the CAA, such as CAA section 202(a)(3)(D), which authorizes EPA to “prescribe requirements to control rebuilding practices” with respect to heavy duty engines. See 42 U.S.C. § 7521(a)(3)(D). Finally, EPA seeks comment on whether, if the Agency were to determine not to adopt the interpretation of CAA sections 202(a)(1) and 216(3) being proposed here, EPA should nevertheless revise the “interim provisions” of Phase 2 rule, 40 CFR 1037.150(t)(1)(ii), to increase the exemption available for small manufacturers above the current limit of 300 glider vehicles per year. EPA seeks input on how large an increase would be reasonable, were the Agency to increase the limit in taking final action. Further, EPA seeks comment on whether, if the Agency were to determine not to adopt the statutory interpretation being proposed here, EPA should nevertheless extend by some period of time the date for compliance for glider vehicles, glider engines, and glider kits set forth in 40 CFR 1037.635. EPA seeks comment on what would be a reasonable extension of the compliance date.

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B. Conclusion

EPA has a fundamental obligation to ensure that the regulatory actions it takes are authorized by Congress, and that the standards and requirements that it would impose on the regulatory community have a sound and reasonable basis in law. ~~See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”).~~ EPA is now proposing to find that the ~~correct~~most reasonable reading of the relevant provisions of the CAA, including CAA ~~section~~sections 202(a)(1), 216(2), and 216(3) is that glider vehicles should not be regulated as “new motor vehicles,” that glider engines should not be regulated as “new motor vehicle engines,” and that glider kits should not be regulated as “incomplete” new motor vehicles. Based on this proposed interpretation, EPA is proposing to repeal those provisions of the Phase 2 rule applicable to glider vehicles, glider engines, and glider kits.

IV. Public Participation

We request comment by ~~[INSERT DATE 30 DAYS AFTER THE PUBLIC HEARING]~~January 5, 2018 on all aspects of this proposal. This section describes how you can participate in this process.

Materials related to the Heavy-Duty Phase 2 rulemaking are available in the public docket noted above and at: <https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-greenhouse-gas-emissions-commercial-trucks>.

1. How Do I Prepare and Submit Information?

Direct your submittals to Docket ID No. EPA-HQ-OAR-2014-0827. EPA’s policy is that all submittals received will be included in the public docket without change and may be made

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available online at www.regulations.gov, including any personal information provided, unless the submittal includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Do not submit information to the docket that you consider to be CBI or otherwise protected through www.regulations.gov. The www.regulations.gov web site is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your submittal. If you submit an electronic submittal, EPA recommends that you include your name and other contact information in the body of your submittal and with any disk or CD-ROM you submit. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA’s public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

EPA will hold a public hearing on the date and at the location stated in the DATES Section. ~~The hearing will be held at _____.~~ To attend the hearing, individuals will need to show appropriate ID to enter the building. The hearing will start at 10:00 a.m. local time and continue until 5 p.m. or until everyone has had a chance to speak. More details concerning the hearing can be found at <https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-greenhouse-gas-emissions-commercial-trucks>~~https://www.epa.gov/regulations-emissions-vehicles-and-engines/petitions-reconsideration-phase-2-ghg-emissions-and-fuel.~~

2. Submitting CBI

Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify

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electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

3. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the action by docket number and other identifying information (subject heading, Federal Register date and page number).
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified in the DATES section above.

V. Statutory and Executive Order Reviews

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(1) Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is an ~~economically~~ significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

(2) Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is expected to be an Executive Order 13771 deregulatory action. This proposed rule is expected to provide meaningful burden reduction by eliminating regulatory requirements for glider manufacturers.

(3) Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities. It would only eliminate regulatory requirements for glider manufacturers.

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(4) Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. Small glider manufacturers would be allowed to produce glider vehicles without meeting new motor vehicle emission standards. We have therefore concluded that this action will have no adverse regulatory impact for any directly regulated small entities.

(5) Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments.

(6) Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

(7) Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This proposed rule will be implemented at the Federal level and affects glider manufacturers. Thus, Executive Order 13175 does not apply to this action.

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(8) Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action as defined by Executive Order 12866. However, ~~The~~ Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits was anticipated to lower ambient concentrations of PM_{2.5} and some of the benefits of reducing these pollutants may have accrued to children. Our evaluation of the environmental health or safety effects of these risks on children is presented in Section XIV.H. of the HD Phase 2 Rule.²⁴ Some of the benefits for children's health as described in that analysis would be lost as a result of this action.

In general, current expectations about future emissions of pollution from these trucks is difficult to forecast given uncertainties in future technologies, fuel prices, and the demand for trucking. Furthermore, the proposed action does not affect the level of public health and environmental protection already being provided by existing NAAQS and other mechanisms in the CAA. This proposed action does not affect applicable local, state, or federal permitting or air quality management programs that will continue to address areas with degraded air quality and maintain the air quality in areas meeting current standards. Areas that need to reduce criteria air pollution to meet the NAAQS will still need to rely on control strategies to reduce emissions. To the extent that states use other mechanisms in order to comply with the NAAQS, and still achieve the criteria pollution reductions that would have occurred under the CPP, this proposed rescission will not have a disproportionate adverse effect on children's health.

²⁴ 81 FR 73478 (October 25, 2016).

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(9) Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

(10) National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

(11) Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations, and Low-Income Populations

The EPA believes that this action may have disproportionately high and adverse effects on some minority populations, low-income populations and/or indigenous peoples, as specified in

Pursuant to Executive Order 12898 (59 FR 7629, February 16, 1994), EPA considered

environmental justice concerns of the final HD Phase 2 rule. EPA’s evaluation of human health

and environmental effects on minority, low-income or indigenous populations for the final HD

Phase 2 Rule is presented in the Preamble, Section XIV.K.²⁵ VIII.A.8 and 9 (81 FR

73844-7, October 25, 2016). We have not evaluated the specific impacts on minority, low-

income or indigenous populations of the emission increases that would may occur as a result of

the proposed action to rescind emissions standards requirements for heavy-duty glider vehicles

and engines. EPA likewise has not considered the economic and employment impacts of this rule

specifically as they relate to or might impact minority, low-income and indigenous populations.

We also have not considered how cost savings to the trucking industry are passed on to

consumers. To the extent trucking becomes cheaper and these cost savings translate into lower

²⁵ 81 FR 73478 (October 25, 2016).

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cost-consumer goods, the purchasing power of low-income and minority populations increases. Also expected, as a result of the Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, were shifts in regional workforces and involuntary unemployment impacts, particularly in the Glider Vehicle and Engine sector. While employment effects are not experienced uniformly across the population and may be offset by new opportunities in different sectors, localized impacts could have adversely affected individuals and their communities. Workers losing jobs in regions or occupations with weak labor markets would have been most vulnerable. With limited re-employment opportunities, or if new employment offered lower earnings, then unemployed workers could face extended periods without work, or permanently reduced future earnings. In addition, past research has suggested that involuntary job loss may increase risks to health, of substance abuse, and even of mortality. These adverse impacts may be avoided with the proposed repeal of the Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits. Consistent with the proposed determination that EPA lacks statutory authority to establish requirements for glider vehicles and glider engines, the agency also believes it does not have discretionary authority to address any potential associated environmental justice effects.

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Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits
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List of Subjects in 40 CFR ~~Part~~ Parts 1037 and 1068

Environmental protection, Administrative practice and procedure, Air pollution control,
Confidential business information, ~~Incorporation by reference~~, Labeling, Motor vehicle
pollution, Reporting and recordkeeping requirements, Warranties.

Dated: _____

Dated:

E. Scott Pruitt,
Administrator.

*** E.O. 12866 Review – Draft – Do Not Cite, Quote, or Release During Review ***

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as set forth below.

PART 1037—CONTROL OF EMISSIONS FROM NEW HEAVY-DUTY MOTOR VEHICLES

1. —The authority for part 1037 continues to read as follows:

Authority: 42 U.S.C. 7401—7671q.

Subpart B – [Amended]

2. —Section 1037.150 is amended by ~~revising removing and reserving paragraph (t) to read~~ as follows:

§1037.150 _ Interim provisions.

* * * * *

(t) [Reserved]

* * * * *

Subpart G – [Amended]

§1037.635 _ [Removed]

*** E.O. 12866 Review – Draft – Do Not Cite, Quote, or Release During Review ***

3. ~~Remove §Section 1037.635 is removed.~~

Subpart I – [Amended]

4. Section 1037.801 is amended by removing the definitions “glider kit” and “glider vehicle” and revising the definitions of “manufacturer” and “new motor vehicle” to read as follows:

§ 1037.801 _ Definitions.

* * * * *

Manufacturer has the meaning given in section 216(1) of the Act. In general, this term includes any person who manufactures or assembles a vehicle (including a trailer or another incomplete vehicle) for sale in the United States or otherwise introduces a new motor vehicle into commerce in the United States. This includes importers who import vehicles for resale.

* * * * *

New motor vehicle has the meaning given in the Act. It generally means a motor vehicle meeting the criteria of either paragraph (1) or (2) of this definition. New motor vehicles may be complete or incomplete.

(1) A motor vehicle for which the ultimate purchaser has never received the equitable or legal title is a new motor vehicle. This kind of vehicle might commonly be thought of as “brand new” although a new motor vehicle may include previously used parts. Under this definition, the vehicle is new from the time it is produced until the ultimate purchaser receives the title or places it into service, whichever comes first.

*** E.O. 12866 Review – Draft – Do Not Cite, Quote, or Release During Review ***

(2) An imported heavy-duty motor vehicle originally produced after the 1969 model year is a new motor vehicle.

* * * * *

5. The authority for part 1068 continues to read as follows:

Authority: 42 U.S.C. 7401—7671q.

Subpart B – [Amended]

6. Section 1068.120 is amended by revising paragraph (f)(5) to read as follows:

§1068.120 Requirements for rebuilding engines.

* * * * *

(f) * * *

(5) The standard-setting part may apply further restrictions to situations involving installation of used engines to repower equipment.

* * * * *

**Post-Hearing Questions for the Record
Submitted to Hon. Neomi Rao
From Senator Heitkamp**

**Examining the Office of Information and Regulatory Affairs' Role in Reviewing Agency
Rulemaking
Thursday, April 12, 2018**

1. Executive Order 13771 has fundamentally altered the regulatory process at all Executive Agencies. As noted in a recent opinion piece, "Benefit-Cost Analysis Should Promote Rational Decisionmaking," for The Regulatory Review, by former OIRA Administrator Sally Katzen, the Executive Order "mentions 'costs' 17 times and never mentions benefits.'" In order to ensure a regulatory process that works for all Americans, it is important that there is a full accounting of costs and benefits for all agency actions – whether they be regulatory or deregulatory.
 - a. While Executive Order 13771 and Office of Management and Budget (OMB) Memorandum M-17-21 both note the continuation of Executive Order 12866 as the "primary governing EO regarding regulatory planning and review," there is concern that not enough attention is focused toward measuring foregone societal benefits which succumb to deregulatory actions. For the 67 Fiscal Year 2017 deregulatory efforts highlighted in the Fall 2017 *Unified Agenda of Regulatory and Deregulatory Actions*, what were the total estimated benefits forgone for each deregulatory effort?

Answer: Most of the 67 deregulatory actions issued pursuant to Executive Order (EO) 13771 were not significant and not subject to OIRA review. Significant deregulatory actions have to meet the same standards as regulatory actions under EO 12866, which means that the benefits of deregulation must substantially justify the costs. Accordingly, by definition, completed significant deregulatory actions have net benefits for society.
 - b. Included with the Fall 2017 *Unified Agenda of Regulatory and Deregulatory Actions* a link was included to a document titled "Accounting Methods for Calculating Costs under Executive Order 13771." This document lays out a system to create standardized calculation rates for costs, so that comparisons between the costs of regulatory actions and the cost savings of deregulatory actions can be made. Has OIRA provided agencies with directives to account for foregone benefits in the same manner?

Answer: The benefits and costs of regulatory actions will be converted to annual values using consistent assumptions. All regulatory and deregulatory actions

remain subject to EO 12866, under which the benefits of an action must justify its costs.

2. OMB Memorandum M-17-21 states that “[a]n ‘EO 13771 regulatory action’ is: (i) [a] significant regulatory action as defined in Section 3(f) of EO 12866 that has been finalized and that imposes total costs greater than zero; or (ii) A significant guidance document (e.g., significant interpretive guidance) reviewed by OIRA under the procedures of EO 12866 that has been finalized and that imposes total costs greater than zero.” The Memorandum further states that a deregulatory action are those that “ha[ve] total costs of less than zero” and are not limited to those as defined as significant under EO12866.

- a. How many non-significant final rules were published in the *Federal Register* between noon on January 20, 2017 and the close of FY2017?

Answer: OIRA does not review or track the number of rules that are not significant published by federal agencies in the *Federal Register*.

- b. What percentage of deregulatory efforts, not including those rules rescinded through the Congressional Review Act, were considered significant under Executive Order 12866?

Answer: Thirteen of the 67 deregulatory actions issued through the end of fiscal year 2017 were considered significant under EO 12866 and were not the result of a Congressional Review Act rescission.

3. OMB Memorandum M-17-21 defines a statutorily required rulemaking as a rule “for which Congress has provided by statute an explicit requirement and explicit time frame for rulemaking.” From the example given, it seems as though both the action and time frame requirements must be satisfied in order for the rule to be considered statutorily required. What is OMB’s legal justification to say that a regulatory action required by law, but that does not include a timeframe, is not a statutorily required regulation?

Answer: This definition is only for purposes of implementing EO 13771. In general, regulations may be required by statute even without an explicit time frame.

4. Under the newly signed Memorandum of Agreement between OIRA and Treasury, the Internal Revenue Service (IRS) will lose some ability to promulgate regulations and guidance without the review of OIRA. One issue that was not discussed in the agreement is if IRS rules and guidance documents will be subject to Executive Order 13771. Will IRS rules and guidance documents be subject to Executive Order 13771?

Answer: Yes. Executive Order 13771 applies to (1) a “significant” regulatory action under Section 3(f) of EO 12866 that has been finalized and imposes total costs greater than zero; and (2) a significant guidance document reviewed by OIRA under the procedures of EO 12866 that has been finalized and imposes total costs greater than zero.¹ This includes IRS regulations and guidance documents that fit in these categories.

¹ Office of Mgmt. & Budget, Memorandum No. M-17-21, “Guidance Implementing Executive Order 13771” (Apr 5, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

Question for the Record
“Reviewing the Office of Information and Regulatory Affairs”
April 12, 2018
Senate Homeland Security and Governmental Affairs Committee

Question for the Record to Administrator Neomi Rao from Senator Michael B. Enzi.

Administrator Rao, you mention in your testimony that the Administration had taken 67 deregulatory actions since 2017. Could you tell me how many of those were related to tax regulations?

Answer: There were four (EO 13771) deregulatory actions issued through fiscal year 2017 related to tax regulations. These are identified below.

- Dividend Equivalents from Sources within the United States
- IRS Notice 2017-36, One Year Delay in Application of IRS’s 385 rule (§ 1.385-2)
- Transactions Involving the Transfer of No Net Value
- Withholding on Payments of Certain Gambling Winnings

Post-Hearing Questions for the Record
Submitted to Administrator of the Office of Information and Regulatory Affairs (OIRA)
Neomi Rao
From Senator Kamala Harris

“Reviewing the Office of Information and Regulatory Affairs”

April 12, 2018

For OIRA Administrator Neomi Rao

On February 28, 2017, the Census Bureau released the 2015 National Content Test Race and Ethnicity Analysis Report. This report, among other things, presented the National Content Test research on how question format affects data on race and ethnicity. The National Content Test specifically tested the format required under current OMB standards that uses separate race and ethnicity questions (separate-question format) against two question formats that combined the race and ethnicity questions and offered either a write-in response or detailed checkboxes with the option to write-in a response. The report found that, “The results of this research indicate that the optimal question format is combined question with detailed checkboxes.”

On March 1, 2017, OMB released a Federal Register Notice requesting comments on the proposals that it received from the Federal Interagency Working Group for Research on Race and Ethnicity (Working Group) for revisions to OMB’s Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity. The Working Group sought comments in four areas, including the Working Group’s initial plan to “continue its review of current Federal agency practices to determine whether or how a revised question format might improve the collection, tabulation, and utility of race/ethnicity statistics for Federal programs and policies,” and the Working Group’s initial proposal “that a Middle Eastern or North African (MENA) classification be added to the standards.”

1. Did the Interagency Working Group for Research on Race and Ethnicity prepare a report after the release of the above-mentioned Federal Register Notice and submit it to the Office of Information and Regulatory Affairs? If a report was prepared, please provide it to the Committee.
2. In developing the 1997 Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, OMB responded to all comments received. 1,862 comments were submitted to the March 1, 2018 Federal Register Notice, including a number of comments from members of Congress. When will OMB respond to the comments it received in response to the March 01, 2017 Federal Register Notice?
3. In the March 1, 2017 Federal Register Notice, OMB wrote that it, “plans to announce its decision in mid-2017 so that revisions, if any, can be reflected in preparations for the 2020 Census.” When will OMB announce a decision on the Working Group’s report and proposal, including whether it will modify or reject any of the proposals?

4. The National Content Test Race and Ethnicity Analysis Report found that a combined-question format on the race/ethnicity question is the optimal question format. What is preventing the OIRA from changing the Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity to allow for the use of this combined-question format for the 2020 Census?
5. The Census Bureau's professional staff also recommended to senior officials, based on results from the 2015 NCT, that a new category in a combined race/ethnicity question, for persons of Middle Eastern/North African (MENA) ancestry/origin would improve the collection of accurate data on race and ethnicity for an increasingly diverse population. OMB's 2017 Federal Register notice included a proposal to add a MENA category and requested comments on this proposed change. In light of the Census Bureau's findings that a new MENA category would offer respondents choices that more accurately reflect the way they identify themselves, will OMB revise the Standards to include a new MENA category? If not, please explain the reasons for rejecting this proposal.

Answers 1-5: OMB issued updated race and ethnicity standards in 1997 for all Federal information collections to ensure that federal forms and surveys, including the Census, collect this information consistently. In September 2016, OMB announced in a Federal Register notice an effort to examine whether the standards needed to be updated. It did not contain specific proposals, but rather options for consideration. OMB subsequently issued a March 2017 Federal Register notice to solicit further input from the public. OMB is still considering issues raised by the March notice. At present, agencies should continue to follow the longstanding current race and ethnicity standards in their information collections.

**Post-Hearing Questions for the Record
Submitted to The Honorable Brent McIntosh
From Chairman James Lankford**

“Reviewing the Office of Information and Regulatory Affairs”
Thursday April 12, 2018

**United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs**

On Compliance with the Regulatory Flexibility Act:

Question: The Regulatory Flexibility Act (RFA) requires agencies to measure the economic impact of its regulation if it is likely to have a “significant economic impact on a substantial number of small entities.” In a 2016 report, GAO found “Treasury and IRS rarely perform a regulatory flexibility analysis assessing a regulation’s impact on small businesses and other small entities as generally required by the [RFA].” The Internal Revenue Manual (Section 32.1.5.4.7.5.4.3) states “to the extent the significant economic impact on a substantial number of small entities contained in the regulation flows directly from the underlying statute or other legal authority, a regulatory flexibility analysis is not required.”

Does the IRS intend to re-evaluate how the economic effect of a regulation is measured, particularly as it relates to how IRS regulations impact small businesses? Please fully explain why or why not.

Answer: The RFA generally requires that an agency complete a regulatory flexibility analysis when it (1) publishes a proposed or final rule that is required to be submitted for notice and comment under 5 U.S.C. § 553; or (2) publishes a proposed or final interpretive rule involving the internal revenue laws and the rule imposes a collection of information requirement on small entities. 5 U.S.C. §§603, 604. These RFA requirements do not apply if the agency certifies that the proposed or final rule will not “have a significant economic impact on a substantial number of small entities.” 5 U.S.C. § 605(b). The certification and a statement providing the factual basis for the certification must be published in the Federal Register at the time the proposed or final rule is published.

Section 32.1.5 of the Internal Revenue Manual provides detailed guidance on how the RFA applies, when a regulatory flexibility analysis is required, and examples of regulatory flexibility analyses. To assist in compliance with the RFA, the Manual also requires the completion of a RFA Checklist for every proposed or final regulation.

It has been the longstanding practice of the IRS to evaluate the economic impact of the regulation based on the regulation itself and not the statute that it is implementing, consistent with the statutory requirements of the RFA. In addition, the IRS submits all proposed and final regulations to the Chief Counsel for Advocacy of the U.S. Small Business Administration for comment on the impact of the regulations on small business pursuant to 26 U.S.C. § 7805(f).

Question: If a rule is determined not to have a “significant economic impact on a substantial number of small entities,” what analysis is performed to inform that decision?

Answer: The analytical process for the RFA is described in the Internal Revenue Manual at 32.1.5.4.7.5.4 and in the RFA Checklist at Exhibit 32.1.5-2. First, the IRS must determine whether the regulation involves the internal revenue laws, because if the regulation does not involve the internal revenue laws, it is not subject to RFA.

Second, the IRS determines whether the regulation is interpretive. If the regulation is interpretive, the RFA applies only if the regulation imposes a collection of information requirement on small entities.

Third, the IRS determines whether the regulation imposes a collection of information requirement on small entities. The term “collection of information requirement” is defined in the RFA and is synonymous to the term as defined in the Paperwork Reduction Act, 44 U.S.C. §3502. The RFA defines “small entities” to include businesses that satisfy the Small Business Administration’s size standards.

Fourth, the IRS determines whether the regulation imposes a significant economic impact on a substantial number of small entities. Whether the number of affected small entities is substantial is based on all relevant facts and circumstances, and the IRS obtains statistical and other data to determine the number of affected entities. The economic impact of the regulation is based on all relevant facts and circumstances, including the hours necessary to comply with the regulation and the costs of compliance.