

OFFICE OF INFORMATION AND REGULATORY AFFAIRS: FEDERAL REGULATIONS AND REGULATORY REFORM

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

SEPTEMBER 30, 2013

Serial No. 113-52

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://judiciary.house.gov>

U.S. GOVERNMENT PRINTING OFFICE

85-082 PDF

WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON THE JUDICIARY

BOB GOODLATTE, Virginia, *Chairman*

F. JAMES SENSENBRENNER, Jr., Wisconsin	JOHN CONYERS, JR., Michigan
HOWARD COBLE, North Carolina	JERROLD NADLER, New York
LAMAR SMITH, Texas	ROBERT C. "BOBBY" SCOTT, Virginia
STEVE CHABOT, Ohio	MELVIN L. WATT, North Carolina
SPENCER BACHUS, Alabama	ZOE LOFGREN, California
DARRELL E. ISSA, California	SHEILA JACKSON LEE, Texas
J. RANDY FORBES, Virginia	STEVE COHEN, Tennessee
STEVE KING, Iowa	HENRY C. "HANK" JOHNSON, JR., Georgia
TRENT FRANKS, Arizona	PEDRO R. PIERLUISI, Puerto Rico
LOUIE GOHMERT, Texas	JUDY CHU, California
JIM JORDAN, Ohio	TED DEUTCH, Florida
TED POE, Texas	LUIS V. GUTIERREZ, Illinois
JASON CHAFFETZ, Utah	KAREN BASS, California
TOM MARINO, Pennsylvania	CEDRIC RICHMOND, Louisiana
TREY GOWDY, South Carolina	SUZAN DELBENE, Washington
MARK AMODEI, Nevada	JOE GARCIA, Florida
RAUL LABRADOR, Idaho	HAKEEM JEFFRIES, New York
BLAKE FARENTHOLD, Texas	
GEORGE HOLDING, North Carolina	
DOUG COLLINS, Georgia	
RON DeSANTIS, FLORIDA	
JASON T. SMITH, Missouri	

SHELLEY HUSBAND, *Chief of Staff & General Counsel*
PERRY APELBAUM, *Minority Staff Director & Chief Counsel*

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

SPENCER BACHUS, Alabama, *Chairman*
BLAKE FARENTHOLD, Texas, *Vice-Chairman*

DARRELL E. ISSA, California	STEVE COHEN, Tennessee
TOM MARINO, Pennsylvania	HENRY C. "HANK" JOHNSON, JR., Georgia
GEORGE HOLDING, North Carolina	SUZAN DELBENE, Washington
DOUG COLLINS, Georgia	JOE GARCIA, Florida
JASON T. SMITH, Missouri	HAKEEM JEFFRIES, New York

DANIEL FLORES, *Chief Counsel*
JAMES PARK, *Minority Counsel*

CONTENTS

SEPTEMBER 30, 2013

	Page
OPENING STATEMENTS	
The Honorable Spencer Bachus, a Representative in Congress from the State of Alabama, and Chairman, Subcommittee on Regulatory Reform, Commercial and Antitrust Law	1
The Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law	4
The Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary	5
WITNESSES	
The Honorable Howard A. Shelanski, Administrator of the Office of Information and Regulatory Affairs	16
Oral Testimony	16
Prepared Statement	19
The Honorable C. Boyden Gray, Boyden Gray & Associates, PLLC	36
Oral Testimony	36
Prepared Statement	39
Sally Katzen, Visiting Professor at NYU School of Law; Senior Advisor, Podesta Group	52
Oral Testimony	52
Prepared Statement	54
John F. Morrall, III, Affiliated Senior Scholar, Mercatus Center, George Mason University	59
Oral Testimony	59
Prepared Statement	61
Nicole Riley, Virginia State Director, National Federation of Independent Business	67
Oral Testimony	67
Prepared Statement	69
LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING	
Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary	8
APPENDIX	
MATERIAL SUBMITTED FOR THE HEARING RECORD	
Prepared Statement of the Honorable Spencer Bachus, a Representative in Congress from the State of Alabama, and Chairman, Subcommittee on Regulatory Reform, Commercial and Antitrust Law	80
Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law	83
Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary	87

IV

	Page
Material submitted by the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary	94
Response to Questions for the Record from the Honorable Howard A. Shelanski, Administrator of the Office of Information and Regulatory Af- fairs	95
Response to Questions for the Record from the Honorable C. Boyden Gray, Boyden Gray & Associates, PLLC	107
Response to Questions for the Record from Sally Katzen, Visiting Professor at NYU School of Law; Senior Advisor, Podesta Group	113
Response to Questions for the Record from John F. Morrall, III, Affiliated Senior Scholar, Mercatus Center, George Mason University	121
Response to Questions for the Record from Nicole Riley, Virginia State Direc- tor, National Federation of Independent Business	124

**OFFICE OF INFORMATION AND REGULATORY
AFFAIRS: FEDERAL REGULATIONS AND
REGULATORY REFORM**

MONDAY, SEPTEMBER 30, 2013

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

The Subcommittee met, pursuant to call, at 4:04 p.m., in room 2141, Rayburn House Office Building, the Honorable Spencer Bachus (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Goodlatte, Holding, Collins, Cohen, DelBene, Garcia, and Jeffries.

Staff Present: (Majority) Daniel Huff, Counsel; Ashley Lewis, Clerk; Doug Petersen, Intern; Philip Swartzfager, Legislative Director for Rep. Bachus; Jonathan Nabavi, Legislative Director for Rep. Holding; Jennifer Lackey, Legislative Director for Rep. Collins; Justin Sok, Legislative Assistant for Rep. Smith of Missouri; and (Minority) Susan Jensen, Counsel.

Mr. BACHUS. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time, although we don't anticipate a recess—unless something wonderful happens, right?

Let me welcome Administrator Shelanski and all our witnesses to this oversight examining the Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform.

I think if there is anything that brings Members of both parties together is the importance of jobs and of creating more jobs in our economy. People call home ownership the American dream, but if you don't have a job you have very little way of ever affording a home. And to me, really, the American dream is having a good-paying job that allows you to provide for your family and for your financial future.

Unfortunately, today there are too many people looking for good work in our economy, and there are simply not enough jobs. And that is also impacting our budget. You know, we are talking about budget deficits and the national debt. We have doubled the food stamp program, the number of people on it in the past 5 or 6 years. We have done the same thing with Social Security Disability.

Those programs are growing exponentially and are really beginning to overwhelm our Federal budget, and all because people apparently can't find a job.

And that is where I think we can tie a part of that to regulations because I think we all agree, and I know Mr. Cohen said many times that regulations aren't bad and we shouldn't assume that they are bad. And a lot of regulations are good, they help safeguard our economy, our safety with our food regulations, and our health. But, then again, and really our past three Presidents have all identified in State of the Union addresses the need to cut back on Federal regulations.

When you have excessive regulations that is separated from a true consideration of cost and benefits, you can do real damage to the economy and people's lives. I remember in economics one of the first things you are taught is about GDP, and GDP is basically a function of capital plus workforce, some people say population, and then productivity. But capital is an essential part. And so to generate jobs you have to have capital and you have to have workforce, and any time you deny that economic working capital you cost jobs.

Now, what does capital have to do with—we know what it has to do with jobs, but what does it have to do with regulations? Well, consider this. A Small Business Administration report based on 2008 data—so this is rather dated—but it put the annual cost of Federal regulations at \$1.7 trillion, and at that time it was 14 percent of our economy. Now, we are not talking about State regulations, we are not talking about local regulations, we are not talking about taxes, we are not talking about health benefits. We are talking about simply the cost of complying with Federal regulations. According to the Small Business Administration, not some conservative think tank, not Republican talking points, the Small Business Administration.

Now, as I said, President Clinton, President Bush, and President Obama have all said we need to reduce excessive regulations. Well, have we done that? And let me say this: President Bush added to regulations, President Clinton more regulations. But how about President Obama? Well, as of January 2013 Congressional Budget Director Douglas Holtz-Eakin testified—and he testified before this Committee in January of this year—that the Obama administration had added \$520 billion worth of new regulations.

Now, that number doesn't include many of Dodd-Frank regulations because they are still being enacted. It doesn't include all the regulations under the Affordable Health Care Act or, as the President has started calling it, Obamacare. It doesn't include many of the regulations being proposed under the President's climate control agenda, which includes many dictates against carbon.

So you take all these regulations, well intended, but they cost money. They cost capital. And taking that capital out of the economy costs jobs. And I am sure there is nobody in this room that has not read that our GDP is growing by 2 percent, 2.5 percent, and that that is not sufficient to create new jobs, that we need to be growing at least maybe 2 percentage points higher. And if we do that, we will create jobs, we will bring in more taxes, it will positively affect Social Security Disability, the pension fund in a

positive way. It should cut down on our food stamp benefits and hundreds of other Federal programs.

And think about 14 percent cost of Federal regulations, if we could just add to the economy about 2 percent. Now, if all regulations cost the same, that would be one out of seven regulations. If you could just decrease the cost of regulations by 2 percent, you would actually add 2 percent to our GDP.

And that is where you come in, Administrator. As the new head of the Office of Information and Regulatory Affairs, you stand as one of the important checks and balances in the Federal regulatory system. You might say, well, Congressman, you also do, you pass the laws, and then the regulators write the regs. And I will tell you that even with the Administrative Practice Act and all these acts, I know in the last decade or 15 years we have only repealed one regulation, so one law, and that was ergonomics. So, unfortunately, the Congress just doesn't seem to ever repeal a law and the regulations that go with it.

Executive agencies must submit their proposed and final rules to your agency for approval before they can be published in the Federal Register. You have the authority to return a rule to the issuing agency if you find defects in the process or analysis.

With this power often comes great pressure from parties interested in regulations and from the issuing agencies themselves. Your office must be committed to fair and unbiased reviews. You are sort of like a college football referee, passions are high on both sides, but you have to make the call. Some of them may be unpopular with someone's agenda, but your job is to make the call and to get it right.

And in making those calls, if you find that a regulation can be less restrictive, less costly, the benefit does not outweigh the cost, you can actually help create jobs. You can give someone a job. And so my message to you is, when you think about these regulations, think about will it cost someone their job or will it result in a job not being created.

Accordingly, I look forward to examining your activities in detail, particularly on several key issues. What is being done to ensure that agency cost-benefit reports are not overstating benefits or inappropriately mixing direct benefits with secondary benefits? This has concerned me as I have reviewed the administration's rationale for additional carbon emission standards, which will have a severe impact on the use of coal.

Now, I am not as concerned about that as I am people working in the industry, of labor. Coal mining jobs are one of the highest paid professions in America, and I think you realize we need high-paying jobs. You have the responsibility with regard to the regulatory impact analysis process. An issue arising from that is what your agency is doing to make sure that real problems are being identified and whether the best regulatory approach is being used to address the problem.

If you don't know already, Administrator, I have a particular interest in whether independent agencies, like the Consumer Financial Protection Bureau, should be required to submit their rules to you for review. Presently they are not. They are exempt despite the

huge impact that their rules will have on the economy and on consumers. It is an agency in desperate need of oversight.

To conclude, if your agency exercises its authority properly, it can be a gatekeeper to ensure smart and effective regulations. We all know what the flip side of that is: regulatory overreach that both puts a drag on our economy, retards job creation and growth, and fails to provide commensurate environmental health and consumer benefits. That is a bad deal for the American people.

With that, I look forward to hearing from you and our second panel of experts on how our regulatory regime is functioning, how it can be improved, and how, if properly supervised, can create more jobs.

I now recognize the Ranking Member, Mr. Cohen of Tennessee, for his opening statement.

Mr. COHEN. Thank you, Mr. Chairman. And before I begin, I wish to make public the information that we shared this morning that, unfortunately, you are announcing you are going to be leaving Congress. Being on this Subcommittee and being ranking person, I have got to know you, and I value your service to the country and the Congress.

At times, I have seen heroic action on your part. Your background in Alabama and seeing civil rights has caused you to make the statements and take positions of moral rectitude concerning civil rights and legislation, and concerning basic human dignity which reaped, I think, some constituent abuse when you stood on the right side, which I think, if I read correctly, you based on your good values from your position on immigration.

So you have got the kind of moral rectitude this Congress needs and that would make us a better Congress if you stayed. So I regret that you are leaving, but I have enjoyed the experience and will continue for the next year and a half or so.

Mr. BACHUS. I will be here for the next year and a half. I am not retiring as much as I am not seeking reelection. So there is a difference. But I very much appreciate those remarks. And my father, if he were alive today, I am very proud of his role in the civil rights movement under great financial penalty at times to his business. But thank you.

Mr. COHEN. You are welcome, sir. It has been a pleasure and will continue to be so.

Now to OIRA, one of our particular areas of jurisdiction. And, Mr. Shelanski, you are new to the game here, but you are an outstanding economist, and for that reason, as I understand it, your nomination went through the Senate without any controversy and I think a lot of plaudits from both sides of the aisle. I commend you for that.

Presidents, as the Chairman has said, Clinton, Bush the younger, and President Obama, have all said basically the same thing about reducing regulations, making them more efficient, harmonizing rules, et cetera. And I know that your predecessor, Mr. Sunstein, attempted to do that, and I am sure you will, too, and get rid of the bad ones, the outmoded ones, refine them, and give us, like Tide, a new, improved Tide, and that is what we need.

There have been efforts to modernize. But when we come here, and as the Chairman said, I always say that the regulations have

benefits, too, and there is a lot of good in regulations. They are not necessarily evil. They do keep our food safe, they keep our airplanes in safe condition, flying and landing and all those things that they need to do, and a lot of regulations keep our financial world safer and will continue to do that.

There is a difference among some of us in the way we look at the benefits from regulations. And my home paper, the Commercial Appeal, had an article this year that was published, a columnist by the name of Doyle McManus, and he cited Cass Sunstein and said that in President Obama's first 4 years in office he issued fewer new Federal regulations than any of the four Presidents who came before him, including President Reagan. I take Mr. McManus' article as being accurate. Moreover, the op-ed noted President Obama has revoked hundreds of outmoded rules that produce savings for government, businesses, and consumers that will add up to billions.

So I look forward to learning about the continuing efforts today that the President has pushed to have agencies improve and modernize the existing regulatory system. The cost of regulations, there is a cost, but there is a benefit, and according to the Office of Management and Budget in their 2012 draft report on the benefits and costs of Federal regulations, the net benefits of regulations in the first 3 years of this administration totaled \$91 billion. That is 25 times greater than during the comparable period under Bush the younger. Moreover, fewer final rules have been reviewed by OIRA and issued by executive agencies during the first 3 years of this administration than in the comparable time during the second Bush administration.

Similarly, the 2013 draft report to Congress noted the benefits of Federal regulations between fiscal year 2002 and 2012, a 10-year period, ranged from \$193 billion to \$800 billion in benefits as against \$57 billion to \$84 billion in costs. That is a pretty nice ratio of benefits over costs.

So I would like to thank you for your service to our country in this important position, and I would like to know from all of our witnesses, including the second panel, what steps Congress can take to help OIRA do its job, including whether Congress should provide OIRA with more resources so that you can be even more effective in streamlining regulations.

I thank our witnesses for being here today. And more importantly, I thank Chairman Bachus for his many times of showing leadership and courage in this Congress.

Yield back the balance of my time.

Mr. BACHUS. I thank you, Mr. Cohen.

I would now like to recognize the Chairman of the full Committee, Chairman Bob Goodlatte of Virginia, for his opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman, and I want to thank you for holding this hearing. I want to join the Ranking Member in congratulating you, thanking you for your many years of service. We entered the Congress at the same time, just a few years ago, and your service has been very meaningful for the people of your district, I have no doubt, but also for people who work here with you, and I thank you for that.

When you served with great distinction as Chairman of the Financial Services Committee, and as we require on our side of the aisle, you had to give that up because of term limits, I was absolutely delighted that you agreed to come back to this Committee and take the Chairmanship of this Subcommittee, and you will do great work. You already have, and you will for the next 15 or so months, and we will look forward to getting a lot done during that time. But we will also miss you because of your good work, your demeanor, your honesty, your character, and your determination to do the right thing. So thank you very much for that service.

I also want to make mention, since I may—I have to attend a couple other things—I may after I give my opening statement, I won't be here necessarily when the second panel is introduced, and I do want to welcome one of my—she now lives outside the district, but she is a native of the 6th District of Virginia and someone who has been very close to my office and to some of the key people in my office for many, many years. And that is Nicole Riley, who is originally from Augusta County, Virginia, and who has served as the State director of the NFIB since 2011. She has also been educated in the 6th District of Virginia, which is a very key thing, at Roanoke College, which is now in the 9th District but was when she was educated there, and she also was a legislative assistant to my good friend, Delegate Steve Landes, and she was a legislative policy analyst under Attorney General Jerry Kilgore, and a special assistant for legislative affairs when current Governor Bob McDonnell was our attorney general. So she comes to us with a great deal of experience and very capable in representing the interests of NFIB members.

Let me turn to the subject that she and others will be testifying in a moment. The Office of Information and Regulatory Affairs, or OIRA, has been called the most powerful Federal agency that most people have never heard of. OIRA is responsible for overseeing the development and promulgation of agency regulations. In particular, OIRA must review required cost-benefit analyses of economically significant rules, which are those rules having an annual effect on the economy of \$100 million or more.

Such cost-benefit analysis is critical because, since early in the Obama administration, many have attributed the economy's lack of recovery in large part to increases in regulation and regulatory uncertainty. Even the administration acknowledges the problem. In a January 18, 2011, Wall Street Journal op-ed, President Obama stated that overregulation "stifles innovation," and has a, "chilling effect on growth and jobs." The President has even issued a number of executive orders and memoranda that address regulatory burdens. These include Executive Order 13563, which directs agencies to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs."

While these executive orders look good on paper, it appears that it is all the Obama administration is willing to do. I want to know what OIRA is doing to ensure agencies actually implement the stated principles.

Unfortunately, there are grounds for concern. Roughly two-thirds of the claimed benefits of economically significant final rules OIRA reviewed in 2010 were actually from secondary effects that were

not the statutorily authorized targets of the rules. What is OIRA doing to make sure that the bulk of the benefits agencies claim for their rules arise specifically out of improving the conditions Congress authorized those agencies to address by regulation?

Similarly, in May of 2013 the administration quietly increased its estimate of the benefit of reducing carbon from the atmosphere from \$21 to \$35 per metric ton. That will dramatically increase agency estimates of benefits from regulations limiting emissions. However, there are significant concerns that the administration's new figure is substantively flawed and that the process for issuing it was not transparent. The Government Accountability Office is investigating.

Administrator Shelanski joined OIRA at a critical time. Job creation continues to fall short of expectations. In August 2013 employers added only 169,000 jobs to payrolls, less than expected, and gains for June and July were revised downward. The unemployment rate ticked down to 7.3 percent, but only because fewer people are looking for work. Even more worrisome, the labor participation rate is the lowest it has been in roughly 40 years. The economy as a whole also remains sluggish. On September 18, 2013, the Federal Reserve lowered its economic growth forecast for 2013 and 2014.

In light of this worrisome data, I am particularly interested in hearing how Administrator Shelanski plans to ensure the administration's actions match its rhetoric about reducing the regulatory burden on the small businesses that form the backbone of our economy. The National Federation of Independent Business surveys; government regulations are consistently a top concern for small-business owners whose compliance costs are also higher than those of larger businesses. We cannot afford to regulate small-business job creators out of business.

To this end, the OIRA administrator holds a number of tools that can be powerful if he chooses to use them. If an agency's cost-benefit analysis is improper or if the agency fails to consider alternatives or account for the impacts on small business, OIRA can return the regulation to the agency so it does not take effect. During the Bush administration, OIRA sent 27 return letters. During the Obama administration, though, OIRA has sent only one.

OIRA's zealous enforcement of the cost-benefit analysis, least burdensome alternative, and other requirements to regulations under consideration by the executive branch will help to prevent unnecessary and excessively costly regulations that harm the economy and kill jobs. And that is why I am pleased Subcommittee Chairman Bachus has called this oversight hearing, and I look forward to Administrator Shelanski's testimony, as well as that of our second panel of distinguished experts. And I thank you and yield back.

Mr. BACHUS. Thank you, Chairman.

Now recognize the Ranking Member for a unanimous consent request.

Mr. COHEN. Thank you, sir. I would ask unanimous consent to enter into the record the statement of Mr. Conyers.

Mr. BACHUS. Without objection, the full Ranking Member's statement, the gentleman from Michigan, John Conyers' statement will be added to the record.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers, Jr. for the Hearing on "The Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform" Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law

**Monday, September 30, 2013, at 4:00 pm
2141 Rayburn House Office Building**

I want to begin by congratulating Mr. Shelanski on his recent appointment as OIRA Administrator. He brings to this critical position a wealth of background and understanding, which should help improve the regulatory process.

Nevertheless, although your tenure is less than 3 months, I do want to hear your thoughts regarding several matters.

One of these matters pertains to the fact that my colleagues on the other side of the aisle are convinced that our Nation's regulatory system is in serious need of repair.

To that end, they have pushed through this Committee a series of anti-regulatory bills, all of which are substantially identical to measures considered in the last Congress and that were the subject of veto threats by the Administration.

Take, for example, the so-called REINS Act, which would require *both* Houses of Congress *and* the President to approve *all* new major rules *before* they can take effect.

If the Congress cannot agree to keep the federal government funded or to prevent it from violating the debt limit, I do not see how it could reach agreement on a broad array of rules, some of which will undoubtedly be controversial.

In effect, the REINS Act would essentially be a procedural “chokehold” on Federal agency rulemaking so that essential public safety, health, and environmental protections that business interests oppose do not go into effect.

Although this bill is intended to “rein-in” the Administration’s control over rulemaking, my friends on the other side of the aisle also are pursuing a bill – known as the Regulatory Accountability Act – that would give *more* control to the Administration over the rulemaking process. And, it would require agencies to ignore prohibitions in other statutes, such as the Clean Water Act and the Clean Air Act, against using cost-benefit analysis.

Yet another bill, the so-called Sunshine for Regulatory Decrees and Settlements Act, would allow virtually anybody who claims to be affected by the proposed decree or settlement to intervene in the court proceeding. Thus, for example, if the settlement pertains to the Clean Air Act, the bill would conceivably allow anyone who breathes air to intervene in the court case.

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

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

I believe all of us on this Subcommittee can agree that good regulations are necessary and that unnecessary regulations are burdensome to all.

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

This accomplishment is all the more remarkable in light of the fact that this Administration inherited the most devastating economic crisis since the Great Depression, which was largely the result of lax regulation.

Nevertheless, in response to concerns voiced by small businesses and others, the Administration has issued a series of executive orders intended to reduce regulatory burdens, by –

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

Do you have any additional suggestions on how OIRA can improve the regulatory process?

Finally, I want to hear from Mr. Shelanski as well as from each of our other witnesses about other ways we can accomplish *real* regulatory reform.

For example, OIRA has been chronically understaffed and underfunded for years. I note that one of the few areas of agreement among the witnesses on the second panel – namely former OIRA Administrator Sally Katzen and Mr. Morrall with the Mercatus Center – is that OIRA needs more resources.

Do you concur?

Could the lack of adequate resources possibly explain, at least in part, the backlog of rules under review at your agency?

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

Mr. BACHUS. And now we have our witness introduction for the first panel. I am told the Judiciary Committee, unlike Financial Services, introduces just one panel at a time, so I want to honor that approach. But we do have a very esteemed second panel, and we are very much looking forward to that.

I do want to introduce a member of the audience, the chairman of the Administrative Conference of the United States, Paul Verkuil.

Would you stand up, Mr. Verkuil? We are honored to have you. And so thank you and your staff.

At this time I will make an introduction of our first panelist. Howard Shelanski is the administrator of the Office of Information and Regulatory Affairs, the Office of Management and Budget. He was previously the Director of the Bureau of Economics at the Federal Trade Commission and a professor at Georgetown University Law School. From 2011 to 2012 he was of-counsel to the law firm of Davis Polk & Wardwell. He was also the Deputy Director for Antitrust in the FTC's Bureau of Economics from 2009 to 2011.

Mr. Shelanski was on the faculty at the University of California at Berkeley from 1997 to 2009. He served as Chief Economist of the Federal Communications Commission from 1999 to 2000 and as senior economist for the President's Council on Economic Advisers at the White House from 1998 to 1999. He was an associate with Kellogg, Huber, Hansen, Todd & Evans from 1985 to 1997, served as a clerk for Justice Antonin Scalia of the United States Supreme Court, for Judge Louis Pollak of the U.S. District Court in Philadelphia, and for Judge Stephen F. Williams of the U.S. Court of Appeals here in D.C. Mr. Shelanski received his B.A. from Haverford College and a J.D. and Ph.D. from the University of California, Berkeley.

Welcome to the hearing. And, Administrator, you are welcome to give an opening statement. And we are not going to time you as far as 5 minutes. If it is 6 minutes or 7 minutes, you are fine. So don't let the lights bother you.

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

Mr. SHELANSKI. Thank you very much, sir.

Mr. BACHUS. That is one procedure I violate, by giving people a little more time.

Mr. SHELANSKI. Thank you very much. Chairman Bachus, Ranking Member Cohen, Chairman Goodlatte, and Members of the Subcommittee, thank you for the invitation to appear before you today. I am pleased to have this opportunity to discuss recent developments at OIRA and my priorities for the Office going forward.

In the roughly 12 weeks since I took office in July, it has been my privilege to work with the excellent and dedicated OIRA staff, the first-rate leadership team at OMB, and our hard-working colleagues throughout the executive branch. Together we are working to achieve the administration's goals of promoting economic growth and employment while simultaneously protecting the health, safety, and welfare of Americans now and into the future.

OIRA has a broad portfolio that extends beyond regulatory review. For example, under the Paperwork Reduction Act, the Office ensures that information collection by the Federal Government is not unnecessarily burdensome. OIRA also provides guidance on privacy policy to Federal agencies and oversees the implementation of government-wide information quality and statistical standards. One of my objectives as Administrator is to work with colleagues across the government to ensure that Federal policy in each of these areas adapts to the ever-changing technological environment while remaining clear and consistent with the law.

To be sure, the largest area of OIRA's work is the review of regulations promulgated by executive branch departments and agencies. A set of executive orders establishes the principles and procedures for OIRA's regulatory reviews. Most significantly, as Chairman Bachus mentioned, Executive Order 12866 and Executive Order 13563 delineate processes for regulatory review and establish standards and analytic requirements for rulemaking by departments and agencies. And importantly, Executive Orders 13563 and 13610 focus on the reduction of regulatory burdens through the retrospective review of existing rules.

My priorities as OIRA administrator are directly rooted in the relevant executive orders. One such priority is to increase the predictability of the regulatory review process by improving the timeliness and transparency of OIRA's key functions. In that regard, I have committed to publishing the Unified Agenda and Regulatory Plan of agency rulemaking activity twice each year. OIRA staff have been working closely with all Federal regulatory agencies toward the timely publication of the fall plan and agenda.

Of similar importance to clarity and certainty of the regulatory environment is that rules, both new rules and those already under review, move through OIRA as efficiently as resource constraints and rigorous analysis permit. It has been a top priority of mine since coming to OIRA to reduce the frequency of extended regulatory reviews and to work with agencies on rules that are already under extended review.

While OIRA's consideration of Federal regulations must first and foremost uphold the standards of analysis that the executive orders establish, unnecessary delays in review are harmful to everyone: to those who are denied the benefits of regulation, to those wishing to comment on proposed rules and influence policy, and to those who must plan for any changes the regulations require of them. I am pleased to report that, thanks to the tireless work of OIRA staff in the months before and since my arrival, we have more than cut in half the number of rules that were under review for more than 200 days, and the number of rules under review for more than 90 days is down considerably and continues to fall.

While increasing the predictability of the regulatory process through timely review of rules and publication of regulatory plans and agendas is essential, the executive orders also make clear that removal of unnecessary burdens is an essential element of the regulatory process. As I have previously testified, ensuring flexibility for small businesses and reducing regulatory burdens for everyone through the retrospective review process are high priorities for me as Administrator. Retrospective review is a crucial way to ensure

that our regulatory system is modern, streamlined, and does not impose unnecessary burdens on the American public. It can also provide an opportunity to improve regulations already on the books.

As I testified in July, our retrospective review efforts to that point had already produced significant results, bringing near-term cost savings of more than \$10 billion to the U.S. economy. As agencies move forward with their current plans, OIRA will work with them to achieve even greater gains. Ensuring follow-through on such plans will be one of our key objectives going forward.

Finally, OIRA has important responsibilities in the area of international regulatory cooperation under Executive Order 13609. We have made progress in a number of areas with our international partners and will continue to further our regulatory international mission in coordination with the Department of State and USTR. Regulatory cooperation benefits both businesses and consumers by promoting consistent standards and procedures across borders and by preserving safety and welfare while promoting competitiveness here and abroad.

In conclusion, the many activities of government bring great benefits to Americans but can also carry costs. It is therefore critical that paperwork and information collection are not unduly burdensome, that Federal agencies ensure privacy and use only high quality data, and that regulation protects health, safety, and welfare in a manner that is consistent with job creation and economic growth. These are central objectives of this administration and are the main tasks of OIRA.

It is my honor and privilege to serve as OIRA's Administrator as we continue to meet these challenges. Thank you again for the opportunity to appear before the Committee today. I look forward to answering your questions.

Mr. BACHUS. Thank you, Administrator.

[The prepared statement of Mr. Shelanski follows:]

[EMBARGOED UNTIL 4:00 PM, SEPTEMBER 30]

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503
www.whitehouse.gov/omb**

**TESTIMONY OF HOWARD SHELANSKI
ADMINISTRATOR FOR THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
UNITED STATES HOUSE OF REPRESENTATIVES**

September 30, 2013

Chairman Bachus, Ranking Member Cohen, and members of the Subcommittee:

Thank you for the invitation to appear before you today. I am pleased to have this opportunity to discuss recent developments at the Office of Information and Regulatory Affairs (OIRA) and my priorities for OIRA going forward.

I am honored that President Obama nominated me, and that the Senate confirmed me, to be the Administrator of OIRA. In the roughly 12 weeks since I took office in July, it has been my privilege to work with the excellent and dedicated OIRA staff, the first-rate leadership team at the Office of Management and Budget under Director Sylvia Burwell, and our hardworking colleagues throughout the Executive Branch. Together we are working to achieve the Administration's goals of promoting economic growth and employment while simultaneously protecting the health, safety, and welfare of Americans now and into the future.

OIRA has a broad portfolio that extends beyond regulatory review. For example, under the Paperwork Reduction Act, the Office is responsible for reviewing collections of information by the Federal Government to ensure that they are not unnecessarily burdensome. OIRA also provides guidance on privacy policy to Federal agencies and oversees the implementation of government-wide information quality and statistical standards. One of my objectives as

Administrator is to work with colleagues across the Government to ensure that Federal policy in each of these areas adapts to the ever-changing technological environment while remaining clear and consistent with applicable law.

To be sure, the largest area of OIRA's work is the review of regulations promulgated by Executive Branch departments and agencies. A set of Executive Orders establishes the principles and procedures for OIRA's regulatory reviews. Most significantly, E.O. 12866 and E.O. 13563 delineate processes for regulatory review and establish standards and analytic requirements for rulemaking by departments and agencies.

Other important Executive Orders focus on the reduction of regulatory burdens through the retrospective review of existing rules (EO 13563 and 13610), and on international regulatory cooperation (EO 13609).

My priorities as OIRA Administrator are directly rooted in the relevant Executive Orders. One such priority is to increase the predictability of the regulatory review process by improving the timeliness and transparency of OIRA's key functions. In that regard, I have committed to publishing the Unified Agenda and Regulatory Plan for agency rulemaking activity twice each year. OIRA staff have been working closely with all Federal regulatory agencies toward the timely publication of the fall plan and agenda.

Of similar importance to clarity and certainty of the regulatory environment is that rules—both new rules and those already under review—move through OIRA as efficiently as resource constraints and rigorous analysis permit. It has been a top priority of mine since coming to OIRA to reduce the frequency of extended regulatory reviews and to work with agencies on rules that are already under extended review. While OIRA's consideration of Federal regulations must first and foremost uphold the standards of analysis that the Executive Orders establish, unnecessary delays in review are harmful to everyone: to those who are denied the benefits of regulation, to those wishing to comment on proposed rules and influence policy, and to those who must plan for any changes the regulations require of them. I am pleased to report that, thanks to the tireless work of OIRA staff in the months before and since my arrival, we have

more than cut in half the number of rules that were under review for more than 200 days, and the number of rules under review for more than 90 days is down considerably and continues to fall.

While increasing the predictability of the regulatory process through timely review of rules and publication of regulatory plans and agendas is essential, the Executive Orders also make clear that flexibility and removal of unnecessary burdens are essential elements of the Federal rulemaking process. As I have previously testified, ensuring regulatory flexibility for small businesses and reducing regulatory burdens for everyone through the retrospective review process are high priorities for me as Administrator.

Retrospective review is a crucial way to ensure that our regulatory system is modern, streamlined, and does not impose unnecessary burdens on the American public. Even regulations that were well crafted when first promulgated can become unnecessary or excessively burdensome over time and with changing conditions. Retrospective review of regulations on the books helps to ensure that those regulations are continuing to help promote the safety, health, welfare, and well-being of Americans without imposing unnecessary costs.

Agencies filed their most recent retrospective review plans with OIRA in July. OIRA completed its review of those plans a few weeks later and agencies have posted them on their websites. As I testified in July, our retrospective review efforts to that point had already produced significant results, bringing near-term cost savings of more than \$10 billion to the US economy. As agencies move forward with their current plans, OIRA will work with them to achieve even greater gains. Many of the retrospective review efforts particularly benefit small businesses. The Department of Transportation's retrospective review plan alone identifies over two dozen initiatives to save money for small businesses and local governments. The institutionalization of retrospective review to ensure follow-through on such plans will be one of our key objectives moving forward.

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

High Level Regulatory Cooperation Council. OIRA has also furthered its international regulatory mission in coordination with the Department of State and USTR, including activities in support of the Transatlantic Trade and Investment Partnership (TTIP) discussion of regulatory cooperation between the US and the European Union. Regulatory cooperation benefits both businesses and consumers by promoting consistent standards and procedures across borders, and by preserving safety and welfare while promoting competitiveness here and abroad. While the international role of OIRA is small compared to its key missions of regulatory review and implementing Federal information policy, it is nonetheless an important effort going forward.

In conclusion, the many activities of government bring great benefits to Americans but can also carry costs. It is therefore critical to ensure that paperwork and information collection do not impose undue burdens; that Federal agencies ensure privacy and use only high-quality data; and that regulation protects health, safety and welfare in a manner that is consistent with job creation and economic growth. These are central objectives of this Administration and are the main tasks of OIRA. It is my honor and privilege to serve as OIRA's Administrator as we continue to meet these challenges.

Thank you again for the opportunity to appear before the committee today. I look forward to answering your questions.

Mr. BACHUS. And at this time I recognize the gentleman from North Carolina, Mr. Holding. We have a U.S. Attorney be your first examiner.

Mr. HOLDING. Well, thank you, Mr. Chairman.

And first off I would be remiss if I didn't thank the Chairman for not only his leadership, but his friendship. Although I am a new Member of Congress and a new Member of this Committee, the Chairman has taken the time to impart to me more than a bit of his wisdom.

And I appreciate your friendship and look forward to that continuing in all the endeavors that you have for the future.

As Chairman Goodlatte said earlier, pointed out that it was in January 18, 2011, in a Wall Street Journal op-ed that President Obama stated that overregulation stifles innovation and has a chilling effect on growth and jobs. I assume you agree with that statement?

Mr. SHELANSKI. Yes, sir, I would believe that overregulation would certainly have that effect.

Mr. HOLDING. Turning to the Unified Agenda and Regulatory Plan, I applaud your commitment to complying with the law and publishing that on a regular basis as specified. During the 12 weeks or so that you said that you have been on the job, I assume one of the first things that you have done is kind of do an analysis of where OIRA is, what resources do you have at hand, what shortcomings do you have. And I would assume that you have looked at the failure to publish the Unified Agenda and Regulatory Plan in the past in a timely fashion. And as you have done that analysis, where are the shortcomings in OIRA that have caused this failing?

Mr. SHELANSKI. Thank you very much, Congressman Holding. The OIRA staff is an absolutely first-rate staff that is dealing with an enormous set of responsibilities, as outlined in my opening statement, and indeed the opening statements that we heard earlier this afternoon. I don't see any shortcomings in the talent, the commitment, the ability of OIRA as a whole or, indeed, of any member of the staff. They are all extremely diligent, working very hard to ensure that the executive orders are observed.

My priority in arriving in early July as Administrator was simply to make sure that nothing from the past would be an impediment moving forward and that would enable me to uphold the commitment I made during my confirmation hearings to ensure that that Unified Regulatory Plan and Agenda did get published twice a year.

As to what may have happened in the past, I was not there at OIRA, and I was not particularly interested, to be honest, about what exactly happened at that time. What I was interested in finding out was whether there was anything at the agency that would prevent me from moving forward and ensuring publication twice each year, and indeed I found nothing that would be an impediment to that task.

Mr. HOLDING. Well, I would recommend to you that you find out what was the impediment in the past to ensure that you have it identified. It may be there right before your very eyes, but since you haven't identified what the impediment was in the past, it is kind of hard to fix it in the future.

You know, I feel very strongly that when the President failed to release the Unified Agenda and never released one until December of 2012, after the election, I think that was very unfair to voters. I think it is unfair because they were not told what regulations the President planned to do when he was—if he were to be reelected. And I believe had they known what regulations that the President had in mind of implementing after his reelection, it may very well have impacted the vote. So I think you have got a problem there, and if you are not undertaking the steps to identify what that problem was just a year ago, I think you are making a mistake.

Turning toward transparency, you know, elaborate for me the importance to businesses large and small, you know, that they have a clear outlook as to what regulations are coming down the pike and looking at them, what they are looking at as they make determinations about what business plans they want to implement. You know, speak to me a little bit about transparency and its importance.

Mr. SHELANSKI. Well, thank you very much. This actually relates to one of the issues with the Unified Regulatory Agenda.

One thing that has happened in the past year and a half, really because of the good work and the attention that OIRA staff has dedicated to the issue, is that what is published in that Unified Plan and Agenda is far better than what was published in the past. We have been working very closely with agencies to ensure that what they do publish in terms of their plans going forward actually aligns reasonably closely with what they are publishing, what they are, in fact, doing. That way businesses, small and large, will be able to identify real targets, will be able to identify real issues on which they want to comment.

In fact, if agencies just put everything they are thinking about on the Regulatory Plan and Agenda, that may look like transparency, but it is obfuscation. It is just like what happens in a discovery dispute when somebody pulls 27 semis up in front and dumps all those documents on your lap and you have got to go hunt through for the things that are really relevant.

Well, we have tried to make the Unified Regulatory Plan and Agenda something that is clearer, by being more rigorous, better, by working more closely with the agencies, so people will know what the real plans are. And that is actually something that during whatever happened in the past to delay the publication, there were a lot of improvements that occurred in the process and in what the publication would be. So I think that certainly helps transparency.

Mr. HOLDING. Thank you, Mr. Chairman. I yield back.

Mr. BACHUS. Thank you.

Mr. Cohen.

Mr. COHEN. Thank you, sir.

Are you familiar with a group called the Heritage Foundation?

Mr. SHELANSKI. Yes, sir, I am.

Mr. COHEN. The Heritage Foundation issued a report last year that claimed that the Obama administration during its first 3 years, and I quote the report, “unleashed 106 new major regulations that increased regulatory burdens by more than \$46 billion annually, 5 times the amount imposed by George W. Bush’s administration in his first 3 years.” Now, that quote is contrary to what

I said in my opening statement. Are you familiar with that position that the Heritage Foundation took?

Mr. SHELANSKI. I am not familiar with that specific report, but I have heard such numbers quoted.

Mr. COHEN. And how would you respond to such numbers that are quoted by the Heritage Foundation?

Mr. SHELANSKI. Well, thank you very much for that question, Ranking Member Cohen, because I think it gets to an interesting issue.

Over a period of years one can come up with many different ways to count the costs and benefits of regulation, many different ways to compare regulation across administrations, pages of regulations, costs of proposed rules, final rules. It is often hard to know what go into these different calculations.

What I am interested in is this: making sure not that we only count the costs of regulation, but that we pay attention to whether those regulations were rigorously developed and reviewed by OIRA in where such review is appropriate, to ensure that they are bringing benefits that exceed those costs. And so simply pointing at the cost side of regulation and what might often be very questionable estimates of the cost side of regulation does not tell the story of why agencies regulate and of the benefits that may be brought.

And so what I am interested in when I look at regulatory tallies is, sure, I care what the costs are. You can come to a point where the cumulative costs imposed on a particular sector of the economy really are creating difficulties for businesses, for consumers, job creation, economic growth. That needs to be paid attention to. But we also need to look at what the purpose of those rules is. And if those rules are bringing substantial benefits, benefits that themselves reduce costs currently and into the future, rules that themselves may in fact safeguard and stabilize the economic system going forward, I think that we have to look very carefully at what we are getting for those costs and not simply look at the cost side.

Mr. COHEN. Are you familiar with the Crain study?

Mr. SHELANSKI. Yes, I am familiar with the Crain and Crain study.

Mr. COHEN. And would you put that on a pedestal or would you put it underneath a pedestal?

Mr. SHELANSKI. I am not sure I can say in polite company, sir, where I would put that study. But let me say pretty clearly that that study has been, I think, pretty thoroughly refuted by everybody who has looked at it. In fact, the Small Business Administration, I don't see them relying on that study. It was not an official report of the SBA. It was done by two outside consultants. There are a variety of methodological problems with that study that I won't take the time to go into here. Others have, Congressional Research Service, I think GAO. One of those organizations put out an analysis thoroughly debunking that study. There have been a number of pieces that have pointed out the analytical flaws with it. So, no, I put that—

Mr. COHEN. Somewhere beneath the Saturday Evening Post, maybe?

Mr. SHELANSKI. Yes. So my view is that that study is not one that I take particularly seriously, and I actually think it is very

unhelpful because it tells, I think, a story that is very frightening until one looks at the fact that the numbers are completely concocted and have very little basis in any real data, any real science, any real analysis.

Mr. COHEN. Well, we do have a problem with science here, we are still working on evolution, we are working on climate change, we are working on economic relativity, shutdowns, and debt ceilings. So it is an area where we need improvement.

Are you aware of any empirical evidence linking jobs—

Mr. BACHUS. Did you say evolution?

Mr. COHEN. There are some people who have questioned evolution on your side of the aisle.

Mr. BACHUS. Oh, oh. I didn't know if we had any rules on evolution.

Mr. COHEN. No, it is beyond our Subcommittee. It is in our larger universe, hemisphere of science and the lack of faith therein.

Are you aware of any empirical evidence linking jobs and regulations?

Mr. SHELANSKI. There are studies that have attempted to link job effects to regulation, but the link between any particular regulation and jobs, or indeed between our entire regulatory system and GDP and jobs, is a very tenuous one, and I am not aware of any study that has strong consensus in the economic community.

Mr. COHEN. If I may ask one last question. Your agency has suffered through sequestration, as has the rest of government. How has sequestration affected your agency, and if you were not affected, if you had more money, do you think you could refine more rules and create more productivity?

Mr. SHELANSKI. Thank you very much for that question. Sequestration is hurting all government agencies. OIRA is not unique in this respect. And indeed OMB as an organization itself is just doing a tremendous amount in every aspect on the budget side, the management side in my regulatory office, it is doing a lot with greatly pared-down resources. I can't say for certain, but we may well be at historic staffing lows in OIRA and indeed OMB-wide.

It would certainly be a benefit to all of the Office of Management and Budget if we had more resources office-wide with which to do our work, and I at OIRA would certainly like to have my share of those additional resources so that we could do deeper and further work and move more quickly in providing clarity to the regulatory environment.

Mr. COHEN. Thank you. I yield back the proverbial nonexistent balance of my time.

Mr. BACHUS. Thank you.

Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate you, and I appreciate also, like my friend from North Carolina, your wisdom and patience as we learn the ropes, and I thank you for your service that will span beyond your years in this Chair.

Mr. BACHUS. Thank you. This is actually better than a funeral.

Mr. COLLINS. Yeah, you actually get to hear it. I have done plenty of those in my life, too.

Mr. COHEN. Wait until you get to Ms. DelBene, she is going to say wonderful things about you.

Mr. COLLINS. I love it, I love it.

Again, thank you for being here. I think there is a lot more that of course we can get into, and we will look forward in my office working with you as we go forward. I want to follow up briefly, I have a few more questions, I want to follow up briefly from the gentleman from North Carolina's question concerning the guidelines. One of the things that you talk about in your opening statement, but also that you had listed out and had sent a memo to agencies regarding publishing of the fall agenda. And I think the deadline on that was that you had asked for it to be due August 29th. Is that correct or is that wrong?

Mr. SHELANSKI. Oh, in terms of receiving our reports from the agencies?

Mr. COLLINS. Yes.

Mr. SHELANSKI. Subject to check, that was approximately I think the deadline we set, yes.

Mr. COLLINS. So is a guesstimation around the 29th?

Mr. SHELANSKI. It was very close to that time period.

Mr. COLLINS. How many have actually got close?

Mr. SHELANSKI. Almost everybody.

Mr. COLLINS. Okay.

Mr. SHELANSKI. We are actually in very good shape. I think we are waiting for one independent agency to come forward with their report.

Mr. COLLINS. I think it follows up on, as what was said, is where the impediments are and then actually getting real information, it would be of service. I think there is some general agreement across both sides of this dais as far as trying to find what helps business and grow jobs and the economy and the things that help and doing away with the things that do not. Do you have any suggestions for legislative reforms that this Subcommittee can look at that are consistent with this administration's goal to create regulatory system for the 21st century?

Mr. SHELANSKI. You know, I think that the—and, Congressman Collins, I thank you for that question because I think it is an interesting question. Having been at OIRA for about 12 weeks I am still developing an opinion on areas in which we might or might not benefit from regulatory reform, but my inclination so far is to say that we have the tools that we need at OIRA to do good regulatory review. And I have some concerns about some of the regulatory reforms that I have heard about.

We have got a good set of executive orders that set forward I think the right analytic principles and the right regulatory process for reviewing rules. We are working closely with the agencies to ensure that their analyses meet those requirements. And, as Chairman Bachus said, it is our responsibility to go back to the agencies and let them know when we think that they have not done a good analysis.

I think that process works well, and at this point I think that leaving the process where it is, with OIRA under the executive orders to develop in that environment, will be sufficient to ensure a sound regulatory system going forward.

Mr. COLLINS. Okay. That is, again, I think something we could, I want to say, you know, relatively, the new role that you are in,

and getting into it later I think there is some questions there I have. But you had mentioned earlier about the cost and the benefits issue, and I am concerned that agencies don't always have the data that they need to accurately calculate, in fact, what you just said, the proposals will have on businesses, local and State economies, whether good or bad.

There has been some proposals that OIRA actually should issue specific guidelines on how agencies should conduct more scientific evaluations of existing regulations and also agencies required to develop plans for future retrospective evaluation, which you made part of your confirmation. As part of the agencies' initial regulatory impact analysis, do you think the agencies currently possess all the data they need to accurately calculate the impact of a proposed rule and, if so, do you think they are consistently using the data to make accurate calculations?

Mr. SHELANSKI. So this is a very important question. So let me start by saying that I share your concern about the need for additional what I might call institutionalization or guidance on the retrospective review process, and that is something that we are very seriously and in real time working on at OIRA, because it is a very important priority, and the more guidance we can give the agencies, the more closely we can work with them, I think the more beneficial this process will be, and to the extent there is underbrush that can be usefully cleared out in doing that and freeing American businesses from excessive burdens and from protecting American citizens by improving regulations by reviewing them through the retrospective review process.

When it comes to guidance on the cost and benefit analysis, you know, we at OIRA do have a set of guidances, our biggest one is Circular A-4, that tells agencies how we want them to do the cost-benefit analysis, working on issues such as discount rates they should apply, what kind of data they should use, what the standards are. It is unquestionably true that there are rules in which the data are hard to come by for the agencies, and so there often is a lot of back and forth in working with the agency to ensure that they are using the best science, the best data that are available.

We don't work in a world of certainty. Economics, cost-benefit analysis, a lot of the issues that come up under this rubric are new, and so we try to ensure that there is enough data to make a reasoned decision and that they are using the best data without artificially discounting data that might be inconvenient, to do a rigorous analysis.

Mr. COLLINS. Okay. Thank you. My time has expired, but I will be submitting for the record a question concerning rule review on positive impact of over \$100 million as well, a significant factor there.

And, Mr. Chairman, I yield back nothing because I have no time left.

Mr. BACHUS. Okay. Thank you, Mr. Collins.

At this time I will recognize the gentlelady from Washington, Ms. DelBene.

Ms. DELBENE. Thank you, Mr. Chair. I first want to say thank you for all of your service. And as someone who started my life as well in Alabama, it was a great honor for me to be able to go to

Alabama with you and many others earlier this year as we did the civil rights trip. And I appreciate even more now that I have an opportunity to do that while you are still here serving in Congress.

Mr. BACHUS. Thank you.

Ms. DELBENE. I am only disappointed that now when you finally learned how to pronounce my name, though, we won't—

Mr. BACHUS. It is not DelBene, it's DelBene?

Ms. DELBENE. No, actually the first time you just said it there you got it right, so maybe we will keep working with you.

Mr. BACHUS. Yeah, they keep giving me different—I have nerve damage in my ears.

Ms. DELBENE. And thank you, Mr. Administrator, for being here today. I appreciate your time. You were talking a little bit about retrospective reviews, and with changes in technology and kind of the way our economy works in many ways, we have reviews and cost-benefit analysis, but some of that also needs to take place because, you know, something that worked in the past just may not work anymore given changes.

And so how do you view that and how can we make sure that we do a good job with helping agencies look at cost-benefit analysis in a different way when the way businesses work, et cetera, may be changing over time?

Mr. SHELANSKI. Thank you very much. That is really a critical question. And one of the things that we need to make sure of is that we don't have regulations that might lock industry into a technology that is on its way out the door or lock them into very expensive capital expenditures when something might be able to be done a lot less expensively shortly down the road. You know, it is like somebody who 3 years ago built a house wiring all kinds of fancy cable through their house, and then someone showed up with a \$10 wireless modem a month later and said, well, you could have saved yourself a lot of money there. We want to avoid that kind of situation.

And I think the agencies, first of all, they are very attuned to these kinds of issues. They have no interest in imposing costs that are unwarranted. In the time I have had the pleasure of serving in this role, I have had the chance to meet with and talk with top officials at most of our executive agencies, and this is a very serious concern on their part.

So as part of the cost-benefit analysis, what is being asked is what technologies are on the horizon, what might there be, a benefit in waiting, might there be a benefit in adopting standards that are flexible so that new technologies can come in.

When it comes to looking at existing rules in the retrospective review process, it is often the case that new technology has emerged that might allow something to happen more inexpensively. The problem is, you know, sweeping that rule away might actually be more costly for industry because often they have already absorbed the fixed costs of regulatory compliance of 10, 20 years ago. And it is one thing to say new businesses coming in don't have to do things the same way. I think that is an important thing for us to look for and it is an important kind of flexibility to have. But to mandate a change for those businesses that have already made the capital expenditure and adapted to an old rule just for the sake of

adopting a new technology could actually be very costly. And despite the fact of the new technology being cheaper, if you were doing this for the first time, might not be cheaper for some of these businesses.

So where do we get the information? We work very closely with agencies, with industry. We hear a lot every time there is a rule-making process going on during the notice and comment period. The agencies hear from industry saying, this will be very costly for us in ways you don't understand.

Or we can get the same result in a less expensive way. And when a rule is under review at OIRA, under the process of the on-the-record publicly disclosed 12866 meetings that we have with stakeholders on all parts, we also hear from them. And so we can go back to agencies and say, why didn't you consider this? What was wrong with this idea? Why isn't this right? And where it is right, part of our job, under the executive order, is to make sure that the agencies take into account of that information. So——

Ms. DELBENE. Is there a way to share best practices? If one agency goes through an issue and kind of updates that as the way that information gets shared so everyone can benefit from that?

Mr. SHELANSKI. I think that the Administrative Procedure Act and the executive order are really, and the documents, the circulars and things that are associated with the executive orders, really set out the procedures that bring to bear a set of best practices in terms of how information is processed. The variation across different industrial segments, different areas in which the departments and agencies regulate is so great that there is probably no single solution.

And this actually gets back to a question Mr. Collins asked me about legislation. I worry about locking in a fixed set of practices, a one-size-fits-all procedure when different industries, in fact, may need different ways of approaching these problems.

So I think there is a set of best practices in the sense of making sure that one is doing the cost benefit analysis, using all available data, really listening to the stakeholders through the notice and comment procedure. And in terms of ways to make sure that we gather information from retrospective review, that is one of the things that we are trying to reach a similar level of development on right now.

Ms. DELBENE. Thank you. And thank you, Mr. Chair.

I also yield back my nonexistent time.

Mr. BACHUS. Thank you, Ms. DelBene. And Mr. Jeffries, I heard you are a man on the move and you are going to go next? Is that right?

Mr. JEFFRIES. Okay, well thank you, Mr. Chairman.

Mr. BACHUS. The Ranking Member said you have to leave in a few minutes.

Mr. JEFFRIES. Well I appreciate you yielding to me and of course your tremendous and distinguished service over the many years that you serve the people of Alabama and this country.

It is my understanding that pursuant to statute, you have approximately 90 days by which to undertake a review of a pending regulation, is that correct?

Mr. SHELANSKI. The executive order sets a timeline, and the initial review period that it sets is a 90-day period.

Mr. JEFFRIES. Now is it often the case that you are unable, for a variety of reasons, the agency, to complete its work during that 90-day period and then there is a process by which an extension is granted?

Mr. SHELANSKI. Yes. There is a process by which extensions can be granted, and the interpretation that is developed of that provision is at the request of the agency and/or granted by the agency. There could be multiple extensions and certainly a lot of the regulation that we review at OIRA is very complicated stuff. And so we do have to resort to that. I would say not most of the time, but there is certainly plenty of examples out there.

Mr. JEFFRIES. It is also my understanding that under your tenure, the backlog that had accumulated has largely dissipated, is that right?

Mr. SHELANSKI. Well, I don't want to claim credit for it. It is something that really began before I got there under the acting administrator who preceded me and really run by the excellent staff at OIRA. They really got with the program before my arrival, and Director Burwell at OMB made it a prior to of hers before I was in place to ensure the office was moving in that direction. I have tried since arriving 12 weeks ago to add some additional energy and push. And so we are down by more than half in terms of rules and extended review from where we were. And I would really like to, and have every intention of pushing that much farther down.

Mr. JEFFRIES. Now, would it be fair to say that sequestration complicates your ability to evaluate pending rules on a timely basis?

Mr. SHELANSKI. It has been problematic, Mr. Jeffries, because I have had to have staff on furlough. And every individual on my staff is incredibly important because each individual desk officer has a portfolio on which they are working, and a day on which they are not allowed to look at their government email or do any work is a day in which that slips further behind, and on top of which, we have already, I can't backfill positions when people leave, and so it becomes a slippery slope. And it is problematic.

And as I have stated in my opening statement, timeliness is important, clarity is important, but ultimately the most important thing, and the reason for being of OIRA, is rigorous, careful analysis of the rules. And we won't compromise on that. And to be sure, furloughs, sequestration, the inability to hire and even backfill positions we have lost greatly compromise our ability to do that rigorous analysis in a timely way.

Mr. JEFFRIES. If we fail to pass a continuing resolution over the next few hours, will your agency be required to shut down?

Mr. SHELANSKI. Like most other Federal agencies, we will not be able to continue operation. So in my particular case, my staff at OIRA will go from approximately 40 to two. And I will call back people as needed to meet court deadlines, but all of our rulemaking review will certainly stop during a period of shutdown.

Mr. JEFFRIES. So it is also my understanding I think that the courts could possibly shut down over the next few weeks, so I am

not even clear what deadlines might actually be salient moving forward, but hopefully, we can avert all of those complications.

One or two last questions, so it is my understanding that you review sort of what is deemed significant proposed regulations and final rules, is that right?

Mr. SHELANSKI. Yes.

Mr. JEFFRIES. And how is that significance determination made as to what is appropriate for your agency to consider?

Mr. SHELANSKI. Well the primary category of significance is economic significance. And executive order 12866 which came out under President Clinton set a target of \$100 million a year of economic turnover, of economic effect as a benchmark for economic significance. So we do review rules where the annual effect on the economy will be \$100 million or more.

There could be other significant determinations that arise because of something has to do with a particularly urgent or important issue. But that is the main category of significance.

Mr. JEFFRIES. Thank you. And I thank the Chair and the distinguished Ranking Member.

Mr. BACHUS. I thank the gentleman from New York.

Administrator, you went to Haverford which is a Quaker background?

Mr. SHELANSKI. Yes, sir. It is a small Quaker college.

Mr. BACHUS. And to Cal Berkeley?

Mr. SHELANSKI. Quite a change yes.

Mr. BACHUS. Was that a change?

Mr. SHELANSKI. It certainly was. There was no question about that.

Mr. BACHUS. Are you from Philadelphia?

Mr. SHELANSKI. I am a native of Philadelphia. In fact, most of my extended family is still there. My immediate family, my wife and child we live here in D.C. and rest of my immediate family lives in Brooklyn, New York.

Mr. BACHUS. Haverford has a stellar reputation producing very good graduates.

Mr. SHELANSKI. Thank you, sir.

Mr. BACHUS. President Obama wrote an op-ed in The Wall Street Journal so—not The Wall Street Journal this is President Obama and The Wall Street Journal, I want to clarify that for the Ranking Member, but he said that overregulation stifles innovation and has a chilling effect on growth and jobs. Do you agree?

Mr. SHELANSKI. I think the overregulation, that is to say, regulation that exceeds the benefits that it provides and that makes it difficult for an industry to grow or plan or function is going to have a variety of negative effects, exactly what effects at what time may be hard to tell. But I have long believed that regulation that serves no purpose, or regulation that can't be shown to achieve its purpose is better left undone because of the risks it could run.

Mr. BACHUS. And I know you mentioned executive order 12866 four or five times in your testimony. That allows you to do a return letter to the agency?

Mr. SHELANSKI. Yes. The return letter is one tool that the administrator has for a rule that does not meet the standards, and it is

not going to through a process of interaction with the agency and during a process of review to ever meet the standards.

Mr. BACHUS. I know under the present administration, I think they only issued one return letter, as opposed to, I know during the George W. Bush administration there were 27 returns.

Are you going to take a closer look at that tool? Or what are some other alternatives to that that you will be using?

Mr. SHELANSKI. Thank you, sir. That is a very good question. I don't have any predetermined target of how many return letters I will or won't send, and I wouldn't feel unfulfilled in my term as administrator if I never sent one. In fact, I might see that as a success.

But certainly it is one tool and if an appropriate circumstance arises, I would not hesitate to use the return letter authority in the executive orders.

There is other authority that can be used, and one is the authority simply to push agencies to actually make a rule compliant with the analytic requirements of the executive orders.

The other tool is that agencies can withdraw rules. And sometimes if there is simply a very great gulf between, for example, and this, again, gets to a question I think either Mr. Holding or Mr. Collins asked me about is the availability of information and data for the agencies, if they don't know enough, they may take the time to find out, to do a study, to wait for more information to develop out there in the world, and that can be an appropriate time for the agency to say, okay, we are going to withdraw the rule, and we will repropose it at such a time that we can get the available data and meet the requirements.

And that is a tool that actually happens, that is actually used quite a bit more frequently than the return letter, in fact, has been used several times in recent weeks.

And I find that to be, there is something good about the withdrawal in that it is really the agency coming to terms with what more it needs to do, and at least in my limited experience of 12 weeks, it is something that can be a more amicable solution than a return letter.

Mr. BACHUS. Thank you. Coming from the Financial Services Committee, I can't tell you the number of times that financial institutions have told me that although there is a big difference in a rule and guidance, that often they are told, you are not complying with guidance, and that actually can have as much of an impact. Of course, guidance you don't get to review guidance. Or do you? What is your role there?

Mr. SHELANSKI. We actually do review guidance. This is actually something that the agencies are not always happy with us about. But in my view, the label that is attached to something that is produced by an agency is a lot less important than the effect that it actually has. So we try to work with agencies to have them submit things that they call notices or guidance because very often those do have, in fact, regulatory effect, and we have, on numerous occasions at OIRA, gone back to them with effectively asking for cost benefit analysis of notices and guidance. We have sometimes asked—in fact, this just happened with EPA where they had a guidance, a very helpful guidance, that was really responsive to

two Supreme Court decisions to articulate the jurisdiction of the Clean Water Act. And they withdrew that guidance and repropose it as a rule. And that will emerge once it is through OIRA review as a proposed rule for the public to comment on.

The reason is that we felt notice and comment was very important although they had done notice and comment on their guidance, but some things should be labeled what they really are which is regulation, not guidance. But if it comes in and it is called a guidance and it has regulatory effect, we will review it.

Mr. BACHUS. I very much appreciate that answer. And I think the Financial Services Chairman and Committee would also, in a bipartisan way, appreciate that.

I am not going to go into question on the so-called social cost of carbon, but the administration did appear to disregard two of OMB's guidelines on cost benefit in issuing them, but I may want to write a letter on it and maybe be joined by some of the other Members. But I don't think at this time I will go into that.

But let me just close by saying, make a case to us that your all your employees are essential in this continuing resolution. Sequestration is creating problems and as oversight committee, I think we have an obligation—and I have done that with the SEC to urge the appropriators to, they have made tremendous new obligations and task and have not provided the funding.

So I think it is a proper role for us to make that case for you. And I have really not heard too many Members on either side of the aisle, the OMB and its different segments and departments I think is one of our most valuable departments. And so we would love to at least give us the opportunity to look at that.

Mr. SHELANSKI. I greatly appreciate that sir. And I would just emphasize that OIRA is in no different position than any other part of OMB. Every one of those offices is working flat out performing vital functions.

Mr. BACHUS. And I have really, I have not heard, I have heard almost no criticism of OMB. I will probably be criticized for saying that, but it returns its value many times over.

Mr. SHELANSKI. Thank you.

Mr. BACHUS. With that, we will excuse the administrator and thank you for your testimony.

Mr. SHELANSKI. Thank you, sir.

Mr. BACHUS. And we will call our second panel.

We are going to delay the start for just a minute.

I think we might proceed. I don't know what that bell is.

Mr. COHEN. How many years do you have to be here until you know what the bells mean?

Mr. BACHUS. I think we are going to hit the badminton thing back over the fence.

Maybe we are getting it from the other.

Professor Sally Katzen has enjoyed a distinguished career in legal practice, government service and academia, the first female partner at the law firm of Wilmer, Cutler and Pickering. Wow.

Ms. Katzen also has served as section chair of the American Bar Association's administrative law and regulatory practice groups. When we get past the sequestration, we may ask you if you want to come back up here and work. She served for 8 years in the Clin-

ton administration including 5 years as administrator for the Office of Information Regulatory Affairs in OMB. She has a bachelor's degree from Smith College and a JD from the University of Michigan Law School.

She has taught at the George Washington University, University of Michigan, George Mason University—George Mason University—the University of Pennsylvania and Georgetown University Law School and currently is a visiting professor at NYU School of Law. Is she the Democratic witness?

Mr. COHEN. I thought she was. The George Mason thing got me totally confused.

Mr. BACHUS. Did you see that in her resume when you asked her to testify?

Mr. COHEN. At least she didn't have Liberty University in there.

Mr. BACHUS. All right. Welcome, Ms. Katzen.

And Boyden Gray, former partner of Wilmer Hale served as White House counsel for former President George H.W. Bush, subsequently the U.S. ambassador to the European Union. He was also appointed to the U.S. special envoy for European Affairs and for Eurasian energy.

In 1993, he received the Presidential citizens medal from President Clinton. He is currently on the board of directors of the Atlanta Council and the European Institute. Boyden Gray is the founding partner of Boyden Gray and Associates, a law and regulatory strategy firm in Washington, D.C. following many years of service to his Nation in both domestic and diplomatic posts.

As White House counsel to President George H.W. Bush, he assisted the President's enactment of the Clean Air Act amendments of 1990, development of a cap and trade system for acid rain emissions, and enactment of the Energy Policy Act of 1992 which aimed to decrease American independence on foreign oil, protect our environment and promote economic growth. He previously had served as counsel to President Ronald Reagan's task force on regulatory relief and as legal counsel to vice president Bush.

Later under President Bush, he served as U.S. Ambassador to the European Union special envoy for Eurasia and energy, diplomacy and a special envoy for European Union affairs.

In addition to his public service and private legal work, he also serves on a variety of boards dedicated to public health, regulatory reform, constitutional law and a variety of other civic and charitable causes.

We welcome you, Mr. Gray.

And Dr. John F. Morrall, III, is an affiliated senior scholar with the Mercatus Center of George Mason University. There you go.

And independent contractor for IMAP data and Bloomberg government. He specializes in regulatory impact analysis reform and government, benefit cost and cost effective analysis, health, labor, housing, and homeland security policy, and risk assessment.

In the last 5 years he has also performed work for USAID the School of Public Environmental Affairs of Indiana University, the Pew Charitable Trust, the United States Chamber of Commerce, the Institute of Brazilian Issues at George Washington University, and the OECD in South Africa and the Institute for applied economic research in Brazil. What is the OECD in South Africa?

Mr. MORRALL. It is the Organization of Economic Cooperation and Development formed after World War II.

Mr. BACHUS. Thank you. And Institute for applied economic research in Brazil. I don't know if I complete that.

But from 1989 to 2008, Dr. Morrall was branch chief for the Office of Information Regulatory Affairs.

So you were at OIRA and acting deputy administrator the highest position at OIRA from 2006 to 2007.

Dr. Morrall has authored several books and articles and graduated magna cum laude from Tufts University and received his Ph.D. from the University of North Carolina at Chapel Hill.

And Tufts is also in Philadelphia, right? Is it in Philadelphia?

Mr. MORRALL. No. It is outside Boston.

Mr. BACHUS. Well, two fine cities.

Ms. Riley, I think the Chairman introduced you. And he read the entire statement. But I would like to acknowledge your work with NFIB which the Chairman mentioned. And I think you saw firsthand some of the effects of regulation on job creation and deployment of capital or non-deployment of capital or use of capital in maybe not as, sometimes not as productive a way.

We now proceed under the 5-minute rule with questions and we again will start.

Barney Frank used to do this all the time. He didn't give the panel the time to do the opening statements. He would go right to questions and now I have done it.

I guess it was time for me not to run for reelection.

At this time, I apologize, our panelists will be recognized for their opening statements which we won't take, we won't adhere strictly to the 5-minute rule. We want to hear what you have to say.

Mr. BACHUS. Ambassador Gray.

**TESTIMONY OF THE HONORABLE C. BOYDEN GRAY,
BOYDEN GRAY & ASSOCIATES, PLLC**

Mr. GRAY. Mr. Chairman, thank you very much for the opportunity to appear. I want to make one basic point which is that the OIRA review process ought to include independent agencies as well as executive branch agencies. That is my main point.

But I do want to make a point at the outset that I am honored to be at the same table with Sally Katzen and the point is the bipartisan nature of this whole endeavor has been apparent in the very, very beginning. It is one of the few places in Washington that still is bipartisan. I hope it stays that way. She was a law partner, tennis partner, is now a teaching colleague. And we get along pretty well together, and I also want to just note a little piece of trivia, that your first witness, his predecessor was at the Office of Legal Counsel in the Department of Justice in 1981 when the first executive order was drafted. And he was a high powered intern just off the Supreme Court clerkship, and he is the one who approved, if not, in fact, drafted the cost benefit language that survived her rewrite of that order 12866 which Ms. Katzen wrote, preserving the work of her, one of her successors, Cass Sunstein in the Office of Information and Regulatory Affairs. So there is a very tangled web

of Republicans and Democrats who try to keep this a common endeavor.

The point that I have made in my prepared testimony and just want to reiterate is the importance of covering independent agencies. Now, we did not do so in 1981, not for strictly legal reasons, but because we thought the political difficulties were greater than the benefits, the political costs were greater than the political benefits. That decision was carried forward, as I understand it, by 12866 and it is still true. But I don't believe now anymore that the political costs are greater. I think the political benefits are far greater to cover them. They are much more powerful than they used to be. The FCC is obviously much more powerful than it used to be, and you perhaps as much as anybody on the Subcommittee and the Committee are aware now how powerful most of the financial agencies are, most of which are independent: the SEC, FCC, the CFPB, a newcomer, and, of course, the Fed itself.

I don't believe that my neighbor to my immediate left now objects to this general notion that OIRA should be reviewing independent agency regulations. I think I have uncovered statements where she has now agreed with that, but she can speak for herself, but I do think this is something which I think has bipartisan support, and I do think that it is absolutely critical to making the system work properly.

I can come up with many examples, but one of my favorites was the issue of the CFTC issuing, or trying to issue under Dodd-Frank, rules on derivatives and we had thought that Congress, you, had exempted and used derivatives, that is common hedging, that has been going on for decades by utilities and energy firms. But for a while, it looked as though, well, that wasn't going to get exempted and that is a case where it didn't make any sense to divorce what the CFTC was doing with what EPA was doing which is the primary and the Federal Regulatory Energy Commission, FERC, the primary regulators of utilities, it didn't make any sense to divorce those. It doesn't make any sense to divorce financial services from the rest of the economy.

And so I would make the plea that this be done, it can be done by executive order, the President can do it now, the President has asked, President Obama has asked independent agencies to submit their rules for review, but it is not mandatory. It could be, should be, and I think we would all be better off if it were.

I can remember trying to go see Cass Sunstein myself on behalf of some clients engaged in the derivative issue, and he wouldn't meet because it was—the CFTC was an independent agency. So I do hope that it is fixed. It is better done by legislation, because that represents more democratic input, but it could be done, it could be done by executive order.

In my prepared statement, I do have a quibble about something which has repeatedly come up so far, the social cost of carbon because I do think it is, you know, an example of why things should get full notice and comment, Administrative Procedure Act review with its review in the OMB in the proper course of its review obligations. The numbers don't make any sense.

We have two markets that are extant, the European market, market in California and the price of carbon in those two markets

is a fraction of what the government says is the social cost of carbon. So I could go into more detail in answer the questions but I did want to make that point.

OMB has also approved, I think, erroneously, EPA's assessment of the benefits of certain of its coal regulations based on benefits of reducing PM_{2.5}. Most of the reductions occur in areas that are well under the PM_{2.5} standard, even the tightened standards, one wonders whether you should really cap benefits in areas that are in complete attainment for the standard.

I will stop there, but again, just repeat I hope that independent agencies get the review from OMB that they deserve.

Mr. BACHUS. Thank you very much.

[The prepared statement of Mr. Gray follows:]

**Hearing before the
U.S. House of Representatives
Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the
Committee on the Judiciary**

**“THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS:
FEDERAL REGULATIONS AND REGULATORY REFORM”**

September 30, 2013

Statement of Amb. C. Boyden Gray

I am honored to have been invited to testify before the Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law on the subject of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

The focus of my remarks today will be the regulatory reforms that can be accomplished by subjecting proposed regulations to the oversight of OIRA—perhaps the most powerful office in the administrative apparatus of our Government, but one of its best-kept secrets.

I. REGULATORY ACCOUNTABILITY ACT

In the last Congress, I twice testified before the full Judiciary Committee in support of the Regulatory Accountability Act of 2011.¹ As I said in 2011, “[b]y incorporating the provisions of the Regulatory Accountability Act . . . into the

¹ My statements remain available on the Committee's web site, at <http://judiciary.house.gov/hearings/pdf/Gray%2010252011.pdf> and http://judiciary.house.gov/hearings/Hearings_2012/Gray_09202012.pdf.

overarching structure of the Administrative Procedure Act—which does *not* exempt independent agencies—Congress will commit the independent agencies to OIRA guidance and oversight, including the discipline of cost-benefit analysis and alternatives analysis.” This remains, to my mind, one of our administrative law system’s most critical needs.

A. OIRA OVERSIGHT OF INDEPENDENT AGENCIES

Before examining the cost-benefit analysis in particular, I will spend a moment on the virtues of OIRA oversight in general. As federal agencies proliferate and the regulatory burden on American public and American industry grows, it becomes increasingly important that the myriad cooks stirring the regulatory soup be subject to meaningful oversight. As Sally Katzen observed after her time as OIRA Administrator under President Clinton, “the problems that plague our nation do not fit neatly into one agency”; “nor are they likely to be solved by one regulatory *action*.”² Subjecting independent agencies to OIRA oversight would therefore result in “better coordinated and coherent regulatory actions, and ultimately better decisionmaking.”³ The need to bring independent agencies into the fold grows more urgent as Congress delegates more and more power to them. The Securities and Exchange Commission, National Labor

² Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 108, 111 (2011).

³ *Id.* at 110.

Relations Board, and other longstanding agencies wield immensely more power than they once did. And the Dodd-Frank Act granted vast new powers to existing independent agencies such as the Commodity Futures Trading Commission, and created another new independent agency, the Bureau of Consumer Financial Protection (“CFPB”), with unprecedented power and unprecedented independence from all three branches of government. Exempting independent agencies from OIRA oversight is sometimes justified by the argument that, whereas executive agencies are the President’s, independent agencies are Congress’s. The premise is no longer true if it ever was: Congress is increasingly unwilling to oversee those agencies, as demonstrated by the Dodd- Frank provisions preventing Congress even from reviewing the budget of the self-funded CFPB.

As a general matter, Congress and the courts can only react to administrative rules after they have already been promulgated; meaningful oversight of the administrative state must start in the executive branch. Indeed, beginning with my experience as counsel to Vice President Bush, I have observed that centralized review of administrative agencies is most effective when the Office of the Vice President takes an active role in its supervision. I have seen ambitious regulatory reform succeed with vice presidential leadership, and I have seen inter-agency efforts fail for want of centralized leadership. Whether or not the Vice President takes an active role in regulatory matters, however, it is now

more important than ever that OIRA be granted the authority it needs to direct and supervise a coherent administrative policy across all federal agencies—not just those whose heads serve at the pleasure of the President.

It is well accepted that the President's constitutional duty to faithfully execute the laws gives him authority to subject independent agencies to OIRA review.⁴ But this is an area in which congressional cooperation, rather than unilateral executive action, is preferable for purposes of inter-branch comity. While the Obama Administration has made much of the fact that it nominally asked independent agencies to review the costs and benefits of their regulations, the executive branch has not taken serious steps to actually align the costs and benefits of independent agencies' regulations. And OIRA does not discuss proposed independent agency rules with the public as it does with respect to executive agencies.

B. COST-BENEFIT ANALYSIS

One of the greatest virtues of the Regulatory Accountability Act is that it would subject independent agencies to the requirement that they establish that the costs imposed by their rules are justified by the benefits they accrue.

Cost-benefit analysis is sometimes unfairly disparaged as tool of

⁴ See VIVIAN S. CHIU & DANIEL T. SHEDD, PRESIDENTIAL REVIEW OF INDEPENDENT REGULATORY COMMISSION RULEMAKING: LEGAL ISSUES (Sept. 10, 2012), at 12-15, *available at* <http://www.fas.org/sgp/crs/misc/R42720.pdf>.

conservatives, and as designed to “promote a deregulatory agenda under the cover of scientific objectivity.”⁵ Both claims are false.

1. IDEOLOGICALLY NEUTRAL

The detractors of cost-benefit analysis tend to oppose it for its results, not its method. For example, there are those who criticize economic analysis because it “has never been the environmentalist’s friend.”⁶ Economic analysis viewed in the abstract is ideologically neutral. When it is used correctly, cost-benefit analysis promotes regulations that are good for society by deterring regulations (from any political quarter) that would elevate the interests of a few above the good of the whole.⁷

But conservatives are by no means the only advocates of cost-benefit analysis.

Sally Katzen opposed codification of cost-benefit analysis while in office,⁸

⁵ FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 9 (2004); see also Daniel A. Farber, *Rethinking the Role of Cost-benefit Analysis*, 76 U. CHI. L. REV. 1355, 1366 (2009) (arguing that cost-benefit analysis is motivated by “political bias against regulation”) (reviewing ACKERMAN & HEINZERLING, *supra*); Jonathan D. Guynn, *The Political Economy of Financial Rulemaking After Business Roundtable*, 99 VA. L. REV. 641, 644 (2013) (citing arguments that cost-benefit analysis is “designed to further a deregulatory agenda by creating regulatory gridlock, imposing an impossible burden of proof on the regulators or making it prohibitively expensive for agencies to issue regulations.”).

⁶ Lisa Heinzerling, *Lisa Heinzerling Responds to Richard Revesz on Cost-Benefit Analysis*, GRIST (May 15, 2008), <http://grist.org/article/cost-benefit-environmentalism-an-oxymoron/>

⁷ Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 225-26 (1999) (“[W]e argue that CBA, properly understood, is consistent with every political theory that holds that the government should care about the overall well-being of its citizens.”).

⁸ Katzen, *supra* note 2, at 108.

but she had a change of heart after she left OIRA. In 2011 she wrote that “requirements for economic analysis and centralized review should be extended to the Independent Regulatory Commissions (IRCs—those multi-headed agencies, such as the Securities and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, etc., whose members do not serve at the pleasure of the President and can be removed only for cause.”⁹ Citing reports by OMB and Resources for the Future, Katzen observed that “IRCs do not typically engage in the rigorous economic analysis that has come to be expected (and generally accepted) for executive branch agencies. In light of the wave of financial regulations triggered by the Dodd-Frank Act, Katzen called extending cost-benefit analysis to independent agencies “a no-brainer.”¹⁰ I agree.

And Cass Sunstein, who headed OIRA during President Obama’s first term and authored *The Cost Benefit State*, published by the American Bar Association, wrote that “us[ing] cost-benefit analysis in a highly disciplined way” to “ensur[e] that high costs are justified by high benefits—is especially important in a period of economic difficulty.”¹¹

This is not a new idea. Judge Patricia Wald, former Chief Judge of the D.C. Circuit, appointed by President Carter, wrote in 1983 that “[e]ven when the

⁹ *Id.* at 109.

¹⁰ *Id.* at 110.

¹¹ Cass R. Sunstein, *Humanizing Cost-Benefit Analysis*, *Euro. 2 J. OF RISK REG.* 3 (2011).

governing statute says nothing specific about economic principles, the agency may rely heavily on economic analysis to meet more general statutory criteria, such as determining that rates are ‘just and reasonable.’”¹²

Given the bipartisanship support its practitioner’s have voiced for cost-benefit analysis, it should come as no surprise that it “has become a mainstream tool used by Presidents of both parties and members of Congress on both sides of the aisle.”¹³

2. FACILITATION OF JUDICIAL REVIEW

Requiring agencies to subject their regulations to cost-benefit analysis also allows for meaningful judicial review of agency action. Without substituting its policy judgment for that of the agency, a court can ensure that the agency employed its expertise to craft a regulation that will do more good than harm.

Perhaps the best example of judicial review of administrative cost-benefit analysis is *Business Roundtable v. S.E.C.*, the very case that sparked some of the loudest complaints that cost-benefit analysis is a partisan device. That case involved an appeal of the S.E.C.’s “proxy access rule.” A federal statute required the S.E.C. to consider the costs and benefits of that rule. When the proxy access rule was appealed in the D.C. Circuit, the court did not try to undertake its own

¹² Patricia M. Wald, *Judicial Review of Economic Analysis*, 1 YALE J. ON REG. 43, 43 (1983).

¹³ Guynn, *supra* note 5, at 644–45.

economic analysis, or even micromanage the agency's own substantive review; rather, the court reviewed only whether the S.E.C. had sufficiently considered the evidence in the record before the agency, and whether the agency had meaningfully considered and replied to affected parties' arguments about the costs of the rule. The agency clearly had failed to satisfy those minimal requirements. As the court held, the agency had "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."¹⁴ But rather than dictating an outcome, the court vacated the rule and remanded the matter to the agency—it gave the agency another bite at the apple. The court did not prohibit the S.E.C. from reaching the same substantive outcome; it simply required the agency to satisfy the applicable procedural requirements.

This is precisely what the reviewing court is supposed to do when confronted with an agency's statutorily required cost-benefit analysis. In the words of Judge Wald,

Where a governing statute requires the agency to conduct an economic analysis as a basis for action, . . . the court must insist that it be done and that it include whatever components Congress specified. Little or no deference is due the agency in such threshold

¹⁴ *Business Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

scrutiny. . . . The court must assure itself that the statutorily mandated decision . . . has been made and that the agency's reasoning was rational and supported by evidence. An agency cannot immunize arbitrary or capricious substantive decisions by dressing them up in the Emperor's clothes of economic jargon.¹⁵

Business Roundtable demonstrates that judicial review of cost-benefit analysis promotes a rulemaking process driven by expertise and not mere politics. There is no good reason why independent agencies, which are responsible for some of the costliest rules in the Federal Register, should be exempt from this process.

3. PROBLEMATIC IMPLEMENTATION OF COST-BENEFIT ANALYSIS

None of this is to suggest that simply requiring agencies to perform cost-benefit analysis of their rules is a fail-proof solution for the problems of regulatory mismanagement. Like any form of analysis, cost-benefit analysis inevitably reflects the value judgments of the regulator. Congress, and this body in particular, must therefore be vigilant in regulating the regulators.

This vigilance is especially needful in the current Administration, which, by its own estimate, has imposed up to \$51.5 million in regulatory costs between 2009 and 2012, considering only the 58 so-called “major rules” issued during that

¹⁵ Wald, *supra* note 12, at 50.

time period.¹⁶ And that self-serving estimate should be viewed skeptically: As former OIRA Administrator Susan Dudley has observed,

Agencies have strong incentives to demonstrate through analysis that their desired regulations will result in benefits that exceed costs. . . . [A]s the regulatory game is now structured, OIRA is the umpire—the sole judge of the balls and strikes pitched by the agencies. When the umpire boasts with such enthusiasm about his team’s score, one has to wonder who will ensure that the game is played fairly.¹⁷

In sharp contrast to the Administration’s own estimate, the American Action Forum (led by Douglas Holtz-Eakin, former chief economist of the President’s Council of Economic Advisers and director of the Congressional Budget Office) estimates that this Administration’s regulatory burden on the economy exceeds \$518 billion.

The Administration’s estimate of the benefits of its regulations is just as problematic as its estimate of costs. Take, for example, the Administration’s estimate of the “social cost of carbon”—a figure that is critical to the cost-benefit analyses for an increasing number of greenhouse gas emissions-related regulations.¹⁸ According to former OIRA Administrator Cass Sunstein, the social

¹⁶ See OIRA, 2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act,” at 19, at http://www.whitehouse.gov/sites/default/files/omb/infoereg/2013_ch/draft_2013_cost_benefit_report.pdf.

¹⁷ Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB’s Reported Benefits of Regulation*, B.U.S. ECON. 47:3, at 175 (2012).

¹⁸ Cass R. Sunstein, Working Paper: *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, HARV. L. SCHOOL PUB. L. & LEGAL THEORY WORKING PAPER SERIES, Paper No. 13-11 (May 15, 2013) (Social cost of carbon “values are used to establish the benefits of regulatory efforts to reduce greenhouse gas emissions, and they have played a significant role in many rulemakings.”), *available at*

cost of carbon (now \$36 per ton), which was the product of an interagency working group, is “binding until [it is] changed” by “some kind of formal process.” Until that time, says Sunstein, “[a]gencies and departments (including OIRA and others within the Executive Office of the President) may not reject such documents, in whole or in part, in the context of particular rules.”¹⁹ But those estimates have never been the subject of a stand-alone notice and comment procedure. And the estimated cost declared by the committee is particularly problematic because the risk it attributes to carbon emissions (and therefore the benefit of their reduction) is global in scope, whereas the cost of regulation is necessarily borne only by entities within the United States. Thus, EPA justifies regulations that impose enormous costs on U.S. industry by reference to benefits that are shared the world over. This is in tension with an OMB Circular stating the commonsense proposition that “Analyses should focus on benefits and costs accruing to the citizens of the United States in determining net present value. Where programs or projects have effects outside the United States, these effects should be reported separately.”²⁰ My point here is not to propose a solution but to guard against complacent acceptance of cost-benefit analysis by administrative agencies.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199112 (citing Light-Duty Vehicle Greenhouse Gas Emission Standards, 75 Fed. Reg. 25,524, 25,520–524 (May 7, 2010) (to be codified at 49 C.F.R. pts. 531, 533, 536, 537, 538); Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers, 76 Fed. Reg. 57,516, 57,559–57,561 (Sept. 15, 2011) (to be codified at 10 C.F.R. pt. 430)).

¹⁹ *Id.* at 4.

²⁰ OMB Circular A-94 (revised), available at http://www.whitehouse.gov/omb/circulars_a094.

II. REGULATORY FLEXIBILITY ACT

Under the current Regulatory Flexibility Act, each of three “covered agencies”²¹ must convene a review panel to assess the impact on small businesses of ill-defined economically “significant” proposed rules.²² The Regulatory Flexibility Improvements Act (H.R. 2542) would give primary responsibility for this assessment to the Chief Counsel for Advocacy of the Small Business Administration,²³ and would require the interagency panel that receives the Chief Counsel’s report to include an OIRA employee.²⁴ The Act would also allow OIRA, not just the originating agency—to decide what rules are covered.²⁵ Finally, the Act would require executive agencies to submit to OIRA (and to Congress) their periodic reviews of small business impacts of their existing rules.²⁶ Including OIRA in the process in these ways would promote consistency and reduce bias in the assessment of regulatory impacts on small businesses—a matter of vital importance to the economy.

III. SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT

²¹ The “covered agencies” are EPA, CFPB, and OSHA. 5 U.S.C. § 609(d).

²² *Id.* § 509(a).

²³ H.R. 2542, sec. 6, amending 5 U.S.C. § 609(b).

²⁴ *Id.*, amending 5 U.S.C. § 609(d).

²⁵ *Id.*, amending 5 U.S.C. § 609(e).

²⁶ *Id.*, sec. 7, amending 5 U.S.C. § 610.

Although the primary subject of my remarks has been OIRA, I would be remiss if I did not address the Sunshine for Regulatory Decrees and Settlements Act (H.R. 4078, Title III). This legislation would help to solve the longstanding collusion between activist groups and sympathetic regulators, which use sham (“sue and settle”) litigation to achieve through “consent decrees” administrative rule that cannot be obtained through the ordinary regulatory process. Relegating administrative rulemaking to backroom deals between administrators and particular interested parties undermines the transparency, public participation, and agency expertise that are the hallmarks of our administrative law system. By requiring greater public notice, tougher judicial scrutiny, a more open judicial process, and (in the Attorney General’s office) direct accountability at the highest levels of the Executive Branch, this Act would ensure that “public interest” litigation truly promotes, not impairs, the public interest.

Mr. BACHUS. And I think we welcome statements of bipartisan-ship, because again, that is really the only way we are going to accomplish anything of any importance is by reaching across the aisle. And we try to do that on this Committee, and if anything can unite us, I think this is one of the issues that should. And Professor Katzen, you are recognized for your opening statement.

TESTIMONY OF SALLY KATZEN, VISITING PROFESSOR AT NYU SCHOOL OF LAW; SENIOR ADVISOR, PODESTA GROUP

Ms. KATZEN. Thank you, Mr. Chairman, Ranking Member, Members of the Subcommittee, I appreciate your inviting me to testify today on the point that Ambassador Gray was just speaking to. It is not free of controversy, but there is broad support across the political spectrum for extending the requirements for economic analysis and OIRA review to the Independent Regulatory Commissions and I have been supportive of S. 1173 that accomplishes this in the Senate.

I would like to use my allotted 5 minutes to make three points: First, agency regulations, like legislation enacted by Congress, is legitimate activity of the government, and experience has shown that they are affirmatively good. Complaints about their cost, their inconvenience, their intrusiveness gets traction, at least with some constituents, and in some quarters. I was cheered by the Chairman's and the Ranking Member's statement about the benefits of regulations because regrettably, we hear less about that than about the costs.

Too often, the benefits are taken for granted and I think in a hearing such as this, it bears emphasis that because of regulations the air we breathe, the water we drink are cleaner than they otherwise would be, that our homes, our workplaces, our cars and planes, our children's toys, our parents' medical devices are safer. It is because of regs that we are able to enjoy our civil liberties, our privacy, the freedom from discrimination and regs provide us with information to make intelligible choices and promote competition and fair practices in our markets so that they are open and acceptable and function effectively.

Regulations are not intrinsically evil to be restrained or suppressed because they bring to life the laws that Congress has enacted and the values that we all share.

It is important, I believe, not to forget this attribute of regulations when we speak blithely about regulatory reform which, in some instances, means additional hurdles for the agencies, or obstacles to overcome in their rulemaking effort, and that sensitivity should be in the forefront.

Second, the regulatory process includes many players starting with the agencies to whom Congress has delegated its authority, and including those affected by the regulations, whether they be the regulated entities or the regulatory beneficiaries. And there is a critical role for OIRA to provide a dispassionate objective critique of proposals to ensure to the extent permitted by law that the work of the agencies takes into account the perspective of other agencies and is consistent with the preferences and priorities of the President.

Some see OIRA a gatekeeper. Others call it a coordinator or facilitator, but the importance of OIRA is beyond dispute. Which brings me my third point, the ability of OIRA to carry out its function effectively.

OIRA has new leadership, and this oversight hearing has given you an opportunity to hear directly from Mr. Shelanski and to judge his competence and capabilities.

You can draw your own conclusions. I believe his background and his performance for the last 12 weeks has proved that he has the qualifications, the skills and the temperament to lead OIRA. He has, however, an exceedingly hard task, because regrettably we have come to the point that OIRA does not have the resources, namely manpower, to continue to perform its function effectively.

When President Reagan signed executive order 12291 and gave OIRA the task of coordinating centralized regulatory review—and there were a lot of rulemakings at that time just as there are a lot now—there were 90 staff members, 90 FTEs. There are now fewer than half that number. It is closer to 40. And during the intervening years, Congress has given OIRA a series of responsibilities, be it filing reports with Congress or additional specific responsibilities under a multitude of statutes.

On top of that, we can talk about morale. I thought Mr. Shelanski was quite restrained, but the OIRA staff is extremely dedicated and diligent. But the sequester hurt. I think that each member of the staff had 8 days of furlough this summer. In addition, we are talking about OIRA's capacity tonight when tomorrow morning, it is possible that the staff will be told to pack it up, go home, and don't do their work. They won't know how long, they won't know whether they will be ever be paid for the downtime that they have suffered. I am not sure there is a whole lot more to say if you are talking about oversight of the OIRA function at this point, but I thank you for including me on this panel and I look forward to any questions you may have.

Mr. BACHUS. I appreciate that passionate statement and it was I can tell you they will be given every consideration.

[The prepared statement of Ms. Katzen follows:]

Statement of Sally Katzen

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

“The Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform”

September 30, 2013

Chairman Bachus, Ranking Member Cohen, Members of the Subcommittee. Thank you for inviting me to testify today about the Office of Information and Regulatory Affairs (“OIRA”). The Subcommittee’s last oversight hearing on OIRA was in March 2012. Since then, there has been an election, and President Obama has nominated (and the Senate has confirmed) new leadership both for OIRA and the Office of Management and Budget (OMB). I believe both OIRA and OMB are in exceedingly capable hands, and the work that has been done in the last few months suggests that it is on the right path to effectively perform its responsibilities.

As you know, I served as the Administrator of OIRA for the first five years of the Clinton Administration, then as the Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council, and then as the Deputy Director for Management of OMB. After leaving the government in January 2001, I taught administrative law courses at the University of Pennsylvania Law School, University of Michigan Law School, George Mason University Law School, and George Washington University Law School, and also taught American Government courses to undergraduates at Smith College, Johns Hopkins University, and the University of Michigan in Washington Program. For the last few years, I have been at the NYU School of Law teaching a seminar in advanced administrative law and a first-year course, Legislation and the Regulatory State; this fall I am also serving as the co-Director of NYU Law School’s Washington DC Clinic for third-year law students. I am also a Senior Advisor at the Podesta Group here in Washington. Before entering government service in 1993, I was a partner at Wilmer, Cutler & Pickering, specializing in regulatory and legislative issues, and, among other professional activities, I served as the Chair of the American Bar Association Section on Administrative Law and Regulatory Practice (1988-89). During my government service, I was the Vice Chair (and Acting Chair) of the Administrative Conference of the United States (ACUS). Since leaving the

government in 2001, I have written articles for scholarly publications and have frequently been asked to speak on administrative law in general and rulemaking in particular.

Since the last oversight hearing, regulations have not gotten a whole lot of favorable press. We are told repeatedly that there has been an unprecedented surge in regulations during the Obama Administration and that the resulting burden (and the likelihood of more regulations in the next few years) is a drain on the economy, the reason why job growth has not been as strong as expected, and the reason why American industry is at a competitive disadvantage in the global market, to name just a few of the assertions by the critics.

In fact, with respect to the number of regulations, there have been *fewer* (rather than more) final rules, and fewer significant final rules (those reviewed by OIRA), published in 2012 and 2013 (to date) than during any year of the George W. Bush Administration (or any year of the Clinton Administration). In addition, it bears emphasis that the 111th Congress enacted several major pieces of legislation, including the Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act, which include delegations of authority to federal agencies for hundreds of regulations to implement these laws. That is what the Constitution charges the Executive to do: “take care that the laws be faithfully executed.” (Art. II, Sec. 3) There may be some in the current Congress who want to repeal these laws, but their efforts to that end have so far been unsuccessful, and as long as the laws are on the books, the agencies are responsible for issuing implementing regulations giving effect to the legislative mandates.

With respect to the total cost of all regulations, the basis for the oft-quoted quantification has been fiercely disputed and discredited, and the sponsoring agency has recently clarified that the underlying study “cannot appropriately be used to inform discussion about any regulatory costs that have or have not been incurred since 2008.” <http://www.sba.gov/advoacy/7540/49291>. Similarly, there are precious few facts to support the various allegations regarding the adverse effect of recent regulations on the economy. An April 8, 2013, paper entitled “What are Regulation’s Effects on Employment?” from the University of Pennsylvania Program on Regulation observed: “researchers and agency analysts have made remarkably few attempts to evaluate systematically the broader employment effects of regulations after they have been adopted and implemented.” It did look at several recent studies, which essentially found “no substantive or statistically significant effects of local air pollution regulations on employment” (emphasis added). <https://www.law.upenn.edu/blogs/reblog/2013/04/08-coglianesi-regulation-and-employment.html>. An April 3, 2012, report from NYU’s Institute for Policy Integrity made essentially the same point: “The current debate on jobs and environmental regulation too often relies on thinly-supported forecasts about

jobs “killed” or “created” by public protections.”

<http://policyintegrity.org/publications/detail/regulatory-red-herring>

Moreover, while we hear a lot about the costs of regulation, we rarely hear about the benefits of regulation – for example, improving our health or the air we breathe or the water we drink; protecting our safety in our homes, our automobiles, or our workplaces; or increasing the efficiency of our markets. Those who embrace cost/benefit analysis should speak to the benefits as well as the costs of regulation. Here, there are data -- incomplete as they may be -- which clearly show that the benefits of rules issued during the Obama Administration have been substantially greater than the costs of those rules. For example, the 2012 Report to Congress on the Benefits and Costs of Federal Regulations showed that for FY2011 (the most recent fiscal year for which data are available), the rules “were estimated to result in a total of \$34.3 billion to \$89.5 billion in annual benefits and \$5.0 billion to \$10.1 billion in annual costs.”

www.whitehouse.gov/sites/default/files/omb/inforeg/2012_cb/2012_cost_benefit_report.pdf at 24. Therefore, even taking the lowest estimate of benefits (\$34.3 billion) and the highest estimates of cost (\$10.1 billion), the rules issued in 2011 produced at least \$24.2 billion in net benefits

In my testimony for the last oversight hearing, I mentioned in passing the subject of the adequacy of OIRA resources. While it is fashionable to argue that government agencies should do more with less, there comes a point when that is simply not possible. We are now at that point. When OIRA was created and President Reagan signed EO 12291 (the predecessor of EO 12866 which today governs regulatory review), there were about 90 FTEs (full-time equivalent employees) at OIRA; during my tenure, the number was between 60 and 50. The current number is hovering around 40. Yet during this period, Congress has assigned new tasks to OMB, including requiring various reports to Congress and imposing specific on-going responsibilities under the Unfunded Mandates Reform Act of 1995, the Small Business Regulatory Enforcement Act of 1996, the Data Quality Act of 2001, the Regulatory Right-To-Know Act of 2001, the Small Business Paperwork Relief Act of 2002, and the E-Government Act of 2002. And all of this is without regard to the extended furloughs of all of the OIRA staff during the past summer as a result of the effect of the sequestration on an agency whose primary costs are for its personnel, and add to that the fact that this hearing is taking place on the last day of this fiscal year, and tomorrow the staff of OIRA could possibly be told to stay home and not do any work; even if a government shutdown is averted after this statement is submitted to the Subcommittee, the OIRA staff, like the staff of almost all government agencies, spent a great deal of time and effort last week (and possibly before that) working on contingency plans for a shutdown rather than on regulatory reviews or other routine business of the office. The business community has repeatedly argued with great force

and logic that certainty is critical to its planning and operations; the same principle, I submit, applies with equal force and logic to government operations.

I am not oblivious to the widespread appeal for smaller government as an abstract concept. But it would, in my opinion, be penny-wise and pound foolish to apply that concept indiscriminately across all programs and agencies. The President's Council on Jobs and Competitiveness, which was created to provide non-partisan advice to the President on strengthening the Nation's economy and enhancing our competitiveness in global markets, stated in its final report: "Thorough review by OIRA improves the quality of regulatory analysis and decisions Even modest improvements in regulations can yield billions of dollars in benefits to the public." http://files.jobs-council.com/files/2011/10/JobCouncil_Regulatory.pdf. The Council recommended that OIRA's staff be increased. There are other voices calling for an increase. See http://www.rollcall.com/news/more_resources_for_regulatory_review_would_benefit_consumers_commentary-227408-1.html. Having had the privilege of serving as Administrator of OIRA, I am convinced that the staff of OIRA is one of the best investments we can make to continue progress in the regulatory arena.

Another topic I raised in the last oversight hearing that relates to the orientation of OIRA, which traditionally has focused virtually all of its time and resources on the review of individual regulatory actions developed by the agencies – one at a time (except where two or three arrive in close proximity to one another). While this review is critical in providing a dispassionate and analytical "second opinion" on an agency's significant regulatory actions and in ensuring that each new significant regulatory action is consistent with the President's policies and priorities (as well as coordinating regulatory policy within the Executive Branch through the inter-agency process over which it presides), it would be an important step forward if OIRA could do more than one-by-one reviews. The issues plaguing our country are not likely to be solved by a single regulatory action, nor do they always fit neatly in one agency. Whether it be clean air, worker safety, food purity, energy efficiency, or a host of other issues of concern, it is often valuable to look beyond the specific proposal presented and consider the broader picture – in effect, construct a framework for addressing the problem, allocating resources, and ensuring a coherent and comprehensive regulatory solution.

The mechanism for embarking on and developing such an approach is already in place – Section 4 of Executive Order 12866, "Planning Mechanism." Under sub-section (c), "The Regulatory Plan," both Executive Branch agencies *and* IRCs must send to OIRA (for OIRA review and circulation to other interested agencies) a document that includes a statement of the agency's regulatory objectives and priorities as well as a summary of "the most important significant regulatory actions that the agency expects to issue in proposed or final form in that fiscal year or thereafter." These materials are

published in the semi-annual *Unified Regulatory Agenda*. I know that the *Agenda* has not always been published on time (in this and previous Administrations), and that last year one of the semi-annual *Agendas* was not published. Some have implied that the lapse last year was the result of nefarious political manipulations at work, but my understanding is that the delay was occasioned by an altogether legitimate (and much needed) effort to make the *Agenda* a more useful tool for all concerned.

The *Agenda* is the one systematic government-wide report of contemplated (and completed) regulatory actions. As such, it is used both by those inside the government and by stakeholders potentially affected by the regulations—be they regulated entities or regulatory beneficiaries -- to monitor what is happening at the various regulatory agencies. But the document is only as valuable as the information is accurate. Regrettably, over the years, a number of regulatory proposals were included in the *Agenda* because someone at an agency thought it was possible that action on that proposal might occur within a few years; then, once entered into the *Agenda*, the entry takes on a life of its own even if there is virtually no likelihood of any activity on the proposal in the foreseeable future. The information then becomes misinformation or obscures what is truly relevant. While it should be easy to “clean up” the *Agenda*, it apparently is appreciably more difficult and time consuming than anyone thought.

For this and other reasons, the process of submitting entries to the *Agenda* has become more of a paper exercise than an analytical tool. Again, this is not new; before, during and after my tenure at OIRA, the focus was on the transactions, rather than broadening the inquiry and better coordinating the regulatory activity of the agencies. But it does not have to be that way. Professor Peter Strauss of Columbia law School and others have called for OIRA to put meat on the bones of this planning process. I concur, so long as OIRA is given the support and resources to do so.

Thank you again for inviting me to participate in this hearing, and I look forward to answering any questions you may have.

Mr. BACHUS. And that is a striking number that the staff is half of what it used to be, and I notice that the administrator said that each of those analysts is a specialist. They have different areas of expertise and they are not interchangeable, and so there definitely, the way we are approaching our budget and our funding leaves a lot to be desired. Mr. Morrall, or Doctor, I am sorry.

TESTIMONY OF JOHN F. MORRALL, III, AFFILIATED SENIOR SCHOLAR, MERCATUS CENTER, GEORGE MASON UNIVERSITY

Mr. MORRALL. John.

Chairman Bachus, Ranking Member Cohen and Members of the Committee thank you for this honor to testify on the role of OIRA. I have spent my working life trying to improve regulatory policy, much of it at OIRA as a civil servant from its beginning in 1981 until.

Mr. BACHUS. Doctor, if you will turn on your mic.

Mr. MORRALL. I have spent my working life trying to improve regulatory policy, much of it as OIRA as a civil servant from its beginning in 1981 to my retirement exactly 5 years ago today. During that time, we reviewed almost 22,000 final rules out of 130,000 published by all Federal agencies, including the independent agencies. I am currently an affiliated scholar at Mercatus, and the regulatory analyst for Bloomberg government. My day jobs entail reading each day's Federal Register, so please forgive me if my remarks make your eyes glaze over, or I don't always use plain language. Blame years of reading hundreds of thousands of pages in the Federal Register.

A well-known Washington saying is, where you stand is where you sit. I sat in thousands of meetings discussing specific regulations as both regulator and as a regulator of regulators with agency officials supporting regulatory proposals, outside interests trying to modify them to their advantage, and White House officials, including Boyden and Sally, trying to do the right thing.

So I have some thoughts about how to improve the regulatory process and its results. I wish to make two broad points, present some research findings that I have been involved with and offer some suggestions for the new administrator.

First, OIRA should focus on its original mission to mitigate unintended consequences of agency actions. Even a well functioning administrative process is not likely to produce smarter regulations absent a strong, internal advocate for economic efficiency and an independent ability to verify the evidence offered.

Incentives and pressures applied to agencies create an ever present risk, decision making influenced more by politics and preferences than objective analysis focused on problem solving for which OIRA and OMB have traditionally been advocates. I told my staff to represent the people not at the table who don't likely don't even know there is a table.

Second, an effective OIRA needs more of the right staff members, individuals trained in economics, benefit cost analysis and the scientific method. And they need more time and opportunity to evaluate major rulemakings that heavily impact economic growth and jobs.

At many of the meetings I attended to discuss regulatory impact analysis, politics not economics dominated. Program officials and their lawyers viewed OIRAs as a procedural hurdle to overcome and a possible danger to their regulations either in their public rollouts or judicial review. The economists from the agencies often sat quietly and later in follow-up could not talk to OIRA without going through their general counsel's office.

The vast literature on OIRA's role and effectiveness is in improving regulations with some exceptions, agrees that safeguards against capture, tunnel vision and ex post rationalization are keys to better regulation. I saw OIRA's main role evolve from watchdog whose job was to ensure that agencies use economic logic and quality benefit cost analysis when regulating to a "conveyor and convener and information aggregator assuring that agencies properly follow the Administrative Procedure Act.

The new administrator is uniquely qualified with both formal legal and economic training to pursue both roles but rulemaking needs more careful analysis of consequences and fewer advocacies for special interests, which are always well represented. With the goal of approving regulation in mind I recommend the following.

First, the OIRA administrator needs to insulate the economic analysis and recommendation from politics as much as legally feasible. It is difficult for agencies to achieve objectivity when subject to so many subjective forces. OIRA can serve as a mechanism for regaining focus on the potential effects of the rulemaking which will impact everyone, rather than being focused on who does or does not support the rule.

Number 2 make it a priority to expand OIRA's resources in the areas where it matters the most, specialists in benefit cost analysis and risk assessment, errors in these two areas can be major barriers to successful problem solving which is the intent and purpose of rulemaking.

And last, make the time devoted to rulemaking as productive as it can be. Consider making procedural change to have agencies submit an OIRA contain a description of the problem, options for addressing it and cost benefit analyses of each option to OIRA for quality control and approval before the agency actually drafts its proposed rule. Thank you very much.

Mr. BACHUS. Thank you, Doctor.

[The prepared statement of Mr. Morrall follows:]



MERCATUS CENTER
George Mason University

Bridging the gap between academic ideas and real-world problems

TESTIMONY

REINVIGORATING, STRENGTHENING, AND EXTENDING OIRA'S POWERS

BY JOHN F. MORRALL III

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

September 30, 2013

Thank you for your time and invitation to testify before this committee on the role of OMB's Office of Information and Regulatory Affairs, or OIRA for short. I have been studying, teaching, and working to improve regulatory policy for over 40 years, including my time as an economist, branch chief, and acting deputy administrator at OIRA from its beginning in 1981 to my retirement from the government exactly five years ago today. While I was at OIRA, we reviewed 21,741 final rules under EO 12866 and its predecessor, out of 129,481 final rules published by all federal agencies. About 300 of these rules were major rules with costs, benefits, or both over \$100 million. The cost of those 300 rules, adding up the agencies' own estimates in today's dollars, is about \$195 billion annually.¹

I was a career civil servant and economist reviewing regulations and helping to manage the regulatory process under various executive orders and five presidents. I also worked at Department of Labor, Housing and Urban Development, Council on Wage and Price Stability (a predecessor of OIRA in the Carter administration), and at the Brookings Institution and the American Enterprise Institute. Before that I taught international economics in the University of Florida's business school. I am currently an affiliated senior scholar at the Mercatus Center at George Mason University and a regulatory analyst for *Bloomberg Government*.² My current jobs entail reading each day's *Federal Register* and analyzing the economically significant regulations and Regulatory Impact Analyses, something I used to do as a government economist. So please forgive me if my remarks make your eyes glaze over or I don't always use plain language.

A well-known Washington saying is, "Where you stand is where you sit," and I have sat in thousands of meetings at all sides of the table, discussing specific regulations as both a regulator and as a regulator

1. See 2009 Report to Congress on the Cost and Benefits of Federal Regulations, Office of Management and Budget, Office of Information and Regulatory Affairs.

2. My observations and recommendations are my own and do not necessarily reflect the views of either the Mercatus Center or Bloomberg Government.

For more information or to meet with the scholars, contact:
Robin Bowen, (703) 993-8582, rbowen@mercatus.gmu.org
Mercatus Center at George Mason University, 5351 Fairfax Drive, 4th Floor, Arlington, VA 22201

of regulators, which is one view of OIRA's role held especially by the agencies. So naturally I have some thoughts about how to improve both the regulatory process and outcomes. I hope they reflect a balanced staff perspective. They are in the form of observations, lessons learned, and recommendations for the new administrator from a lifelong advocate of better regulation. In view of the fact that OIRA's key function is to review regulations according to the good government principles of various executive orders and the president's own policies, I wish to make two broad points. First, OIRA should focus on its traditional mission of being a "watchdog" for the public, including citizens not yet born, seeking and attempting, if possible, to mitigate any unintended consequences of agency actions. Even a well-functioning process is not likely to produce good regulations absent a strong advocate for the broad public interest in the rule-making process or an independent ability to verify agency claims. I will explain why the incentives and pressures applied to agencies create an ever-present risk of decision-making influenced more by politics and preferences than by the objective analysis focused on problem-solving that OIRA and OMB have traditionally been advocates for.

My second, and related point, is that an effective OIRA needs more of the right staff members—individuals trained in benefit-cost analysis and risk assessment—and more time to evaluate economically significant rulemakings.

BACKGROUND

OIRA's key function is to review regulations according to the good government principles of various executive orders and the president's own policies. It reviews regulations issued by the executive branch agencies before they are published in the *Federal Register* as both proposals for notice and comment under the Administrative Procedure Act and as final regulations. By executive order, Executive Branch agencies are not permitted to publish significant regulations until completing OIRA review.

OIRA was established by President Carter in 1980 to control red tape and charged by President Reagan in January 1981 to help combat an economic crisis many feel was worse than the one we have just been through. Stimulative monetary policy could not cure a crisis it had created. Micro policy could, by reforming regulations. Reducing regulatory costs and maximizing its net benefits could create economic growth, higher employment, and a safer and more healthful society.³ Twenty years ago today, President Clinton, after an internal debate about OIRA's future, decided to strengthen President Reagan's EO 12291 by issuing EO 12866, which focused review efforts on the most significant regulations and codified certain transparency and open government procedures. Despite the inherent controversy of having to say no to agencies and their constituencies, OIRA review and Regulatory Impact Analysis, as outlined in EO 12866, remain the basic framework for managing the executive branch regulatory process. (In the old days our softball team proudly called ourselves the No-Men.)

At many of the meetings to discuss the Regulatory Impact Analysis of the regulation, or RIA, a certain dynamic was often clear. The program officials and their lawyers saw the RIA as procedural hurdle to overcome and a possible danger to defending the regulation, either in the public rollout or upon a judicial challenge. Economists from the agencies often sat quietly in the meetings and were not supposed to talk to OIRA economists without going through their general counsel's office. Another important observation was that in meetings with outside interests, including the regulated, hardly anyone opposed a specific regulation. Rather, they suggested ways to tweak the regulation to their advantage or increase the costs to their competitors.

There is a vast literature about OIRA's proper role, its effectiveness in improving regulation, and recommendations for improvement, written by political scientists, economists and administrative law specialists,

3. Then vice president George H.W. Bush was put in overall charge of that effort as head of the Task Force on Regulatory Relief.

and environmental law professors.⁴ Except for the environmental law professors, the literature generally agrees that safeguards against capture, tunnel vision, and ex post rationalization are needed in the regulatory development process.

I will mention just a few recent findings with which I have been involved that may prove useful to the new administrator, but first, I will provide some recent context.

An Observation: From Watchdog to Information Retriever

OIRA's main modus operandi appears to have evolved after 42 years from being a watchdog whose job was to ensure that agencies used economic logic and quality benefit-cost analysis when regulating to being a "conveyor and convener" and "information aggregator" for the agencies so that they properly followed the Administrative Procedure Act and the "prescriptions of the relevant executive orders."⁵

Certainly, following the Administrative Procedure Act is a very important component of high-quality regulation, but the agencies have both strong incentives to make sure their regulations are not overturned on APA grounds and many more lawyers than OIRA. Moreover, the agencies have specific missions and mandates to mitigate important social problems by regulation and thus have fewer incentives than OMB/OIRA to ensure that costs and benefits have been carefully analyzed and alternative approaches examined. OMB's mandate is much broader and reports directly to the president. Given our limited government and private resources, OMB's traditional mission, not to mention its comparative advantage, has been to worry about and, if possible, mitigate any unintended consequences of agency actions and to make policy recommendations on budget and regulatory priorities within various statutory frameworks.

My observation is that the more recent OIRA has shifted its focus from the substance of regulatory policy issues and a soft regulatory budget role to ensuring that the management of the regulatory process is full and complete. My observation is supported by comparing the views of recent administrators on the role of OIRA, expressed after they left public service in the *University of Pennsylvania Law Review* in 2008 and the *Harvard Law Review* in 2013. The earlier article emphasizes the important role that benefit-cost analysis and priority played in OIRA review while the later article emphasizes the importance of its administrative role as a "conveyor and convener" and "information aggregator," although they both discuss the roles of process and substance.⁶

The big picture view of OIRA's mission was well expressed by Cass Sunstein in 2002:

OIRA should also see, as one of its central assignments, the task of overcoming tunnel vision, by ensuring that aggregate risks are reduced and that agency focus on particular risk does not mean that ancillary risks are ignored or increased.⁷

Effective OIRA administrators appreciate old Washington wisdom, such as the already mentioned "where you stand is where you sit," and the newly popular "trust but verify." Even a well-functioning process is not likely to produce good regulations absent a strong advocate for the broad public interest in the rule-

4. The authors include both Supreme Court Justices and Nobel Laureates in economics.

5. The terms "conveyor and convener" and "information aggregator" were used by Cass Sunstein to describe OIRA's role in a recent *Harvard Law Review* article, "OIRA: Myths and Realities," published after he left OIRA. The emphasis on following the Administrative Procedure Act and the "prescriptions of the relevant executive orders" was a main message of Administrator Howard Shelanski's July 24, 2013 testimony before the Reducing Red Tape hearings of the House of Representatives, Committee on Small Business.

6. See John Graham "Saving Lives Through Administrative Law and Economics" *University of Pennsylvania Law Review* 157, no. 2 (December 2008) and Cass Sunstein "OIRA: Myths and Realities" *Harvard Law Review* 126 (2013): 1842.

7. *Ibid.*

making process or an independent ability to verify. OIRA and OMB have traditionally been both advocates for economic efficiency and experts in impartial data analysis. The new administrator is uniquely qualified with both formal legal and economic backgrounds. As someone who knows what it's like to work at OIRA, I would tell the new administrator that I think regulatory policy needs more careful analysis of consequences and less advocacy of specific interests. In my career, I recall several instances where better and more objective RIAs might have avoided significant harm to our national economy: HUD goals and timetable rules for GSEs that led to the increase in subprime mortgages and EPA's renewable fuel standards and ethanol regulations that increased corn prices.

To reinvigorate that role, OIRA needs first to restore its economic and technical staffing levels, which have been cut in half over its existence while its functions in paperwork, information policy, and statistical policy have been dramatically expanded. At one time, OIRA had a specific branch of a dozen or so economists who specialized in benefit-cost analysis, and OIRA hired scientific experts in risk analysis. Today it has a few experts scattered among five branches who are, for the most part, staffed with overworked although highly competent desk officers. In the past, OIRA was also fortunate to attract top economists on detail from the agencies. They impartially reviewed RIAs from other agencies, making substantive contributions while gaining insights that advanced their careers and agency regulatory policy when they returned.⁸

RECOMMENDATION

In the words of Cass Sunstein's 2002 recommendation, "OIRA should be reinvigorated, and its powers should be extended and strengthened, so as both to deter unreasonable regulation and to ensure that reasonable regulation is forthcoming."⁹

As a first step, OIRA's ability to thoroughly review benefit-cost analyses and ensure high-quality standards should be a high priority of a new administrator.

Findings from the Recent Literature: OIRA Has a Lot of Potential to Improve Regulation but Must Overcome Strong Political Influences

Recent findings from studies of the regulatory process by Mercatus scholars and others show that regulatory reform and better regulation are clearly needed and have significant potential to improve investment and economic growth. This is well understood by most of the world, with over 50 countries adopting RIAs and regulatory oversight practices informed by OIRA's early success. What we have learned is that better regulation is a constant struggle against short-term political gain for narrow interests.

First, while at OIRA, I developed league tables of risk regulations and found that the cost-effectiveness of final regulations aimed at saving lives can vary by several orders of magnitude. The findings imply that a better system of setting priorities when it comes to regulation could save thousands of lives while saving billions of dollars by focusing time and effort on issuing regulations that could save more lives at lower costs.¹⁰

Second, a study with Stewart Shapiro of Rutgers University, also a former OIRA economist, called "The

8. Several later became heads of the policy shops at their agencies.

9. Ibid. Shortly after this recommendation, OIRA was reinvigorated and strengthened by John Graham, who was President Bush's only confirmed OIRA administrator. He hired more economists and scientists, returned regulations to the agencies, using public "return letters," and even suggested cost-effective regulations to the agencies, using "prompt letters."

10. See Morrill, "A Review of the Record," *Regulation* (November/December 1986) and "Saving Lives: a Review of the Record," *Journal of Risk and Uncertainty* 27, no. 3 (2003).

Triumph of Regulatory Politics: Benefit Cost Analysis and Political Salience," published after we left OIRA, found upon analyzing ten years of benefit-cost data for 109 major rules that there was no relationship between the amount of information considered in the analysis and the net benefits in the rule.¹¹ We then decided to test other variables that might potentially affect the net benefits of a regulation. In particular, we wanted to examine the effect of political factors on the results of an analysis. We divided our dataset both by the comments received on the rule (assuming that rules that received more comments were more political) and by whether the rule was a "midnight" regulation promulgated in the last six months of an administration (assuming that administrations wait to the end of an administration to promulgate their more controversial rules). Our findings were stark. Rules that were issued away from the glare of the political spotlight had higher net benefits than politically salient rules.

The paper concludes, "Politics and economics in the rulemaking process are fatefully intertwined. Congressional politics influences the statute that puts bounds on the policy options an agency may consider. Presidential and agency politics influence agency choices both on policy and, as shown here, on the analysis of the policy." An OIRA administrator needs to insulate the economic analysis and recommendations from politics as much as is legally feasible.

Third, in a second paper with Shapiro, "Does Haste Make Waste? How Long Does It Take to Do a Good RIA," we examine the relationship between the amount of information in an RIA and the time it takes to write and review the RIA.¹² We find that the longer an agency spends developing the regulation and the longer that OIRA spends reviewing it, the more information in the analysis. However, the direction of causality is unclear. Better analyses may take more time to review. Or more review may make analyses better. We recommend increasing OIRA staff, which has advantages regardless of the direction of causality. Increasing OIRA staff has significant potential for improving regulatory analysis and the underlying regulations at a relatively low cost, even taking into account that the regulation provides significant net benefits, as OIRA maintains. As a second-best option, increasing OIRA review time would also likely provide net social benefits.

Finally, in a study based on data from the RIA Report Card project at the Mercatus Center at George Mason University with colleagues Jerry Ellig and Patrick McLaughlin,¹³ we found that, apart from relatively poor-quality scores, there was little overall difference in the quality and use of RIAs between the Bush and Obama administrations, although interestingly we found that the more liberal agencies (Labor, Health and Human Services) got through OIRA with lower-quality analyses in the Obama administration, while the more conservative agencies (Defense, Homeland Security) got through OIRA with lower-quality analyses in the Bush administration. OIRA needs to do a better job enforcing its quality standards and being aware of political influences.

The staff had a saying in OIRA when I was there: we don't make policy decisions; we just raise the cost of making bad decisions (by making them more transparent).

11. See Stuart Shapiro and John Morrall, "The Triumph of Regulatory Politics: Benefit Cost Analysis and Political Salience," *Regulation and Governance* 6, no. 2 (June 2012).

12. See Stuart Shapiro and John Morrall, "Does Haste Make Waste? How Long Does It Take to Do a Good Regulatory Impact Analysis," published online 21 August 2013, *Administration & Society*. The benefits of longer review time were confirmed by Ellig and Fike using a different data set. See Jerry Ellig and Rosemary Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis" (Working Paper No. 13-13, Mercatus Center at George Mason University, Arlington, VA, July 2013).

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

FINAL THOUGHTS

The enormous amount of regulation generated each year and the huge potential for improving it could provide enormous net benefits to society. A strong watchdog agency is needed to provide the transparency and checks and balances needed to set priorities for high-impact regulations.

In addition to rebuilding OIRA's technical staff and enhancing its voice in policy debates with the agencies, several other more subtle steps should be considered by the administrator.

In its 2008 draft report to Congress, OIRA proposed publishing a scorecard that consisted of nine questions to rate the completeness of agency RIAs.¹⁴ It was already using such a scorecard for internal purposes, such as staff performance awards. The hope was that this transparency approach would directly encourage agencies to do a better job providing the information required by OMB circular A-4, which established best practices for RIAs. However, even though the three peer reviewers asked by OIRA to review the report expressed support for the scorecard concept and no adverse comment was received, OIRA has not gone forward with the project.¹⁵ Given that the scorecard concept is widely used in the academic literature on regulatory policy, including by the Mercatus Center, it may be time for OIRA to step up to the plate and increase its leverage.

Finally, a procedural change that would likely strengthen and reinvigorate OIRA would be to require that agencies perform their RIAs, including cost-benefit analyses of alternatives, before they choose their preferred alternative and draft the regulation. Agencies would be required to describe the problem to be solved, including any market failure, and send the RIA formally to OIRA for quality control and approval before the proposed regulatory language is sent. An amendment to EO 12866 could formalize this process.

Thank you again for the chance to express my views.

ABOUT THE AUTHOR

John Morrall is an affiliated senior scholar at the Mercatus Center at George Mason University. His primary research interests are regulatory impact analysis, benefit-cost analysis, and regulatory reform and oversight. From 1981 until 2008 he worked at the Office of Information and Regulatory Affairs of the Office of Management and Budget as an economist, branch chief and Acting Deputy Administrator. He was the lead author for OMB's annual Report to Congress on the Costs and Benefits of Federal Regulations.

Dr. Morrall has been both a Visiting Economist at the American Enterprise Institute and a Brookings Institution Economic Policy Fellow. He also worked on regulatory reform at the Council on Wage and Price Stability. Prior to his government service he was an Assistant Professor of International Economics at the University of Florida. He has also taught economics at the American University and the University of North Carolina at Chapel Hill.

ABOUT THE MERCATUS CENTER

The Mercatus Center at George Mason University is the world's premier university source for market-oriented ideas—bridging the gap between academic ideas and real-world problems.

A university-based research center, Mercatus advances knowledge about how markets work to improve people's lives by training graduate students, conducting research, and applying economics to offer solutions to society's most pressing problems.

Our mission is to generate knowledge and understanding of the institutions that affect the freedom to prosper and to find sustainable solutions that overcome the barriers preventing individuals from living free, prosperous, and peaceful lives.

14. OIRA, *Draft 2008 Report to Congress on the Costs and Benefits of Federal Regulations*, 18. This scorecard was used by Shapiro and Morrall to rate final RIAs with both cost and benefits from 2001 to 2008 in the two articles cited above. A more complete scorecard based in part on this one has been used to rate all proposed major rules since 2008. They are posted at <http://mercatus.org/reportcard>.

15. OIRA, *2008 Final Report to Congress on the Costs and Benefits of Federal Regulations*, 20–24.

Mr. BACHUS. And Ms. Riley.

**TESTIMONY OF NICOLE RILEY, VIRGINIA STATE DIRECTOR,
NATIONAL FEDERATION OF INDEPENDENT BUSINESS**

Ms. RILEY. Thank you, Mr. Chairman and Members of the Subcommittee. It is my pleasure to be here on behalf of the National Federation of Independent Business and our 350,000 members across the country, 5,500 of those that are in the State of—Commonwealth of Virginia. So I know they very much appreciate the Committee's interests on how Federal regulations impact them as small business owners and the amount of time and resources it takes for them to comply. So thank you very much for this opportunity.

In my written testimony, you will find more details regarding how members feel about today's regulatory climate, but I did want to first recognize that our small business owners are very much aware and recognize the need for regulation, understanding that there is public safety for consumers, for clients and for the general public. But what they really do worry about is they want to make sure that those regulations are sensible. And what we mean by that is that they accurately weigh all the costs and benefits, including flexible compliance options. For many small business owners one size does not fit all and so many of them, flexibility would certainly be helpful.

But what I really want to spend most of my time this afternoon speaking of are actually to give you three good examples of members' stories that I have heard while I have been out on the road visiting with our members across the Commonwealth, because I think a lot of times it helps to really get a real picture, a flavor for what small business owners are actually experiencing.

The first example I want to talk about is members that we have in Roanoke City, Chris and Betsy Head, they are franchisee owners of Home Instead Senior Care, which means they provide companionship-type services for their clients, for people who are elderly or disabled. And this allows these people to stay in their homes more than having to put them in facilities to be cared for.

Specifically, the Department of Labor just 2 weeks ago finalized a rule that was known as the companionship exemption for minimum wage and overtime for home care workers employed by third party agencies, many of which are small businesses, including the Heads. And specifically this overtime portion is where, I think, a lot of folks including the Heads are really going to feel an impact on their business, but there is also going to be impact on their clients and there is going to be impact on their employees.

The Heads often provide what they call sleep over service for their clients. And this is where a worker comes in at night for a 10 to 12-hour shift, ensures the client eats dinner and gets them ready for bed, and then while the clients is asleep, the worker sleeps as well on site in case of an emergency.

The new Department of Labor rule will require employees be paid time and a half for every hour worked over 40 in a given week. Under the exemption, employees received their straight hourly wage for hours over 40. So this will significantly increase the cost for these employees that provide this type of sleep-over

service. Many clients simply won't be able to afford this change. The Heads anticipate that they will see a 20 to 25 percent number of clients that will leave and try to go elsewhere. And they might end up trying to find, what they are worried about is they potentially go to folks who are not licensed, they would do more, go to someone who might work in that gray area. But to stay competitive, the Heads will have to limit their employees to 40 hours to keep costs down so that that client could afford them.

So but we are seeing where both the client is going to be seeing less care or not be able to afford the care that they need, and you are also going to see employees who typically would have had more hours in pay are now going to be limited to 40 hours.

Another example comes from Mr. Bill Neff from Harrisonburg, Virginia. He is a commercial real estate developer has been in business about 50 years. And he ran into some trouble not too long ago with a church actually that was trying to construct on a new piece of property that they had. He put together a projected cost for that project, and it included what would need to deal with stormwater runoff. And a lot of this comes from the EPA particularly where Harrisonburg is located it is in the Chesapeake Bay watershed, so there are a lot of stringent rules regarding stormwater runoff.

He typically, in this project, originally proposed that they put in a retention pond with rock to be able to filter the runoff during the storm. He submitted that project for permits. It was rejected, and he ended up having to put in a filtration system that would now cost \$60,000. The original proposal was only \$10,000.

So this was a significant burden on that church. And now any new commercial property project that he takes on, he will have to now consider those costs into the project.

A third example is Rob Frazier with Frazier Quarry. They are a limestone company in Rockingham County, and they recently have had to deal with a rule that came through a couple years ago that requires a mining operation to, in the event of an emergency, make the a call to the agency to report that emergency within 15 minutes of the emergency occurring.

They had a situation where this did occur here. They did not want to face the 5- to \$60,000 fine that would be incurred upon them, even though within 15 minutes of that emergency they are really more concerned about obviously making sure emergency personnel are onsite, their employees are taken care of, but here they are having to make this call to this agency within 15 minutes.

Once they did make the call, they did make the call within 15 minutes, they were given a phone service. That individual on the call did not know why they were calling, did not understand why they were making this call. And so then they had to spend additional time trying to explain why they were trying to call the agency to report this emergency.

So a lot of times for small business owners, it is also the frustration of just the compliance piece that they face on a daily basis. So hopefully these three situations give a little bit of an illustration of what they face on a day-to-day basis. And I certainly appreciate the time and I will take any questions. Thank you.

Mr. BACHUS. Thank you.

[The prepared statement of Ms. Riley follows:]



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

on the date of

September 30, 2013

on the subject of

The Office of Information and Regulatory Affairs:

Federal Regulations and Regulatory Reform

Dear Chairman Bachus and Ranking Member Cohen:

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

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

In my job as NFIB's Virginia state director, I routinely travel the state and visit with small business owners hoping to grow their business and create job opportunities within their community. All too often, however, I hear stories about how unreasonable federal and state regulation is becoming a greater ordeal to comply with. Our members tell me that routinely a new regulation affecting them is added to the list of rules they already struggle to comply with. And if a new rule doesn't directly threaten the existence of their business, it certainly takes time away from running their business and creating jobs.

The statistics back up the stories I hear. According to NFIB's monthly survey of its members, *Small Business Economic Trends*, "government requirements and red tape" is the second most-frequent response to the question: What is the single most important problem facing your business today? More than one in five small business owners answered that regulation is the biggest problem they face. The only problem ranking higher is taxes.¹

Every day, the problem is getting worse. From January 1 through September 27 of this year, federal agencies have issued 2,878 rules according to regulations.gov, the federal government's online rulemaking portal.² That is more than 10 new requirements a day that small business owners need to review to see if they apply to their business. The entrepreneurs that I visit with simply don't have time to keep up with the load.

Accurate Cost Estimates are Important

Small business owners are increasingly concerned with what they believe are questionable agency estimates of the benefits of rules versus the cost. When we explain to them how an agency estimates the costs for a particular rule, they find it unfair that an agency is allowed to use indirect benefits to generate large purported benefits but there is no requirement that agencies calculate reasonably foreseeable costs to indirectly regulated entities, which often are small businesses. This discrepancy applies to regulatory flexibility analyses as well.

Take for example a proposed rule issued recently by the U.S. Environmental Protection Agency (EPA) to limit carbon emissions from new power plants. NFIB members are

greatly concerned about the potential impact of this rule on their ability to get affordable electricity. Yet in its regulatory flexibility analysis, the EPA concluded that the rule will not have a significant impact on small businesses because they are not directly regulated. So EPA has not even considered the impact of rising electricity prices on small businesses as a part of the total costs of the rule. The small business owners I talk to do not think this is fair.

NFIB believes that getting an accurate portrayal of indirect regulatory costs would help paint the picture of the impact these rules have on small businesses. That is why we have strongly supported the Regulatory Flexibility Improvements Act, which I'm pleased to say has been favorably reported by the House Judiciary Committee under the leadership of Chairman Goodlatte and Rep. Bachus.

Examples of the Impact of Regulation on Virginia Businesses

I want to take this opportunity to provide you with a few real life stories from NFIB members in Virginia that illustrate the bottom-line impact and frustration that regulations often cause small business owners.

The Department of Labor's Companionship Exemption Rule

The first example I want to mention is a rule that was just finalized by the U.S. Department of Labor (DOL) about two weeks ago. Even though it failed to adequately identify a market failure, the Wage and Hour Division finalized a rule eliminating what's known as the companionship exemption for minimum wage and overtime for home care workers employed by third party agencies, many of which are small businesses. These workers serve clients – typically the elderly and disabled that cannot fully take care of themselves – in a non-medical capacity by making sure clients stay safe. Occasionally, they will help prepare meals, help the client get dressed, or even play a board game with the client to pass the time. However, their primary function is to ensure the safety of the client by providing companionship.

This industry provides an affordable alternative for families that don't want to see a loved one placed in a nursing home or other type of care facility. Yet this recent rule has jeopardized an entire industry of third party providers, including the business of Chris and Betsy Head. The Heads are franchisees of Home Instead Senior Care, and their company is located in Roanoke County. Last year, as part of NFIB's Small Businesses for Sensible Regulations campaign, the Heads detailed how the proposed changes in the rule – which were substantively maintained in the final rule – would affect their company.

The Heads said they had no problem with the minimum wage portion of the rule. Their employees' average wage is \$9.40 per hour and none make less than \$8.50 per hour. However, the overtime portion is going to have serious negative impacts on their company, the clients, and – contrary to what DOL believes – the workers themselves.

The Heads often provide their clients "sleepover" service, where the worker comes in at night for a 10-12 hour shift, ensures the client eats dinner and gets them ready for bed.

Then, while the client is asleep, the worker sleeps as well on site in case of an emergency. The new DOL rule will require employees be paid time-and-a-half for every hour worked over 40 in a given week. Under the exemption, employees received their straight hourly wage for hours over 40.

However, the client simply can't afford this change. As Chris Head told the Roanoke Times last year, "we anticipate that between 20 and 25 percent of our clients receiving care will have to go elsewhere, either to institutionalized settings, or do without, or go into the gray market and hire someone by paying under the table without any of the insurance or oversight or other benefits of going through an agency."³

To stay competitive, the Heads will have to limit employees to 40 hours to keep costs down where the client can afford. A third party provider like the Heads will have to send multiple workers to cover the same number hours. This type of arrangement is not just a burden on the business, but can present dangers for the client as well. In cases of dementia, Alzheimer's or other cognitive impairment, the client relies on familiarity with the care provider. A client's safety may now be at risk because of this rule.

Paradoxically, this regulation intended to make workers better off will actually make them worse. One of the Heads' employees currently working 50 hours at Home Instead will now be limited to 40. In order to make up the 10 hours lost, he or she will have to find employment with another company and travel from site to site. The worker will not get to enjoy the overtime benefits promised by DOL and instead will spend additional time looking for and traveling from job to job.

DOL's removal of the companionship exemption is likely to lead to a significant drop off in the Heads' business, major disruptions and reduced care quality for those that need it, and worse circumstances with no increased pay for employees. Everyone loses with this rule.

The Environmental Protection Agency's Chesapeake Bay Runoff Rules

My next example illustrates how the continued ratcheting down of rules presents challenges for small businesses.

Bill Neff, Sr. has owned Bill Neff Enterprises, a commercial real estate development business in Harrisonburg, for over 50 years. He recently shared with me a story about how he agreed to help out a local church with its construction on a new site that ran into significant red tape and higher costs than he could have imagined.

Because the church is located in the Chesapeake Bay watershed, there are certain measures developers must take to prevent stormwater contamination from making its way downstream to the bay. In this instance, Mr. Neff originally proposed to incorporate an open pond or basin with rock to capture rain and treat it before it made its way into the ground water that heads to the bay.

Under previous standards, Mr. Neff quoted the church that such a pond would cost about \$10,000. However, when Mr. Neff submitted the plan for approval of a permit, he

was surprised to learn that EPA had changed the water quality standard to the point that before being released into the ground the water had to be filtered to "drinking water" quality. The new filtration system required to reach the new levels would increase the total cost of the pond to nearly \$60,000. But the added costs don't end there. The water quality must be monitored every month and a report sent in. Also, once a year an engineer must be hired to verify the water quality and send in yet another report.

Obviously, since Mr. Neff was trying to do things cost-effectively for the church, these expenses raised significant concerns and jeopardized the entire project.

The Mine Safety and Health Administration's Emergency Reporting Rule

As my last example illustrates, many times even when there is clear direction from Congress on a very well-intended regulation, how an agency handles compliance efforts from small businesses can lead to frustration.

Rob Frazier operates The Frazier Quarry, a limestone quarry in Rockingham County and a third and fourth-generation family business. Mine safety is serious business. After disasters at the Sago and Aracoma Arma mines in West Virginia in January 2006, Congress responded by passing the Mine Improvement and New Emergency Response (MINER) Act. Within this act, Congress required mine operators to inform the Mine Safety and Health Administration (MSHA) within 15 minutes of a serious accident. Congress required this 15-minute deadline because the agency was already working on developing the requirement when the MINER Act was drafted in Congress.

To many in the mining business, including Mr. Frazier, the 15-minute requirement was too restrictive because when a serious accident happens the mine operator is focused entirely on making the situation as safe as possible, evacuating miners and other personnel, calling 911 to get medical attention to the site quickly, and taking other emergency measures. Surely notifying MSHA of a serious accident is important, but not at the cost of the safety of those on the site.

Regardless, mine operators expect that if such notification is required the agency must be equipped to deal with calls when a serious accident happens. Mr. Frazier had a reportable event happen at his job site. Rather than risk the \$5,000 to \$60,000 penalty for mine operators who fail to notify MSHA within 15 minutes, Mr. Frazier called the MSHA hotline. His call was answered by a phone answering service, and the person on the other end seemed to have no idea why he was calling.

This troubling story shows how frustrating compliance can be. Put yourself in the shoes of Mr. Frazier. Something serious has happened at your mine. You are responsible for the safety of everyone at the site. You take the time out of your emergency response to alert the federal government and the person on the other end of the line seems confused as to why you're calling. If small businesses are held to high standards of compliance, then the least the government could do is be prepared to take their call.

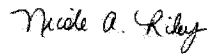
Conclusion

As I hope these stories illustrate, small business owners do not take regulatory compliance lightly. They recognize that while it is certainly not the reason they started their business, it is a necessary task in running one. What small business owners ask is that the agencies that regulate them only regulate them. The owners that I talk to frequently are frustrated by what seems like a constant flow of new mandates coming out of Washington that provide little practical impact.

Agencies and OIRA need to recognize the genuine burden each regulatory requirement places on small businesses. To do so, they need to be committed to a true accounting of a proposed rule's actual costs and benefits, including those costs on indirectly affected small businesses.

Thank you for the opportunity to share these stories with you today.

Sincerely,



Nicole Riley
State Director
NFIB/Virginia

¹ NFIB Research Foundation. *Small Business Economic Trends*. September 2013. pp. 18.

<http://www.nfib.com/Portals/0/PDF/sbet/sbet201309.pdf>

² www.regulations.gov

³ Roanoke Times. *NFIB, Del. Chris Head & wife complain about proposed Dept. of Labor regulation*. April 19, 2012.

<http://blogs.roanoke.com/politics/2012/04/19/nfib-del-chris-head-wife-complain-about-proposed-dept-of-labor-regulation/>

Mr. BACHUS. Mr. Holding.

Mr. HOLDING. Thank you, Mr. Chairman. The introduction of Mr. Gray left out a very important element that he is a distinguished North Carolinian, and hails from a family that has been committed to public service within North Carolina and throughout the United States for generations, and it is an honor and a pleasure for me to be here sitting across from you, so thank you.

Mr. Gray, in your written testimony, you note that centralized review of administrator agencies is most effective when the Office of the Vice President takes an active role in its supervision. If you could share with us a little bit about your experience in seeing this process work when the Vice President is taking an active role, and whether or not you know if Vice President Biden's office is has taken on such a role and should if it has not.

Mr. GRAY. Well, of course, my experience with this comes through my service as counsel to Vice President Bush who was delegated the authority to convene all of this effort beginning in 1981. But Vice President Quayle continued in that capacity when Vice President Bush became President, and Vice President Gore did the same thing when President Clinton was elected. So there is a long history of this. And why is it important? Because I think OMB, even more now probably than ever, because of the cuts in the staff, OMB needs a champion in the West Wing, OMB is part of the larger executive office of the President and the head of the director of OMB is a member of the cabinet and attends senior staff, et cetera. But it is always great to have a champion in the White House. It certainly, I think, was important to John, he can speak for himself and his colleagues and I would be willing to say that Sally would second the motion when she was head of OIRA.

Mr. HOLDING. Thank you. You also had pointed out regarding EPA regulations and the specifically co-regulations coming out of the EPA, and I just wanted to give you a minute to elaborate on your thoughts there and the problems that you see.

Mr. GRAY. Well the social cost of carbon leaving aside the procedural defects, which I think are fairly clear, there is just a mixup on the numbers and the number of 36, which is now the number used, \$36 a ton is a worldwide benefit. But I don't think that can be attributed to reductions made just in the United States. The costs all occurred here but the benefits are worldwide. I think the benefits should be attributed to a rule containing carbon in the United States should be what the benefits are in the United States, that is what the OMB circular actually provides for and I think that is what should happen.

Now what is the benefit in the United States? It couldn't be any greater than U.S. share of GDP, world GDP which is under 25 percent, it is probably a lot less because we have controlled carbon better than many countries, contrary to the sort of public image, and probably closer to 10 or 15, maybe as low as 7.

And if you look at the delta, the difference between say 15 and 36, it is more than \$100 billion a year and the potential regulatory costs, you could say it is the equivalent of a \$1 trillion tax increase over a 10-year period. That is not peanuts. And so I think it needs to be sorted out.

As I said, the price that Europeans pay is about \$7.50 give or take, and the price that is paid in California which is a pretty good proxy for the U.S. is 20 percent of the U.S. economy is less than 12. And so I think that needs to get sorted out.

On the question of $PM_{2.5}$, which is mainly to the present time a coal issue, the benefits for some of the rules have been astronomical, the MACT rule, the air toxics rule, the actual air toxic benefit from the air toxic reduction is like about 5/10 of, half of 1 percent of the total benefits. The total benefits are in 99 percent derived from calculations of what it means to reduce $PM_{2.5}$ but those reductions, as I said a few minutes ago, all occur most of them, I mean, 90 percent or more in attainment areas that is parts of the country that are well in attainment of the standard. And I don't think you can imply a straight line benefit down to zero for your $PM_{2.5}$ reduction. I am a lawyer I am not a scientist. John can talk to this if you want to ask him a question with much greater sophistication than I can.

But why do we have attainment? Why do we have national air quality standards if you are going to continue to regulate below the level of the standard and claim the same benefit?

Mr. HOLDING. Thank you. Ms. Riley, quickly I just wanted to thank you very much for being here. The NFIB is a great resource in my district, and has brought to my attention many examples analogous to the ones that you have brought here before the Committee and the impact unfair and unreasonable burdensome regulations are bringing upon small business. Chairman Goodlatte's district and my district share a lot of similarities.

And as I listened to the examples that you brought forth, they are very similar to what the folks in my district are facing. So thank you for being here. Mr. Chairman, I yield back.

Mr. BACHUS. Thank you, Mr. Holding, and the gentleman from Memphis.

Mr. COHEN. Thank you. Thank you. It is I think appropriate that this may be the last substantive Committee that meets before the government closes down. It is not the sexiest subject, it is not the most watched and provocative subject, so a good way to wind down into halting government.

The big issue, I guess, and the big picture, Ambassador, is—let me ask you, in 1985 were you working with the administration?

Mr. GRAY. Yes, sir.

Mr. COHEN. Do you recall when there was an attempt to not raise the debt ceiling and President Reagan spoke about that?

Mr. GRAY. I am afraid to say I do not recall that specific incident. There were several, we were talking about this in the ante room, several shutdowns during the Reagan-Bush years, and quite frankly, I can't remember the details of any of them except that for the very first one I was deemed nonessential, and it was one of the most humiliating things in my life.

Mr. COHEN. That didn't last long, though, did it?

Mr. GRAY. No, it was only about 2 or 3 days but I didn't dare appear in public during daylight hours for fear someone would look at me and say look, he is not essential. It was quite traumatic. It is traumatic for anybody. When I was on the council, I had to oversee a couple of shutdowns, and we worked with OMB over who was

supposed to be nonessential and essential. And I am telling you what a very pain, it is a very, very painful exercise. But I do not remember——

Mr. COHEN. President Reagan, this was about getting beyond the debt limit, what do you think would happen you got so much experience I read your vitae, what would happen to the world's economy if we on October 17th did not raise the debt ceiling?

Mr. GRAY. I think that the consequences would be very severe, and I can not really get my arms around my head around what would happen if we just ignored it.

Mr. COHEN. And let me ask you something. When you play tennis with Professor Katzen, does she go to her left and you go to your right?

Mr. GRAY. We are very bipartisan when we play, but I probably play more opposite her than with her, and don't ask me or her who usually wins. It is always sort of mixed doubles, so it is kind of hard to trace the actual causality in these matches.

Mr. COHEN. And then tell me this, none of this is relevant to anything, but except to the big picture. You clerked for Chief Justice Warren. Can you tell us something about Chief Justice Warren? He was one of my heroes, and I was impressed to see that you had time with him.

Mr. GRAY. Gosh. Well, it was one of the great experiences of a lifetime, and maybe the best experience, and he was wonderful to work for. All of his ex-clerks loved him. He never, I think, got over, always complained about his service on the Warren Commission. I think he thought that was the biggest mistake he ever made, and I can still remember his wife saying, you know, it is a good thing that Earl was not a woman because he can never say no. But he was a wonderful man to work for, and what I most admired about him were two things: He had an uncanny sense for what was really going on in litigation, and at the Supreme Court, he really knew what was going on, and he really understood the legal issues, and writing dissents for him was very difficult because you couldn't quite capture his own passion, and he wrote extremely well legally, and I was always surprised that here is somebody who had been a politician who could handle legal analysis so well.

The other thing was is that he was used to being in the public eye. I don't want to belabor this point, used to being in the public eye all of his life, and when he came to the Court, he pulled down the curtain and never gave another press conference, never appeared in public again and shut it off cold turkey, and I think that is an extraordinary gift to the Nation when he did that.

Mr. COHEN. I have got something I want to share with you. I think I have got it here if I can read it. Have you been out to—do you know these words, "Where there is injustice, we should correct it; where there is poverty, we should eliminate it; where there is corruption, we should stamp it out; where there is violence, we should punish it; where there is neglect, we should provide care; where there is war, we should restore peace; and wherever corrections are achieved, we should aim them permanently to our storehouse of treasures"?

Mr. GRAY. I should know who said this. I wish I did know. Was that Chief Justice Warren?

Mr. COHEN. That is a verbiage from 1970 that is placed on his stone. Of course he passed, I guess he passed later, but that is what is on his tombstone.

Mr. GRAY. On the tombstone.

Mr. COHEN. I went out across the river in Arlington and photographed that because I thought it was just so beautiful, and he was a great man, and that is one of his quotes, but happy for your experience, and that was good.

Mr. GRAY. Thank you, sir.

Mr. COHEN. Professor Katzen, how did you end up at George Mason, and what did you teach? Balancing your resume?

Ms. KATZEN. No, I always was under the impression that administrative law was a bipartisan effort, that there are principles that one can subscribe to that do not go along ideological lines. The Chair was quite kind to mention that I had been chair of the administrative law section. I followed Justice Scalia, and then Chairman Verkuil from ACUS followed me.

There is no rhyme nor reason or predetermination for a position, and if I was teaching administrative law, it seemed to me that I could teach anywhere. I found the experience very interesting because of the faculty lunches every day, I learned new things.

Mr. COHEN. Were you forced to eat crow ever?

Ms. KATZEN. No. No, and I didn't require them to, either.

Mr. COHEN. Good for you. Good for you. I yield back the balance of my time, and thank each of the witnesses.

Mr. BACHUS. I taught law school at the university just on a very brief basis when the professor was disabled, and it was a very challenging experience because you are dealing with very bright students, and you better get the message right, you better; what you say better be correct or they will correct you, and I don't think there is a tougher profession, more demanding than teaching at any level, but at the college level, but it can be delightful because you can—you also learn as much as you teach.

This has been an excellent panel. I am very encouraged by the fact that there is some bipartisan agreement on some things. The bill in the Senate that Senator Warren and—Warner and others have, so I think it gives us a lot of direction, and I am not going to—I think we have had a good hearing. I am not going to mess it up, particularly after I announced today I wouldn't be running for reelection, and the government appears to be shutting down, so—so I have probably said enough. But it is a sad day for our country if, in fact, the government does shut down, and so thank you very much for your attendance and your testimony, and this is a very bright panel and a lot of good information to digest.

This concludes today's hearing, and thank you to all of our witnesses, again, for attending, and without objection all Members will have 5 legislative days to submit additional written questions for the witnesses or additional material for the record. This hearing is adjourned.

[Whereupon, at 6:09 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Statement of Subcommittee Chairman Spencer Bachus
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on “The Office of Information and Regulatory Affairs: Federal Regulations and
Regulatory Reform”
Monday, September 30, 2013, at 4:00 p.m.
(Final)

Let me welcome Administrator Shelanski and all our witnesses to this oversight hearing examining the Office of Information and Regulatory Affairs, Federal Regulations and Regulatory Reform.

To begin, if there is one thing that should bring Members from both sides of the aisle together, it is the need for more jobs in our country. They call owning a home the American Dream. Not to take anything away from that, but I have always believed that the real American Dream is having a good-paying job that allows you to provide for your family and build your own wealth. Unfortunately, there are too many people still looking for good work in our economy today. And part of the reason for that is the growing burden of federal regulations.

Now, there really isn't anyone who would seriously argue that we need no regulation at all. Sensible regulations preserve our environment, the safety of our food, and our health. But when you have excessive regulation that is separated from a true consideration of costs and benefits, you can do real damage to the economy and people's lives without providing commensurate protections.

Consider these figures. A Small Business Administration report from 2008 put the annual cost of federal regulations at \$1.75 trillion – about 14% of the economy. Since then, \$520 billion worth of new regulations have been added and that does not even count the rules yet to come from Obamacare, the Dodd-Frank-Act, and the President's climate

change agenda. These regulations, however well-intended, cause businesses to divert capital from creating jobs and leave them less able to grow.

Administrator Shelanski, as the new head of the Office of Information and Regulatory Affairs, you stand as one of the important checks and balances in the federal regulatory system.

Executive agencies must submit their proposed and final rules to your agency for approval before they can be published in the Federal Register. You have the authority to return a rule to the issuing agency if it finds defects in the process or analysis.

With this power often comes great pressure, from parties interested in the regulations and from the issuing agencies themselves. Your office must be committed to fair and unbiased reviews. In fact, I'd compare it to being an SEC referee during the Iron Bowl between Alabama and Auburn – passions might run high, but your job is to get the call right.

Accordingly, I look forward to examining OIRA's activities in detail, particularly on several key issues. What is being done to ensure that agency cost-benefit reports are not overstating benefits or inappropriately mixing direct benefits with secondary benefits? This has concerned me as I have reviewed the Administration's rationale for additional carbon emission limits, which will have a severe impact on the use of coal.

OIRA also has responsibilities with regard to the Regulatory Impact Analysis process. An issue arising from that is what OIRA is doing to make sure that real problems are being identified and whether the best regulatory approach is being used to address the problem.

If you don't know already, Administrator Shelanski, I have a particular interest in whether independent agencies like the Consumer Financial Protection Bureau should be required to submit their rules to you for review. The CFPB is exempt despite the huge impact that its rules will have on the economy. It is an agency in desperate need of oversight.

To conclude, if OIRA exercises its authority properly, it can be a gatekeeper to ensure smart and effective regulation. We all know what the flip side of that is – regulatory overreach that both puts a drag on our economy and fails to provide commensurate environmental, health, and consumer benefits.

With that, I look forward to hearing from Administrator Shelanski and our second panel of experts on how our regulatory regime is functioning and how it can be improved.

###



**Statement of the Honorable Steve Cohen
for the Hearing on the
“Office of Information and Regulatory Affairs:
Federal Regulations and Regulatory Reform Under
the Obama Administration”
Before the Subcommittee on Regulatory Reform,
Commercial and Antitrust Law**

**Monday, September 30, 2013 at 4:00 p.m.
2141 Rayburn House Office Building**

Before I begin, I just wanted to congratulate Chairman Spencer Bachus on his announcement that he intends to retire at the end of this Congress. Although we will still have some time left to work together, I would like to take the opportunity to say what a pleasure it has been to get to know him and work with him. He is a thoughtful and kind man with a generous spirit, and I will miss him.

It has been a year and a half since our last oversight hearing on the Office of Information and Regulatory Affairs and I thank the new Administrator, Howard Shelanski, for taking the time to appear before us.

On January 18, 2011, President Obama issued Executive Order 13563, which supplemented and reaffirmed the principles of Executive Order 12866, issued by President Clinton. EO 13563 added an emphasis on increasing public participation in

the rulemaking process and identifying ways to reduce costs and simplify and harmonize rules through inter-agency coordination.

EO 13563 clarifies that agencies must identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public, including considering alternatives to mandates, prohibitions, and command-and-control regulation.

Perhaps most significantly, EO 13563 requires agencies to develop a plan to conduct a periodic review of existing significant regulations that “may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”

Mr. Shelanski’s predecessor, Cass Sunstein, issued a number of guidance memoranda regarding EO 13563 and particularly its requirement that agencies conduct periodic review of existing significant regulations, emphasizing the need for agencies to “consider strengthening, complementing, or modernizing rules where necessary or appropriate – including, if relevant, undertaking new rulemaking.”

Those efforts thus far appear to be working. In an op-ed that appeared in the *Memphis Commercial Appeal* earlier this year, columnist Doyle McManus cited Mr. Sunstein, who noted

that in President Obama's "first four years in office, he has issued fewer new federal regulations than any of the four presidents who came before him, including Ronald Reagan."

Moreover, the op-ed noted, President Obama has revoked "hundreds of outmoded rules [that] produced savings for government, business and consumers that will add up to billions."

I look forward to learning about the continuing efforts to date of the President's push to have agencies improve and modernize the existing regulatory system.

Based on some of the statements I have heard from some of my colleagues, I imagine we will hear about the costs of regulations under this Administration.

I note that according to the Office of Management and Budget's 2012 Draft Report on the Benefits and Costs of Federal Regulations, the net benefits of regulations in the first three years of this Administration totaled \$91 billion, which is 25 times greater than during the comparable period under the Bush Administration.

Moreover, fewer final rules have been reviewed by OIRA and issued by executive agencies during the first three years of the Obama Administration than in the comparable period of the Bush Administration.

Similarly, the 2013 draft Report to Congress notes that the benefits of federal regulation between FY 2002 and FY 2012 ranged from \$193 billion to \$800 billion in benefits, as against \$57 billion and \$84 billion in costs.

Finally, I would like to know from all of our witnesses on both panels what steps Congress can take to better help OIRA do its job, including whether Congress should provide OIRA with more resources.

I thank our witnesses for being here today and look forward to their testimony.

Statement of Judiciary Committee Chairman Bob Goodlatte
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on "The Office of Information and Regulatory Affairs: Federal
Regulations and Regulatory Reform"
Monday, September 30, 2013, at 4:00 p.m.
(DH – FINAL)

The Office of Information and Regulatory Affairs
or "OIRA" has been called "the most powerful federal
agency that most people have never heard of." OIRA
is responsible for overseeing the development and
promulgation of agency regulations. In particular,
OIRA must review required cost-benefit analyses of
"economically significant rules," which are those
rules having an annual effect on the economy of \$100
million or more.

Such cost benefit analysis is critical because,
since early in the Obama Administration, many have

attributed the economy's lack of recovery in large part to increases in regulation and regulatory uncertainty.

Even the Administration acknowledges the problem. In a January 18, 2011, *Wall Street Journal* op-ed, President Obama stated that over-regulation “stifles innovation” and has “a chilling effect on growth and jobs.” The President has even issued a number of Executive Orders and Memoranda that address regulatory burdens. These include Executive Order 13563, which directs agencies to “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs.”

While these Executive orders look good on paper, it appears that is all the Obama Administration is willing to do. I want to know what OIRA is doing to

ensure agencies actually implement the stated principles.

Unfortunately, there are grounds for concern. Roughly two-thirds of the claimed benefits of economically significant final rules OIRA reviewed in 2010 were actually from secondary effects that were not the statutorily authorized targets of the rules. What is OIRA doing to make sure that the bulk of the benefits agencies claim for their rules arise specifically out of improving the conditions Congress authorized those agencies to address by regulation?

Similarly, in May 2013, the Administration quietly increased its estimate of the benefit of reducing carbon from the atmosphere from \$21 to \$35 per metric ton. That will dramatically increase agency estimates of benefits from regulations limiting

emissions. However, there are significant concerns that the Administration's new figure is substantively flawed and that the process for issuing it was not transparent. The Government Accountability Office is investigating.

Administrator Shelanski joins OIRA at a critical time. Job creation continues to fall short of expectations. In August 2013, employers added only 169,000 jobs to payrolls, less than expected, and gains for June and July were revised downward. The unemployment rate ticked down to 7.3%, but only because fewer people are looking for work. Even more worrisome, the labor participation rate is the lowest it has been in roughly forty years. The economy as a whole also remains sluggish. On

September 18, 2013, the Federal Reserve lowered its economic growth forecasts for 2013 and 2014.

In light of this worrisome data, I am particularly interested in hearing how Administrator Shelanski plans to ensure the Administration's actions match its rhetoric about reducing the regulatory burden on the small businesses that form the backbone of our economy. In National Federation of Independent Business (NFIB) surveys, government regulations are consistently a top concern for small business owners, whose compliance costs are also higher than those of larger businesses. We cannot afford to regulate small business job creators out of business.

To this end, the OIRA Administrator holds a number of tools that can be powerful if he chooses to use them. If an agency's cost-benefit analysis is

improper or if the agency fails to consider alternatives or account for the impacts on small business, OIRA can “return” the regulation to the agency so it does not take effect. During the Bush Administration, OIRA sent 27 return letters. During the Obama Administration, though, OIRA has sent only one.

OIRA’s zealous enforcement of the cost-benefit analysis, least-burdensome alternative, and other requirements to regulations under consideration by the Executive Branch will help to prevent unnecessary and excessively costly regulations that harm the economy and kill jobs. That is why I am pleased Subcommittee Chairman Bachus has called this oversight hearing.

I look forward to Administrator Shelanski's testimony and to that of our second panel of distinguished experts.

#

Material submitted by the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

More Resources for Regulatory Review Would Benefit Consumers | ... http://www.rollcall.com/news/more_resources_for_regulatory_revi...

ROLL CALL

Back to Article

More Resources for Regulatory Review Would Benefit Consumers | Commentary

By Jerry Ellig and Rosemarie Fike
Sept. 6, 2013, 11:17 a.m.

Regulatory advocates charge that 120 regulations are "stalled" at the Office of Information and Regulatory Affairs, the office that reviews executive branch regulations before they can be proposed or finalized. OIRA was singled out for criticism at a Senate Judiciary Committee hearing, "The Hummingbird of Regulatory Paralysis," held just before the August recess. On the other side of the Capitol, OIRA Administrator Howard S. Shalenski told the House Small Business Committee that this year's sequester and furloughs have limited OIRA's ability to conduct retrospective reviews of regulations.

Yet neither the administration nor its critics acknowledge that OIRA has been suffering from severe personnel constraints for decades. OIRA's staff is currently outnumbered 5,000 to 1 by staff of federal regulatory agencies. Expanding OIRA would likely pay big dividends by increasing the odds that regulations solve real problems while minimizing the burden on people's lives, liberty and prosperity.

A thorough regulatory impact analysis should identify the widespread problem regulation might solve, consider a variety of alternative solutions, and then assess the benefits and costs of each alternative. Without this information, regulatory decision-makers are flying blind.

Research suggests that OIRA reviews help improve the quality of agencies' analysis. In a working paper recently published by the Mercatus Center at George Mason University, we find that longer OIRA review times correlate with higher-quality regulatory impact analysis. We also find that agencies do a better job of explaining how they use their analysis to make decisions during periods when the OIRA administrator is a presidential appointee, rather than a temporary acting administrator. This suggests that when OIRA has more clout, agencies are more accountable.

This is not the only research to document the potential link between OIRA review and the quality of agency regulatory impact analysis. In a forthcoming article in *Administration & Society*, Stuart Shapiro of Rutgers University and John Morral of the Mercatus Center find that regulations that undergo longer OIRA review have more thorough analysis. They estimate that expanding OIRA's staff would be the most cost-effective way to facilitate more careful regulatory review.

OIRA is one of the federal agencies that has shrunk substantially since its inception, with its staff falling from 60 to 45 since its creation in 1981.

In comparison, federal regulatory agencies added about 75,000 employees from 1980 to 2012, according to the *Regulators' Budget*, an annual publication of the Regulatory Studies Center at George Washington University and the Weldon-Kauffman Center at Washington University in St. Louis. That's an increase of 51 percent.

There's no clearer David vs. Goliath matchup in the nation's capital. Ironically, regulatory advocates portray the agencies as David and OIRA as Goliath. At the Senate Judiciary Committee hearing, Rena Steinzor, president of the Center for Progressive Reform, charged that regulatory agencies are "chronically underfunded," whereas OIRA is "the most troubling illustration of political interference" with regulations.

Some advisers to the administration recognized OIRA's staffing handicap long before the current argument over the sequester and furloughs. In 2011, President Barack Obama's jobs council noted that although OIRA's role is "widely accepted and valued," the office shrunk by half. The council recommends that OIRA's staff "be increased to a level that will permit it to conduct meaningful review of both executive branch and independent agency regulations."

Small improvements in the benefits or costs of regulations can save the public billions of dollars. Given that reality, even doubling OIRA's \$8 million budget sounds like a bargain.

Jerry Ellig is a senior research fellow with the Mercatus Center at George Mason University. Rosemarie Fike is a doctoral candidate in economics at Florida State University. They are co-authors of a new working paper released by the Mercatus Center, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis."

1 Comment Like Tweet 03/26/13

More from Roll Call

- 50 Richest Members of Congress: The Wealth Keeps Growing
- Lawmakers Who Opposed EPA 'Guidance' Remain Wary of Proposed Rule
- Lautenberg-Vitter Is a Breakthrough for Flawed Toxics Law

From Around the Web

- 4 Reasons You Shouldn't Save for Retirement (Money Muser)
- 10 Insanely Overpaid Public Employees (The Fiscal Times)
- Wells Fargo to Lend \$65B to Women-Owned Small Businesses (Fox Business)

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

Questions for the Record
The Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform

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

September 30, 2013

QUESTIONS FOR ADMINISTRATOR SHELANSKI

Questions from Subcommittee Chairman Spencer Bachus

1. *Former OIRA Administrator Susan Dudley explains, “OIRA is the umpire—the sole judge of the balls and strikes pitched by the agencies.” Do you agree with this description of OIRA’s role as an impartial, objective arbiter?*

ANSWER: OIRA’s role is set forth in Executive Order (E.O.) 12866 (and later, E.O. 13563). Sec. 2(b) of E.O. 12866 notes that “Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President’s priorities, and the principles set forth in this Executive Order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency.

2. *Under Executive Order 12866, OIRA is to review regulatory action that may “raise novel legal or policy issues.” Nevertheless, OIRA has failed to review a number of high-profile rules which fit neatly within this category. For example, OIRA reportedly will not review the Food and Drug Administration’s proposed rule to permit generic drug companies to alter the labeling on their products (RIN 0910-AG94), even though the rule directly conflicts with statutory law. Federal law requires generic drug labels to be “the same as” the labels on their brand name counterparts. This sameness requirement is also a factor in keeping generic drug prices low, so altering it raises significant legal and policy questions.*

- a) *Do you consult with the Office of Legal Counsel or any other office with legal expertise to identify regulations as significant on the grounds of posing “novel legal or policy issues”? If not, on what basis is that determination made?*
- b) *What specific steps do you take to ensure that OIRA properly identifies and reviews rules that may “raise novel legal or policy issues”?*
- c) *Once a regulation is being reviewed on the basis of “novel legal” issues, will OIRA also review the economic impact of the rule?*

ANSWER: OIRA reviewed the FDA proposed rule referenced in the question, titled “Supplemental Applications Proposing Labeling Changes for Approved Drugs and Biological Products” (0910-AG94), after finding it to be a significant rule. OIRA concluded its review on

November 8, 2013 and FDA published the rule on November 13, 2013. The public has had an opportunity to comment on all aspects of the proposed rule, including the substantive policy and the underlying legal authority. The comment period has been extended to March 13, 2014, from its original deadline of January 13, 2014. OIRA consults other offices as needed in the course of significance determinations. When OIRA determines that a rule is significant, OIRA conducts its review under the provisions of Executive Orders 12866 and 13563. This includes review of the agency's assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

3. *Experts have expressed concern that OIRA's methodology for cost-benefit analysis is flawed. For example, a full two-thirds of the claimed benefits of economically significant rules that OIRA reviewed in 2010 were actually from secondary or indirect effects that were not the target of the rules.*
 - a) *What is OIRA doing to make sure that the bulk of claimed benefits arise specifically out of improving the conditions that Congress authorized the agency to address by regulation and that secondary or indirect effects are handled separately in regulations under statutes directly aimed at those effects?*
 - b) *Since OIRA counts secondary or indirect benefits, does it equally consider secondary or indirect costs in its analysis? For example, FDA proposed to regulate the spent grain that brewers sell at deep discounts as animal feed (RIN 0910-AG35). Brewers have done this for generations with no apparent human health risk. It may be cheaper for brewers to discard the grain than to comply and sell it, which could raise feed costs for farmers. Similarly, the labeling rule referenced in question two could trigger significant litigation and related drug monitoring costs for generics and could raise drug prices for consumers and government funded medical plans. If OIRA does not equally consider such secondary or indirect costs, why not?*
 - c) *In its September 23, 2013 rule for new coal burning plants, EPA claimed negligible compliance costs because the industry is shifting to renewable fuels. This seems inconsistent with EPA's claim of benefits from preventing new construction of high emission coal plants. Either these coal plants would never be built anyway, so the rule has no benefit, or they would be, but for the rule, in which case there is a cost. What are you doing to ensure that agencies have analyzed "costs as accurately as possible," as required by President Obama's Executive Order 13563?*

ANSWER: The primary purpose of any regulation is to address the specific problem that Congress authorized the rule-writing agency to address. Regulations often have collateral costs and benefits, however, and it is appropriate and consistent with Executive Orders 12866 and 13563 to analyze these through the agency's regulatory impact analysis. Agencies should consider all significant costs and benefits in their regulatory impact analyses, including

“secondary” and “indirect” costs and benefits, to the extent practicable. During OIRA review, OIRA staff and agency staff have many discussions to ensure that “costs [of any given regulation are analyzed] as accurately as possible,” as required by EO 13563.

The appropriate baseline for any regulatory impact analysis is the state of the world absent the rule. In some cases, agencies use multiple baselines to reflect a range of plausible states of the world absent the rule. It is essential, however, that whatever baseline(s) an agency chooses, it use the same baseline(s) for its evaluation of costs and benefits.

For the proposed rule regulating greenhouse gas emissions from new power plants, EPA projected that no new coal burning power plants would be built during the period of analysis, absent the rule. For this reason, EPA projected that the requirements applicable to new coal-fired power plants would have no quantified costs or benefits.

4. *What are you doing to ensure that agencies are using Regulatory Impact Analysis (RIA) properly, to inform their rulemaking rather than to justify a predetermined approach (e.g., requiring agencies be specific about how they used the RIA to develop the proposed rule)?*

ANSWER: OIRA reviews regulatory impact analyses with the view to having them reflect the best available scientific evidence and the best practices for cost-benefit analysis (as summarized in OMB Circular A-4). The assessment of regulatory alternatives within an RIA serves to show whether the selected policy is the best option that could reasonably be considered.

5. *The Dodd Frank Act gives the Consumer Financial Protection Bureau (CFPB) unprecedented power and independence. For example, Dodd-Frank bars Congress from even reviewing the budget of the self-funded CFPB. In light of Executive Order 13579, regarding independent agencies, what can OIRA do to ensure that its review of CFPB regulations is as strong as can be given that other safeguards are lacking?*

ANSWER: CFPB is an independent regulatory agency, and therefore, not subject to Executive Orders 12866 or 13563, or to the centralized regulatory review conducted by OIRA. As you note, in July 2011 the President issued E.O. 13579, “Regulation and Independent Regulatory Agencies,” calling upon independent agencies to voluntarily comply with E.O. 13563, “Improving Regulation and Regulatory Review,” which reinforces the importance of thorough and rigorous cost-benefit analysis by agencies, originally required by E.O. 12866. Under E.O. 13579, independent agencies are asked, to the extent permitted by law, to make regulatory decisions only after consideration of costs and benefits (qualitative and quantitative).

In addition, under changes to the Regulatory Flexibility Act (RFA) enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, CFPB must, prior to the promulgation of a proposed rule, convene and chair a Small Business Review Panel to consider the impact of regulatory proposals that it determines would have a significant economic impact on a

substantial number of small entities. The Panel consists of representatives from the CFPB, the Chief Counsel for Advocacy of the Small Business Administration, as well as OIRA. The Panel process allows small entities that would be affected by a regulatory proposal to be consulted about the pending action and be offered an opportunity to provide information on the proposal's potential effects.

6. *On September 20, 2013, EPA announced rules for new coal burning plants requiring that they curb or capture 40 percent of their greenhouse gas output. The rule relies on the viability of what many argue is still unproven carbon capture and sequestration technology to reduce emissions. What did OIRA do to ensure that EPA's rule rested on proven rather than speculative technology? Did EPA heed OIRA's advice on the use of new or unproven technology? If not, did you consider using a return letter? What is OIRA doing generally to ensure that agencies' rules rest on proven rather than speculative technology?*

ANSWER: OIRA conducted its review of this proposed rule and determined that it was consistent with the regulatory principles embodied in Executive Order 12866 and 13563. The EOs state among other things that, "each agency shall base its regulatory decisions on the best reasonably obtainable scientific, technical, economic, and other information" and that agencies, "shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions." The rule docket includes detailed supporting documentation that explains the technical basis for EPA's determination that the technologies on which the proposed requirements are based are "adequately demonstrated" as required by the Clean Air Act. To further clarify the basis for its determination that the technology on which the proposed rule is based is adequately demonstrated, EPA recently submitted to OMB for review a Notice of Data Availability and supplemental Technical Support Document.

7. *There is concern that agencies like EPA are simply refusing to comply with requirements that they consider the impact of their proposed regulations on small businesses. What are you doing to ensure regulations are as least burdensome as possible on small businesses? When agencies fail to address the burden on small business adequately, what does OIRA do to ensure compliance (e.g., return letter)?*

ANSWER: I believe small businesses are critical to economic growth and job creation. The President issued a Memorandum directing Federal agencies to consider ways to reduce regulatory burdens on small businesses. As part of the OIRA review process, we work very closely with the regulating agency to consider -- and where possible, mitigate or eliminate -- small business impacts. OIRA also works closely with the SBA Office of Advocacy to explore possible alternative regulatory approaches as required by the Regulatory Flexibility Act (RFA).

8. *New research from the Mercatus Center highlights the regressive effects of overregulation. Because of the law of diminishing marginal returns, regulated entities have to spend increasingly more to achieve increasingly smaller marginal regulatory*

benefits. Accordingly, low income households are spending money mitigating low probability regulatory risks that they could better spend reducing higher risks of more immediate relevance to them. What is OIRA doing to identify and analyze the potential regressive effects of proposed regulations on vulnerable populations?

ANSWER: In accordance with OMB Circular A-4, OIRA urges agencies to assess, as part of their regulatory impact analyses, the distribution of impacts across sub-populations, including various income groups and sectors of the economy. Such assessments shed light on the distributional equity consequences of rulemaking, which—as noted in Executive Orders 12866 and 13563—are appropriate considerations in regulatory policy.

Question from Subcommittee Member Doug Collins

1. *Administrator Shelanski, as you know, “economically significant” regulatory actions are those having “an annual effect on the economy of \$100 million or more” or meeting other specified criteria.*
 - a. *Does OIRA defer to agencies’ economic effect calculations in determining whether a proposed rule should be classified as economically significant?*
 - b. *Would a rule be classified as “economically significant” and thus subject to additional layers of review, even where the costs alone are well below the threshold, but the projected benefits are very high and so added together they exceed \$100 million?*
 - c. *What are the benefits of additional review in such a case?*

ANSWER: OIRA does not independently investigate the expected costs and benefits of proposed rules. We do review agencies’ analyses of the economic effects of rules, however, and work with agencies to ensure that their analyses are sound. In the course of such review, there may be cases when an agency initially believes that a proposed or final rule should be classified as a particular level of significance, but after further review the rule is classified as a different level of significance.

Rules are classified as “economically significant” if they have annual costs, benefits, or transfers of \$100 million or more in any one year. Sometimes, there are rules that are expected to have benefits above the \$100 million threshold, while costs are below. These would still be classified as economically significant. In such a case, treatment as an economically significant rule is warranted because of the substantial impact that the rule may have. For example, one of the key components of regulatory analysis is the analysis of alternatives. When rules have large effects - whether in the form of costs, benefits, or transfers - analysis of alternatives can reveal information that leads to improved regulatory decisions that could increase the net benefits of rules.

Questions from Ranking Member Steve Cohen

1. *At the hearing, I asked you about a report from the Heritage Foundation report that claims the Obama Administration during its first three years "unleashed 106 new major regulations that increased regulatory burdens by more than \$46 billion annually, five times the amount imposed by the George W. Bush Administration during its first three years."*

What are your observations regarding this report's findings?

Was this report peer reviewed?

Was this report peer-edited?

Was this report subjected to public comment?

ANSWER: This question appears to refer to the Heritage Foundation's report, "Red Tape Rising: Obama-Era Regulation at the Three-Year Mark," from March 2012. The report attempts to aggregate the costs of new federal regulations. The figures in the report differ from the aggregation of costs in OIRA's annual report to Congress on the Benefits and Costs of Federal Regulations in several significant ways. First, the Heritage report includes costs of regulations imposed by independent agencies, while OIRA does not. Second, OIRA's report excludes rules that have been overturned or reconsidered, while the Heritage report appears to include them. Third, in some cases when the agency was unable to provide an estimate of costs, the Heritage report uses estimates from other sources. Fourth, the Heritage cost totals do not include cost-savings from deregulatory rules. I have no knowledge of whether this report was subject to peer review, was edited by any peer reviewers, or was subject to public comment.

2. *Please describe how OMB goes about preparing its annual report to Congress on the benefits and costs of federal regulations. Why is there such a range with respect to the report's range of anticipated benefits of major federal regulations? In disputing the Administration's estimate that the cost of the 58 major rules issued between 2009 and 2012 was \$51.5 billion, Mr. Gray cites the American Action Forum's estimate that this amount was actually \$518 billion. What is your response to this assertion? How do we know that these numbers aren't just puffery? How do we square this report with the Heritage Foundation report?*

ANSWER: OIRA prepares the OMB Report to Congress on the Benefits and Costs of Federal regulations in accordance with Section 624 of the Treasury and General Government Appropriations Act of 2001, which is also known as the Regulatory-Right-to-Know Act. In the Report, we summarize estimates by Federal regulatory agencies of the quantified and monetized benefits and costs of major Federal regulations reviewed by OMB over the last ten years. Prior to finalizing the report, we publish a draft of the Report for public comment and peer review. The final Report reflects consideration of input received from the public and peer reviewers.

In the 2013 Draft Report to Congress, we report that the estimated monetized benefits associated with federal regulations range between \$192.7 billion and \$799.7 billion between October 2002 and September 2012. The breadth of the range of these estimates is largely attributable to

uncertainties associated with EPA's estimate of air quality improvements from fine particulate matter reduction, which the Draft Report discusses.

We have not tried to fully reproduce the American Action Forum (AAF) number, but we believe that the \$500 billion is constructed using a set of questionable assumptions and practices. For example, the AAF appears to use the cumulative costs of regulations and attribute those costs to the year in which the rules were published rather than reporting annualized costs and benefits.

We have not made an attempt to thoroughly explore or explain the differences between the Heritage and American Action Forum Reports.

3. *As you may recall, the Administration issued a strong veto threat against the Regulatory Accountability Act in the last Congress. A substantially similar bill is pending before the current Congress. This bill would add more than 60 additional procedural and analytical requirements to the Administrative Procedure Act's rulemaking process that agencies use to promulgate regulations and override various laws prohibiting agencies from considering costs when public health and safety are at stake such as the Clean Air Act, the Clean Water Act, the Occupational Safety and Health Act, and the Federal Mine Safety and Health Act. It even requires formal rulemaking for certain so-called high impact rules, a process long rejected by virtually everyone in the administrative law community. In issuing its veto threat, the Administration warned that the bill "would seriously undermine the ability of agencies to execute their statutory duties" and would also "impede the ability of agencies to provide the public with basic protections," among other concerns. What are your thoughts about this bill?*

ANSWER: As you mentioned, the Administration issued a statement indicating that senior advisers would recommend a veto of the Regulatory Accountability Act in the last Congress. It continues to be our position that this bill would "impede the ability of agencies to provide the public with basic protections, and create needless confusion and delay that would prove disruptive for businesses, as well as for state, tribal and local governments."

4. *Why has the Administration been so proactive in addressing regulatory issues?*

ANSWER: The Administration is committed to a 21st-century regulatory system that is cost-effective, evidence-based, and modern.

5. *What more can the Administration do to ensure that our regulatory system is the most effective?*

ANSWER: The Administration continues to work to maintain a balance between our obligation to protect the health, welfare, and safety of Americans and our commitment to promoting economic growth, job creation, competitiveness, and innovation.

6. *What is your response to the allegations that:*
regulations kill jobs?
regulations lead to uncertainty?
regulations lead to higher prices?
regulations are forcing American companies to move off-shore?

ANSWER: The Administration is obviously sensitive to imposing unjustified regulatory costs. Whenever agencies issue new regulations, Executive Order 13563 requires, among other things, that agencies ensure that the benefits justify the costs, select the least burdensome alternatives consistent with obtaining regulatory objectives, consider public participation, simplify rules, and adopt flexible approaches to rulemaking. This is also why the President, in the same regulatory executive order, called for a historic government-wide review of regulations on the books – a “regulatory lookback” -- to streamline, modify, or repeal regulations and reduce unnecessary burdens and costs.

That said, the fact that some regulations should be streamlined or modified does not change the fact that most regulations are on the books in order to protect the health, safety, and welfare of the American public. The Obama Administration believes that we don’t have to sacrifice Americans’ health and safety to drive growth, job creation, and innovation—and our record shows that. The net benefits of rules finalized through the fourth fiscal year of the Obama Administration were \$159 billion, including not only monetary savings but also lives saved and injuries prevented. And in the meantime, the number of final rules reviewed by the White House OIRA and issued by Executive Agencies during the first term of the Obama Administration was actually lower than the number reviewed and issued during the first term of the Bush Administration.

7. *What can Congress do to improve the regulatory system?*

ANSWER: At this time, and with the issuance of the President’s Executive Orders on regulation, I believe the Administration has the tools it needs to maintain a regulatory system that is cost-effective, evidence-based, and modern.

8. *When OIRA reviews a rule and suggests certain changes, are those suggestions made public?*

ANSWER: Changes to a rule during OIRA’s interagency review process, whether changes made by OIRA, the drafting agency, or anyone else in the Federal government, can be seen after the rule is published by comparing the published version to the draft that was submitted to OIRA for review.

9. *Is transparency essential to the legitimacy of the OIRA review process?*

ANSWER: Yes. The Federal rulemaking process has a strong foundation in transparency as evidenced by the notice and comment process set forth in the Administrative Procedure Act. In addition, the Administration's Open Government efforts have focused on increasing the openness of the rulemaking process. For example, the Administration launched a regulatory review dashboard at www.reginfo.gov and OIRA has issued memoranda in recent years, such as Increasing Openness in the Rulemaking Process – Improving Electronic Dockets and Increasing Openness in the Rulemaking Process – Use of Regulation Identification Number.

10. *Please explain the difference between OIRA formal review of rules and the informal review of rules that OIRA conducts prior to its formal review.*

ANSWER: When OIRA is formally reviewing a rule, OIRA conducts interagency review according to the procedures set forth in E.O. 12866 and E.O. 13563, and the public can track the status of the review on OIRA's website at <http://www.reginfo.gov>. Of course, before rules come in for formal review, agencies and OIRA may consult with each other or otherwise discuss a rule that will come to OIRA at some point in the future.

11. *Some believe that agencies must request and obtain permission from OIRA before OIRA accepts an agency's rule for formal review. Is this true? If so, please explain.*

ANSWER: Agencies often have discussions with OIRA about the content of regulations they are considering sending to OIRA for interagency review. In order to ensure that OIRA, other offices within the Executive Office of the President, and other interested Federal agencies have sufficient time and resources to properly review a rule, we do also sometimes discuss with agencies the sequencing of the submission of their various rulemakings.

12. *Are "return letters" and "prompt letters" a good or bad idea?*

ANSWER: I believe that returning rules to agencies according to the provisions of Executive Order 12866 is one of many ways in which the Administrator of OIRA can help ensure that agency rules comply with the law, the relevant Executive Orders, and OMB Circular A-4. At the same time, I believe in having a collaborative relationship with the agencies and that such letters are usually not necessary.

13. *What impact has sequestration had on your agency?*

ANSWER: We would refer you to OMB's previous statements about the significant, negative impacts of sequestration. OMB had the highest number of furlough days as a result of sequestration. In total, OMB staff were furloughed for 8 days. We would note that the bipartisan appropriations bill represents a positive step forward. It adheres to the funding levels in the

budget agreement enacted in December 2013, and unwinds some of the damaging cuts caused by sequestration.

14. *What impact has sequestration had on the ability of agencies to promulgate rules?*

ANSWER: We would refer you to the agencies themselves for specific questions about the impact of sequestration on their ability to develop and issue rules, but in general, sequestration had a significant negative impact on many core Government functions.

15. *Can OIRA override the safety determination of an agency based on an adverse cost-benefit analysis?*

ANSWER: When developing rules, both E.O. 12866 and E.O. 13563 require the agencies, to the extent permitted by law, to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify). OIRA does not “override” authority granted by law to a department or agency, and the extent to which an agency is authorized or required to take balancing factors such as costs into account is defined by Congress through an agency’s statutory authority.

16. *If Congress directs an agency to improve safety by regulating an activity, may that agency decline (or can OIRA direct the agency to decline) to regulate in that area based on cost considerations?*

ANSWER: Executive Orders 12866 and 13563 clearly state that nothing in the orders should be construed to impair or otherwise affect the authority granted by law to a department or agency. If Congress properly directs an agency to issue a regulation, it must do so.

17. *If Congress directs an agency to take specific factors, excluding costs, into account in promulgating a rule, and the agency determines that these factors warrant a certain regulatory outcome, may OIRA or the agency nevertheless consider cost?*

ANSWER: As discussed in question 16, nothing in E.O. 12866 or E.O. 13563 should be construed to impair or otherwise affect the authority granted by law to a department or agency. If Congress requires the agencies to take specific factors into account in promulgating the rule, and specifically prohibits consideration of costs, the agencies follow the law.

OIRA expects the agencies, however, to complete a cost-benefit analysis as required by the Executive Orders, because a good regulatory analysis is designed to inform the public and other parts of the Government of the effects of the chosen regulatory approach and its alternatives. In addition, OIRA is required to report to Congress on the costs and benefits of major

Federal regulations, pursuant to Section 624 of the Treasury and General Government Appropriations Act of 2001, also known as the Regulatory-Right-to-Know Act. Providing the public with information on the costs and benefits of a regulatory action provides transparency, and allows for a more complete understanding of the consequences of the regulatory action.

18. *In response to a Congressional directive to enhance safety, may an agency move forward with a safety rule even in the absence of a positive cost-benefit analysis?*

ANSWER: Please see the responses to Question 16 and 17.

19. *When developing regulations, should agencies view cost-benefit analysis as decisive or determinative whereby no regulation can be adopted if its costs do not exceed its benefits or should such analysis play an informative role in combination with other analyses that agencies perform when developing rules?*

ANSWER: As OMB's Regulatory Analysis Guidance (Circular A-4) explains, regulatory analysis is a tool agencies use to anticipate and evaluate the likely consequences of rules. The motivation behind the analysis is to learn if the benefits of an action are likely to justify the costs, or discover which of various possible alternatives would be the most cost effective. Agencies often develop and use other analyses in developing rules, such as risk assessments and other scientific and technological information. E.O. 13563 requires that each agency ensure the objectivity of any scientific and technological information and processes used to support a regulatory action.

20. *With respect to H.R. 2122, the "Regulatory Accountability Act," should all agencies be required to adopt the least costly regulation, even when alternative versions of the regulation would provide much greater benefits at only a slighter higher cost?*

ANSWER: E.O. 13563 states that each agency should "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity)." The Administration continues to believe this is the right way to choose among alternative regulatory approaches.

21. *Cass Sunstein, in a 2002 article, argued that cost-benefit analysis can "sometimes produce an illusion of certainty." He observed that the "false promise" of cost-benefit analysis can "produce bottom lines to be mechanically applied by regulatory agencies."¹ What are your thoughts about Mr. Sunstein's observations?*

¹ Cass Sunstein, *Arithmetic of Arsenic*, 90 Geo. L.J. 2255, 2258 (2002).

ANSWER: I, like former Administrator Sunstein before me, believe that cost-benefit analysis can be a useful tool when applied thoughtfully. OMB's Circular A-4, which sets out guidance to agencies on conducting sound and informative regulatory analyses, recognizes that benefit-cost analysis is a tool regulatory agencies use to anticipate and evaluate the likely consequences of rules. The Circular states that it may not always be possible to express in monetary units all of the important benefits and costs, and explains how agencies should take non-quantified benefits and costs into account. Circular A-4 also includes a section that directs agencies to consider and describe the significant sources of uncertainty in their estimates. A regulatory impact analysis prepared under the guidance of Circular A-4 can therefore set out a balanced assessment of the impacts of a proposed action.

We believe OMB's Executive Orders and Circulars acknowledge that cost-benefit analysis is not a merely mechanical exercise. It may not always be possible to express in quantitative and monetary units all the important impacts of a chosen regulatory approach.

22. *Under what circumstances is a proposed rule withdrawn? Is a public explanation provided when a rule is withdrawn?*

ANSWER: An agency might elect to withdraw a rule from OIRA review for any number of reasons. For example, the agency might determine that it has additional analytical work to complete before moving ahead with a rule. The question of whether to provide an explanation for the withdrawal is a matter for agency discretion, and depends on the circumstances of the particular rule. As part of OIRA's commitment to transparency, OIRA's website, www.reginfo.gov, records the fact that the rule was withdrawn and the date on which the withdrawal took place.

23. *Could you please identify any ways in which OIRA review of rulemakings could be made more transparent?*

ANSWER: OIRA will continue to work with agencies on improving the rulemaking process. OIRA already follows a number of transparency procedures; for example, when a rule is under review at OIRA, the fact of the review and the status of the review (pending or concluded) is disclosed on the OIRA website. In addition, whenever a member of the public meets with OIRA on a rule under review, the fact of the meeting and the names of the participants are disclosed on the OIRA website.

**Response to Questions for the Record from the Honorable C. Boyden Gray,
Boyden Gray & Associates, PLLC**

BOYDEN GRAY & ASSOCIATES PLLC

1627 I STREET, NW, SUITE 950
WASHINGTON, DC 20006
PHONE (202) 955-0620 · FAX (202) 955-0621

November 20, 2013

Honorable Spencer Bachus, Chair
Honorable Steve Cohen, Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

**Re: Hearing on the Office of Information and Regulatory Affairs:
Federal Regulations and Regulatory Reform**

Questions from Subcommittee Chairman Spencer Bachus

1. *Do you see something of a recurring theme in the difference between the Administration's rhetoric and its actions when it comes to regulatory reform (e.g., questionable cost-benefit analysis, skirting requirements for regulatory flexibility on small businesses)?*

Yes. The Obama Administration often pays lip service to sound regulatory principles that, *if followed*, would well serve the American people and the rule of law. But the Administration's words are too rarely matched by its deeds.

For example, President Obama's Executive Order 13563, titled "Improving Regulation and Regulatory Review," requires agencies to propose only those rules whose benefits exceed their costs,¹ to "tailor [their] regulations to impose the least burden on society,"² and to assess available alternatives to direct regulation.³ Furthermore, it requires agencies to employ the "best available techniques to quantify anticipated present and future benefits and costs as accurately as possible,"⁴

¹ Exec. Order No. 13563 § 1(b), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>.

² *Id.*

³ *Id.*

⁴ *Id.* § 1(c).

House Judiciary Committee
November 5, 2013
Page 2

to allow public participation in rulemaking,⁵ and to simplify and harmonize “redundant, inconsistent, or overlapping regulations.”⁶ (That E.O. reaffirmed President Clinton’s Executive Order 12866, which in turn built upon the foundation set by President Reagan in Executive Order 12291.) On the same day he issued that executive order, the President issued a memorandum “firmly committ[ing]” his Administration “to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses.”⁷ The memorandum urged the agencies “to give serious consideration to whether and how it is appropriate . . . to reduce regulatory burdens on small businesses, through increased flexibility.”⁸ And just weeks later, Cass Sunstein, President Obama’s Administrator for the Office of Information and Regulatory Affairs, followed up with a memorandum to the heads of agencies, reiterating and further stressing the need for agencies to improve public participation, cost-benefit analysis, inter-agency coordination, and retrospective review of burdensome, outdated regulations.⁹

Unfortunately, the Administration has not practiced what it preached. Its agencies have shown themselves all too willing to abandon these principles when they interfere with the Administration’s political agenda.

Instead of responsibly weighing the costs and benefits of proposed regulations and carefully tailoring rules so as to minimize burdens on regulated entities, the Administration has tacked a staggering regulatory price tag onto the cost of doing business in the United States. According to the agencies’ own estimates, the Obama Administration’s regulations from 2009 through 2012 have imposed a combined cost of \$518 billion, not including rules promulgated by independent agencies.¹⁰ The agencies have justified these staggering costs with benefits that are

⁵ *Id.* § 2; *see also* Memorandum on Openness and Transparency (Jan. 21, 2009) (“[M]y Administration is committed to creating an unprecedented level of openness in Government.”).

⁶ Exec. Order No. 13563 § 3.

⁷ Presidential Memorandum – Regulatory Flexibility, Small Business, and Job Creation (Jan. 18, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-flexibility-small-business-and-job-cre>.

⁸ *Id.*

⁹ Cass R. Sunstein, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies (Feb. 2, 2011), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>.

¹⁰ *See* Sam Batkins, *Piling On: The Year in Regulation*, American Action Forum (Jan. 14, 2013).

House Judiciary Committee
November 5, 2013
Page 3

too often illusory,¹¹ merely incidental to the purpose of the relevant regulation,¹² derived from paternalistic limitations on free choice,¹³ and, as I shall discuss below, incommensurate with the rules' immense costs.

Instead of seriously assessing alternatives to direct regulation, agencies often fail even to question the premises on which their regulations are based, much less to calculate the costs and benefits of alternatives. The Affordable Care Act promises that "nothing in this Act (or an amendment made by this Act) shall be construed to require that an individual terminate . . . health insurance coverage in which such individual was enrolled on March 23, 2010."¹⁴ Despite the Department of Health and Human Services' recognition of "Congress's intent to preserve coverage that was in effect on March 23, 2010,"¹⁵ the agency's grandfathering regulation effectuated a conscious preference for migrating individuals onto new Affordable Care plans. It selected the standard it did because it "permit[ted] enough flexibility to enable a smooth transition in the group market over time."¹⁶ The agency offered no explanation, much less a cost-benefit analysis, for favoring migration to Affordable Care plans over the congressionally protected freedom to retain one's original plan.

Instead of using the best available cost-benefit techniques, agencies tend to use whatever tools help them justify predetermined policy choices. In calculating the "social cost of carbon," an inter-agency working group noted that "[u]nder current OMB guidance contained in Circular A-4, analysis of economically significant . . . regulations from the domestic perspective is required, while analysis from the international perspective is optional."¹⁷ Instead of following that guidance, however, the working group explicitly rejected it, calculating at a global level the

¹¹ Susan E. Dudley, *OMB's Reported Benefits of Regulation: Too Good To Be True?*, Regulation 26, 26-28 (Summer 2013), *available at* http://research.columbian.gwu.edu/regulatorystudies/sites/default/files/u41/Dudley_OMB_BC_Regulation-v36n2-4.pdf.

¹² *Id.* at 28-29.

¹³ *Id.* at 29-30.

¹⁴ 42 U.S.C. § 18011(a)(1).

¹⁵ 75 Fed. Reg. 34546.

¹⁶ *Id.* at 34546.

¹⁷ Interagency Working Group on Social Cost of Carbon, United States Government, Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (May 2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/social_cost_of_carbon_for_ria_2013_update.pdf.

House Judiciary Committee
November 5, 2013
Page 4

benefits of carbon reductions, even though the relevant regulatory costs will be borne exclusively by domestic entities.¹⁸

Instead of promoting public participation in the rulemaking process, the current administration has demonstrated a proclivity for regulating in the dark. The interagency working group's most recent estimate of the social cost of carbon was the product of a closed-door process that denied the public any opportunity to comment on the new estimate.¹⁹

Instead of reducing "redundant, inconsistent, [and] overlapping regulations," such regulations have proliferated under the current Administration. Take the 2012 rule governing motor vehicle greenhouse gas emissions and fuel economy standards—a joint rulemaking by the EPA and the Department of Transportation.²⁰ DOT faithfully implemented the 1975 Energy Policy and Conservation Act's non-discretionary requirement that a gallon equivalent of natural gas be deemed to have "a fuel content of .15 gallon of fuel" for purposes of fuel economy standards.²¹ But EPA's greenhouse gas rule nullified the 0.15 multiplier by setting emissions standards that are blatantly inconsistent with it.²² This would be bad enough by itself, but the Supreme Court's ruling in *Massachusetts v. EPA* that EPA had the authority to regulate carbon dioxide emissions relied on the express assumption that the two agencies could "both administer their obligations *and yet avoid inconsistency*."²³ Despite the governing statute and DOT's implementing regulation, the EPA replaced the statutory formula with a much less beneficial "incentive" of its own—allowing a natural gas vehicle to be counted 1.6 times for purposes of the fleet-wide carbon dioxide emissions standard. And even that incentive phases out by 2022.

Instead of eliminating unjust burdens on small businesses, the Obama Administration has piled on more. As calculated by the Competitive Enterprise

¹⁸ *Id.* at 14-15.

¹⁹ See Susan E. Dudley, et al., Public Interest Comment on Reconsideration of the Department of Energy's Final Rule: Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens 2-3, 5, 9-10 (Sept. 6, 2013).

²⁰ 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, Final Rule, 77 Fed. Reg. 62623 (Oct. 15, 2012).

²¹ 49 U.S.C. § 32905(c).

²² See Rulemaking Comments of Boyden Gray & Associates, *NHTSA-2010-0131 and EPA-HQ-OAR-2010-0799 Proposed Rule, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards* (Feb. 13, 2012).

²³ *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (emphasis added).

House Judiciary Committee
November 5, 2013
Page 5

Institute, the Administration's (untimely) 2012 Unified Agenda of Regulatory and Deregulatory Actions listed 854 rules in development that would affect small businesses.²⁴ Of those, 470 were sufficiently substantial to require a Regulatory Flexibility Analysis—more than in any other year in the past decade.²⁵

2. *You note the need for OIRA to “guard against complacent acceptance of cost-benefit analysis by administrative agencies.” Is that especially true of the Social Cost of Carbon estimate given its centrality to rulemaking efforts by multiple agencies?*

Yes. The interagency working group's estimate of the social cost of carbon has been and will be used by multiple agencies to justify all manner of regulations that touch on greenhouse gas emissions.

This year alone, the Department of Energy and the EPA cited the social cost of carbon in the following rules and proposed rules: National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters²⁶; Energy Conservation Program: Energy Conservation Standards for Distribution Transformers²⁷; Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category²⁸; Energy Conservation Program: Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens²⁹; Energy Conservation Program: Energy Conservation Standards for Metal Halide Lamp Fixtures³⁰; Energy Conservation Program: Energy Conservation Standards for Walk-In Coolers and Freezers³¹; Energy Conservation Program: Energy Conservation Standards for

²⁴ Wayne Crews, *Congress to Mark Up Small Business Regulatory Flexibility Bill*, OpenMarket.org: The Blog of the Competitive Enterprise Institute (Sept. 17, 2013), <http://www.openmarket.org/2013/09/17/congress-to-mark-up-small-business-regulatory-flexibility-bill/> (citing Ten Thousand Commandments, Table 6, https://docs.google.com/spreadsheets/pub?key=0AiYyxLrbT19_dDJfSUo1SHI1ckJtMEdlUHRMZnVuSWc&output=html).

²⁵ *Id.*

²⁶ 78 Fed. Reg. 7138-01.

²⁷ 78 Fed. Reg. 23336-01.

²⁸ 78 Fed. Reg. 34432-01.

²⁹ 78 Fed. Reg. 36316-01.

³⁰ 78 Fed. Reg. 51464-01.

³¹ 78 Fed. Reg. 55782-01.

House Judiciary Committee
November 5, 2013
Page 6

Commercial Refrigeration Equipment³²; and Energy Conservation Program for Consumer Products: Energy Conservation Standards for Residential Furnace Fans.³³

Because of the importance of the social cost of carbon in the cost-benefit analysis of these and similar rules, the defects in the administrative process that resulted in the latest social cost of carbon estimate are especially grave. This list of regulations that depend on the social cost of carbon will only grow in the coming years as agencies use reductions in carbon emissions—whether intended or ancillary—to justify more costly regulations. For these regulations to be legitimate, the social cost of carbon must be determined in a process that is transparent and open to public comment, and the domestic costs associated with domestic regulations cannot be offset by global benefits.

As it currently stands, the “cost of carbon” established by Administration fiat is utterly at odds with the prices set by mechanisms more closely resembling markets. In the California Air Resources Board’s August 2013 auction, carbon allowances reached a settlement price of \$12.22 per metric ton³⁴; meanwhile, in Europe, carbon allowances are reportedly selling for just \$5.99 per metric ton.³⁵ To be clear, these are not markets in the truest sense, since they are largely constructed by governments to (at best) imitate real markets.³⁶ Nevertheless, even these partial-market mechanisms—a vast improvement upon prices dictated wholly by regulators—result in prices far, far lower than the Administration’s fiat price of \$37 per metric ton.³⁷ Indeed, just this week the *Financial Times* reported that banks were fleeing the European carbon market precisely because “carbon prices have plummeted.”³⁸

³² 78 Fed. Reg. 55890-01.

³³ 78 Fed. Reg. 64068-01.

³⁴ <http://www.arb.ca.gov/cc/capandtrade/auction/august-2013/results.pdf>.

³⁵ Mathew Carr, *EU, California Show China How to Avoid Carbon-Permit Oversupply*, BLOOMBERG BUSINESSWEEK (Nov. 19, 2013) (“4.43 euros (\$5.99) today in Europe on ICE at 8:52 a.m.”), at <http://www.businessweek.com/news/2013-11-19/eu-california-show-china-how-to-avoid-carbon-permit-oversupply>.

³⁶ See, e.g., Reuters, *EU this week to OK talks on helping carbon market, official says* (Nov. 4, 2013); Pilita Clark, *EU votes to prop up carbon prices on emissions trading system*, FINANCIAL TIMES (July 3, 2013).

³⁷ White House, “Refining Estimates of the Social Cost of Carbon” (Nov. 1, 2013), at <http://www.whitehouse.gov/blog/2013/11/01/refining-estimates-social-cost-carbon>.

³⁸ Jim Pickard and Ajay Makan, *London banks quit carbon trading*, FINANCIAL TIMES (Nov. 18, 2013); see also Stanley Reed and Mark Scott, *In Europe, Paid Permits for Pollution are Fizzling*, N.Y. TIMES (Apr. 21, 2013).

House Judiciary Committee
November 5, 2013
Page 7

Responses to Questions from Ranking Member Steve Cohen

1. *Please name the principal clients that your law firm represents.*

The principal clients that my firm currently represents are:

- The Competitive Enterprise Institute
- State National Bank of Big Spring, Texas
- The State of Kansas
- The State of Montana
- The State of West Virginia
- The 60 Plus Association

2. *You mention that the cost of regulations for the period of 2009 to 2012 could be as high as \$518 billion. Please tell us what was the total amount of benefits that these regulations generated.*

The defects in this Administration's cost-benefit methodology prevent an accurate calculation of the true benefits of its regulations. Susan Dudley, the OIRA Administrator under President George W. Bush, has cogently outlined these methodological deficiencies in an article titled *OMB's Reported Benefits of Regulation: Too Good To Be True?*³⁹

The vast bulk of the regulatory benefits claimed by this Administration come from reductions in fine particulate matter (PM_{2.5}) and the reductions in premature mortality that are supposed to follow. Using PM_{2.5} as the primary justification for regulatory cost is rife with problems. One is that even OMB admits "significant uncertainty" about the causal connection between reducing PM_{2.5} and delaying death and about how to quantify the value of delaying death."⁴⁰ (Most of the beneficiaries of PM_{2.5} reductions are octogenarians, and they stand to gain fewer than six months of additional life expectancy from PM_{2.5} levels; the estimated value of mortality risk reduction does not take these important facts into account.⁴¹) A second problem is that the Administration quantifies benefits for reducing PM_{2.5} even in places where PM_{2.5} emissions are already below the National Ambient Air Quality Standard—the EPA-determined acceptable level for atmospheric PM_{2.5}.⁴² A third

³⁹ Dudley, *supra* note 11.

⁴⁰ *Id.* at 27.

⁴¹ *Id.* at 28.

⁴² *Id.*

House Judiciary Committee
November 5, 2013
Page 8

problem is that many of the claimed benefits from PM_{2.5} reduction (a majority in 2012) are attributed to rules intended to solve *other* problems but coincidentally reduce PM_{2.5} as well.⁴³ Finally, Dudley found that recent regulations purport to derive benefits from “allegedly saving businesses or consumers money by constraining their choices,” without finding any market failure that would justify such paternalism.⁴⁴

I have not attempted to recalculate the benefits of all of this Administration’s regulations according to a fair methodology, and I am not aware of anyone who has attempted a comprehensive recalculation. Dudley notes that almost 80% of the total regulatory benefits reported by OMB are attributable to three dubious categories of benefits: reductions of particulate matter by rules designed for that purpose, ancillary reductions of particulate matter by rules designed for other purposes, and alleged savings to businesses and consumers from rules that prevent their choices. If these alleged benefits were properly discounted, the costs of many regulations would far exceed their benefits.

3. *You state that there is “longstanding collusion between activist groups and sympathetic regulators.”*

Please identify a few verifiable examples of collusion.

John Cruden, a former senior career official in the Department of Justice’s Environment and Natural Resources Division for more than two decades during two Republican and two Democratic Administrations, testified before this Subcommittee in the 112th Congress Mr. Cruden stated that he was:

not aware of any instance of a settlement, and certainly none [that he] personally approved, that could remotely be described as “collusive.” Quite the opposite: in every case of which [he was] aware, the Department of Justice vigorously represented the federal agency, defending the agency’s legal position and obtaining in any settlement the best possible terms that were consistent with the controlling law.

Was Mr. Cruden mistaken or did he make a misrepresentation to Congress?

The EPA has been party to a troubling history of regulation-through-settlement.⁴⁵ The sue-and-settle model of rulemaking subverts the features of our

⁴³ *Id.* at 28-29.

⁴⁴ *Id.* at 29.

⁴⁵ See, e.g., U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013), at <http://www.uschamber.com/sites/default/files/reports/SUEANDSETTLEREPO>

House Judiciary Committee
November 5, 2013
Page 9

regulatory system designed to protect against agency overreach. When the agency commits itself to promulgating a rule in a court-approved settlement with an environmental organization, it evades the notice-and-comment requirement that is the hallmark of American administrative law, and the protects the resulting rule from full judicial review, under the shield of a court order.

Examples of regulations resulting from settlements between EPA and environmental organizations include the 2012 Utility MACT Rule,⁴⁶ the Lead Renovation, Repair and Painting (LRRP) Rule,⁴⁷ the Oil and Natural Gas MACT Rule,⁴⁸ and the Florida Nutrient Standards for Estuaries and Flowing Waters.⁴⁹ The Chamber of Commerce has catalogued many other regulations resulting from sue and settle cases.⁵⁰

I do not know whether Mr. Cruden was involved in any of these cases or whether he was otherwise aware of the settlements, so I cannot comment on Mr. Cruden's knowledge when he testified before this Subcommittee. I will note that even where all parties genuinely believe that a closed-door settlement results in the "best possible terms," that result comes at a high cost—the loss of transparency and a meaningful opportunity for public notice and comment, and an insulation of the resulting regulation from review by the Office of Management and Budget. A backroom deal does not cease to be collusive simply because the parties involved think they are achieving laudable goals.

4. *Does OIRA have adequate resources to fulfill its responsibilities?*

I do not have first-hand knowledge of OIRA's resources, but at a public event on cost-benefit analysis hosted by NYU Law's Institute for Policy Integrity, persons familiar with OIRA's work indicated that the office is short-staffed to a degree that affects its ability to fulfill its important role as the executive branch's check on agency overreach.

RT-Final.pdf.

⁴⁶ 77 Fed. Reg. 9304.

⁴⁷ 75 Fed. Reg. 24802.

⁴⁸ 77 Fed. Reg. 49490.

⁴⁹ See Federal Nutrient Water Quality Standards for the State of Florida's Estuaries, Coastal Waters, and South Florida Inland Flowing Waters (Coastal Rule), http://water.epa.gov/lawsregs/rulesregs/florida_coastal.cfm ("The Consent Decree deadline for the final numeric water quality criteria . . . is September 30, 2013.).

⁵⁰ U.S. CHAMBER OF COMMERCE, SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS 30 (2013), *available at* <http://www.uschamber.com/sites/default/files/reports/SUEANDSETTLEREPORT-Final.pdf>.

House Judiciary Committee
November 5, 2013
Page 10

5. *Hypothetically, if a consent decree pertains to air quality standards under the Clean Air Act, should anyone who breathes air be allowed to intervene in an underlying civil action pertaining to such standards and be heard on such decree?*

I do not believe that merely breathing air qualifies an individual to intervene in any case involving Clean Air Act regulation pursuant to a consent decree. Intervention is governed by Rule 24 of the Federal Rules of Civil Procedure. That rule gives a mandatory right of intervention to anyone who “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.”

In most cases, the EPA, which is the agency charged with administering the Clean Air Act is competent to represent the interests of individuals whose only interest is limited to the general public interest in breathing clean air. But entities with a specific interest in the subject matter of these sue-and-settle cases, including businesses that would be affected by regulations that come about as a result of consent decrees, should be given a reasonable opportunity to intervene in these cases. The agency that is a party to such a case should be required to publish notice of a proposed consent decree a reasonable time before it is filed with the court.

6. *Unfortunately, proponents of regulatory reform and those who oppose anti-regulatory initiatives appear to be at polar opposites on various issues.*

What role could the Administrative Conference of the United States play with respect to these issues?

The non-partisan character of the Administrative Conference of the United States makes it uniquely competent to mediate between divergent opinions about the proper direction of administrative law. As I testified before this Subcommittee in 2004 concerning the reauthorization of the Administrative Conference, through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs.⁵¹

The Conference’s success was based in large part on the breadth of its volunteer membership and in its reliance on empirical research by academics to ensure that its recommended improvements to the administrative process were based in fact and not ideology. As I testified in 2004, for “over a quarter century the

⁵¹ *Reauthorization of the Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 108th Cong. (2004), available at <http://judiciary.house.gov/legacy/93774.PDF>.

House Judiciary Committee
November 5, 2013
Page 11

Administrative Conference of the United States has maintained a reputation for non-partisan, expert evaluation of administrative processes and recommendations for improvements to those processes. It had no power but the power to persuade, and no political constituency other than those interested in improving administrative government."⁵²

The Conference's work in some cases resulted in bipartisan legislation to improve the legislative process. For example, both the Negotiated Rulemaking Act of 1990 and the Administrative Dispute Resolution Act were the product of the Conference's work, both in terms of the studies and reports that underlay the justification for these two laws and also in terms of the interested persons and agencies brought together to support the law.

I believe that the Conference remains a valuable resource for the reform of our regulatory system. As it was in the past, the Conference is well equipped to look beyond anti-regulatory and pro-regulatory labels to find empirically grounded solutions to the challenges of the modern administrative state.

Sincerely,



C. Boyden Gray
BOYDEN GRAY & ASSOCIATES PLLC

⁵² *Id.* at 61.

**Response to Questions for the Record from Sally Katzen, Visiting Professor
at NYU School of Law; Senior Advisor, Podesta Group**

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on
The Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform
September 30, 2013

Questions for the Record

QUESTIONS FOR SALLY KATZEN

Questions from Ranking Member Steve Cohen

1. One of the principal arguments proponents of so-called regulatory reform make is the claim that regulations “kill jobs” and “bury businesses in red tape.”

What is your response?

Are you aware of any evidence supporting these allegations?

Answer:

Although the allegation of “job-killing regulations” is often repeated, there is very little credible evidence that support such claims.

OMB’s 2011 Report to Congress summarized the literature on the relationship between regulations and jobs. The takeaway is that the evidence is mixed, with some analyses finding layoffs and others finding hiring, and still others finding regional or sectoral shifts in employment opportunities. These outcomes are highly contingent on the industry, the type of regulation and many other factors, so they cannot (and should not) be used to support any general claims about regulation “killing jobs.”

An excellent conference was held by the Institute for Policy Integrity of NYU Law School in October 2013 and there is a new book from Coglianese, Finkel, and Carrigan, “Does Regulation Kill Jobs,” that include materials from leading experts discussing the difficulty and manipulability of existing economic models designed to answer this question.

2. Does OIRA have adequate resources to fulfill its responsibilities?

Answer:

No. OIRA (and OMB generally) have inadequate resources to fulfill its responsibilities; its staff has been reduced over the past years while its responsibilities have increased.

3. Do agencies exaggerate benefits and minimize costs as Mr. Gray appears to argue?

Answer:

There have been many (conflicting) assertions about the accuracy of *ex ante* estimates of costs and benefits, even though there are very few studies of the issue and those studies yield a mixed picture. My review of the literature suggests that agencies do not “exaggerate benefits and minimize costs.” To the contrary, agencies typically overstate actual costs, because the rules, once adopted, produce technological advances (American ingenuity at work) or because of changes in the scope of the rules (either through revisions to the rule or enforcement discretion). The variations in compliance (and enforcement) can also lead to an overstatement of benefits. So far as I am aware, however, there is no systematic choice by agencies to misrepresent either the costs or the benefits of a rule.

4. You discuss in your prepared testimony the benefits of having a “Regulatory Plan.” Please elaborate.

Answer:

In my prepared testimony, I mentioned the Regulatory Plan, which is a piece of the existing regulatory apparatus, that could be used to address one of the concerns about OIRA’s traditional focus on each proposal as a separate transaction – namely, the cumulative impact of multiple proposed or final rules from a single agency or multiple proposed or final rules from multiple agencies on a particular sector of the economy. Because the agencies are required to provide OIRA (and other Executive Branch agencies and offices) a brief description of the regulatory actions they are expecting to focus on during the upcoming year, this Plan can serve not only as an advanced notice to the public (its intended purpose), but also as an analytical tool to explore the cumulative impact of the regulatory agenda.

5. Mr. Morrall appears to believe that politics and economics influence the rulemaking process. He recommends that the OIRA Administrator should “insulate the economic analysis and recommendations from politics as much as legally feasible.”

Could this initiative potentially impede the ability of these agencies to promptly respond to imminent risks or crises?

Answer:

OIRA has traditionally conducted its review of the economic analysis separate from any other consideration so it can produce “the facts ma’am, just the facts,” in the immortal words of Sargent Friday on Dragnet. But the economic analysis, while incredibly informative, is not dispositive in the review of a proposal or draft final rule for a variety of reasons, including that there may be costs or benefits that cannot be quantified and monetized, there may be significant variability in the data or significant uncertainties, or there may be distributional aspects of the rule that should not be ignored, to name a few. So once you have the economic analysis, it is essential to consider the policy considerations. When describing the process, I use the term “policy” rather than “politics” because the latter term sometimes carries a negative connotation not related to substance whereas “policy” implicitly includes substantive considerations.

In any event, if the Administrator of OIRA, who is after all a political appointee (nominated by the President and confirmed by the Senate), to decide to decline to entertain policy considerations along with the economic analysis, there could be a number of unintended adverse effects, including occasions when agencies could not promptly respond to imminent risks or crises.

**Response to Questions for the Record from John F. Morrall, III,
Affiliated Senior Scholar, Mercatus Center, George Mason University**

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on
The Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform
September 30, 2013

Questions for the Record

Answers for QUESTIONS FOR JOHN MORRALL
Submitted November 20, 2013

Questions from Subcommittee Chairman Spencer Bachus

1. In your written testimony, you mention two rulemakings for which improved analysis might have avoided significant national harms. Can you elaborate on those?

Answer: The two rulemakings I mentioned were HUD's regulation implementing Affordable Housing Goals for Fannie Mae and Freddie Mac (the GSE's) and EPA's Renewable Fuel Standards. Both programs mandated progressively tighter annual quotas for firms to meet that although well intentioned had drastic unintended consequences. Better analysis and in particular closer attention to market forces could have reduced the significant harms to our economy that resulted from the arbitrary quotas. In 2004 HUD set mortgage quotas for low income borrowers that the GSE's had to meet for the years 2005 to 2008 that relied on subprime mortgages without carefully analyzing safety and soundness concerns or impact of defaults on the national economy. Its RIA actually estimated that there would be a \$180 million transfer from the GSE's and lenders to the borrowers. In 2007 EPA set its biofuel blending quotas in absolute terms from 2007 and beyond without regard to the actual demand for gasoline. Its RIA assumed that the quotas would not be binding or significantly impact corn and other agricultural prices. The well recognized harms these regulations caused subsequently led to corrective regulatory actions. Congress transferred HUD's authority to set affordable housing goals and timetables to a new agency and EPA has recently proposed to reduce renewable fuel standards for 2014.

2. In your view, how effective have agencies been in conducting retrospective reviews to identify and eliminate outdated or unnecessary regulations?

Answer: Understandably, agencies have great difficulty in objectively evaluating their own programs and regulations. Moreover, although there is widespread support for the concept of retrospective regulatory review, any specific existing regulation will often have strong supportive interests from those who benefit as well as those who have already borne the costs while broad and diverse interest that may benefit from its removal tend not be well organized. All Presidents since 1981 have had formal retrospective review programs that in my view had little success beyond tinkering along the edges with the exception of the 1981 to 1983 program. It succeeded partly because it was the first, closely overseen by a White House Task force led by Vice President and the

Administrator of OIRA, and it took place during a severe economic crisis. Clearly strong and independent agency oversight is needed for effective retrospective review.

3. Based on your experience at OIRA, do you think OIRA should have given more scrutiny to the Administration's update to the Social Cost of Carbon? If so, how? What opportunities might be available for OIRA to revisit the issue for greater analysis and transparency?

Answer: My understanding is that OIRA was involved but so were 10 other agencies including four other White House agencies so it is not clear how much additional OIRA scrutiny would have improved the estimates. In any case, the Administrator of OIRA has recently called for a notice and public comments on revised estimates. My concern with Social Cost of Carbon estimates is that they diverge from the guidance in OMB Circular A-4 by not including a 7% discount rate as required by the Circular and used in other RIAs and by including global benefit estimates because "Even if the United States were to reduce its greenhouse gas emissions to zero, that step would be far from enough to avoid substantial climate change" and using global estimates might help persuade other countries (read China) to reduce greenhouse gas emissions.

Questions from Ranking Member Steve Cohen

1. Sally Katzen recommends that agencies be encouraged to develop a "Regulatory Plan" as provided in section 4 of Executive Order 12866.

What are your thoughts about this suggestion?

Answer: I agree with my former boss and wonder why OIRA has not published one for 2013 as required by EO 12866.

2. Should the role of OIRA be that of a "gatekeeper" or a "collaborator"?

Answer: In my experience, OIRA best performed its good government role when it served as a "gatekeeper" for quality Regulatory Impact Analysis (RIA) that accompany major regulations. In addition it plays an important collaborator role by facilitating and organizing agency and especially White House Offices comments on specific regulatory actions.


3. Should cost-benefit analysis be determinative or informative when agencies develop regulations?

Answer: It is well recognized by economist and policy analysts that cost-benefit is not determinative but an information tool to aid in organizing relevant evidence for decision makers. EO 12866 and OMB Circular A-4 both make this clear and list other relevant considerations besides costs and benefits that should be examined in an RIA such as impacts on distributional equity and basic civil rights. When these other consideration

are paramount, cost-benefit analysis can often show the most cost-effective alternative to meet the goals of the regulatory action.

4. Can cost-benefit analysis “sometimes produce an illusion of certainty,” as former OIRA Administrator Cass Sunstein wrote in 2002?

Answer: Yes, if improperly performed. OMB Circular A-4 provides guidance on cost-benefit analysis that emphasizes the importance of taking into account uncertainty through such methods as ranges, sensitivity analysis and formal uncertainty analysis such as Monte Carlo simulations for regulations of over a billion dollars of impact. But practitioners often emphasize one estimate that can lend an illusion of uncertainty. For example, the Administrator of OIRA recently wrote in a White House Blog that the Administration was lowering the cost of carbon estimate used in regulatory analysis from \$38 per metric ton (an estimate made in May 2013) to \$37 per metric ton for 2015. In the past OIRA had used broad ranges to emphasize uncertainty for key values used in cost-benefit analysis. For example, Circular A-4 issued in 2003 recommended that a range of values of \$1 million to \$10 million should be used in estimating the economic value of regulations that may prolong life.



**Response to Questions for the Record from Nicole Riley, Virginia State
Director, National Federation of Independent Business**

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on
The Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform
September 30, 2013

Questions for the Record

QUESTIONS FOR NICOLE RILEY

Questions from Ranking Member Steve Cohen

1. We, on this side of the aisle, constantly hear that our regulatory regime puts American manufacturers at a disadvantage with their overseas counterparts.

Would you recommend that the United States match its regulatory requirements to those of China so American manufacturers could compete more fairly?

What about making America's air quality standards equivalent to China's?

How about importing China's mine safety standards to America?

If China has a lower level for lead in children's toys, should the United States have a comparable level?

Would you serve your child powdered milk manufactured in China?

Answer: NFIB and its small business owner members are not asking Congress, nor federal agencies, for the substantial regulatory rollbacks mentioned above. We believe that federal agencies should take great care when issuing *new* regulations. Too often in today's regulatory climate federal agencies keep ratcheting up existing standards that have proven effective. The result of this effort is substantial new cost and paperwork burdens with little marginal benefit to the public.

NFIB would like to see sensible regulations founded on the following principles:

- America's small businesses deserve a greater voice in the federal regulatory process.
- The Administration's first focus should be on providing assistance to small businesses before assessing penalties.
- Every major regulation should undergo rigorous benefit-cost analysis.
- Regulations should be based on objective data and hard science.
- The regulatory process requires more transparency and accountability.

2. You state that from January 1, 2013 to last September 27, 2013, federal agencies have issued 2,878 rules.

To your knowledge, did every single one of these rules directly impact small business owners? If not, how many of these rules do directly impact small business owners?

Answer: Not every rule affects small businesses directly. However, we believe that most of these rules directly affect small businesses. At a minimum, small businesses related to industries targeted by each rule need to review aspects of the rule to determine if it applies.

It is crucial to keep in mind that even just a handful of new regulatory requirements, when added on top of those they are already complying with, can be a substantial burden that affects a small business's ability to grow and create jobs. That is why regulators must use care and adequately consider direct impacts on small businesses, which does not happen often enough despite current laws that require it.

It is also important to recognize the harmful impact to small businesses of rules that do not directly impact them. Rules that will increase the cost of energy, for example, have certain impacts on a small business's bottom line despite the fact that they do not have to comply with these rules.

