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EXAMINING FEDERAL RULEMAKING CHALLENGES AND AREAS OF IMPROVEMENT WITHIN THE EXISTING REGULATORY PROCESS

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY AFFAIRS AND FEDERAL
MANAGEMENT

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
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EXAMINING FEDERAL RULEMAKING CHALLENGES AND AREAS OF IMPROVEMENT WITHIN THE EXISTING REGULATORY PROCESS

THURSDAY, MARCH 19, 2015

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

The Subcommittee met, pursuant to notice, at 10:01 a.m., in room SD–342, Dirksen Senate Office Building, Hon. James Lankford, Chairman of the Subcommittee, presiding.

Present: Senators Lankford, Ernst, Heitkamp, and Peters.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Good morning. This is the first hearing in a series of hearings to pursue the issues and solutions surrounding the Federal regulations.

I want to welcome each of our witnesses. We are very fortunate to have three witnesses who have been regulators and one witness who faces regulations on a daily basis. I thank you all for your written and your thoughtful testimony. I look forward to speaking with each of you and the contributions you can make to the ongoing conversation.

Today's hearing will focus on the Federal Government's regulatory process. How does the regulatory process affect the quality, structure, efficiency, and accountability of agency rulemaking? Focusing on the processes will enable this Subcommittee to view the forest through the trees of all the regulations.

Although Federal regulations have undoubtedly conferred benefits to everyday Americans, it is clear there are also regulatory excesses and significant burdens. More than 25,000 pages of rules published on average from 2010 to 2013 by many of the Federal Government's 430-plus agencies, regulations today place a $2 trillion burden on the United States' economy. In other words, the regulatory burden today equals 12 percent of the Nation's gross domestic product (GDP).

At some point individuals cannot make a reasonable day-to-day decision to advance their own family or their business because they spend time and treasure completing forms and Federal requirements: forms to prove to the government what they do each day,

even forms to tell the government they have nothing to tell the government.

One simple way to ensure that the regulatory process benefits everyday Americans is to make sure that individuals have the opportunity to voice their opinions on all proposed regulations and make sure their comments are actually heard.

In fact, Congress required notice and comment in the rulemaking process. When an agency seeks to promulgate a rule, that agency must provide notice of its proposed rule in the Federal Register and seek comment on that rule. In theory, notice and comment allows everyday Americans who are affected by regulations to participate with their government to develop the regulation. A government by the people, and for the people, should also hear and respond to the people when regulations are written.

In practice, however, many Americans feel that their voices are not adequately heard. Those without the resources to hire attorneys or those who are too far outside the beltway to share their perspectives feel that notice and comment is not enough.

Today, I hope we can discuss ways in which the Federal Government, whether it be individuals or agencies or Congress, can better respond to individuals' concerns.

The Subcommittee takes these issues very seriously. In fact, I would like to announce before we begin the hearing a project that Ranking Member Heitkamp and I are working on together. Senator Heitkamp and I have designed a portal for the Subcommittee website called "Cut Red Tape" where we encourage Americans to tell us about how specific regulations negatively affect them. We want to know if there are particular Federal regulations that are onerous, out of date, lack common sense, or have an enormous burden. This is our own version of a regulatory look back.

I do not believe that our Nation should have no regulations, but I do believe that regulations should be local whenever possible, limited in scope, and that the least costly solutions should be followed. We hope to have this web-based effort ready in the very near future. Once it is up and running, the Subcommittee will collect and read all submissions, and we hope to highlight regulatory stories in the future to address these individuals' particular concerns.

I look forward to discussing these issues with our Members and witnesses today. With that, I would recognize Ranking Member Heitkamp.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. Thank you, Mr. Chairman.

Welcome to the "Redhead Caucus." You did not know you were signing in for that, did you?

We are very excited about this project because what you will discover, kind of moving forward, is that this is not a partisan issue. Most of us who actually receive comments from constituents can tell you clearly that these issues do not know political parties. They are business issues. They are important issues of how we move the country forward.

And so I want to tell you, Mr. Chairman, I am so grateful that we are going to be working on these regulatory issues, as well as

other issues involving Federal employees, which fall under the Subcommittee's jurisdiction.

When most people think of regulation, they probably think of paperwork a small business might have to fill out or the records someone needs to keep in order to file their income taxes, but regulations are much more than that.

Regulations underpin almost everything our Nation and our citizens do. Regulations keep our products and food safe. Regulations work toward making a fair society. Regulations work to prevent fraud and keep our economy and America working. It is safe to say that regulations are one of the most important parts of the Federal Government, even if they are not always well understood.

For our Nation to be successful, for our citizens to be able to work hard and provide for their families, for our Nation to be secure and safe, we need effective, efficient, and rational regulatory process that works for American business and American families.

In the upcoming months, you will hear me talk a lot about efficiency and effectiveness. Those words need to be the key focus of any discussion about our regulatory process. A world without regulation will not work, but we need effective, efficient, and rational regulation.

Businesses large and small need certainty. They do not get that if the Federal regulatory process stretches on for years and years. That is not efficient, and that is not effective, and that seriously harms the economy and local businesses.

As we have been talking about this process and talking about existing regulation, I have also put on the table the delayed regulatory impacts, when regulations are delayed or not done in a timely fashion. I think a prime example of that is the Environmental Protection Agency (EPA's) continued failure to set renewable volume obligations under the renewal fuel standards. Because of their failure to follow the law, biodiesel plants across the country, including the one in Velva, North Dakota, have had to shut down production placing an economic burden on this critical industry.

If the Agency had done its job, there would be no harm. Therefore, the lack of regulation has caused serious economic disruption in that industry.

Effectiveness is just as important as efficiency. I think everyone agrees that a level playing field is a good thing. Effective regulations get us there, and effective regulation balances the costs imposed on business with the benefit to consumers and to Americans. They also balance the cost to manufacturers and the safety benefits our families experience.

One of my focuses today is to engage with the witnesses on how best to make the Federal regulatory process more effective. A myriad of laws make up the regulatory framework, from the Administrative Procedure Act (APA) to the Paperwork Reduction Act and others. It is critical that we examine these rules for our regulatory process and determine what needs to change, what needs to be updated and what simply needs to be eliminated. Those last points are critical. We must always work to eliminate, simplify, and update regulations that are out of date.

Think about that. Thousands of regulations that have no purpose, that add no value to our society, to our economy continue to

be on the books. This retrospective review process needs to be at the heart of any consideration on how we improve this process. Technological changes, regulations that impact how industries operate must also change.

The Administration has made retrospective review a priority, and we have seen some success. Federal agencies posted updated lists of regulations they are reviewing just yesterday. It is clear that a lot of good work is being done. The Administration reports that finalized initiatives through this retrospective process will achieve $20 billion in savings over 5 years.

I met with the Office of Information Regulatory Affairs (OIRA) Administrator last week, and he reiterated to me the Administration's strong commitment to do better regulatory process, and I hope Howard and the Federal agencies will work with the Chairman and me as we examine this regulatory process from all sides.

We will hear a strong variety of opinions at today's hearing, and I look forward to hearing about how we can best resource regulation.

No one disagrees that we need an effective, efficient process, and I think that everyone understands the importance of retrospective review. However, all that work requires resources: People to do the process, people to review the cost benefits, all the things that we must do to achieve smart, efficient, and rational regulation.

In the near future, Chairman Lankford, as he has discussed today, and I will launch an effort to not just hear from witnesses who have the resources to come here to Washington, DC. to have discussions, but to hear from North Dakotans, to hear from Oklahomians——

Senator LANKFORD. Oklahomans. Just an Okie.

Senator HEITKAMP. Oklahomans. I was not going to use the other word. OK.

To hear from people who have had for years this pent-up frustration who will now have a vent to talk to people who are serious about listening about those regulations, and we hope that this will ensure for us a continued commitment to the process as we read through this effort but also will give us a better understanding of how we prioritize.

So, I think it is critical that any discussion on how to improve regulation begins with an honest discussion of resources and how we are going to modify and to take a look at the burdens that this body imposes on regulatory agencies.

With that, I look forward to hearing from the witnesses and discussing with them their ideas on how we can improve for our Nation the regulatory process.

Thank you, Mr. Chairman.

Senator LANKFORD. Thank you. I look forward to the conversation.

At this time we will proceed to testimony from our witnesses.

John Graham is the Dean at Indiana University School of Public and Environmental Affairs where he has been since 2008. Dr. Graham served as the Administrator in the Office of Information and Regulatory Affairs—you will hear that term used a lot—from 2001 to 2006.

Neil Eisner is the Senior Fellow of the Administrative Conference of the United States. Mr. Eisner served as the Assistant General Counsel to the U.S. Department of Transportation's Regulation and Enforcement Division through six Presidential administrations from 1978 to 2013. Mr. Eisner also teaches courses as an adjunct professor at the American University School of Law.

Drew Greenblatt is the President and owner of Marlin Steel Wire Products, a manufacturing company out of Baltimore, Maryland. Mr. Greenblatt bought the company in 1998. Today Marlin Steel employs 25 people, had $5.5 million of sales in 2014, and exports worldwide. He also serves on the executive board of the National Association of Manufacturers (NAM).

Pamela Gilbert is a partner at the law firm of Cuneo Gilbert & LaDuca focusing on government relations, where she has been since 2003. Ms. Gilbert served as the Executive Director of the Consumer Product Safety Commission (CPSC) from 1995 to 2001.

I would like to thank the witnesses for appearing today. It is the custom of this Subcommittee to swear in all witnesses who appear before us. So, if you do not mind, I would like to ask you to stand and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give to this committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. GRAHAM. I do.

Mr. EISNER. I do.

Mr. GREENBLATT. I do.

Ms. GILBERT. I do.

Senator LANKFORD. Thank you. You may be seated.

Let the record reflect the witnesses answered in the affirmative.

We will be using timing today as we have your oral testimony. We have all received your excellent written testimony. That will be a part of the record. We would like to ask your oral testimony to be about 5 minutes to save time for questions.

Dr. Graham, you are first up.

TESTIMONY OF THE HON. JOHN GRAHAM,[1] DEAN INDIANA UNIVERSITY SCHOOL OF PUBLIC AND ENVIRONMENTAL AFFAIRS, AND FORMER DIRECTOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS

Mr. GRAHAM. Thank you, Mr. Chairman and Members of the Subcommittee.

It would seem that the process of rulemaking should be simple: define a problem, propose a solution, take comment, issue the rule, wait for the lawsuits. That is the American way.

But in reality, it is a more complicated process than that. And it starts, quite frankly, not in the Executive Branch, but in the U.S. Congress. When Congress regulates in the dark, bad things can happen.

There is a tendency to define this problem exclusively in terms of agency abstractions like EPA and CPSC but, if you look at a lot of the regulatory problems we have and trace it back to the original lawmaking, you see seeds of the problem in the legislation itself.

[1] The prepared statement of Mr. Graham appears in the Appendix on page 33.

I have in my written testimony the tortured history of the requirement for ethanol as a motor fuel. And coming from Indiana, I want you to know I have some sympathy with ethanols in motor fuel, but the details of the way Congress wrote the original legislation precipitated a lot of the problems we had with food prices and so forth.

I suggest a little beefing up of the Congressional Budget Office (CBO). A little bit more of the analysis they do for budget issues should also apply to regulatory issues. We can talk about that more, if you would like.

Theme No. 2, when regulators use poor quality data, bad things can happen. The Consumer Product Safety currently has an inquiry into the safety of table saws. Each year, believe it or not, 30,000 woodworkers end up in emergency rooms with injuries due to blade contact. About 2,000 of them lead to amputation of at least one digit.

They tried to figure out at CPSC which of these categories of table saws were most involved, and they came to the conclusion that it is the large expensive cabinet saws that are responsible for most of this.

This was a big surprise to many of us in the field of injury control and risk analysis. It turns out there was a wording error in the way the survey was designed to these patients in emergency rooms, and they made it sound like if they had a bench top, a small bench top saw, that they really had a cabinet saw. So they answered, "I had a cabinet saw."

This data has been published and released to the public, and it has, in my opinion, created a misdirected effort at thinking a big cabinet saw is the problem when, frankly, the ordinary table saws, the small bench-top models at Walmart for $100 or $200, these are the ones that are most often used in these problems.

Gee, aren't their remedies for this problem? The Office of Management and Budget (OMB) already has remedies for this problem. One, this type of study should be subject to independent peer review by qualified experts before it is released to the public. Two, there should be information quality correction mechanisms applied before it is disseminated. After it is disseminated, if there is an error, it should be corrected, but the OMB guidance has no teeth it. There is no remedy if, in fact, the agency does not solve these problems.

Three, when multiple regulators tackle the same problem, bad things can happen. I highlight in the written testimony the incredible progress we are making in natural gas and oil production in this country, passing Saudi Arabia and Russia as the leading producer in the world, but yet what is incredible, we could be doing even better if our regulatory systems are more responsive to the needs of a growing industry like this.

Take one simple example: In order to do hydraulic fracturing you need sand. You need a particular kind of sand that is uniquely available in Minnesota and Wisconsin, Northern White sand, because it can withstand the pressure and high temperatures at 10,000 feet below the earth's surface. To get sand, you have to mine sand. To mine sand, you have to get permits.

I have laid out, with my doctoral student, in my written testimony, all of the steps in the State of Minnesota to get a permit to do sand mining. There are 15 separate steps, multiple agencies and, if you look carefully at it, a lot of it has its roots in the Federal Government, not in the State Government of Minnesota because this authority is being passed along to the local level.

Fourth theme, when Federal agencies skirt OMB and cost-benefit analysis review, bad things can happen. I cite a paper I have done with a Harvard law student where we lay out all the creative mechanisms that Federal agencies can use, and often do use, to regulate without having any OMB review and no cost-benefit analysis.

Neil and I have been on the opposite sides of this, so I will be fascinated to get him into the dialogue, but agencies often have an incentive to skirt OMB review. They do not want to deal with OMB. Believe me, I hired some of these examiners at OMB. I would not want have to deal with them either. They are tough.

So, if you can figure out a way to navigate this process without dealing with OMB, why not? That is a big problem because that leads to no second looks, no cost-benefit analysis, and a lot of regulatory activity.

Final theme, when U.S. regulators do not collaborate with our trading partners in Europe, bad things can happen. Automobiles, companies trying to sell cars on both sides of the Atlantic, are an illustration. The United States and EU both see tremendous opportunities for cooperation, but it turns out that going back all the way to 1958, the United States regulators and the European regulators could not agree on how they were going to do this process. So, we went in different directions, and we have different regulatory programs, and we have literally dozens of rules from tires to headlights to various aspects of the vehicle that are different in Europe than the United States.

It would take a long time to make all of these rules compatible. A more simple approach the Europeans have proposed is a mutual recognition. We recognize their safety standards; they recognize our safety standards. It is a practical approach. It deserves consideration.

I hope I have you off to a good start and put some ideas on the table. I look forward to the comments and discussion.

Senator LANKFORD. Mr. Eisner.

TESTIMONY OF NEIL EISNER,[1] SENIOR FELLOW, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AND FORMER ASSISTANT GENERAL COUNSEL, REGULATION AND ENFORCEMENT, U.S. DEPARTMENT OF TRANSPORTATION

Mr. EISNER. Chairman Lankford, Ranking Member Heitkamp, Members of the committee, thank you for inviting me to testify today on this important topic.

As one who has worked in the rulemaking process for many years, I appreciate the effort of the committee to hear from a diverse group of people in a bipartisan effort to examine the need for improvements.

[1] The prepared statement of Mr. Eisner appears in the Appendix on page 48.

Based on a lot of my experience as an attorney in the government, working with other agencies and work I have done in a variety of different arenas, I have provided you some details in my prepared statement illustrating how I think the regulatory process works well—I am not saying everybody does it well, but it works well in general; the many voluntary actions agencies have taken to make the process more efficient and effective; and I have also provided some specific suggestions for improvements.

I would like to summarize the key points in that statement now.

First, the Administrative Procedure Act established an excellent, relatively simple process. Almost 70 years of agency experience and court decisions have provided a solid basis for determining what is acceptable and what works well.

Since it was passed, however, dozens of additional requirements have been directly or indirectly imposed on the process. A consolidation of the requirements without substantive changes would be welcomed by many, but I admit that it would be very difficult to achieve.

For it to work well, we need to have constant oversight of the process and, particular, rulemaking actions to ensure effective decisions. For example, the Department of Transportation (DOT's) Deputy Secretary meets each week with a different operating administration in the Department to discuss issues in all of its rulemakings.

OIRA provides very good guidance. I hope John is not surprised by some of the good things I will say about OIRA. They provide very good guidance, they ensure appropriate coordination, and they provide a check on the objectivity of an agency's decisions. And in Congress, simply setting up a hearing gets the attention of very senior officials. That and other less formal action can help identify specific changes that an agency can be required or encouraged to take.

Too many people believe that agencies do not take public comment seriously. My experience was that DOT did. It takes extra, voluntary steps to increase effective public participation, significant comments are discussed in senior level briefings, and changes are made to proposed rules.

Legislation cannot correct the misperception, but Congress may be able to help, for example, by providing agencies the encouragement or resources they need to take the steps that have helped to educate the public in some instances and improve perceptions.

Some also complain that agencies' compliance programs are based on a "gotcha" philosophy. DOT policy was different. It was not that way. It encouraged the highest level of compliance. We did not want to fine people after they had accidents. We wanted to help them learn how to comply so that they would have no accidents. They achieved this through a variety of steps such as providing time to fix a problem before they decide whether to impose a penalty.

Some question the quality of risk assessments and cost-benefit analyses. DOT agencies are generally well regarded for their analyses. The disagreements are usually over such things as assumptions made when good data is not available. Good agencies try to address these issues openly, mindful of the Paperwork Reduction

Act and with techniques such as "teardown" studies and sensitivity analyses.

Another current issue is international regulatory cooperation. Done correctly, I agree with John, it can increase benefits and decrease costs. A good example involved DOT including the Canadian Government in a successful effort to negotiate a common, model rule to be used in both countries. However, under the Federal Advisory Committee Act the Canadians could participate in the process, but they could not vote. To prevent future problems, I would suggest Congress consider ways to address this issue.

Many do not believe the agencies effectively review existing rules, however, a well-run agency is reviewing rules on an informal, but daily, basis, everyday looking at what is working and what is not working. Before reviews were even required, the Federal Aviation Administration (FAA) and the predecessor of the Pipeline and Hazardous Materials Safety Administration (PHMSA), had very impressive in-depth review programs. PHMSA's predecessor even created a separate office to conduct the reviews. But competing priorities and decreasing resources essentially ended both.

Since 1988, DOT has tried to have a formal review program. We published a plan, and every 10 years we set up a new schedule to review all of our rules in the Department. Considering the limited resources available to agencies, I would not recommend any general legislative changes in this area. Agencies know they need to do a better job.

The rulemaking process generally works very well. It can be improved, but we should not amend general requirements because some use them ineffectively, and we need to recognize that new requirements may unnecessarily slow down or stop good rules or the rescission of bad ones. They also may encourage agencies to use less effective tools than binding rules or stop use of valuable voluntary steps because of a lack of time or resources.

I want to thank you for the opportunity to speak with you today. I look forward to any comments or questions you may have.

Senator LANKFORD. Thank you. Mr. Greenblatt.

TESTIMONY OF DREW GREENBLATT,[1] PRESIDENT AND OWNER, MARLIN STEEL WIRE PRODUCTS, LLC, AND EXECUTIVE BOARD MEMBER, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. GREENBLATT. Good morning. My name is Drew Greenblatt, and I am the President of Marlin Steel. We are based in Baltimore, Maryland.

I appreciate this opportunity to testify on behalf of the National Association of Manufacturers. We are the voice of 12 million factory workers, men and women all throughout the Nation.

Marlin Steel produces custom wire baskets, wire forms, and precision sheet metal fabrications like this one for material handling applications for clients all over America and the world, 38 countries. We make everything in the USA. Our sales are over $5.5 million, and our growth has come despite government policies and un-

[1] The prepared statement of Mr. Greenblatt appears in the Appendix on page 61.

necessary burdensome and inefficient regulations that place us at a competitive disadvantage. We need to refine and revise these regulations to grow jobs in America.

Manufacturers in the United States have been experiencing an economic recovery, but we continue to face extensive challenges. Our competitors in Europe, Asia, South America, they are aggressively seeking new customers and opportunities, and their countries strategize for success in manufacturing. They want to eat our lunch.

Meanwhile, manufacturers in the United States face expanding regulatory requirements that impose increasing burdens, and it drives up our costs. This hurts our employees' chances. We believe that regulation is critical to the protection of worker safety, public health, and the environment. As a matter of fact, at our company, we have gone 2,286 days without a safety incident. We buy into safety. It is important.

Indeed, some critical government objectives can only be achieved through regulation, but new regulations are too often poorly designed, poorly analyzed, and inefficient. They can be unnecessarily complex. They can be duplicative, and their critical inputs, science and other technical data, are sometimes unreliable and fail to account for significant uncertainties.

The cumulative burden of regulation is the greatest threat for a business like mine, small business. It is not just one regulation that could hurt my business. It is the collection of thousands of accumulated requirements. It is like Chinese water torture. These are hidden penalties that hold back Marlin's full potential and America's full potential.

I can attest that poorly designed regulations and unnecessary paperwork requirements create real costs that affect the bottom line. For example, in 2010, we received a love letter from the Department of Treasury—I am being facetious here—imposing a $15,000 fine for inadvertently omitting a single signature on a 20-page form. We signed in three places. We forgot the fourth. This is from a 2006 form. This is for our 401(k) plan, which is a good thing for our employees. This simple oversight led to wasteful costs, activity unrelated to operating a business, and months of anxiety.

We had to pay a small penalty for this missed signature. This episode totally diverted important resources away from more important pressing things, like competing with China, competing with Germany. Unfortunately regulations are allowed to accumulate with no real incentives to evaluate or cleanup the past, and they too often are a one size fits all—big company, small company, everybody in the same bucket—without the need or sensitivity to impact the small businesses. We can do better.

Government would do well to adopt a practice from business called "lean manufacturing." All factories do this nowadays. We constantly strive to eliminate waste or anything unrelated to accomplishing our objectives, making our client happy. Real incentives are necessary to promote such a culture. And some form of sunsetting regulations would do just that. We implore you to get sunsetting going.

We believe that independent regulatory agencies need to be more accountable and should be required to follow cost-benefit require-

ments and be subject to third-party review. Principles for reviewing regulation should be statutory and improved for the increasingly complex and highly scientific inputs in modern regulations.

The Regulatory Accountability Act introduced by Senator Portman would help ensure that agencies engage in these sound regulatory principles. The regulatory process should be more sensitive to small business. This act should be reformed to improve the quality of regulations and prevent agencies from exploiting loopholes in current law. Dollars spent by manufacturers on regulatory compliance for unnecessarily cumbersome or duplicative regulations are dollars not spent buying new tools, hiring new talent, making us more competitive. Marlin Steel and other manufacturers in the United States cannot achieve our full potential if we fail to change the regulatory system that is increasingly inefficient in meeting objectives.

Reforming our regulatory system is a necessary component for growth and job creation. Manufacturers are ready to lead if Congress and regulators will remove some of the barriers in our success.

Thank you for this opportunity to testify today. I will be happy to answer your questions.

Senator LANKFORD. Thank you. Ms. Gilbert.

TESTIMONY OF PAMELA GILBERT,[1] PARTNER, CUNEO GILBERT & LADUCA, LLP, FORMER EXECUTIVE DIRECTOR, CONSUMER PRODUCT SAFETY COMMISSION

Ms. GILBERT. Hi, good morning.

Chairman Lankford, Ranking Member Heitkamp, Members of the Subcommittee, thank you for the opportunity to testify today on the issue of improving the efficiency and effectiveness of the Federal regulatory process.

My name is Pamela Gilbert. I am a partner at Cuneo Gilbert & LaDuca, but I served as Executive Director of the Consumer Product Safety Commission from 1996 through mid-2001. Today I am testifying on my own behalf, and all of these opinions are just my own.

When we discuss effective regulation, it is crucial that we remember what happens when the regulatory system breaks down. The public, the news media, public officials from both parties, every geographic region, people rise up. They ask how could this have happened? And they commit, we are going to make changes to make sure that the regulatory system steps up and this never happens again.

We saw this last year when the National Highway Traffic Safety Administration (NHTSA), oversaw recalls involving more than 60 million vehicles: record setting. This record breaking number of recalls began when it was discovered that General Motors (GM) waited for over a decade to recall cars with a deadly ignition switch defect that now has been linked to scores of deaths and serious injuries. I sat in the hearings last year held by the Senate Commerce Committee in which Senator after Senator asked NHTSA's then-Acting Administrator "what went wrong?"

[1] The prepared statement of Ms. Gilbert appears in the Appendix on page 74.

In 2007 the United States experienced a similar but different year of the recall in which hundreds of consumer products were recalled under the supervision of the CPSC. Many of them were toys that we grew up with and we gave to our children and our grandchildren like Barbie Dolls, Thomas the Tank, Easy-Bake Ovens. So, all of a sudden this relatively unknown agency was front page news, and it was a topic of conversation at the playground and the water cooler. Americans throughout the country in red States, blue States, purple States, were asking what is this agency doing to protect our children? Congress responded and passed, by almost a unanimous vote—I think there were three votes against on both sides, House and Senate—passed the Consumer Product Safety Improvement Act, which is the most far-reaching reform of the Agency since it was founded in 1973.

Congress established the Federal regulatory system to protect the public health, safety, and welfare, and American consumers expect that this system is working to keep the products they purchase safe, the air they breathe clean, and the vehicles they drive free from defects. American businesses, in turn, thrive, in part, because consumers have confidence in the safety of the marketplace. If you ask the executives at General Motors and Mattel if they wish that the regulatory agency had caught these problems sooner, before they got out of hand, I know what they would say. Nobody benefits when the regulatory system fails.

Our current regulatory system, unfortunately, is already burdened with insufficient resources and bureaucratic requirements that add unnecessary costs and inefficiencies, and these burdens have real costs. Unsafe cribs kill innocent babies. Children were sent to hospital emergency rooms with repeated and painful surgeries because they swallowed tiny magnets that were in toys. And, of course, we know that hundreds of people, thousands of people, are killed and injured in defective cars. The pain to the families is incalculable, but companies also suffer. They suffer financial losses and reputational harm.

In 2008 Congress passed the Consumer Product Safety Improvement Act (CPSIA) in response to a crisis of public confidence in the safety of toys and other children's products. A key cause of this crisis was the inability of the CPSC, under its existing extensive analytical requirements, to address the hazards in the marketplace that were posed by unsafe children's products. Congress, in the CPSIA, acknowledged this, and directed CPSC to enact a series of mandatory safety standards for children's products, including toys and cribs, infant walkers, toddler beds, a long list. And it put those rulemakings under strict deadlines.

But here is what is interesting about this. In order to enable the Commission to proceed expeditiously to protect children in this way, the CPSIA directed CPSC to bypass its existing regulatory requirements and proceed under the streamlined procedures of the Administrative Procedure Act, and, in fact, this was not the first time Congress had done that.

Every time Congress has to step in because CPSC is not doing its job and it directs the Commission to issue a regulation, it directs CPSC to bypass its own requirements and proceed under streamlined requirements because Congress recognizes that CPSC's

burdensome regulatory requirements stand in the way of an effective and efficient regulatory response.

We have many successes to celebrate in our regulatory history: Cleaner air, purer water, safer food, drugs, and products, but our rulemaking system needs reform. As my experience at CPSC has demonstrated, timely and effective response to threats to public health, safety, and welfare can only occur if agencies are not bogged down with nonproductive, extensive analytical requirements and are provided with the resources necessary to carry out those actions.

Thank you for this opportunity, and I am happy to answer your questions.

Senator LANKFORD. Thank you. Using Chairman's privilege, I am going to defer to some of other Members, and I will actually go last in my questioning time today. So, I would like to recognize Joni Ernst if you are OK with that?

Senator HEITKAMP. Absolutely.

OPENING STATEMENT OF SENATOR ERNST

Senator ERNST. Good morning. Thank you to all of our witnesses here this morning, and thank you to the Chairman and the Ranking Member. I appreciate your steps to listen to our constituents and their concerns about rulemaking, the regulations process and how it is impacting their daily lives.

This is such an exciting topic. I cannot believe we do not have a roomful of people here today.

When I was out and about over the course of the past year in Iowa, this was one of the top issues. Rules and regulations impact every individual, every individual in Iowa. It does not matter—insert State here—rules and regulations impact everyone, whether it is in manufacturing—and thank you, Mr. Greenblatt, for being here today—manufacturing, healthcare, agriculture—very important in the Midwest—and many other industries.

About 4 years ago in Iowa it had become such a great concern that the Governor, Republicans in the House and the Senate at the State legislature convened a rules and regulations tour across Iowa, and what we did, we established sites all across the State. We went out, as legislators, the Governor, lieutenant Governor, and we met with individuals and we took their testimony, both written and oral. And we compiled all of those statements.

And at the end of the tour, we had binders with thousands of statements on how rules and regulations were sometimes positively impacting their lives, but for the most part, I would say probably 98 percent of the comments we got were how they were impeding innovation and productivity in their daily lives, again, whether it was as individuals or as businesses.

Mr. Eisner, I would like to mention and ask you a question because you did mention public participation in the rules process, and you mentioned that the perception of the agencies is that they do not take public comment seriously. And I often got that perception also, is that many of our agencies out there—you may take that public comment, but whatever happens to it? Does it just go away or do we actually act on it and look into it, which is something we did in Iowa. We actually set priorities, separated out what we could

work on in the State, separated out Federal regulations that would have to be dealt with another day. But we do need to take public comment seriously.

I know you have done this. I think you have shown that very well through your time at DOT, but I am not convinced that other agencies do that.

Could you please comment your knowledge of other agencies and where you think public comment fits in and how do we encourage agencies to take this seriously?

Mr. EISNER. First of all, a lot of agencies do take voluntary steps to improve that participation. For example, we are not the only ones who have on our general regulatory site instructions on how to submit effective comments. EPA has something like that, I believe, the Federal Communications Commission (FCC) has something like that.

At DOT we also, as I mentioned, had these regular meetings, things like that. And in these meetings, the briefing documents would say, "here are the comments from," and then they would list major segments of the industries or the public that were regulated. Here is what they said, and then a few pages later you would have slides on changes that were made or not made.

The important part—and that is why I stress oversight—is for other people like OMB, like my office, and other offices, the Small Business Administration's (SBA) Office for Advocacy, to ask questions during the review, to ask why this? Why couldn't you make that change? And see whether it is a reasonable explanation.

I think a lot of agencies do that. I did not get involved in looking at a lot of their rules, but just from talking to them. We had an informal group that would meet periodically or communicate by e-mails. People were trying to do a better job in that regard.

And, again, just some of the other examples that I have talked about that agencies could use. FAA would provide an expert before some of their hearings so that people who needed help in understanding the rules before they commented on them at a hearing could ask questions of the expert from the agency.

Some of the agencies, like Coast Guard, will go to where the people are that they are regulating. When they were part of the department, they had fishery rules. They would go to the fishing areas to get public testimony.

So a lot of that is done by a lot of different agencies inside DOT and elsewhere. More can be done. I have heard the comments and the concerns enough so that I know some are probably not doing it effectively.

But in all honesty, Senator, I went to meet with a group representing a significant part of one of the industries we regulate, and I was talking about a new rulemaking when one of the members asked me why we made no changes. I was talking about an alcohol testing rule—and why we made no changes in response to their comments as a result of what we did in the drug testing rulemaking that we had issued earlier.

And he said, "You did not do anything. You changed nothing." And I said, "I am not here prepared to talk about that rule in detail, but off the top of my head I remember"—and I listed 10 significant changes we had made. And I said, "Why do you tell us we

did not make changes when those responded to your comments and did make the rule a better rule?" There were delicate balances.

I cannot explain why some people think we do not make changes. I know that not everybody misunderstands. There are a lot of people who are not getting what they want and what they think they should get, but when we did it, they still told us we did not make any changes.

Senator ERNST. That is an interesting comment. I know that there are a number—and I apologize, is that OK? I have gone over my time, if I could just have a couple more minutes on this topic.

It is interesting. I think communication is a very important part of working with the public and making sure that, one, you have annotated that you have received or heard their concerns and explaining why it is necessary to have that rule or regulation or if it is not necessary or not common sense, maybe the changes that have been made that make it more common sense or whether it has gone away.

What we did, what the result was in Iowa after the rules and regulations tour, the legislature did take on this issue. We prioritized 10 of the top priorities of Iowans. We looked at those. We responded back to constituents across the State, but we did enact legislation, which was rolling sunsets of the rules and regulations. Every 5 years, we need to review those, make sure they make sense. If they are no longer needed, they go away. If we still need them, then we renew them.

Rolling regulatory reviews, we also did job impact statements where, if it fell within certain parameters, then the legislature would need to make approval of a rule or a regulation.

There are things that can be done to make sure we are staying on top of rules and regulations. They need to make sense, first. If they do not, they need to go away. But communication, again, Mr. Eisner, is very important, I think, as part of this in working with our public.

Thank you, Mr. Chairman.

Senator LANKFORD. I recognize the Ranking Member.

Senator HEITKAMP. Thank you so much for your very thoughtful and—we are already exchanging notes based on what you have provided for us today. It has been a great first step in kind of a broad overview, and so I want to thank you so much for sharing your enormous talents today with us and your thoughts and your insights and really your experiences. It has been very helpful.

I want to start out maybe with a story. I used to be the Attorney General of North Dakota, so as Attorney General, I had responsibility for truth in lending, truth in advertising. There was an industry—I will not mention it—it was notorious in terms of advertising, stretching the truth a little bit. And so we tried to kind of come in and set some parameters on what could be said and what could not be said in advertising.

And I got a lot of pushback, and I said, "That is fine." "You do not want these regulations. I will eliminate all regulation." And I said, "But I am going to take out a full page ad with whatever, even personal resources, every Sunday saying, 'Do not believe a word you read in the paper in advertising. You think that there are laws that protect you against unfair advertising, but we do not

have regulations that actually enforce those laws, so do not trust what you read.' "

"Wait, wait, wait, Attorney General, do not do that."

And so my point in all of this is that when the public thinks there are regulations that protect our safety of our children, when they think there are regulations that protect and do the appropriate thing with automobiles—I mean, I could go down the line with food safety—and then when those systems fail, they wonder why. And we could have a long discussion about the financial system, right?

And so we know that there is an essential part of this, which is the public's expectation and how do we meet those expectations without doing what you have suggested, Mr. Greenblatt, which is create a completely uncompetitive environment for American manufacturing, for American business, for American farmers, which I represent the best in the country, if not the world, and so we are very interested in all these processes.

So I think my first question is to you, Mr. Graham. I think we are very interested in what resources OIRA needs, what powers they need. Obviously they do not control independent agencies. We have to rely on the regular process there. Kind of structural reforms and resource reforms that you think might address some of the issues that have been discussed today.

Mr. GRAHAM. On OIRA's resources, my recollection is that, when the Agency was established in the early 1980s, it had on the order of 80 full-time career professionals. You can check those exact numbers. When I was at OIRA in 2001 to 2006, we were at around 50, as OMB Director Mitch Daniels had given us four or five extra slots. We then declined to 45 or 46. The last I checked with the OIRA Administrator, which was a couple months ago, he said they were at the 38 level.

So I think people should understand that OIRA is a troubled agency. It is not doing well, and a lot of the talented people that have been there for many years have retired. They have not had the ability to replace them with good young talent. So, parts of OMB are thriving and doing very well, but OIRA is not one of them. And I think you could have a big impact if you were able to make an impact on that part of the problem.

Senator HEITKAMP. I want to follow that up with what I see as a case-by-case struggle that we have, which is that there may be a new law passed like Ms. Gilbert discussed, where let us just bypass the system and do this. And so for all of the generalized rules that we have and whether it is Executive Orders (EO) or whether it is paperwork rules, every one of these laws that get enacted, for the most part, require regulation without ever analyzing what the cost will be on the agency of that regulation, that regulatory rulemaking process. And then they may create a completely different process with different kinds of requirements.

And I am wondering when you were at OIRA, did you ever do a matrix of what those additional requirements were, what some of the reductions in requirements were? Did you ever look at how all of those individual pieces of legislation really affected kind of a uniform system of understanding of rulemaking?

Mr. GRAHAM. That is a hard question. That is a complicated one. I want to draw a distinction between analytical requirements that are placed on regulators and burdens that are placed on businesses of regulatees, and embedded in your question is a little bit of both of those.

My experience is agencies, like the Department of Transportation and the Environmental Protection Agency, they do not have difficulty getting their act together to regulate when Congress authorizes them to do so. They do the analyses and they take the steps they need to. Could that be streamlined a little bit so that it is easier for them to regulate when they really need to? Yes, but I do not think that is the heart of the regulatory problem. The heart of the regulatory problem is the burden of regulation on the rest of society. That is the heart of the problem.

Senator HEITKAMP. But I do want to point out, I gave a classic example of where delay in regulation by EPA, who you say is well equipped to regulate, delay in regulation has cost my industry and biodiesel and the renewable fuels industry tremendous amount of uncertainty, if not expense.

Mr. GRAHAM. Right. I guess we would want to look at the question, is that really because of the analytical requirements that EPA has to go through? Is that they are delaying? Or are there reasons that relate to the politics of the issue which is why they are delaying?

Senator HEITKAMP. Right. This gets to the heart of the matter, doesn't it? The law is the law. We expect them to implement the law, and when there is a different competing opportunities for not necessarily a change in policy for the Administration but different industries coming at them in different directions, we end up stalemated, and stalemate is the order of the day in Washington, D.C. And we fail to give certainty.

This is such a big topic. I could talk all day about it, but I guess my point is that looking at this and thinking about the overall regulatory process and maybe, Mr. Eisner, you are in better position and I am just going to turn this over because we are going to have a longer discussion here, but you are in a better position to kind of respond to this mishmash that we have where we have a generalized rule that gets co-opted in individual pieces of legislation over a long period so we do not seem—you say, yes, but, our enabling act said this. So our authorizing act said do it this way as opposed to other ways.

Mr. EISNER. I am sorry. Your question is whether——

Senator HEITKAMP. My question is, when we are trying to set an overall process here—and that is really what we are trying to do. We are trying to say, how can we streamline this? How can we make this simpler? How can we guarantee that there is at least public satisfaction that they have been heard? And I hear your response to the Senator from Iowa.

But when the specifics or when the exceptions then change the general rules, that makes it extraordinarily difficult for us to say we have a process that is working in the way that we expect it to work when each enabling act or each authorizing act sets a different process.

Mr. EISNER. If there are multiple processes imposed on agencies, and in some cases I do not think there are multiple processes, but there are overlapping requirements; they do slow the process down. But there are a lot of reasons the processes slow down. When I do a training course, when I initially set it up for DOT I had two slides with about 15 or 20 common explanations for delays. Some of them, as John said, could be political. Some of them could be incompetence. Some of them could be because they do not have the resources or they do not have the data. Some can be because they made mistakes while they were developing the document and had to go back and start over. There are good reasons and there are bad ones.

Senator HEITKAMP. Mr. Chairman.

Senator LANKFORD. Thank you.

I am going to go through a round of questions, and then we will start immediately our second round. And the second round, just to let everyone know, will be everyone's microphone is open. We will have open colloquy here on the dias and also at the table, and we will allow for a lot of more interaction as we go from there. Let me just walk through a couple quick questions on this as we try to deal with some solution issues on it.

Mr. Graham, you talked about the cost-benefit analysis, and one of the things you brought up specifically was you mentioned the incentives to avoid going through the cost-benefit analysis just because of the process and the paperwork that is internal. So, I find it ironic that the companies are struggling with all the paperwork and internally in the agencies. They are struggling with all the paperwork and the process as well on it.

Can we talk a little bit about the incentives and how do we fix that so that the incentive is to do a cost-benefit analysis—that was the desire of Congress—and benefits all of us rather than the discouragement from actually doing it.

Mr. GRAHAM. Right. Let me give you a concrete example. Suppose the Environmental Protection Agency we are about to say, we are going to require 15 percent of all new cars sold in the United States to be electric cars, and you have to sell that many. That is the way it is going to be. There will be $10,000 to $20,000 incremental costs for each of these electric cars. That rule would have a hard time, under a Democratic or Republican administration, getting through OMB. It would have to have a cost-benefit analysis, and OMB would review it.

We have this regulation now in this country. How did it happen? It happened because EPA signed a waiver form that allowed California to enact this requirement. And then under the Clean Air Act, other States are allowed to follow California's program. Now we have 10 States doing this. A quarter of the country has this requirement by 2025.

All of that was done, even though it is a regulation with national economic ramifications. There was never an OMB review. There was never a cost-benefit analysis.

So you have to look very carefully at the ways in which these agencies can behave to avoid these requirements, you have some good legal staff that requires some good looks at it.

Senator LANKFORD. It does. And here is the issue I think we can commonly agree on: regulations are not supposed to just appear out of the dark. They follow law. So we are not a nation of regulations. We are a nation of law, and we are not trying to promote more regulations, and regulations is not the answer. Law and following the law is the answer, and those regulations come out of statute.

When something happens like that that has no statutory background to it that is invented, I think that is where Americans get furious.

Mr. GRAHAM. But it does have statutory background and it is complicated. The Clean Air Act says that States may not establish their own standards for motor vehicles unless they are California. California is entitled to a waiver, if certain criteria are satisfied, and EPA gave that waiver, but they did not do a cost-benefit analysis to support that waiver because the "waiver" isn't covered as the kind of activity that is subject to a cost-benefit analysis.

Senator LANKFORD. Yes, we are back to the same issue where you go to the EPA with the ethanol rules that we have talked about a couple times as well. They have in the statute the ability to be able to waive the requirements, and it is not being exerted on that. They are locked up. We are literally a year-and-a-half past when they were supposed to tell us the quantities for last year, and manufacturers are sitting and waiting trying to determine how much they had to manufacture last year because they are waiting on EPA to try to give them a decision.

Mr. GRAHAM. Yes, and if you are a manufacturer of the more advanced biofuels—like in Indiana, we would like to make ethanol, not from the corn but from the cob and the stalk and get credit as advanced biofuels. Well, if they keep delaying this requirement, there is no guarantee there will ever be any market for this. So you have got yourself——

Senator LANKFORD. Well, the largest manufacturer in the country that does cellulosic just went out of business last year in the process. We can talk about ethanol another time. In fact, we will in a few months. That is coming. That is one of the many things there.

The incentive that sits out there for regulators when they are actually trying to impose meeting with companies, whether that be a fine for not signing a form or I have met with multiple different manufacturers that have told me if they go back 15 years ago, 20 years ago, government agents came to their business, did an inspection—whether it was the Occupational Safety and Health Administration (OSHA) or whoever it would be—and would help them find issues, and it was a helpful process. Now, they are terrified to have regulators show up because it is a fine because it does not seem to be, "Hey, here we are here to help you." It is, "We are here to fine you," and there seems to be an attitude shift on it.

Have you noticed, Mr. Greenblatt, on the manufacturing side of this, a shift in the way regulators interact with your business? You do not have to name any particular agency on it, but has there been an attitude shift that you have engaged?

Mr. GREENBLATT. We work with OSHA. In Maryland it is called MOSH, Maryland OSHA. There are two paths. There is the path you described, the mentoring counselor path, and there is the alter-

native path. And we have embraced the mentoring role, and we have found it to be very helpful and very productive.

Senator LANKFORD. Good.

Mr. GREENBLATT. And they have given us many good ideas.

One concern we have about that is I think we should consider the 80/20 rule. We have a factory with many different activities going on and when the inspector came around to our facility, he passed by 132-ton press brakes and he passed by 20-ton punch presses that were very safe, and then what did he find? He found that we had a toaster oven connected to the wall in a certain receptacle, and he literally cut it with a scissor as if that is our biggest threat to our employee.

Again, if you do an 80/20 rule, if you look at sheet metal fabricators, that is probably not the next big threat, the toaster oven issue. The next big threat is probably going to be something near the press brakes or the laser or somewhere.

And so it was puzzling to us that that was something they would cut a cord, literally physically cut a cord on.

Senator LANKFORD. I am going to ask this question and then I am just going to open it up for conversation from there, and we will shift into the second round.

There is a Supreme Court ruling that just came out dealing with the Mortgage Bankers Association and the issue of interpretive rules.

The Supreme Court ruled that the agencies have the ability to be able to transition interpretive rules without notice and comment and to make that change. Now, I do not want to deal with the Court aspect of it. My first response on that was, what is an interpretive rule? Is that clearly defined in law what an interpretive rule is? Or does this give the ability to agencies to be able to designate any rule change from here on out as interpretive, and then they do not have to go through notice and comment?

Does anyone want to make a comment on the fact there may not be a comment in the days ahead?

Mr. EISNER. I would like to start off the discussion on that, Senator. There are problems in that area, but I do not think we need a new definition of interpretation.

Senator LANKFORD. Is there a current rule, an interpretive definition of what an interpretive rule is?

Mr. EISNER. In simple terms, it is the agency's nonbinding statement on what it believes a rule requires, oftentimes in a particular situation. That is one of the reasons I would recommend we be very careful in this area. By statute in some cases, agencies are required to give out telephone numbers of people you can contact for advice like that, and a lot of what agencies do when an inspector goes into a plant or when somebody is going in and looking at books or looking at records that you have submitted is they get asked questions: How do I do this or how do I do that?

And the agency responds. Sometimes it is in person, sometimes it is through an e-mail or a letter. Sometimes if they think it is generally applicable to everybody and it might help them, they will post it on the Web.

But day in and day out they are giving advice in very informal ways on what you need to do. It is oftentimes "if I do X, will that satisfy the rule?" "Yes." "Good." "Fine."

There are times when agencies issue interpretations that cause people a lot of problems. Sometimes they are going way beyond what they had actually said in the rule and insisting it is just guidance. Sometimes they are treating it as if it is binding. That is wrong, and not just the courts but others try to get a hold of that.

When John was the head of OIRA they set up a policy requiring agencies to submit certain kinds of guidance documents and interpretations to them. At the Department, if we see something like that, we will say, "What is your basis for that?" A lot of agencies ask for notice and comment on guidance that they think might be controversial and they want to hear people out and see how they can expand on it. Most try to do it well. I would be the first one to admit, some people abuse the process. That is something you cannot handle with a definitional change or a draft of a new term.

Senator LANKFORD. So the challenge is what is an interpretive rule and how do we actually get that out there if now the courts have determined interpretive rule does not go through an Administrative Procedure Act. What is to stop any agency in the future from just saying every rule is interpretive basically?

Mr. EISNER. They did not decide in that case that every interpretation does not have to go through notice and comment procedures. What they determined was that—because that is in the statute—it does not require it. There is an exception for it.

Senator LANKFORD. Right.

Mr. EISNER. The problem is people abuse it, and that is what gets into court. In this particular situation, they changed their interpretation.

Senator LANKFORD. Right.

Mr. EISNER. And the issue is should they have gone out for comment on changing the interpretation to make sure the change would not have an adverse affect. That is why a lot of agencies do ask for comment. But in this particular case, the Court said there was no reason to do that. The Court said when it is unreasonable, when the change is unreasonable, they can overturn it under the existing requirements in the APA.

You do not want to stop agencies from being able to give out helpful guidance.

Senator LANKFORD. No, I do not, because we have agencies that will not give help that literally I have had folks that have said, "I have called an agency and said 'Does this count?' and they said, "Well, we will determine that when we come out to inspect." At that point they say it is too late.

It is happening a lot with FDIC right now with small community banks where they will call and say, "I would like to do this kind of loan. Will this count?" They say, "well, we will tell you when we get there. " It is too late at that point.

Mr. EISNER. And to a certain extent John took care of it. It is one of reasons we created this website—we are not the only agency to put this up. We have a definition of each of our kinds of rules, interpretive rules, policy statements, and binding legislative rules. We also have detailed explanations of what guidance documents

may look like, from the preamble to a proposed and final rule, which can provide helpful information all the way down to oral advice when there is no record of what the FAA or the NHTSA official said when he was talking to you.

And we tell people about all these different kinds of ways of giving advice and how they should use some with care and how others they can rely on. The agency even says, "You can rely on this."

That is the kind of thing that I think a lot of agencies do. Those that have problems need to do a better job.

The Congress had problems with FDA many years ago with the way they use their interpretive authority. And Congress focused on them with some particular requirements, and they are now considered one of the leaders in the way they handle guidance documents. They have a good operating practice.

Senator HEITKAMP. One of the concerns that I have is that we do not want to get, in this Committee, into the weeds on each individual agency or each individual entity. What we want is we want to have the view from a mile high. That is our job on this Committee, and we have talked about this, and each one of these things are very helpful illustrations of what might be causing the problem, but I want to get to the overlay of State regulation and how much of that—whether the Federal agencies legitimately or actually engage in a review of what is happening with State regulation that needs to be harmonized or at least appreciated as we work forward.

We go back to the discussion about automobiles. Well, it was done under the Clean Air Act, but California probably could have enacted a statute that said, just like renewable fuel standards, we are going to make all these cars go this way. Right? That is California sovereign prerogative. We do not always agree, trust me, in North Dakota on what California ought to be doing, but, we have to recognize that we are dealing with various levels of sovereignty and States' rights.

And so we have this overlay of State regulation that does not seem to get very well harmonized with Federal regulation. Tell me what requirements are in the law today for Federal agencies to actually have consultation, meaningful consultation with State entities that are regulating at the same level. And I think, Mr. Greenblatt, you would probably agree that it is the cumulative effect of Federal and State regulation that really has you coming and going because they are not always consistent.

So, what would you recommend to us? What would you suggest to us as a good model for better harmonization with State agencies?

Mr. GRAHAM. That is a great question. One of the things I have been doing is studying how the European Member States of the European Union interact with Brussels in this regulatory area. And, of course, there are lots of differences about Europe and their structure of government than the United States, but the one thing they have is they have a variety of processes that basically require—I forget what fraction, 60 percent or two-thirds of the Member States—to agree on something before the Federal Government does it.

Now, if you take that general principle and bring it into the regulatory area, maybe the Governors—I do not know, pick what fraction you want—three-quarters, two-thirds—should have to sign on to one of these big Federal regulations and say this is a good idea before you do it. I think it is a very different way to get meaningful participation of the State governments.

But the agencies will say, "Oh, we consult with the Governors, we consult with the National Governors Association," but there is not actually any formal teeth to it, if you understand what I am saying.

Senator LANKFORD. That is part of the conversation here with Congress and with the Senate and everything else. There is this ongoing conversation because that is what we are supposed to do. We are supposed to represent our States bringing that message from our States to our own government to say, "Wait a minute, this does not work in our State" and bring it to us.

How could that work within a Federal system even to where agencies—obviously as I mentioned before, regulations are supposed to be an extension of the lawmaking process that it actually comes back to lawmakers in whatever forms or back to States to be able to evaluate does this really work?

Mr. GRAHAM. Just following up, at the beginning of your question, prior to the Clean Air Act, California or any State was permitted to pass legislation and do whatever they want. But it was the Clean Air Act that prohibited any State from passing their own automobile legislation except they gave the out for California because of the smog in Los Angeles and the need to have very special activity there.

Senator HEITKAMP. The point I would make is there already was a level of preemption.

Mr. GRAHAM. There is a very strong level of preemption.

Senator HEITKAMP. Right. So California, if they were listening to this discussion, they would say, "Well, you already preempted. We have the exception. You cannot complain about how we are administering our laws and our sovereignty to protect——"

Mr. GRAHAM. No, under the Clean Air Act California must get permission from EPA to exercise that authority.

Senator HEITKAMP. We could talk about the Toxic Substances Control Act (TSCA) right now and what is happening with labeling and TSCA, and that would probably be a better example because they have moved into the void.

Mr. GRAHAM. Right. So, for example, maybe a certain percentage of States should have to agree on that and sign onto a Federal chemical regulation under TSCA before it is done.

Senator HEITKAMP. Wow. I mean, this——

Mr. GRAHAM. I mean, if it is such a great idea, why can't you get a good chunk of Governors to say it is a good idea?

Senator ERNST. Or the Senate, yes.

Senator LANKFORD. This is something we have all talked about a lot and that is multiple forms. The trucking company I talked to recently in my State—it is a small trucking company and they talked about how many times they fill out basically the same form for different agencies.

How can we work that through with OIRA or with whatever it may be to try to make sure that one company is not filling out basically the same form four times?

Mr. Greenblatt, I saw in your testimony there was a comment you made there about filling out the same form for multiple sales over and over again—I think, for the Securities and Exchange Commission (SEC)—that you mentioned that as well. If you want to comment on that, but I want to comment on how do we fix this so that companies are not repetitively filling out forms?

Mr. GREENBLATT. So the SEC is requiring publicly traded companies to divulge their conflict minerals, their exposure to conflict minerals. So all the publicly traded companies that we sell to, and we sell to virtually 400 or 500 publicly traded companies right now, they all require us to fill out a form to confirm that we are not selling steel baskets that have these conflict minerals. We buy steel from Nucor in Indiana, all 100 percent USA made. We are not buying anything from bad places in Africa.

So, it is very unpleasant because every single one of the publicly traded companies has a different format of a document so that they can adhere to their SEC requirements. And it is a very complex form, and so you cannot have just anybody fill it out. It has to be a very smart person within your company, and every company has a different form.

What happens is it sounds like a noble idea; however, it really impacts small business people because they have to address this——

Senator LANKFORD. You are saying you just cannot have a certificate saying, "We do not sell things from this one," and just give it to everybody and they keep it on file?

Mr. GREENBLATT. That would be the best way to do it. Please enact that.

Senator LANKFORD. Well, that would be the independent agency that is sitting out there that is outside the bounds of everything, so that is a whole different issue.

Senator HEITKAMP. Yes, it sure is.

Senator LANKFORD. Again, that goes back to the common sense thing, and it goes back to the big picture thing that, we just want to help solve—that companies are able to be protective, not having to chase down forms. That is not what you want to do. It is a reasonable thing to say we do not deal with bad actors. It is unreasonable to say verify it in 400 different ways.

Mr. Graham, one quick comment on the duplication. Is there anything that can happen with OIRA to be able to help manage the duplication where entities are basically filling out the same form for multiple agencies?

Mr. GRAHAM. I think you have some good statutory authority that exists now under the Paperwork Reduction Act.

Senator LANKFORD. Right.

Mr. GRAHAM. You do not really have a viable mechanism at a paperwork-burden-by-paperwork burden basis for OIRA to play a significant role. You are talking about 38 staffers, and you are talking about a gigantic regulatory system at the Federal, State, local levels. They cannot be there for all these paperwork activities.

So basically what I would say is the thinking that needs to be done is how do you take the Paperwork Production Act, which is an existing statutory authority and then make it meaningful. That is a hard problem, but that is the assignment.

Senator LANKFORD. Where would they go for this trucking company to say, "I just filled out the same form three times for three different agencies."

Mr. GRAHAM. Right.

Senator LANKFORD. Who do they go to? Who do I go to to say "fix this"?

Mr. GRAHAM. Right.

Senator LANKFORD. I think that is one of the key issues we could find is where do they go to say "make this stop?"

Mr. GRAHAM. Right.

Senator HEITKAMP. Many States have adopted streamline processes where they make those agencies come together because they are obviously at the ground level much more responsive and nimble than we are and so those one-stop shops that can be great models that the States have created, in my State and other States, could be good models to talk about how you streamline permitting, how you streamline all of this.

Senator PETERS. Well, thank you, Mr. Chairman and Ranking Member.

Actually, as I listen to this conversation of streamlining paperwork, I was involved in this issue in the House on a bill with Mr. Latta that we worked on, Mr. Chairman, that dealt with paperwork related to buying an automobile.

As you know, when you buy automobiles, there is usually a pretty thick stack of documents that you have to fill out. One of the pieces of paper was that you had to sign to verify that the automobile complied with the Clean Air Act, which passed back in the 1970s. Every automobile complies with the Clean Air Act. There are all sorts of things on the car and all sorts of recognitions, but this paperwork was required, and it was required by Congress. It was not an agency that required it.

It took an act of Congress to get rid of a piece of paper that is with every car purchase that makes no sense whatsoever. So we also have to put the light on us a little bit as well, that a lot of these paperwork requirements have some sort of congressional action that was taken sometimes 30, 40 years ago, that hopefully in this committee we will have an opportunity to continue to work on.

Senator LANKFORD. That goes back to the same conversation. We have to have someplace that people can respond to and say "How do we fix this," and then we can separate out. That is congressional action that is needed to get rid of that, or that is already the agencies have authority. Somewhere people need to be able to go to fix that.

Senator PETERS. Right. And I look forward to doing that.

If I can switch gears a little bit and just ask, Ms. Gilbert, I noticed in your testimony a lot about cost-benefit analysis, and that certainly has become a topic here in Congress and a lot of folks like to see cost-benefit analysis. I know you have had an interesting take on some of that, one that the costs tend to be overestimated versus the benefits when some of that is done.

So if you could maybe flesh out a little bit of what you have said in your opening as well as your testimony as to what do you see as the role of cost-benefit analysis as we are looking at regulations and passing things and understanding that there are some biases perhaps in that?

But if you could talk a little bit about that, that would be helpful.

Ms. GILBERT. Sure. Thanks, Senator Peters.

Just so you understand, at the Consumer Product Safety Commission, it is in the statute itself, not relying on Executive Orders or other things that have been passed since. The statute itself requires extensive cost-benefit analysis, not only for the rule that the Agency is proposing, but for all the alternatives that have been presented. Then the Commission also has to pick the least burdensome alternative of those alternatives using an extensive cost-benefit analysis.

As the former Executive Director and also now as a consumer advocate working with the Agency, I will tell you that that often paralyzes the Agency.

And the table saw rule is one example that, I know John Graham and I agree on. It is a very commonsense rule. It is tragic. Every single one of these amputations—and there are tens of thousands of them—can be prevented, and the Commission has the way to do it, but it cannot get through the process. So cost-benefit analysis can just hold back very important commonsense rules in the government.

Of course, it makes sense to look at the costs of complying with regulations when you are putting a regulation together. There is a commissioner at the CPSC now, Bob Adler, who likes to talk about this, and I think he has it right that, it is really misstated to say a cost-benefit analysis. It is really cost versus cost.

When there is a dangerous product out in the market that is killing and/or injuring people, there are costs to that, there are costs to not fixing it. There are societal costs. There are costs that are indirect and direct. And then to fix that problem, let us say it is putting air bags in automobiles, for example, or taking lead out of children's products, also costs. There is no doubt it costs companies. But we need to be looking at the cost of doing it and the cost of inaction. And as I have described it to you, you can imagine, it is hard, it is very hard to estimate. I think it is difficult to estimate on the business side how much does it cost to retool, to put those air bags in?

I know when the air bag issue was going on for decades, the cost of putting air bags in cars was widely inflated to what it actually is today. And I would also say that I think the American public is very grateful we have a regulation that requires air bags in cars. It could have happened decades earlier, but it did not. And now nobody—manufacturers, dealers, consumers—would want to take that regulation away, I think.

I think we want agencies to look at the costs for sure, but what you need to be very careful about is layering this cost-benefit analysis on top of this one, on top of that one. And I would be very careful about requiring what CPSC is required to do, which is to do a cost-benefit analysis on all the alternatives that are out there because sometimes that is almost impossible to do. And yet, that

holds up, again, the commonsense regulation that everyone may agree to.

Mr. GRAHAM. Just a quick response. I have done a cost-benefit analysis of the rule she is talking about, and the benefits do look like they exceed the costs. I do not think the problem is in cost-benefit analysis. A lot of things she describes as a cost/cost analysis, that is what we do in a cost-benefit analysis.

The problem with the CPSC is that it has a very particular way the statute was written by Congress in the beginning, and what it does is it creates this presumption for a voluntary standard before you can consider a mandatory standard, and the structure of the deliberation in the voluntary standard puts the industry that is to be regulated as in a key driver seat in the voluntary standard setting process. This makes it very hard for CPSC to enact regulation.

This is a very unusual feature of the CPSC process. I do not think it is a generic thing that is across many agencies.

I agree with you that the rule is potentially a very good idea, and I think it can pass, and I have published peer-reviewed articles indicating that passes cost-benefits analysis tests, but the heart of the problem is that the feature of the rulemaking process at CPSC where they go through this very long industry-led voluntary standard setting process first.

Senator HEITKAMP. I want to make just a quick point because I do not know that I was really articulating my point about various laws that change the rules. Here we are. We think we are going to set a cost-benefit analysis. This makes sense. Well, we have an individual statute that says do it this way. How much of that is out there, is my point? How much of this do we think we are fixing a problem. We are not fixing anything because we have all these mini little structures out there that are in law already that make it impossible to set general rules.

Mr. GRAHAM. Well, I think that one is tempted to think what we should do is just go into each one of these areas, CPSC, DOT, and really learn and study the details of their system and then tweak and refine each of those systems.

I have been working in this area for decades. If this committee goes down that path, OK, you will not——

Senator HEITKAMP. Therein lies despair?

Mr. GRAHAM. You will not succeed. Because there is just so much idiosyncracy along the way. You need to pick a couple themes, and you need to try to get them across the board at all of these agencies, including independent agencies, and there will be some awkwardness in how these things fit with each individual agency. I acknowledge that, but the alternative of thinking that you are going to go in and you are going to fine-tune the architecture in each one of these agencies, that just is not going to be possible.

Senator HEITKAMP. I do not want to fine-tune anything. I just want to know where it is. No one knows where it is. No one has done that kind of systematic study.

Mr. GRAHAM. I will give you one example. And I wish the Senator from Iowa were here because she was talking about public participation. One of the things I think that members should be aware of is that agencies take public comment and public participation after they have proposed a solution. And like all human

beings, once we think we know what the solution is, we put it on the table, it is not that easy to move people off that original proposal. They will refine it and change it a little bit.

In some of these rules it is probably better if the agency says, "Hey, we are thinking about regulating this area. We are going to do this advanced notice where we are going to lay out some data, what we think the problems are, look at a range of ideas," and not lock themselves into anything. Take comment at that stage, and then once they have that, then they go to a proposal.

Does it slow them down 3 to 6 months? Probably does. In a lot of important rules it is probably better that they come out and just define the problem a little bit and have an advanced notice before they even get to the proposal, that way you do not have all that ego behind that position.

Senator LANKFORD. Does anything prohibit that right now from an agency from doing that?

Mr. GRAHAM. No. But there is nothing that requires them to do that.

Senator LANKFORD. Does anyone do that? Does any agency do that?

Mr. GRAHAM. Yes, on occasion they do that.

Ms. GILBERT. So can I respond to that?

Up until the CPSIA, CPSC was required to do that. CPSC had a three-stage rulemaking process: Advance notice of proposal rulemaking, notice of proposed rulemaking, final rule. It was incredibly burdensome. You had to do it every time.

CPSIA in 2008 changed that. CPSC still, most of the time, does an ANPR. But they do it voluntarily.

Mr. EISNER. If I could, Senator Heitkamp, there are statutes that say things like "you cannot consider cost." That does not prohibit the agency from doing a cost-benefit analysis, and we have used those cost-benefit analyses in some instances to convince Congress to change the statute.

Sometimes the statute specifically requires something. For example, some device that will tell you if a child is behind your car when you are backing up or mudflaps on trucks. We were required to do that. We came up with a cost-benefit analysis on the mudflaps on trucks and said we do not think it is worth it, and they agreed and changed the statute.

But, again, the agency can do the analysis, and that is important, and, again, analyzing every alternative somebody suggests could be burdensome, but analyzing reasonable alternatives, yes, it takes time, but it is what a good agency should do, and it should be used before the decision is made.

Senator PETERS. If I could go back to the voluntary requirements, and, Ms. Gilbert, I know you have mentioned some of the concerns with voluntary standards and the potential for judicial review. Do you want to comment a little bit from Mr. Graham's comments and some of the challenges with those voluntary standards and how that makes it your job or jobs of folks in your former position very difficult?

Ms. GILBERT. Sure. Thank you.

CPSC does have a requirement that it has to defer to voluntary standards if they exist, and they will be adequate, and they will

be likely to be complied with. And there is a different part of the statute that says the Commission actually has to wait to see if that voluntary standards process is going to happen, to give that process a chance. So as you can imagine, that can lead to enormous inordinate delays.

When I was at the Commission, 90 percent of what we did on the regulatory end was through voluntary standards because the Commission's own regulatory process is so burdensome and that voluntary standard requirement existed. So we primarily worked through voluntary standards, which can work quite well, and we were able to participate in a lot of good voluntary standards. But we got to one point where we decided we had to regulate because the standard was not working and this deals with bunk beds.

Children were strangling in their bunk beds because the slats were the wrong width apart, or there were cutouts for design purposes, and children's bodies could slip through and then their heads would get caught.

A woman came to our agency who literally found her daughter strangled to death in the morning, one morning when she went to wake her up. And to her great credit, she took that tragedy and came to the Consumer Product Safety Commission and beseeched us to pass a mandatory rule because the voluntary standard was in place, but it did not work to save her daughter's life.

We did regulate—and we were afraid we were going to get a lawsuit. We were really afraid that the industry was going to come in and say, "We had a voluntary standard and therefore you could not regulate." They did not at the end of the day. I think it is because these deaths, while they do not occur often, are so horrific.

But that is the kind of problem that agencies would come up against when you have a requirement, again, to work through the voluntary process.

Senator LANKFORD. Thank you. Let me ask a question just following up on the same line. Mr. Eisner, there is an interesting comment that you made in your written testimony where you said the influence of officials outside the agency affect the manner in which agencies conduct notice and comment responses, regulatory impact analyses and such.

Can you help me understand that a little bit? You have your folks inside the agency that are trying to work through making a decision impact, regulatory effects, all those things. When you say "outside the agency," is that Congress? Where is that coming from on that? And how is it impacted?

Mr. EISNER. Well, outside the agency could include other agencies that we coordinate with who might have questions or comments about the analysis we have done or the proposal we are making.

Senator LANKFORD. How does that affect the decision of the agency as far as when you are evaluating effectiveness and cost-benefit, all of those things?

Mr. EISNER. Well, for example, if we are working closely with another agency that is affected by our regulation, they may point out data to us that would affect the analysis we are doing, or they may point out an alternative we had not thought about, and we could go back and do that before we put it out for public comment.

Senator LANKFORD. OK. So that is helpful input is what you are saying there?

Mr. EISNER. It can be helpful, but it also can be negative. It can be another agency—when I say "agency," it can include the White House—that does not want to rule in that area at that particular time.

One of the points I think I was trying to make is do not assume it is the agency. I am not saying agencies do not make mistakes, but do not assume that what you do not like is the result of an agency decision.

Senator LANKFORD. So you are saying sometimes the agency will make a decision, cost-benefit analysis, whatever it may be, whether it be the White House or another agency or somebody else, steps in, either slows it down, says, "No, wait on it," or tries to influence it to change it.

Mr. EISNER. Yes.

Senator LANKFORD. OK. So is that a fixable issue, or is that just the nature of "Welcome to Washington"? That is going to always happen.

Mr. EISNER. Welcome to Washington.

Senator LANKFORD. One of the things that we are trying to deal with is obviously there are a multitude of issues. We will try to bring as many as we can, and we are trying to address it in the most general fashion. You are right. We are not going to be able to go agency to agency and try to walk through that process. Ultimately that is the Executive Branch trying to work and managing it, but there are also legal issues that we have to be able establish as well that we want to make sure that we can clear as much as possible.

Senator HEITKAMP. You made a comment about how frequently we fall in love with our ideas or in love with our regulation and we are not going change them based on comment. I think that what you are hearing from this dialogue today is we are not in love with any idea; we are in love with what works. And this has been extremely helpful to me to begin to kind of narrow that down and trying to figure out 80/20. What is that big bang for—take care of the big stuff and maybe let the little stuff go.

And so I want you to know, this is really an open process. This is really an opportunity to continue to have this dialogue with great intellectual folks like yourselves who have thought about this, who have spent a lot of time working directly in the process, and, please, stay tuned because I think we are going to be very serious about this. We hope that it could be one of those places where we actually have bipartisan consensus and actually respond to concerns that the American public has.

But your discussion today has been enormously helpful to me personally as I try and sort through where that greatest opportunity is for collaboration and change.

Senator LANKFORD. We will send some questions to you in the days ahead, if you do not mind, and we will try not to belabor you with even more paperwork since we have been discussing that as well. But some of the things we did not get to, but I do not want to continue on with a long hearing. You all have things to do as well today, but the issue of back-door rulemaking came up in a cou-

ple of our conversations, how to be able to manage that. I think that is a great frustration to a lot of manufacturers that I have talked to trying to figure out where did this come from, how did this happen, and then to figure out a process. How do we remove incentives to not follow the basic parts of the statutes?

The other one is the independent agencies, and you had mentioned it as well. And that is how that needs to come in line. We have a group that are operating without OIRA engaging with them, small staff as they are, but there is no real oversight in that part of it as well. So, that is something I think we do need to address in the days ahead, and I will be interested in any kind of impact.

I would like to also announce the Subcommittee's next hearing before we adjourn today. It will be on regulatory process and it will be Tuesday, April 28. It will be held addressing the proper role of judicial review in the Federal regulatory process. Obviously that is something that all of you care about deeply and are connected with.

That concludes our day's hearing. I would like to thank our witnesses for their testimony. The hearing record will remain open for 15 days, until April 1, 5 p.m., for the submission of statements and questions for the record.

Thank you for being here. This hearing is adjourned.

[Whereupon, at 11:31 a.m., the subcommittee was adjourned.]

APPENDIX

Testimony of John D. Graham, Ph.D, Dean, Indiana University School of Public and Environmental Affairs

Hearing Title: Examining Federal Rulemaking Challenges and Areas of Improvement within the Existing Regulatory Process

Date: March 19, 2015

Subcommittee on Regulatory Affairs and Federal Management, Committee on Homeland Security and Governmental Affairs, United States Senate, Washington, DC.

My name is John D. Graham. I am Dean of the School of Public and Environmental Affairs, Indiana University (Bloomington and Indianapolis). From 2001 to 2006 I served as the Senate-confirmed Administrator, Office of Information and Regulatory Affairs (OIRA), US Office of Management and Budget (OMB). Prior to serving at OMB, I was the founding Director of the Center for Risk Analysis at the Harvard School of Public Health (1990-2001). I have published ten books and hundreds of articles on topics related to regulatory reform, especially on topics related to health, safety, and environmental regulation. I earned my BA in economics and politics from Wake Forest University, my Master's degree in public affairs from Duke University, and my Ph.D. in public affairs from Carnegie-Mellon University. My doctoral dissertation was one of the early analyses of the benefits and costs of the automobile airbag.

In my testimony today, I would like to suggest some directions for improvement in the federal rulemaking process. I will not present any detailed, formal recommendations but instead focus on several broad themes for the Subcommittee's consideration.

Throughout my testimony, I will use the term "regulatory impact analysis" (RIA) to refer to the many ways that analysis can support rulemaking. A wide range of analyses might be included in an RIA, such as a risk assessment, an engineering feasibility analysis, a technology assessment, a benefit-cost analysis, a cost-effectiveness analysis, a value-of-information analysis, a small-business impact analysis, an environmental impact analysis, an analysis of paperwork burdens, and a distributional equity analysis. Thus, I will be using the term RIA more broadly than it is sometimes used. I have taught several of these analytic tools in the classroom for over thirty years, and I have seen their practical value at OMB. I strongly believe that they can offer insights to policy makers that are not always evident through use of common sense and intuitive judgment.

If regulation was cost-free, it would not be necessary to require that new regulations be subjected to RIA. We could allow regulations to be enacted whenever regulators felt that they had identified a correctable problem. In reality, regulations are typically costly for the organizations that must comply with them (e.g., state and local governments, non-profit organizations, and businesses) and those costs are typically passed on to the consumers or taxpayers.

The critical question for regulations is whether the benefits are sufficient to justify the costs, and whether there is a regulatory alternative that might be preferable in its benefit-cost profile

(Sunstein, 2002). Often, the most critical contribution that OIRA/OMB makes is to suggest a regulatory alternative that had not previously been considered by the regulatory agency— one that is more effective and/or less costly (Sunstein, 2012; Dudley, SE, 2013). In some cases, RIAs help regulators find ways to save more lives and reduce compliance costs at the same time (Graham, 2008)!

Now I shall now turn to five themes or promising directions for regulatory reform, each supported by real-world case studies to give life to the theme.

Theme #1: The U.S. Congress should explore ways to strengthen its own capabilities and requirements regarding regulatory impact analysis (RIA).

The federal rulemaking process does not proceed unless the U.S. Congress provides a federal department/agency with statutory authority to regulate (Croley, 2008). Some of the problems we face in rulemaking relate to how Congress crafts an agency's statutory authority. In particular, Congress sometimes writes highly detailed regulations into statute, providing the executive branch with limited discretion as to how a complex problem is to be solved. When a new statute is passed on the heels of an emotional crisis (e.g., 9/11 or Katrina), Congress may use legislative language that suggests that a problem shall be solved, regardless of what it costs the public – even though that is impractical (Graham, 2008). And Congress does not require that new regulatory legislation be subject to benefit-cost analysis of alternatives before members vote on new laws.

When Congress regulates in the dark, bad things can happen.

Ethanol Case Study

Ethanol, often made from corn, can be used as a motor fuel (alone or in blends with gasoline). It has several advantages compared to gasoline: (1) it is a renewable fuel (meaning that it is not physically limited in long-run supply like oil is), (2) it can be produced in the US (instead of relying on imports), (3) it burns more cleanly than gasoline (e.g., fewer smog-forming pollutants), and (4) it supplies a source of oxygen that improves engine operation.

Based on these advantages, Congress passed regulatory legislation in 2005 and 2007 that rapidly expanded the amount of ethanol that refiners must blend with gasoline. (Technically, the requirement was for any "renewable fuel" but ethanol was known to be the most practical compliance option). Specifically, refiners were compelled to blend 9 billion gallons of ethanol by 2008, 15.2 billion gallons by 2012 and ultimately 36 billion gallons by 2022 (Graham, 2010). In the early years of the mandate, corn-based ethanol was a lawful alternative; in later years refiners were required to include "advanced" biofuels such as ethanol made from corn stover (e.g., the cob and the stalk rather than the corn) that reduce greenhouse gas emissions by 50%. In order to comply with the requirement, corn production was increased so rapidly that, in 2010, 40% of US corn output went to support ethanol production (Graham, 2010)!

Unfortunately, the renewable fuels mandate has proven to be quite costly, and has produced some pernicious side effects. For starters, ethanol is more costly to produce than gasoline and

has an energy content that is 20% less than that of gasoline, which means that a gallon of ethanol takes a car fewer miles than a gallon of gasoline. .In addition, large amounts of energy are consumed in the process of growing and harvesting the corn, transporting the corn to ethanol plants, making ethanol from corn, and transporting the ethanol to refiners. The net energy balance of corn-based ethanol is not very good, which reduces its environmental advantages. And the rapid increase in corn production contributed to an unexpectedly sharp rise in the price of corn, including the many foods that use corn as an input (e.g., hogs are fattened with corn). Environmentally, some new downsides of ethanol production are now recognized, such as the release of greenhouse gas emissions into the atmosphere when new land is cleared for grow the corn used in ethanol production – though the magnitude of this effect is not known with much certainty (Dumortier, J et al, 2011).

It turns out that an analytically sound comparison of ethanol and gasoline is not straightforward and requires more than good intuition (de Gorter and Just, 2010). The combination of the downsides of corn-based ethanol has proven to be so disconcerting that Congress is now beginning to consider a relaxation or repeal of the renewable fuels mandate (Pear, 2012; EnerKnol Research, 2015). For a variety of reasons, the hoped-for "advanced biofuels" have been slow to reach the commercialization stage, and their economic competitiveness remains uncertain (Carriquiry, MA et al, 2011). With the recent surge of US oil production from shale, the energy-security rational for ethanol has also been weakened, at least temporarily.

Before Congress voted on the renewable-fuels legislation in 2005 and 2007, and RIA should have been produced that compared the benefits and costs of corn-based ethanol with gasoline, assessed the economics of conventional and "advanced biofuels," and considered some regulatory alternatives (e.g., a longer phase in period). In my opinion, much of the backlash against corn-based ethanol might have been lessened or avoided entirely by a simple regulatory alternative: a more gradual phase-in period that would have softened the temporary distortions in agricultural and energy markets that were experienced.

The U.S. Congressional Budget Office did perform a cost analysis in 2005, as is typical of major new legislation (e.g., see CBO, 2005). CBO, as a budget-oriented shop, focused on the fiscal impacts of the mandate on federal, state and local governments (which were minor), and devoted less attention to the larger impacts on the private sector (refiners, consumers of corn, and motorists). More importantly, CBO never estimated the benefits of the regulatory legislation. Thus, members of Congress were provided no objective assessment of whether the anticipated benefits of the mandate might justify the costs. And members of Congress were not provided a comparison of any regulatory alternatives (e.g., a slower phase-in period that would allow corn farmers and blenders to respond more gradually to the mandate). CBO did not do this RIA-like work because Congress does not require its own regulatory legislation to be subject to RIA. Moreover, CBO has never been properly organized and staffed to prepare formal benefit-cost analysis of regulatory legislation.

There are many lessons of regulatory reform that can be gleaned from the ethanol story. Here I am making a simple point: before members of Congress vote on new regulatory legislation, CBO or another objective agency should prepare a RIA. There would be an additional side benefit of a buttressed CBO: members of Congress could ask CBO to submit RIA-related

comments to federal agencies when they issue costly regulations. Bottom line: Congress needs to enhance its capabilities and requirements concerning RIA.

Theme #2: Good rulemaking requires effective use of high-quality information but federal agencies sometimes use data to inform rulemakings that do not meet minimum quality standards.

Lawyers play an important role in the rulemaking process but the quality of a rulemaking sometimes hinges greatly on the accuracy and relevance of the scientific, engineering, behavioral, and economic information (National Research Council, 2009). The federal government has access to tremendous expertise, both inside and outside of the government but that does not mean that regulars always use that expertise. For a variety of reasons, regulatory agencies often resort to short-cuts that cause important rulemakings to be informed by faulty, uncertain, or misleading information. Even when regulatory agencies are supplied valid and relevant information during the public-comment process, they do not always consider that information or use it properly.

Over the years, OMB has tried to correct the information-quality problem in two ways: (1) it has issued a bulletin calling for agencies to subject their key scientific determinations to independent external peer review, and (2) it has issued information quality guidelines that require agencies to create a correction mechanism for situations where the agency has disseminated erroneous or misleading information. The OMB initiatives are a modest step in the right direction but they have little teeth because the bulletin and guidance are not enforceable in federal court. Thus, it is not difficult to find examples where regulators officially disseminate information that is of poor scientific quality.

Case Study: Injuries from Table Saw Use

The U.S. Consumer Product Safety Commission (CPSC) has access to one of the best data systems in the world on the frequency of injuries related to consumer products. It is called the National Electronic Injury Surveillance System (NEISS), and it is based on nurse-conducted interviews with patients in 100 emergency rooms around the country. Based on NEISS data, CPSC estimates that, each year, about 30,000 emergency room visits are caused by blade-related injuries from finger contact with rotating table saws. An estimated 2,000 of those cases involve the amputation of at least one digit, and thousands more involve lacerations of the tendon that are so severe that permanent functional impairment results (even after reconstructive surgery).

CPSC is exploring a possible rulemaking that would reduce the frequency and severity of table saw injuries through new technologies based on flesh detection/contact and blade removal. Stated simply, if an inattentive woodworker allows his hand to get too close to the blade, the rotating blade would stop or move out of harm's way. A cabinet saw now on the market, called SawStop, has demonstrated the feasibility of this type of automatic safety system. I came to learn about SawStop in my role as an expert witness for the insurance industry in product liability cases involving table saw injuries (Graham and Chang, 2014).

Now in the pre-rulemaking phase, CPSC is seeking to determine whether most injuries to woodworkers occur on small benchtop models or whether they occur during use of large, more expensive cabinet saws.

CPSC administered a specialized survey to a sample of injured woodworkers where the woodworkers were asked, in effect, whether the table saw they used was a benchtop model or a cabinet saw. The intention of the CPSC survey was laudable but the questionnaire was poorly designed and produced invalid results that inappropriately indicted cabinet saws. The wording of the survey caused respondents to confuse cabinet and benchtop saws.

CPSC disseminated the results of the survey without any external peer review, even though the information is highly influential, since it could cause voluntary industry safety efforts, liability suits, and a future CPSC rulemaking to be shifted from benchtop models to cabinet saws. Some of the potential harm of the CPSC's dissemination has been explained in a public comment process but the flaws in CPSC's survey design could have been prevented through a careful validation effort upfront and/or an external peer review prior to release of the results of the survey.

There are many lessons that can be drawn from CPSC's efforts to enhance table saw safety but here my point is a very limited one: Good rulemaking requires use of high quality information; dissemination of faulty information by federal agencies can be quite harmful.

Theme #3: Organizations regulated by the federal government are sometimes subject to multiple, overlapping, and duplicative regulations issued by the same federal agency, by multiple federal agencies, or by multiple federal, state and local agencies.

Since the 1960s, the federal regulatory apparatus has grown enormously in both its scope and resources. One of the growth industries in the United States is staffing at federal regulatory agencies. Regulatory activity is also growing at the state and local levels of government, and in some cases the regulatees navigate regulatory requirements at all three levels of government.

One of the drawbacks of the proliferation of regulatory activities is that it raises the cost of doing business in the United States. In addition, regulatory complexity tends to favor large companies over small ones, since small companies typically have less in-house capacity to deal with multiple regulatory systems. One of the principal objectives of regulatory reform is to find ways to streamline the regulatory process so that laudable regulatory objectives can be accomplished at less cost and time to the regulated community (Breyer, 1982; Coglianese, 2012).

To illustrate the ramifications of regulatory complexity and duplication, I shall present several short case studies concerning the use of unconventional methods to produce oil and natural gas. Due to recent technological innovations (e.g., high-pressure hydraulic fracturing and directional/horizontal drilling), the United States recently surpassed Russia and Saudi Arabia as the leading oil and gas producer in the world. However, the success of the American energy industry is being slowed by regulatory constraints on the development of the infrastructure required to support this resurgent industry.

Case Study: Permits for New Sand Mines

When hydraulic fracturing is employed, the developer uses a combination of water, sand, and chemicals to coax the oil and/or gas from sedimentary rock thousands of feet below the earth's surface. The sand that is ideal for this purpose is called "Northern White" (round crystal), a type of sand that can withstand the severe heat and pressure of an underground oil and gas operation. As a rough rule of thumb, the more Northern White that is used by the developer, the more output the developer tends to obtain from a well. Much of this sand is located in two states: Wisconsin and Minnesota (Sider, 2014). The companies engaged in sand mining are required to obtain the appropriate permits from regulatory authorities to produce their product.

I recently asked a graduate student at IU-SPEA, Scott Perry, to outline for me the number of regulatory agencies that may be involved in permitting of a sand mining operation in this region. For illustrative purposes, we chose the State of Minnesota, which appears to have somewhat more complex requirements than the neighboring state of Wisconsin. Here is a summary of his preliminary analysis.

1. A conditional land use permit must be secured from the relevant local government authority (e.g., a county planning or zoning office). That permit typically requires information on the mining plan, hours of operation, noise, traffic, dust, and a reclamation plan.
2. A water appropriation permit must be obtained from the Minnesota Department of Natural Resources if a significant amount of water will be consumed during the mining activity and reclamation phase.
3. A protected waters permit must be obtained from the Minnesota Department of Natural Resources if the mining activity will impact a protected body of water.
4. A burning permit must be obtained from the Minnesota Department of Natural Resources if an applicant will need to burn brush from clearing and stripping operations.
5. A trout stream setback permit must be obtained from the Minnesota Department of Natural Resources if sand mining will occur within a mile of a designated trout stream.
6. An endangered or threatened species permit must be obtained from the Minnesota Department of Natural Resources if the mining activity will jeopardize the continued existence of any endangered or threatened species or result in adverse modification of critical habitat.
7. A wetland permit must be obtained from the Minnesota Board of Water and Soil Resources by demonstrating that impacts on wetlands will be avoided or that unavoidable impacts will be minimized, including mitigation measures for any loss of wetlands.
8. A fuel and hazardous materials management permit must be obtained from the Minnesota Pollution Control Agency, demonstrating containment, storage, recycling, and disposal of used oil, lubricants, antifreeze, paint, solvents and other hazardous materials.
9. A liquid storage tank permit must be obtained from the Minnesota Pollution Control Agency for both above-ground and below-ground storage tanks.
10. An air quality permit must be obtained from the Minnesota Pollution Control Agency demonstrating appropriate control of numerous air pollutants.
11. A water quality permit must be obtained from the Minnesota Pollution Control Agency if any discharge will occur for a variety of reasons (e.g., from washing materials that leave

the mine, whether by gravity flow or pumping; storm water runoff from mine stock piles and pit walls; and generation of wastewater by air emission control systems).
12. An environmental review by the Minnesota Environmental Quality Board is required when mining is expected to exceed 40 acres in size to a mean depth of 10 feet.
13. An environmental impact statement is mandatory for operations exceeding 160 acres.
14. A permit may be required from the Minnesota Department of Transportation if silica sand is transported in a vehicle that exceeds specified size and weight limits.
15. A federal Army Corps of Engineers permit (a "Section 404 Permit") is required if discharge of dredged or fill material or excavation occurs within waters and wetlands.

Each of the 15 steps may seem reasonable but the combination of the fifteen steps (or even half of the steps) constitutes a major undertaking that can require many days of work by teams of lawyers, engineers, and scientists. For small mining operations, the required task of obtaining and implementing these permits is formidable.

Regulatory reform asks the following question: is there a creative way to streamline this process without any detriment to public/environmental protection? One way to explore this question is to compare the Minnesota requirements to the requirements in one or more neighboring states. Note that it is not appropriate for the federal government to ignore this issue on the argument that the permits are being required by state and local agencies in Minnesota. A close reading of the process will reveal that a variety of the 15 steps are required by federal laws such as the Clean Water Act, the Clean Air Act and the Endangered Species Act. Mining operations in the United States are a classic illustration of multiple, overlapping regulatory systems.

Case Study: Pipelines to Transport Oil and Gas

Pipelines are the safest and most cost-effective way to transport oil and gas from the drilling pad to a refinery or user. The commercial value of new drilling activity is diminished if pipelines do not exist to transport product to the marketplace. In recent years, it has become much more time consuming and expensive for pipeline companies to obtain permission from regulators to upgrade existing pipelines or install new ones, particularly pipelines that cross state lines. The years of controversy about the Keystone pipeline project have drawn some public attention to this issue but recent evidence suggests that the delays in the Keystone pipeline are not an aberration (Holland and Hart, 2013).

In the Bakken oil fields of North Dakota, oil and natural gas liquids can be transported to Gulf coast refineries, or to the east and west coasts, via rail, truck or barge. However, those methods of transport are typically less safe and often more than twice as expensive as transport by pipeline. In the Bakken, developers producing oil sometimes must co-produce natural gas as part of the system. However, North Dakota lacks the pipeline infrastructure to bring natural gas to markets where it is needed (Johnson, 2014). As a result, numerous developers flare (burn with no use of the energy) the gas rather than capture it, even though flaring is wasteful and bad for local air quality (Sider, 2014). The practice of flaring gas may soon be minimized by new regulatory requirements in North Dakota but part of the flaring problem is induced by a regulatory problem: the lack of a permitted pipeline network to move natural gas to markets where it can be sold to consumers, industry and utilities (Dawson, 2014).

The growing resistance to oil and gas pipelines in the United States is not simply the natural resistance of local residents and community leaders to the nuisance of pipeline construction and the occasional mishaps that occur due to defects in pipeline construction or inadequate maintenance and repair of pipelines. Recent news articles have documented a growing amount of collaboration between local activists and national environmental groups that oppose expanded production of oil and gas. The national groups are providing money and expertise to local groups, enhancing their ability to slow down the process of permitting pipelines (Harder, 2014). In the future, regulatory reformers need to be aware that multiple permitting requirements can provide multiple points of intervention for activist groups, whose objective is to delay permitting processes (Moore, 2013). The current regulatory structure is designed to assess the technical requirements for creating infrastructure for oil and gas development and not the social impacts, which may be the primary concern of activist groups.

A good example of a state whose economic future may be influenced by its ability to acquire numerous new pipelines is Ohio. The Utica Shale in eastern Ohio is now recognized as a profitable new source of "wet gas," meaning that valuable liquids (ethane, butane, pentane and propane) can be separated out for use in industry while the dry gas can be sold to consumers and to generate electricity (Schneider, 2013). From 2012 to 2013, the amount of natural gas produced in Ohio more than doubled (from 87 to 172 billion cubic feet), mostly due to the application of hydraulic fracturing and horizontal drilling in the Utica Shale (Funk, 2014). Environmentally, Ohio is an attractive state for oil and gas development since its geology offers numerous sites suitable for safe deep-well injection of wastewater that is produced along with the gas (Downing, 2013). The neighboring state of Pennsylvania has a persistent waste-management challenge due to the lack of deep-well injection sites.

What Ohio does not have is a robust network of pipelines that can transport oil and gas to appropriate refiners, processors, and users. At the present time, there are three multi-billion dollar interstate pipeline projects under review at the Federal Energy Regulatory Commission (FERC), where the pipelines would serve different parts of the Utica Shale (Chavez, 2014). The FERC serves as the lead agency under which numerous other federal agencies permitting activities are "coordinated," at times not very effectively. The resulting process has become quite complicated, with layers of review at both FERC and within other federal agencies. The Ohio example provides a practical example of how economic activity in a state, the region and the nation as a whole, is linked to an increasingly complex federal regulatory process.

Theme #4: Federal agencies sometimes make quasi-regulatory determinations of large economic import but with no supporting benefit-cost analysis.

I recently co-authored an article on the phenomenon of "stealth regulation," defined as low-visibility federal regulatory activities that are not subject to any cost-benefit analysis requirements and are not typically subject to intensive OMB review (Graham and Liu, 2014). The phenomenon is worrisome because regulatory agencies, who sometimes fear the oversight, scrutiny, and delay associated with OMB review, may look to such quasi-regulatory actions to accomplish their policy objectives. Typically, the activities entail issuance of guidance documents, policy statements, waivers for state/local regulation, and the signing of

consent decrees that compel regulation (and hence reduce the effectiveness of OMB review) (Noe and Graham, 2008). Let me provide one simple but interesting example: the decision of a federal agency to allow the State of California to enact a distinctive regulatory program.

Case Study: California's Zero Emission Vehicle (ZEV) Program

The federal government has taken a variety of aggressive steps to promote the commercialization of the electric car. The policy rationales relate to both energy security and environmental protection (Sandalow, 2009). Specific measures include: up to $7,500 in federal income tax credits for purchasers of electric vehicles; $2.1 billion in subsidies for battery manufacturing projects, vehicle component production, construction of production facilities, and community demonstration projects where electric cars and charging stations are subsidized for citizens and community leaders; and billions more in federal loan guarantees for electric car facilities were granted to companies such as Nissan, Ford and several other suppliers (Graham et al, 2014).

On the regulatory front, EPA and DOT undertook a joint rulemaking (2009-2012) aimed at increasing the average fuel efficiency of passenger vehicles from 35.5 miles per gallon to 54.5 miles per gallon by 2025. The EPA-DOT rulemaking as a whole was supported by an elaborate RIA, including benefit-cost analysis. Tucked in the rulemaking were two little-noticed provisions for electric vehicles that were not subject to any cost-benefit analysis.

First, DOT/EPA encouraged vehicle manufacturers to comply with the tighter MPG requirements by producing electric vehicles rather than less costly innovations such as conventional hybrid engine (e.g., as championed by Toyota in the Prius) or the clean diesel engine (as championed by several German manufacturers) (Michalek et al, 2011; Huang et al, 2011). To tilt the compliance incentive in favor of electric vehicles, DOT/EPA allowed vehicle manufacturers to count each electric car as two vehicles instead of one in their MPG compliance calculations for the early years of the 2017-2025 program. In addition, in the carbon-control aspect of the rule, electric cars are not penalized for any of the carbon dioxide emissions that are induced at the electric power plant when a motorist draws electricity from the grid. In effect, electric vehicles are treated as "zero emission vehicles" (ZEVs) by DOT/EPA.

Second, and more importantly, in 2009 EPA granted a waiver to California (and about ten states aligned with California) under the Clean Air Act to proceed with an ambitious ZEV regulatory mandate (EPA, 2009). Vehicle manufacturers that wish to sell new vehicles in California (or the allied states of New York, Oregon, Washington, etc.) must offer an increasing number of ZEVs for sale from 2018 to 2025, reaching a minimum of 15% of new vehicle sales in 2025. Under the most recent version of the ZEV mandate, automakers do not receive any partial credit for selling conventional hybrids or clean diesels, though they can receive credit for an electric vehicle or a qualified fuel-cell electric vehicle. California-based Tesla (producer of the famous high-end electric sports car), which is classified as a "low volume" manufacturer under the rule, is exempt from ZEV burdens but permitted to sell its ZEV "credits" to other manufacturers, thereby boosting its troubled balance sheet.

Given that the federal government was undertaking numerous steps to promote the electric vehicle, EPA could have declined California's request for a waiver under the Clean Air

Act. Without such a waiver, California is not permitted under federal law to impose such a regulatory requirement on the automakers. The waiver decision that EPA made was not supported by a national RIA and was not reviewed by OMB.

I took a look at the technical rationale for the ZEV program that was issued by the California Air Resources Board (CARB). It does include a rudimentary RIA, but much of it is focused on whether the ZEV rule is good for California. In reality, the ZEV rule has national ramifications because more than 25% of new vehicles sold each year are sold in California or the aligned states.

The basic finding of CARB's cost-benefit analysis is that it will take about ten years of use for the energy savings from a ZEV to pay for the $10,000 cost premium for a ZEV (CARB, 2011). A variety of technical assumptions in CARB's analysis would not likely have passed muster at OMB under the relevant RIA guidance document, Circular A-4 (OMB, 2003). But the key point is that the RIA was performed from California's perspective rather than a national perspective. This is particularly evident on the analysis of employment impacts, where CARB explores the job gains at companies that sell recharging stations (companies that are based in California) but gives less analytic attention to potential jobs losses at auto assembly plants and suppliers that are not typically based in California or the aligned states.

There are some plausible reasons to predict that the CARB mandate will cause a reduction in overall car sales, without offering much energy-security or environmental benefit. With regard to car sales, car dealers are finding it very difficult to sell electric cars, even with all of the subsidies and incentives now in place (including the attractive HOV lane access provided in California). The more affordable electric vehicles typically have a driving range of less than 100 miles on a full charge and take roughly four hours to recharge. In order to sell a large number of ZEVs to new car buyers, manufacturers and dealers may have to cut prices on ZEVs and compensate somewhat for those losses by raising prices on non-ZEV vehicles (Gruenspecht, 2001). When sales of non-ZEV vehicles decline, welfare losses ensue. The resulting welfare losses will not be confined to California and the aligned states. Those losses will be felt partly in the form of reduced bonuses to auto workers and in layoffs at assembly plants where non-ZEV vehicles are made. Few employment losses will occur in ZEV states because few assembly and supplier plants are located in those states. Adverse labor impacts will be concentrated in geographic locations where vehicles are produced and where suppliers are located (e.g., Mexico, Japan, Germany, Missouri, Ontario, Michigan, Alabama, Tennessee, Kentucky, and Indiana).

On the other hand, the ZEV program may not produce any significant environmental benefits because the market interactions between the ZEV mandate and the federal 54.5 MPG fuel-economy mandate were not analyzed carefully. If a manufacturer is compelled to sell an additional ZEV on the California market, they can count that vehicle twice (!) under federal regulation in their MPG compliance calculation. That means that the manufacturer is free to sell an additional gas guzzler and still comply with the federal MPG mandate. Adding the ZEV mandate to a federal program that encourages ZEVs could, under plausible assumptions, cause more carbon pollution than a federal MPG program by itself (with or without the 2-for-1 compliance sweetener). To put it simply, no one really knows whether the California ZEV program will accomplish any climate-protection benefits because a proper RIA was not

performed. Previous research on other California and EPA vehicle regulations is pessimistic about the extent of incremental climate-protection gains from California rules (Goulder et al, 2009).

The sobering story of the California ZEV program illustrates why a relatively simple waiver decision by EPA can have national economic ramifications. Yet that decision is not required to be subject to a national RIA or OMB review.

Theme #5: Federal agencies sometimes issue regulations without considering their implications for international trade.

During my tenure at OMB (2001-2006), I devoted considerable energy to promoting more regulatory cooperation between regulators in the United States and regulators in the European Union (EU). Most of the trade issues that divide the United States and Europe relate not to tariffs but to conflicting regulatory requirements that impact companies doing business on both sides of the Atlantic Ocean.

In the United States, European regulators may have a reputation for more stringency than American regulators but my experience in this area is that there is plenty of unreasonable regulatory activity in the United States as well as in Europe. Indeed, the most comprehensive study found no evidence that the EU is systematically more precautionary than the United States (Wiener et al, 2011).

Last year I had the fascinating experience of testifying before the trade committee of the European Parliament on the subject of a possible trade agreement between the United States and the European Union. Both agriculture and autos were an important part of the discussion.

It became apparent that many thoughtful Europeans are aware that the genetically-modified seeds that are widely used in U.S. agriculture would not be a significant threat to human health, safety, or environmental protection if used widely in Europe. Nonetheless, those same thoughtful people admit that European regulators do not permit these seeds to be sold to European farmers (excepting some recent authorizations by the Spanish government). Indeed, the World Trade Organization – though it has weak powers to enforce its decisions – has already ruled in favor of the United States on this issue.

I was pretty disturbed about the European position on agriculture until I learned more about how automobiles are regulated differently in the United States than they are in Europe, and about the persistent tendency of auto regulators in the US to dismiss the legitimacy of the European regulatory approach to auto safety and emissions control. The root of the problem began in 1958 when many countries in the world agreed to regulate automobiles in the framework of a United Nations agreement. With respect to safety, the United States has never been willing to become a contracting party to the UN agreement. In effect, from an international perspective, the U.S. National Highway and Traffic Safety Administration (NHTSA) pursues its own regulatory agenda. On emissions control, some cooperative progress has been made on regulations for passenger cars and light trucks but commercial vehicles remain a major area of regulatory conflict between the United States and the EU.

Once US-EU regulatory differences are codified, it is laborious to harmonize them. Rather than negotiate and harmonize hundreds of different regulations related to headlights, tires, bumpers and other specific parts, the EU has proposed to the United States a process of mutual recognition: we should accept cars that meet EU's auto regulations; they should cars that meet U.S. auto regulations. According to an RIA prepared by the European Commission, even a partial mutual recognition agreement would have the effect increasing the sales of vehicles and parts on BOTH sides of the Atlantic. The benefits might actually be larger for the United States than for the EU (i.e., export growth from the EU to the United States by 71% and by 207% from the United States to the EU) (EC, 2013; Centre for European Policy Research, 2013). For Europe, where the economy is much more depressed than it now is in the US, a boost in car sales to the US would be extremely valuable.

Unfortunately, what I hear through informal sources is that U.S. regulators are dragging their feet on the subject of mutual recognition in the auto sector. A key issue will be whether the EU can show that the overall safety of European cars is comparable to the overall safety of American cars. Assuming the necessary data are available, I will be surprised if the EU is unable to make this demonstration.

In summary, I want to take this opportunity to applaud each member of the Subcommittee for devoting time and energy to the topic of regulatory reform. It is an issue that can seem opaque and complex but it is, as I have demonstrated, very important to the economic future of the United States and our friends around the world.

Thank you in advance for considering this request. I look forward to comments and questions from the Subcommittee.

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Statement of Neil Eisner

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before the

Senate Subcommittee on Regulatory Affairs and Federal Management

on

"Examining Federal Rulemaking Challenges and Areas of Improvement Within the Existing Regulatory Process"

March 19, 2015

Chairman Lankford, Ranking Member Heitkamp, Members of the Committee. Thank you for inviting me to testify today on this important topic. I understand that this hearing is intended to examine today's federal rulemaking process and address areas that need improvement. I also understand that there will be other hearings on this subject. As one who has worked in this area for many years, I appreciate the effort of the committee to hear from a diverse group of people in a bipartisan effort to examine the need for improvements.

I have worked on regulatory issues for many years. For a little over a year, I was the Acting Assistant Chief Counsel for Regulations and Enforcement at the Federal Aviation Administration (FAA). I then moved up to a newly created position in the Office of the Secretary of Transportation (OST) as the Assistant General Counsel for Regulation and Enforcement, where, for 35 years, I oversaw the regulatory activities of the entire Department. Since my retirement from the Federal government, I have been a consultant on a variety of administrative law issues. I have also been an adjunct professor at American University's Washington College of Law for over a decade, where I have taught classes on Administrative Law and the Federal Regulatory Process. I am also a Senior Fellow in the Administrative Conference of the U. S. (ACUS) and Chair of its Rulemaking Committee. In addition, I am a former Chair of the American Bar Association (ABA) Section of Administrative Law and Regulatory Practice and currently a Senior Fellow in the Section. I have written articles for scholarly publications and spoken in many forums, including law schools, on administrative law matters, particularly rulemaking.

Based on my experience at DOT, which has one of the largest regulatory programs in the Federal government, I have found rulemaking to be a very important tool for the government in addressing problems we, as a nation, face. I believe the process generally works very well. It can be improved, and many agencies are voluntarily making continuous efforts to do that. However, we must be very careful in identifying the problems that need fixing, particularly determining whether the problem results from a deficiency in the underlying procedural requirements or under the authorizing statute. We also need to determine whether the problem results from the failure of only some agencies to follow existing requirements; we should not amend good requirements, requirements that are well understood after many years of use, because some officials are ineffective in implementing their rules. We should not add potential or unnecessary burdens to a process applicable to all agencies where those burdens may slow

down or stop the issuance of "good" rules or the rescission of "bad" rules because of implementation failures of a few. We also have to be mindful that such action could also convince agencies that have authority to implement their statutory obligations through either rules or orders to use the adjudicatory process, which generally would not be as effective as rulemaking and would not require such things as economic analyses.

I would like to provide some details to illustrate how the process works well and the many positive, voluntary actions agencies have taken to improve the process – to make it more efficient and effective. We have to encourage more of this. I would also like to offer some specific suggestions on what can be improved by this Committee and the Congress.

The Administrative Procedure Act

The Basic Process. The basic statute governing rulemaking, the Administrative Procedure Act (APA), established an excellent, relatively simple process. The APA requires "notice and comment" processes that open the government decision making to public participation; the exceptions that are provided for "good cause" are reasonable and rarely misused. The agencies are required to respond to the public comment received and provide a reasoned basis for their final decisions, and, importantly, final decisions are subject to judicial review. The statute also provides the public the right to petition agencies for the issuance, amendment, or repeal of a rule. Almost 70 years of agency experience and court decisions have provided a solid basis for determining what is acceptable and what works well.

Related Requirements. Since the APA was passed, dozens of additional requirements have been directly or indirectly imposed on the regulatory process through new statutes, executive orders, presidential memoranda, OMB orders, and other documents. Even if everyone agreed that they all added worthwhile requirements, they have created problems just by the existence of so many, from so many different sources. Some of the requirements cause confusion by creating overlapping requirements or using different terms for essentially the same thing (e.g., "major" and "economically significant" rulemakings). At DOT, we created a summary document of all of the requirements and would update it as necessary. Despite that, Departmental staff found it difficult to keep up, and rulemakings were delayed when documents had to be returned to the initiating office to make the necessary changes. A consolidation of the requirements, without substantive changes, would probably be welcomed my many of the participants in the process. However, it would be very difficult to achieve, because there are so many different sources. Some would object to consolidation, because they do not want codification of executive orders, since it would make them difficult to change or update. Perhaps that could be addressed by separate, but coordinated executive branch and legislative brand consolidation.

Executive Branch Oversight. Direct agency and departmental oversight of the process as well as individual rulemaking actions is an important element for ensuring effectiveness and efficiency. Earlier in my career, I heard, too frequently, from senior officials about their frustration that they were first made aware of significant agency proposals when it was too late to affect the decision making. That was one of the reasons why my office was created. DOT has taken a number of steps over the years to address this and provide further organized oversight. When my office was created, a Departmental order on DOT's regulatory policies and procedures was issued. The order established requirements for agendas of all rulemakings, early coordination among the agencies, economic analyses for all rules, retrospective reviews of

existing regulations, and enhanced public participation. Over the years, additional steps were taken, such as establishing a formal retrospective review plan and schedule. The Department also developed training on the rulemaking process and such specific topics as economic analyses and impacts on small entities. The Department also created what was the first electronic, internet-accessible public rulemaking and adjudicatory docket in the government; among other things, this helped the public and the agency more readily follow the rulemakings and efficiently comment on or review comments. It created and electronic tracking system that permitted senior leadership to more easily follow the progress of rulemakings.

Perhaps one of the most valuable steps DOT took was the creation of a program for meetings between the Deputy Secretary, General Counsel, and other senior OST officials with a different operating administration each week to review all of the agency's rulemakings. This required senior officials in OST and the agency (usually represented by the Administrator and other senior agency officials) to keep apprised of each rulemaking's details and issues, so that they could effectively discuss those rulemakings starting at the earliest stages. They would discuss various issues, including concerns about compliance with the APA and other requirements, before decisions were made. Where more in-depth discussions were needed, The Deputy Secretary would schedule separate briefings. To get that level of participation so early in the process was quite valuable. The officials probably found that it resulted in better decisions and that the earlier attention saved everyone considerable time at the end of the process. Indeed, the senior officials found the meetings so valuable that they started adding other subjects to the meetings, such as reports to Congress and responses to National Transportation Safety Board (NTSB) recommendations.

However, it is often difficult for senior officials to appreciate the need for early involvement. But these are the people I would sometimes be surprised to learn had no idea about things like the costs of, or legal problems with, rulemakings they were promoting; and this was in a Department that did a very good job with its rulemaking responsibilities. Although these were rare instances and the failures were remedied, they resulted in wasted resources pursuing a faulty proposal. Initially, to get them to spend time in early discussions on rulemakings or in training courses about how to effectively apply the process requirements, you need to convince the very highest officials in the agency and department to support or even push it. It would very difficult for a legislature or President to mandate these kinds of activities.

OIRA oversight is also important and valuable. OIRA provides very good guidance on how to prepare economic analyses. It ensures appropriate coordination with other agencies. It provides a check on the objectivity of an agency's decision. Simply reminding some agency officials that their decision must undergo OIRA review before a proposed or final rule can be issued may cause agency officials to change their mind. However, some also argue that OIRA focuses too much on keeping costs down rather than attaining a reasonable level of benefits. They also criticize OIRA for causing unreasonable delays in rulemaking, a subject of an ACUS Statement in December of 2013 on "Improving the Timeliness of OIRA Regulatory Review." To the extent these OIRA "actions" reflect the views of the President, however, it would be difficult to effectively address them through legislation, and legislation could simply increase burdens on the agencies.

Judicial and Congressional Oversight. Judicial review is an important part of the success of the APA process. The agencies routinely consider it during the rulemaking process. They

closely review court decisions involving the process to determine whether they need to modify their implementation. They know that "cutting a corner" or taking a chance might result in their having to do the entire rulemaking over again. I recognize that litigation can be a costly and lengthy process. But it can also create serious problems for agencies, especially if they get a reputation in the courts for not following the legal standards.

Congressional oversight can also be very effective. Simply setting up a hearing gets the attention of senior officials; they do not want to be in the position of trying to explain something that is difficult to defend. Unsatisfactory answers in the hearing may also make it clear to Congressional committees that fixes to the substantive statutes of offending agencies are necessary. Less formal actions can be taken, also. For example, committee staff can use regular meetings with agency staff to explore perceived problems. Members or committees could ask the Government Accountability Office (GAO) or agency Inspector Generals (IGs) to gather necessary data to determine whether there are problems with particular agencies, such as failing to prepare required analyses. Focused legislation could be used to address particular problems. For example, a "failing" agency could be required to create an independent office that reports directly to the head of the agency, an "ombudsman," to receive complaints about the agency; the ombudsman could be authorized to protect the names of the complainants, determine whether the complaint is legitimate, and if he or she cannot get the problem fixed, report it directly to the head of the agency or department and, if necessary, to Congress. Because of the costs involved in creating such an office, Congress should only use this where other steps are not fixing the problem. Even discussions of the possibility of such legislation might result in appropriate fixes. Finally, the Committee could consider changes to the Congressional review provisions in the Small Business Regulatory Enforcement Fairness Act (SBREFA) and the way it is used. I do not believe it is necessary for that statue to require that "hard" copies of all final rules and supporting documents be submitted to both houses of Congress and GAO before they can take effect. It creates unnecessary expenses for the agencies and creates some confusion about whether or when a rule takes effect. It also subjects Congress and GAO to a significant paper burden. These documents are readily available via the internet, and the statute should be amended to eliminate the requirement for the agency to submit them. The Congress should also consider better ways to use the final rules. For example, committees could spend more time closely reviewing the rules from agencies they believe are problematic or to look at particular issues such as effects on small businesses or State, local, and tribal governments.

Consideration of Changes. To the extent the Committee does consider changes to the APA or other generally applicable statutes, one important factor you should keep in mind whenever you identify a problem is that the agency may not be the cause that problem. An agency may not adequately address public comments, it may not provide a reasonable basis for its actions, or it may take too long to make a decision, but those failures may have been directed by officials outside the agency. It also may have been made by a political appointee in the agency who disagreed with career staff advice. Those decisions may or may not have been justified, but any legislative changes may come after the official has left. Changes to the APA will not necessarily fix the problem. More importantly, even if the problems are due to agency failure, changes to the APA would apply to all agencies. Imposing extra procedural or analytical requirements on those doing a good job may result in those agencies foregoing the voluntary and innovative steps they may otherwise take to improve their particular rulemakings. For example, the additional requirements may cause them to not issue an ANPRM or permit a reply comment period. It may

lead agencies to take less effective steps, such as adjudication or guidance in lieu of a binding rule.

It is also important to note that changes to a 70-year old statute would have to be very carefully drafted to avoid unintended consequences. For example, FAA issues thousands of "airspace" rules or "airworthiness directives" every year that everyone wants and often needs quickly; they are "rules-of-the road" telling pilots things like the amended approach path to take to particular runway at a particular airport or routine fixes that need to be made to an aircraft to address problems; occasionally there are some that warrant special handling, and the agency gives it the necessary extra attention. Inadvertently making a change that delays those kinds of good rules could cause significant problems. Moreover, extra analytical requirements could prevent an agency from deciding to rescind an unnecessary rule or amend another one to keep up with changes in the state-of-the- art, because it does not have the resources to meet the new requirements.

Public Participation. One of the most troubling aspects of the APA process is the perception that agencies do not take public comment seriously, that they do not make changes to their proposed rules based on those comments. It is troubling because DOT and many other agencies I am familiar with do take them seriously.

That is why agencies take many extra, voluntary steps to increase effective public participation. They seek comment before they issue notices of proposed rulemaking (NPRM), through such steps as advance notices, requests for comment or data, and public meetings. They may provide reply comment periods so that the public can respond to what others have said. They also issue supplemental notices of proposed rulemaking (SNPRM) and interim final rules (IFR), usually because they have made changes on which they want, but may not be required to get, further comment. They provide early notice of pending rulemaking actions through agency websites and the *Federal Register*. They have processes for interested people to sign up on a list serve to receive notification when the agency places proposals or related documents in the rulemaking docket. They may have agency experts available prior to the start of a hearing to explain their proposals to those who need help. They may hold hearings in the evening to make participation easier for those who cannot attend during the day. They are increasingly turning to technology to make effective participation easier; they have tried internet technology, such as blogging sites, to see if that may allow better participation and exchange of ideas. They have explored the use of simple forms on the internet to see if that can ease submission. They provide simple instructions for the public on how to submit effective comments.

With respect to consideration of comments, at DOT, significant comments are discussed in senior-level briefings. Power point presentations often include multiple slides covering the comments and the changes made as a result of them. The participants in the meetings – including inter-agency reviews – discuss the merits of the comments and whether more should be done. Finally, sometimes agencies will make decisions to completely withdraw proposed rules because of the adverse comments they received. When final action is taken, some will be accompanied by press briefings and releases that note the changes made.

The bottom line is that agencies do consider comments and make changes, but many in the public think they do not. The perception is important because that may mean that many who should participate in the process will not. It is also important because, when people believe that

they have been given a fair opportunity to participate, even if their recommendations are not adopted, they are more likely to accept or comply with any eventual rule.

This is a difficult problem; there are no easy solutions. Agencies simply have to keep trying to find ways to make it clear they do consider comments. For example, I believe that, when set up properly, negotiated rulemaking can be very effective. One of the reasons for this is because members of the public get to see the decision-making process up close and personal. They get to see how difficult it is to make a decision that will satisfy everyone on all issues, they see the agency representative ask good questions and acknowledge that he or she is receiving helpful information, and they may witness the agency representative change his or her position on some issues. As another example, we had a rulemaking where the oversight officials thought the agency and the affected industry were not "hearing" each other; the agency had issued multiple proposals trying to clarify its position and industry kept responding that the agency had it all wrong. We recommended the agency have a facilitated public meeting. The facilitator was a neutral party who could delicately nudge the participants, including the agency, to listen better. It worked. More use of techniques like this might make it clearer that the agencies are listening, even when these techniques are not used. I do not believe legislation can fix the problem, but the Congress may be able to help, for example, by providing agencies the resources they need to use facilitated processes or otherwise providing incentives to agencies who need to do more of some of the things noted above.

Public Petitions. Although my experience at DOT was that there were relatively few written public petitions, maybe because there was a very large number of other, less formal methods for agencies to receive information on the need to issue, amend, or repeal a rule. Agencies may learn about problems when they are visiting a business or attending meetings with industry and public interest groups about compliance with existing rules. Reports on things like accidents or environmental releases may make it clear to an agency that a change is needed. Too many requests for interpretations and exemptions or enforcement or litigation experience may indicate a problem. Government entities such as the NTSB, IGs, or GAO may make recommendations for new or changed rules. I believe those methods are very effective and are well utilized at DOT. The right to petition is, of course, always available, and in December of 2014, ACUS adopted some valuable recommendations on how agencies can make the process more effective and timely, many based on best practices already in use.

Compliance Programs. Another frequent complaint I have heard about rulemaking programs is that agencies' compliance programs were based on a "gotcha" philosophy followed by unfair penalties. My experience at DOT was the opposite. DOT's general policy was that it wanted to achieve the highest level of compliance possible with its rules. DOT did not want to have to impose a penalty for a violation. They achieved this through a variety of steps. The agencies would do training or issue helpful guidance after they issued some rules. They would offer contact information for people who needed help. They would post commonly asked questions and answers on the internet. When they visited a regulated entity, they would offer advice on problems they saw. They would advise companies they visited for a compliance review about their right to complain and protections against retaliation. They would often hold off on a penalty to give a company the opportunity to fix the problem. In imposing a penalty, they would consider the company's ability to pay. If they found it necessary to impose a penalty, their goal was still to advise the company on how to fix the problem.

The Department, however, regulates over 500,000 companies and as many as 8 million employees. Some companies or individuals are very careless. Some intentionally ignore requirements. In my experience, the Department's enforcement actions were well-justified. There were occasions where the agency's actions were not justified, and when higher officials found those kinds of problems, they were appropriately addressed.

Other suggestions. I do have one relatively minor suggestion, noted below, for the Committee to consider. The APA provides exceptions to the informal rulemaking requirements for matters relating to public property, loans, grants, benefits, or contracts that may no longer be appropriate. Many agencies voluntarily apply the APA requirements to those rulemakings and the ABA and ACUS have recommended such action, but there has been some movement recently to reverse the voluntary coverage. This Committee should consider whether the APA should be amended to delete these exceptions.

Analytical Requirements

One of the most contentious issues in the rulemaking arena appears to be the quality of the processes for identifying the problem – often referred to as a risk assessment – and the analyses of the alternatives for fixing the problem; sometimes combined into one document, these analyses can cover overall costs and benefits and cost–effectiveness as well as particular effects on the environment; State, local, and Indian tribal governments; unfunded mandates; energy; paperwork; privacy; foreign commerce; and other matters. My experience has been with DOT agencies that are generally recognized as doing a very good job on these analyses or assessments. Significant rulemakings are subject to considerable scrutiny and challenge within the agency and during the review conducted by my prior office, and review by OIRA and other affected Federal agencies, including the Small Business Administration's (SBA) Office of the Chief Counsel for Advocacy. Proposed rules are then subject to public comment and any final rule undergoes the same level of scrutiny. Some agencies have large staffs of analysts and others may have to rely on outside contractors.

I believe the procedures for conducting these analyses are very good. OIRA has prepared an excellent document, a circular on "Regulatory Analysis," that is valuable for the economists and other analysts but also easily understood by other professional staff involved in the decision-making process. Some analysts make mistakes, some analyses are weak. This may result from a variety of factors, such as time constraints or inadequate resources. It may also result from senior officials making decisions first and then directing that analyses be prepared to justify the decision. This, however, is not a problem that can be addressed by additional analytical requirements. Oversight by the agencies, OIRA, and others, complemented by judicial review and Congressional oversight help. The appointment of good people and training for agency officials also can help. DOT provides the oversight and the training, and I know other agencies also do so, but sometimes you cannot get the ones who need it most to attend the training.

I have also found that the problems that are raised with the analyses at DOT are not generally over the quality of the analyses or whether they are even done. The issues are generally over such things as assumptions that are made when there is inadequate data available. When agencies realize they have limited data, they will generally note this in the proposed rule's preamble or the analysis and ask the public to provide what data they have, often by asking specific questions. Sometimes they will hold public meetings or take other steps to gather such

information from the public before they start a rulemaking. They must also be careful not to violate the provisions of the Paperwork Reduction Act in their attempts to gather data. Some requests are very successful. Others are not, perhaps because some parties with good data disagree with the need for any regulation and do not want to aid the agency's efforts.

When there are disputes about the data, good agencies will take additional steps to try and address the concerns raised. For example, when the National Highway Traffic Safety Administration (NHTSA) issued a proposal to establish an automatic occupant protection rule, it received comments from some that its estimate for the cost of an airbag was much too high and from others that it was too low. Although airbags were not available in motor vehicles at the time, there were some available for testing. NHTSA did a "tear down" study of one, priced each part in the marketplace, kept track of the time to rebuild the airbag, used standard industry wages for the time, added in a standard profit, and came up with a cost number. In its cost-benefit analysis, it also included a "sensitivity analysis" that looked at the effect of the low and high numbers suggested by commenters as well as the number from its "tear down" study on the cost-benefit ratio before a decision was made on what to do in the final rule.

I have found that many who have complaints about the analyses are generally not aware of the depth or sophistication of the analyses. Some concerns are legitimate, and I have seen changes made to address those concerns before final decisions were made. Furthermore, I have found that the economists are constantly trying to improve their techniques and data sources and will proudly note how much better today's analyses are than those made 35 years ago. What is needed in this area is for OIRA to continue to update its guidance, as necessary, and for the agencies to be provided the necessary resources for training and other activities to learn how to do a better job.

International Regulatory Cooperation

As the countries of the world become more economically inter-related, it becomes more important to ensure that we consider the effect of that on the costs and benefits of our regulations. We can decrease compliance costs and increase safety, for example, by having one, uniform requirement throughout the world for the placard placed on hazardous material packaging; anywhere in the world, emergency responders will know how to handle a problem. The U.S. regulatory agencies understand this and spend substantial time working with their counterparts around the world. We must cooperate with the other nations to ensure that our regulations do not require their citizens to violate their laws to comply with our rules and vice-versa. We must ensure that our citizens can participate in the rulemakings of other nations as easily as they can participate in ours. Most importantly, we must take advantage of opportunities to coordinate our regulatory activities so that we can lower the cost of implementing our respective rules while increasing their benefits. Many people have legitimate concerns about how much we can effectively accomplish; for example, we must ensure that each country will actively enforce the requirements on which we agree. If we can do this, the benefits can be significant.

A good example of this occurred a number of years ago at DOT. Congress mandated that the Department convene a negotiated rulemaking to develop model standards for parking permits for

people with disabilities. This was not an area that DOT regulated, but it was an area in which many Members of Congress received numerous complaints. People with permits from one State would often have problems using it in another State. Hence, the need for the statute and the effort of the Department to work out a consensus agreement to develop essentially one standard for the permits that could then be used everywhere in the U.S. My counterpart in the Canadian government called me to ask if they could participate in the negotiations; her point was quite simple: it would be even better and potentially less expensive for the permit holders if the standard was uniform throughout the U.S. and Canada. We agreed, and the resulting negotiations were successful. There was one potential obstacle that we were able to work around. A negotiating committee convened by the U.S. government with more than one non-government member requires compliance with the Federal Advisory Committee Act (FACA). Foreign government representatives are not permitted to be members of U.S. advisory committees. They can attend and speak at the meetings, but they cannot vote. The committee saw the advantages of developing a model that was acceptable to all members as well as Canada, and they were successful in accommodating Canada's concerns. In other situations, it may not be that easy. Congress should consider ways to address this issue, where appropriate, to permit more effective and efficient negotiations.

Retrospective Review of Existing Rules.

Across the Federal government, I have seen a clear recognition of the need to periodically review existing rules to see if they are working as expected. Despite this, many people do not believe that the agencies do a good job; some argue they do not do enough reviews or do not perform an objective analysis. Based on my DOT experience and an article I co-authored a couple decades ago on "Federal Agency Review of Existing Regulations," I see four major issues. First, I think many miss the extent to which a well-run agency is reviewing its existing rules on an informal but regular, often daily, ad hoc basis. Second, some agencies have formal programs to schedule and conduct reviews; they may successfully conduct all of them, but often cannot, because of competing priorities. For example, the President may require a review of all regulations over a relatively short period of time or Congress may mandate a lengthy set of new regulations that affects the resources the agency has for its formal review program. A presidentially-required review may achieve impressive results in a short period of time but usually does not permit the agency to conduct the extensive and thorough research and analysis some rules need. Third, for many decades, the agencies have lacked the resources needed to do all the reviews they wanted; recent budget cuts have compounded that problem. Finally, and closely related to the third point, many do not appreciate the time and depth of the analyses it takes to do a thorough review.

As I noted above with respect to petitions, there are a number of ways agencies obtain information about the need to revise or revoke a rule. Some of the information, such as an NTSB recommendation or numerous requests for an exemption may result in the identification of a problem that warrants thorough analysis. Some information may warrant immediate action to at least identify a quick fix until further analysis can be done. For example, within hours of an air carrier accident, senior FAA officials may meet to discuss whether there were shortcomings in existing rules that should otherwise have prevented the accident. After an accident where failure to deice the aircraft was a factor, FAA quickly held a public meeting to review existing

requirements; there was agreement that more was needed, and before the next winter FAA developed and issued a proposed and then a final rule. Some data, such as motor vehicle accident data, is received on a regular basis and compiled annually for public dissemination. This kind of data is used, among other things, for regular studies of the effectiveness of the rules an agency has issued. NHTSA has prepared excellent reports on the effectiveness of its rules based on this kind of data; an excellent example is one issued in January of this year, "Lives Saved by Vehicle Safety Technologies and Associated Federal Motor Vehicle Safety Standards, 1960 to 2012 – Passenger Cars and LTVs."

DOT has made a serious effort for over four decades to conduct regular, retrospective reviews – starting before executive orders or statutes imposed specific requirements. These reviews have not been limited to the informal processes noted above.

While I was part of the FAA regulatory team in the late 1970's, FAA developed an approach to allow its staff to review major parts of their regulations in an organized, coherent manner that provided significant opportunities for public participation. The program office responsible for conducting the reviews asked that my office assign one or sometimes two attorneys to each review; the assignment was a "highest priority" for the attorney -- i.e., he or she would always be available when needed. As an example of these reviews, one of the first was of FAA's aircraft certification regulations. It covered 11 of FAA's 73 "Parts" of the Code of Federal Regulations (CFR). A "Part" covers numerous sections. FAA started by asking for public suggestions for changes and received almost 2,000. They then used public hearings and other steps to discuss the suggestions and subsequently issued 8 NPRMs of approximately 200 pages each, proposing about 600 changes. They adopted approximately 500 in 9 final rules averaging about 200 pages. The process took 8 years to complete. It was a massive but very successful effort. However, it was only a fraction of the agency's existing rules. FAA started others. The problem was resources. Just before I left FAA, the program office asked me for another "first priority" attorney. I had no one to give them; all of my attorneys were assigned to existing reviews. The agency no longer does reviews like this.

As another example of the problems, the predecessor agency of the Pipeline and Hazardous Materials Safety Administration (PHMSA) had set up a special office in the 1970's to conduct regulatory reviews. By the time my co-author and I completed the study for our article noted above, agency staff advised us that, with an increasing workload resulting from statutory mandates, the office was primarily devoting its time to developing new rules. The "review" office had essentially disappeared.

DOT continues to take steps to address the need to review existing rules. In 1998, the Department established a 10-year plan and schedule for reviewing all of its rules, with some exceptions. In 2008 it published a new schedule for the next ten years. The plan and schedule are published as part of the semi-annual Regulatory Agenda and posted on the Department's regulatory website. The Department encourages public suggestions and participation in the process and provides very brief status updates in each Fall publication of the Agenda and on its website.

One important point to stress, because of some misunderstanding about how some agencies conduct reviews (e.g., some people question why agencies do not announce dates for reviews of final rules when they issue the final rule), is that many agencies perform reviews based on rules

as they appear in the CFR. Some final rules do create new programs, but many amend existing rules. Oftentimes, those amendments cut across many existing rules or programs. A final rule, for example, amending a definition may have significant effects on rules for medical approvals, licensing, operations, and equipment. It may make more sense for the agency to review each of those subject areas separately, including the effect of the definitional change on that subject when the subject is reviewed.

Other departments and agencies are making similar, conscientious efforts to review their rules. For example, the Department of Labor (DOL), is just completing a public participation phase of a review that includes the use of Idea Scale, a software program that allows the agency to have interactive public participation.

ACUS adopted a recommendation in December of 2014 on "Retrospective Review of Agency Rules" that provided many valuable suggestions for agencies and also accented the need for budgetary resources. Considering the limited resources available to agencies, I would not recommend any legislative changes imposing general, additional or different requirements. Instead, if Congress identifies particular agency problems, it could encourage or mandate specific changes for them.

Agency Innovation

One of the things I think illustrates the effort of many agencies to develop high quality rules – rules that are effective and reasonable – is the many voluntary, innovative steps they have taken to improve the process. I have mentioned some of these above, particularly with respect to public participation. There are a few others worth highlighting.

In the 1980's, the senior career staff of many rulemaking Departments and agencies created an informal group to ease communication about a variety of issues that they all confront. For example, they have discussed issues about the implementation of new rulemaking process requirements, they have combined their expert resources to offer employee training, they have shared information on the values they use for "statistical lives" in cost-benefit analyses and the methodology for developing those values, and they have shared information about important court decisions or pending legislation. Based on the collegial relationships we developed, we also made it much easier to work together. For example, when DOT and the Department of Interior (DOI) were having problems resolving how to handle issues concerning aircraft-bird strikes, my contact at DOI and I talked about it and set up a meeting among the agencies' staffs that helped resolve the matter. DOT was the first agency to use the negotiated rulemaking process, generally a voluntary process that, if set up properly, can lead to very effective rules. EPA followed closely behind us, and we quickly started sharing best practices. For example, EPA obtained good results by providing a one-day training course on the basics of effective negotiation. We were very interested in the idea, so they came to our next negotiation and provided the training so we could observe and evaluate it. When DOT started to work with the Cornell University e-Rulemaking Initiative (CeRI) to examine whether the use of blogs could help improve public participation and the quality of comments, we invited other agencies who were interested in the project to join us in the initial discussions with Cornell so that we could try to design a project that would result in a report that was valuable to other agencies. When DOT

created software to create a Rulemaking Management System (RMS) that tracked the status of all rulemaking actions in the Department and created the ability to generate a range of reports, allowed electronic submission and circulation of documents for review by others in the Department, and created an electronic filing system, we shared what we had done with other departments and agencies and provided the software to those who were interested.

A number of agencies have voluntarily created regulatory websites that provide the public with a significant amount of information about the substance of the rulemakings they are working on as well as the process for developing the rules. DOT's site -- http://www.dot.gov/regulations/ -- for example, provides information on the rulemaking responsibilities of the operating administrations and OST as well as contact information for people who can provide more information; a description of all the process requirements applicable to DOT rulemakings, with links to the requirements; a description of how the rulemaking process works, including a section on how to prepare effective comments, particularly written to help small entities and individual commenters; a description of the economic values used by DOT in preparing cost-benefit analyses; information about DOT guidance documents and requirements governing DOT's use of them; reports on the status of DOT's significant rulemakings; reports on the effects of DOT rulemakings, designed to help those interested in particular issues, such as rules that may have effect on small entities, or European Union nations, or paperwork burdens; reports on regulatory enforcement and compliance data; information that is intended to help small entities and state, local, and tribal governments effectively participate in DOT's rulemaking process and implement any final rules; information on DOT's retrospective review plan, a description of the process, and a list of the reviews; information on DOT's efforts with respect to plain language drafting; and information about DOT's blog project with CeRI. EPA and the Federal Communication Commission (FCC) are examples of two other agencies with websites they created to help the public. It takes a considerable amount of time to create the sites and keep them up to date.

The People

I would be remiss if I did not mention the people I worked with in and out of the government who spend a great amount of time to try to make the process more effective and efficient. The many career people I worked with in DOT as well as in many other agencies were very bright, capable people who worked very hard to develop solutions to the problems they faced. They enjoyed and were very proud of their work. I worked through six Presidential Administrations and many more changes in DOT political leadership, and there, too, I generally saw people who understood their responsibilities, personally participated in many of the "debates" among their staffs, and were conscientious and objective in their decision making.

Many senior political and career officials throughout the government and private citizens devote considerable time to participation in the work of ACUS and other organizations such as the American, D.C., and Federal Bar Associations, as well as associations for economists and other professional experts involved in rulemaking issues. They use their expertise and experience to help develop recommendations to improve the rulemaking process or to make presentations in training programs or courses. I know I personally benefited from my exposure to their expertise and experience.

These people all help make the process work well and continually get better.

I believe that Federal regulations can and do effectively address problems that the marketplace cannot fix. I have personally dealt with people around the world who envy our system and want to learn from our experience. I also recognize that the process can be used ineffectively, even by people with the best intentions. Those who are proud of their achievements also know that there is always room for improvement, and they work hard at that. We just need to be careful how we seek those improvements.

I want to thank you for the opportunity to speak with you about these important issues. I look forward to any comments or questions you may have for me.

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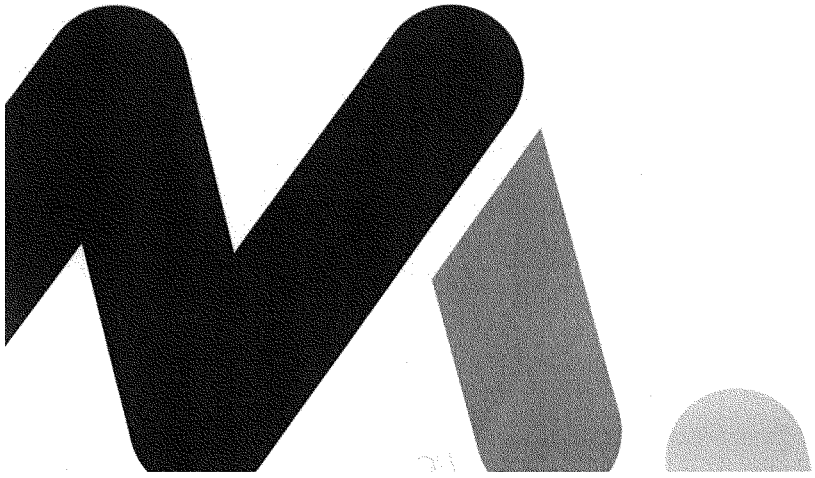
Testimony

of Drew Greenblatt
President and Owner
Marlin Steel Wire Products, LLC
on behalf of the National Association of Manufacturers

before the Subcommittee on Regulatory Affairs and Federal Management
of the Committee on Homeland Security and Governmental Affairs
U.S. Senate

on Examining Federal Rulemaking Challenges and Areas of
Improvement within the Existing Regulatory Process

March 19, 2015



COMMENTS OF THE NATIONAL ASSOCIATION OF MANUFACTURERS
BEFORE THE

SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
U.S. SENATE

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Chairman Lankford, Ranking Member Heitkamp and members of the Subcommittee on Regulatory Affairs and Federal Management, thank you for the opportunity to testify about federal regulations and how the rulemaking process relates to my business.

My name is Drew Greenblatt, and I am president and owner of Marlin Steel Wire Products, LLC, based in Baltimore, Maryland. Marlin Steel Wire is a leading manufacturer of custom wire baskets, wire forms and precision sheet metal fabrication assemblies—all produced entirely in the United States. The customers for our materials-handling solutions come from pharmaceutical, medical, industrial, aerospace and automotive industries all over the world. We export to 38 countries. Twenty percent of Marlin Steel Wire's employees are mechanical engineers. Like so many other manufacturers in the United States that compete in a global economy, Marlin Steel Wire succeeds through innovation, investment and the hard work of our dedicated employees. The innovative ideas from the engineering team propel success at Marlin Steel Wire. When I bought the company in 1998, we had about $800,000 in sales with 18 workers. Today, Marlin Steel Wire employs 30 people and has over $5.5 million in sales. We continue to succeed despite government policies and regulations that make it harder for us to grow, export and create jobs.

I am pleased to testify on behalf of the National Association of Manufacturers (NAM). I serve as a member of the NAM Board of Directors, a member of its Executive Committee and as the vice chairman of the Small and Medium Manufacturers Group. The NAM is the nation's largest industrial trade association and voice for more than 12 million men and women who make things in America. The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs. Manufacturers very much appreciate your interest in and support of the manufacturing economy.

I. State of Manufacturing

In the most recent data, manufacturers in the United States contributed $2.09 trillion to the economy (or 12 percent of GDP). For every $1.00 spent in manufacturing, another $1.37 is added to the economy, the highest multiplier effect of any economic sector. Importantly, manufacturing supports an estimated 17.6 million jobs in the United States—about one in six private-sector jobs. In 2013, the average manufacturing worker in the United States earned $77,506 annually, including pay and benefits—24 percent more than the average worker.

Manufacturing in the United States lost 2.3 million jobs in the last recession. Since the end of 2009, we have gained back 826,000 manufacturing jobs. To maintain manufacturing momentum and encourage hiring, the United States needs not only improved economic conditions but also government policies more attuned to the realities of global competition. Because of the significant challenges facing manufacturing in the United States, the NAM advocates federal policies that will ensure a robust and dynamic manufacturing sector that is ready to meet the needs of our economy and workers.

II. Regulatory Environment

The conversation about regulation too quickly becomes partisan. Democrats and Republicans have much in common on their views on regulation, but the rhetoric often fails to match that consensus. Similarly, the business community is often misunderstood about their views on regulation. Manufacturers believe regulation is critical to the protection of worker safety, public health and our environment. We believe some critical objectives of government can only be achieved through regulation, but that does not mean our regulatory system is not in need of considerable improvement and reform. New regulations are too often poorly designed and analyzed and ineffectively achieve their benefits. They are often unnecessarily complex and duplicative of other mandates. Their critical inputs—scientific and other technical data—are sometimes unreliable and fail to account for significant uncertainties. Regulations are allowed to accumulate with no real incentives to evaluate existing requirements and improve effectiveness. In addition, regulations many times are one-size-fits-all without the needed sensitivity to their impact on small businesses. We can do better.

Unnecessary regulatory burdens weigh heavily on the minds of manufacturers. In the NAM/*IndustryWeek* Survey of Manufacturers released on March 8, 69.1 percent of respondents cited an unfavorable business climate due to government policies, including regulations and taxes, as a primary challenge facing businesses—up from 62.2 percent in March 2012. This percentage of respondents was principally equivalent to those citing rising health care and insurance costs (69.4 percent) as one of their primary business challenges.

The federal government's own data reflects these challenges. According to the annual information collection budget, the paperwork burden imposed by federal agencies excluding the Department of Treasury[1] increased from 1.509 billion hours in fiscal year (FY) 2003 to 2.446 billion hours in FY 2013, an increase of 62.1 percent. To put this number in perspective, federal agencies—not including the Department of Treasury—imposed more than 279,000 years' worth of paperwork burden on the American public in one year. In the past 10 years, federal agencies (excluding the Department of Treasury) added almost 82 million hours in paperwork burden through their own discretion. This is on top of the 1.121 billion hours that non-Treasury agencies estimate was added because of new statutory requirements.

Manufacturers appreciate the need for recordkeeping and paperwork essential to ensuring compliance with important regulatory requirements, but government-imposed regulatory burdens continue to increase despite advancements in technology and both statutory and executive branch directives that federal agencies minimize unnecessary burdens.

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[1] The Department of Treasury's burden has increased from 6.590 billion hours in FY 2003 to 7.007 billion hours (or 6.3 percent) in FY 2013. *See* Office of Information and Regulatory Affairs (OIRA), "Information Collection Budget of the United States Government 2014" (2014), https://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb_2014.pdf.

Government policies should support the global competitiveness of manufacturers and other businesses in the United States, not impose increasing burdens. Manufacturers in the United States confront challenges that our global competitors do not have.

The issue of an increasing federal regulatory burden is not unique to a particular presidency or political party. The non-Treasury paperwork burden increased 60 percent[2] during the eight years that President George W. Bush was in office. The NAM has welcomed efforts by President Barrack Obama and his Administration to reduce regulatory burdens. The President has signed executive orders, and the Office of Management and Budget has issued memoranda on the principles of sound rulemaking, considering the cumulative effects of regulations, strengthening the retrospective review process and promoting international regulatory cooperation. Unfortunately, these initiatives have yet to provide real cost reductions for manufacturers or other regulated entities.

These directives are well-intentioned, but any benefits realized by these efforts have been subsumed by the unnecessarily burdensome regulations that federal agencies have been and are promulgating. Based on data from the Government Accountability Office, 484 major new regulations—defined as having an annual effect on the economy of at least $100 million—were issued over the previous six years. These regulations include significant burdens imposed on manufacturers in the United States and represent real compliance costs that affect our ability to expand and hire workers.

III. Regulatory Challenges Facing Manufacturers in the United States

Because manufacturing is such a dynamic process, involving the transformation of raw materials into finished products, it involves more environmental and safety issues than other businesses. The burden of environmental regulation falls disproportionately on manufacturers, and it is heaviest on small manufacturers because their compliance costs often are not affected by economies of scale. In September 2014, the NAM issued a report[3] that shows the economic impact of federal regulations. The study found that manufacturers in 2012 spent on average $19,464 per employee to comply with regulations, nearly double the amount per employee for all U.S. businesses. Small manufacturers—those with fewer than 50 employees like Marlin Steel Wire—incur regulatory costs of $34,671 per employee per year. This is more than triple that of the average U.S. business.

In October 2013, the Manufacturers Alliance for Productivity and Innovation (MAPI) released a study that highlighted the regulatory burdens placed on manufacturers. The study found that since 1981, the federal government has issued an average of just under 1.5 manufacturing-related regulations per week for more than 30 years. Individually and cumulatively, these regulations include significant burdens imposed on manufacturers in the United States and represent real compliance costs that affect our ability to expand and hire workers.

As the owner of a small manufacturing company, I know very well the importance of allocating scarce resources effectively to achieve continued success, which includes increased pay and benefits for my employees. Every dollar that my company spends on complying with an

[2] Government-wide paperwork burden, excluding the Department of Treasury, was 1.205 billion hours in FY 2000 and 1.929 billion hours in FY 2008. *See* OIRA, "Information Collection Budget of the United States Government 2009" (2009), https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/icb_2009.pdf.

[3] NAM, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* (September 2014), http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf.

unnecessary and ineffective regulatory requirement is one less dollar that can be allocated toward new equipment or my employees' health care or tuition benefits. Government-imposed inefficiencies are more than numbers in an annual report. They are manifested in real costs borne by the men and women who work hard to provide for their families. This is something about which I am passionate.

I can attest that poorly designed regulations and duplicative or unnecessary paperwork requirements create real costs that affect manufacturers' bottom lines. In 2010, Marlin Steel Wire received a letter from the Department of Treasury imposing a fine of $15,000 for inadvertently omitting a third signature on a 20-page form when we created a 401(k) plan for our employees. This simple oversight led to several weeks of unnecessary anxiety and communications unrelated to operating a business. Though we paid a smaller penalty for the missed signature, valuable resources were diverted away from our business activities simply because of a missed signature on a form.

Marlin Steel Wire's success as a manufacturer in the United States relies on our ability to reach the 95 percent of consumers living outside our borders. But unnecessary, burdensome paperwork imposed on us by the federal government harms our productivity. For example, we spend three minutes filling out a form when we ship products to Canada or Mexico. But if we ship products to a non-NAFTA country, we spend 20 minutes filling out forms. The longer form does not seem necessary and only harms our productivity relative to foreign competitors looking to serve the same markets.

My company receives an exceedingly high number of surveys from the Department of Commerce. Failure to comply with an agency's request for information requested can result in stiff penalties, so I'm forced to reallocate resources and staff time, on top of paying third parties for unexpected services, to comply with agency demands. It seems that regulators should more thoughtfully consider their requests for information and coordinate both within their own agencies and among others. Moreover, the estimates provided by an agency for how long forms will take to complete are grossly underestimated.

An example of the indirect costs of regulation that affect my business is compliance with the Securities and Exchange Commission's (SEC) rule on conflict minerals. Although the rule only applies to public companies, I am now faced with complying with a different certification form for every one of my suppliers to prove that no part of my products are made or derived from the regulated minerals coming from the Democratic Republic of the Congo or an adjoining country. This is a costly obligation not directly imposed on me by government, but is a cost imposed because of a government regulation. These indirect effects of rules can be every bit as costly as direct effects and should be considered when an agency is complying with the Regulatory Flexibility Act. In this rule, the SEC lawfully ignored those indirect effects, and the Senate should follow the lead of the House of Representatives, which recently passed legislation to address this issue.

These examples highlight the challenges of enforcement and compliance with current regulatory requirements. Their associated costs are an extra weight holding manufacturers down as we try to move forward, find new markets, grow our businesses and create new jobs. There is a failure within the federal government to truly understand the impact of regulatory requirements, such as paperwork and recordkeeping, on the public. A small manufacturer or any regulated entity in the United States should not have to be on constant guard for the next burdensome and poorly designed requirement issued by an agency. Our regulatory system should be designed to promote coordination within and between agencies, and regulations

should be designed to most effectively meet regulatory objectives to minimize unnecessary burdens.

Manufacturers recognize that regulations are necessary to protect people's health and safety, but we need a regulatory system that effectively meets its objectives while supporting innovation and economic growth. In recent years, the scope and complexity of federal rules have made it harder to do business and compete in an ever-changing global economy. As a result, manufacturers are sensitive to regulatory measures that rely on inadequate benefit and cost justifications.

Agencies are failing in their responsibility to conduct analysis that would better assist them in understanding the true benefits and costs of their rules. Despite existing statutory requirements and clear directives from the President to improve the quality of regulations, manufacturers face an increasingly inefficient and complex myriad of regulations that place unnecessary costs on the public.

IV. Reducing Regulatory Impediments

Manufacturing in America is making a comeback, but it could be much stronger if federal policies did not impede growth. If we are to succeed in creating a more competitive economy, we must reform our regulatory system so that manufacturers can innovate and make better products instead of spending hours and resources complying with inefficient, duplicative and unnecessary regulations. Manufacturers are committed to commonsense regulatory reforms that protect the environment and public health and safety as well as prioritize economic growth and job creation. The time is now for members of both parties to work together to find ways to improve the regulatory system.

Manufacturers support reform proposals that would fundamentally change the regulatory process with the goal of improving the quality of rules that agencies issue. Leaders in Washington must view regulatory reform as more than just a rule-by-rule process but instead as a system-by-system and objective-by-objective review. The NAM recommends a number of reforms outlined below that would improve the system through which modern rulemaking is conducted.

a. Streamline Regulations through Sunsets and Retrospective Review

Our regulatory system is broken, unnecessarily complex and inefficient, and the public supports efforts to streamline and simplify regulations by removing outdated and duplicative rules. Through a thoughtful examination of existing regulations, we can improve the effectiveness of both existing and future regulations. Importantly, retrospective reviews could provide agencies an opportunity to analyze, revise and improve techniques and models used for predicting more accurate benefits and costs estimates for future regulations. As Michael Greenstone, former chief economist at the Council of Economic Advisers under President Obama, wrote in 2009, "The single greatest problem with the current system is that most regulations are subject to a cost-benefit analysis only in advance of their implementation. That is the point when the least is known, and any analysis must rest on many unverifiable and potentially controversial assumptions."[4] Retrospective review of existing regulations should

[4] Michael Greenstone, "Toward a Culture of Persistent Regulatory Experimentation and Evaluation," in David Moss and John Cisternino, eds., *New Perspectives on Regulation*, The Tobin Project, 2009, p. 113, http://tobinproject.org/sites/tobinproject.org/files/assets/New_Perspectives_Ch5_Greenstone.pdf.

include a careful and thoughtful analysis of regulatory requirements and their necessity as well as an estimation of their value to intended outcomes.

For an agency to truly understand the effectiveness of a regulation, it must define the problem that the rule seeks to modify and establish a method for measuring its effectiveness after implementation. In manufacturing, best practices include regular reprioritizations and organized abandonment of less useful methods, procedures and practices. The same mentality should apply to regulating agencies: the retrospective review process should be the beginning of a bottom-up analysis of how agencies use their regulations to accomplish their objectives. Agencies should look to the private sector and the concept of "lean manufacturing" as a model for how to improve our regulatory system. Many manufacturers have transformed their operations by adopting a principle called "lean thinking," where they identify everything in the organization that consumes resources but adds no value to the customer. They then look for a way to eliminate efforts that create no value.

In the government setting, agencies might identify anything that is not absolutely necessary to achieve the regulatory outcome and eliminate it. When considering a new regulation or reviewing existing requirements, agencies must first define the problem, which should include early participation by all stakeholders. They must engage in a bottom-up interagency analysis of how agencies use regulations, guidance and paperwork requirements to accomplish objectives. It is vital to identify all inefficiencies and determine how to eliminate efforts and processes that create no value or assist in meeting objectives. Finally, agencies must institutionalize these best practices, including regular reprioritizations and organized abandonment of less useful methods, procedures and practices.

The Administration strongly promotes the benefits of conducting retrospective reviews. Executive Order 13563 directs agencies to conduct "retrospective analysis of rules that may be outmoded, ineffective, insufficient or excessively burdensome, and to modify, streamline, expand or repeal them in accordance with what has been learned." Retrospective review of regulations is not a new concept, and there have been similar initiatives over the past 40 years. In 2005, the Office of Management and Budget (OMB), through the Office of Information and Regulatory Affairs (OIRA), issued a report, titled *Regulatory Reform of the U.S. Manufacturing Sector*. That initiative identified 76 specific regulations that federal agencies and OMB determined were in need of reform. In fact, the NAM submitted 26 of the regulations characterized as most in need of reform. Unfortunately, like previous reform initiatives, the 2005 initiative failed to live up to expectations, and despite efforts by federal agencies to cooperate with stakeholders, the promise of a significant burden reduction through the review of existing regulations never materialized.

There is significant bipartisan interest in implementing federal policies that will tackle the problem of regulations that place unnecessary costs on manufacturers and businesses yet are not benefitting society. On March 11, Sen. Angus King (I-ME) introduced the Regulatory Improvement Act of 2015 (S. 708) with Sens. Roy Blunt (R-MO), Jeanne Shaheen (D-NH) and Roger Wicker (R-MS). This bipartisan legislation would establish a bicameral and bipartisan Regulatory Improvement Commission to review outdated regulations and submit regulatory changes to Congress for an up-or-down vote. In the 113th Congress, Sen. Amy Klobuchar (D-MN) introduced the Strengthening Congressional Oversight of Regulatory Actions for Efficiency Act (SCORE Act, S. 1472), which would require a new division within the Congressional Budget Office (CBO) to analyze economically significant regulations that have been in effect for five years to determine if they are meeting the stated goals they were intended to provide.

To truly build a culture of continuous improvement and thoughtful retrospective review of regulations, retrospective reviews must be institutionalized and made law. One of the best incentives for high-quality retrospective reviews of existing regulations is to sunset rules automatically that are not chosen affirmatively to be continued. The NAM has supported past legislation introduced in the past two Congresses by Rep. Randy Hultgren (R-IL), the Regulatory Sunset and Review Act (H.R. 309, 113th Congress), that would implement a mandatory retrospective review of regulations to remove conflicting, outdated and often ineffective regulations that build up over time. If an outdated rule has no defender or continued need for existence or is shown to have decreased in effectiveness over time, it should be sunset.

Adopting lean thinking into the review of existing regulations could produce more robust and significant reductions in regulatory burdens while maximizing the benefits associated with protecting health, safety and the environment. If agencies were conducting this kind of review, we would see requests to Congress to change statutes to allow for greater flexibility in a number of regulatory programs. Rep. Hultgren's bill includes a provision directing agencies to report to Congress on needed legislative changes that would assist them as they implement regulatory changes as a result of their reviews. The necessity of legislative changes should be an opportunity, not a roadblock, to any proposal.

The power of inertia and the status quo is very strong. Without an imperative to review old regulations, it will not be done, and we will end up with the same accumulation of conflicting, outdated and often ineffective regulations that build up over time. These types of systems need to be put in place throughout the government to ensure regulatory programs are thoughtful, intentional and meet the needs of our changing economy.

b. Strengthen and Codify Sound Regulatory Analysis

The complexity of rulemaking and its reliance on highly technical scientific information has only increased since the passing of the Administrative Procedure Act (APA) in 1946. Our administrative process has not kept up with those changes, and agency accountability is lacking without meaningful judicial review. Moreover, the process by which the government relies on complex, scientific information as the basis for rules should be improved and subject to judicial review. Efforts to encourage peer review of significant data and to create consistent standards for agency risk assessment should be part of that process. The NAM supports legislative reforms to the APA to incorporate the principles and procedures of Executive Order 12866 into the DNA of how every rule is developed. Manufacturers also support legislation that would improve the quality of information agencies use to support their rulemakings. President Obama reaffirmed the principles of sound rulemaking when he issued Executive Order 13563, stating,

> Our regulatory system must protect public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. . . . It must measure, and seek to improve, the actual results of regulatory requirements.

Manufacturers and the general public agree with these principles and believe the regulatory system can be improved in a way that protects health and safety without compromising economic growth. Agencies should, among other things, use the best available

science, better calculate the benefits and costs of their rules, improve public participation and transparency, use the least burdensome tools for achieving regulatory ends and specify performance objectives rather than a particular method of compliance to improve the effectiveness of regulatory measures. Members of the subcommittee from both sides of the aisle have expressed support for reform proposals that include many important regulatory requirements designed to improve the quality of an agency's analysis and the effectiveness and efficiency of its rules. Last Congress, Sen. Rob Portman (R-OH) introduced the bipartisan Regulatory Accountability Act (S. 1029), comprehensive reform legislation that would instill sound rulemaking principles into the fabric of our regulatory system. Agencies would be statutorily required to conduct cost-benefit analysis and recognize the true regulatory impacts of their rules. The House passed the Regulatory Accountability Act in January, and the NAM supports Senate consideration of this important reform package.

Manufacturers and other businesses are often asked which regulation is the most burdensome. It is a difficult question to answer because the cumulative costs of federal, state and local regulations are extremely complex. As with the multitude of surveys that agencies require Marlin Steel Wire to complete, agencies must also better consider the cumulative effects of their regulations and requirements. Important reform measures, like Sen. Portman's Regulatory Accountability Act, would require agencies to consider the cumulative costs of regulatory requirements. Executive Order 13563 and OMB guidance for agencies both articulate this principle. Moreover, President Obama also issued Executive Order 13610, which directs agencies to consider "the cumulative effects of their own regulations, including cumulative burdens . . . and give priority to reforms that would make significant progress in reducing those burdens while protecting public health, welfare, safety and our environment." Agency adherence to each of these regulatory principles is vital if we are to implement fundamental change to our regulatory system that improves the effectiveness of rules in protecting health, safety and the environment while minimizing the unnecessary burdens imposed on regulated entities.

c. Improve Congressional Review and Analysis of Regulations

Congress is at the heart of the regulatory process and produces the authority for the agencies to issue rules, so it is also responsible, along with the executive branch, for the current state of our regulatory system. While Congress does consider some of its mandates' impacts on the private sector through regulatory authority it grants in law, it has less institutional capability for analysis of those mandates than the executive branch. Congress does not have a group of analysts who develop their own cost estimates of proposed or final regulations. Over the past two decades, members of Congress have proposed to create a congressional office of regulatory analysis. As the Congressional Budget Office parallels the Office of Management and Budget, so too should Congress have a parallel to OIRA.

This institutional change to the regulatory system could encourage more thoughtful analysis of the regulatory authority Congress grants in statutes, provide Congress with better tools in analyzing agency regulations and allow Congress to engage in more holistic reviews of the overlapping and duplicative statutory mandates that have accumulated over the years. The NAM supports legislative proposals like Sen. Klobuchar's SCORE Act, which would provide Congress with an office to analyze the prospective impact of economically significant rules in addition to conducting retrospective reviews. Not only would this office give lawmakers better information about the potential impacts of a proposed regulation, but it would also provide agencies with analysis conducted by an objective third party. This is an important rethinking of the institutional design of our regulatory system and could lead to regulations that more effectively meet policy objectives while reducing unnecessary burdens.

d. Support Centralized Review of Agencies' Regulatory Activities

President Clinton's 1993 Executive Order 12866 defines OIRA's regulatory review responsibilities. OIRA reviews significant rules issued by executive branch agencies and the analyses used to support those rules at both their draft and final stages. The office applies a critical screen to the contents of regulation, agencies' analytical rigor, legal requirements affecting the proposal and the President's priorities and philosophy. Nowhere else in the government does this take place. Single-mission agencies are frequently effective in accomplishing their objectives. This intense focus on a relatively narrow set of policies can weaken their peripheral vision, however, including their assessment of duplication between agencies, cumulative impacts of similar rules on the same sector of the economy or other broader considerations. OIRA is the only agency that brings to bear a government- and economy-wide perspective. For that reason, OIRA is a critical institution in our regulatory process for conducting a centralized review of the agencies' regulatory activities, facilitating interagency review, resolving conflicts and eliminating unnecessary duplication.

A key responsibility of OIRA is to ensure that regulating agencies are meeting the requirements of Executive Order 12866 for a significant regulatory action. The executive order states, "Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Importantly, OIRA facilitates public participation in the regulatory process and helps ensure that agencies' analyses, to the extent possible, are accurate. Without quality analysis, it is difficult to ensure that regulations are meeting health, safety and environmental objectives "while promoting economic growth, innovation, competitiveness and job creation," as stated in Executive Order 13563.

Despite its critical function, even as the size and scope of the government has increased, OIRA has shrunk. As OIRA's staff was reduced from a full-time equivalent ceiling of 90 to fewer than 40 employees today, the staff dedicated to writing, administering and enforcing regulations has increased from 146,000 in 1980 to 290,690 in 2013. OIRA's budget has been reduced by more than 60 percent, or nearly $11 million in real 2005 dollars, while the agencies' budgets have increased from $15.2 billion to more than $50 billion in real 2005 dollars. To ensure that OIRA can fulfill its current mission, additional staff and resources are necessary. Much has been made about the length of OIRA reviews, but additional resources would allow OIRA analysts to do their jobs more quickly.

By expanding OIRA's ability to provide objective analysis, to conduct thoughtful regulatory review and to work with regulating agencies, federal regulations will meet health, safety and environmental objectives more effectively at a much lower cost to businesses. A modest investment in this institution will pay back significant returns to the entire economy.

e. Hold Independent Regulatory Agencies Accountable

The President does not exercise similar authority over independent regulatory agencies—such as the National Labor Relations Board, the Securities and Exchange Commission and the Consumer Product Safety Commission—as he does over other agencies within the executive branch. They are not required to comply with the same regulatory principles as executive branch agencies and often fail to conduct any analysis to determine expected

benefits and costs. Therefore, the rules issued by these agencies can impose significant costs on manufacturers.

The President's bipartisan Council on Jobs and Competitiveness made recommendations in its interim and final reports to encourage Congress to require independent regulatory agencies to conduct cost-benefit analyses of their significant rules and subject their analysis to third-party review through OIRA or some other office. Congress should confirm the President's authority over these agencies. If there is consensus that this process makes executive branch rules better, why would we not want to similarly improve the rules issued by independent regulatory agencies? Consistency across the government in regulatory procedures and analysis would only improve certainty and transparency of the process.

Last Congress, Sens. Rob Portman (R-OH) and Mark Warner (D-VA) introduced the bipartisan Independent Agency Regulatory Analysis Act (S. 1173), which would authorize the President to require independent regulatory agencies to conduct cost-benefit analysis for significant rules and submit them to OIRA for third-party review. Comprehensive regulatory reform measures, such as the Regulatory Accountability Act, would codify analytical requirements and sound regulatory processes for independent regulatory agencies. These agencies often dismiss sound regulatory analysis as a hindrance to their abilities to regulate. However, the case for the inclusion of independent regulatory agencies in a centralized review of regulations is clear, and Congress should act to make it certain.

f. Increase Sensitivity to Small Business

The Regulatory Flexibility Act of 1980 (RFA) requires agencies to be sensitive to the needs of small businesses when drafting regulations. It has a number of procedural requirements, including that agencies consider less costly alternatives for small businesses and prepare a regulatory flexibility analysis when proposed and final rules are issued. In 1996, Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA), which requires the EPA and OSHA to empanel a group of small business representatives to help consider a rule before it is proposed. In recognizing the importance of the SBREFA panel process, the 111th Congress expanded this requirement to include the new Consumer Financial Protection Bureau when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Lawmakers have universally supported the RFA's provisions, but Congress needs to strengthen the law and close loopholes that agencies use to avoid its requirements. Unfortunately, agencies are able to avoid many important RFA requirements by simply asserting that a rule will not impact small businesses significantly. Only a small number of regulations require a regulatory flexibility analysis because "indirect effects" cannot be considered. As outlined above, the SEC's conflict minerals rule did not have to review its indirect effect on small business suppliers. In addition, despite the success of the small business panel process, it only applies to three agencies. The RFA's requirements are especially important to improving the quality of regulations and have saved billions of dollars in regulatory costs for small businesses. In January 2015, the Small Business Administration's (SBA) Office of Advocacy—an independent office helping federal agencies implement the RFA's provisions—issued its annual report indicating that it helped save small businesses more than $4.8 billion in FY 2014. The RFA has yielded $90 billion in savings for small businesses over the past 10 years. Imagine the positive impact on regulations if agencies were not able to avoid the RFA's requirements so easily.

The House has already passed legislation, the Small Business Regulatory Flexibility Improvements Act of 2015 (H.R. 527), which would close many of the loopholes that agencies exploit to avoid the RFA's requirements. The NAM supports H.R. 527 and urges Senate consideration. Agency adherence to the RFA's requirements is important if regulations are to be designed in a way that protects the public, workers and the environment without placing unnecessary burdens on small businesses. Through careful analysis and an understanding of both intended and unintended impacts on stakeholders, agencies can improve their rules for small entities, leading to improved regulations for everyone.

g. Enhance the Abilities of Institutions to Improve the Quality of Regulations

As discussed above, the SBA's Office of Advocacy plays an important role in ensuring that agencies thoughtfully consider small entities when promulgating regulations. When Congress created the office in 1976, it recognized the need for an independent body within the federal government to advocate for those regulated entities most disproportionately impacted by federal rules. The office helps agencies write better, smarter and more effective regulations. We urge Congress to support this office and provide it with the resources it needs to carry out its important work.

The Office of Industry Analysis is within the Office of Manufacturing and Services at the Department of Commerce's International Trade Administration and was created to assess the cost competitiveness of American industry and the impact of proposed regulations on economic growth and job creation. The office was created in response to a 2003 executive branch initiative to improve the global competitiveness of the manufacturing sector in the United States and was included as a recommendation in a January 2004 report, titled *Manufacturing in America: A Comprehensive Strategy to Address the Challenges to U.S. Manufacturers.* The report states the office should develop "the analytical tools and expertise . . . to assess the impact of proposed rules and regulations on economic growth and job creation before they are put into effect." This office has developed the analytical tools necessary to perform those functions and to provide the Department of Commerce with a strong, thoughtful voice within the interagency review of proposed regulations. The department must speak for manufacturing when rules are being considered. Unfortunately, the office no longer engages in the type of regulatory analysis for which it was established. The cost of regulatory compliance is an important factor influencing our competitive profile within the global economy. The Office of Industry Analysis was created to reduce the unnecessary regulatory burdens placed on domestic firms, and its role as a provider of objective, third-party analysis to regulators should be restored and strengthened.

h. Improve and Streamline the Federal Permitting Process

An often overlooked piece of regulatory reform is the regulatory process we impose at the federal, state and local levels on permitting for infrastructure projects. Our current system is a product of unintentional design with a myriad of overlapping and duplicative processes that lead to extensive delays and higher costs for both private and government-funded projects. The result is structural decay, lost jobs and an inefficient use of resources. Infrastructure is not keeping up with the demands of a growing economy, and manufacturers in the United States are placed at a competitive disadvantage when the infrastructure is not there or is in decline.

This is another opportunity for government to learn from the private sector and use lean manufacturing thinking to eliminate waste in the process. As we seek to invest scarce federal resources in our nation's infrastructure to support our economy, federal agencies should not

overlook the need to improve infrastructure project delivery by eliminating redundant activities, such as duplicative federal reviews and approvals that states are capable of performing.

In January, Sens. Portman and Claire McCaskill (D-MO) introduced the Federal Permitting Improvement Act (S. 280). The bill would greatly improve the permitting process by removing many bureaucratic delays that slow important construction projects. Importantly, S. 280 would establish deadlines and allow contiguous states impacted by an infrastructure project to coordinate and facilitate authorizations. Manufacturers rely on our nation's vast interconnected infrastructure to support and supply every sector of the economy, and we appreciate the leadership of Sens. Portman and McCaskill on this issue. As discussed throughout this testimony, we must do better than the status quo to maintain our global competitiveness. Permitting reform will ensure that infrastructure performs at a pace to keep up with the needs of business.

V. Conclusion

Chairman Lankford, Ranking Member Heitkamp and members of the subcommittee, thank you for your attention to these issues and for holding this hearing. We can reform the regulatory system and improve analysis while enhancing our ability to protect health, safety and the environment. Manufacturers are committed to working toward policies that will restore common sense to our broken and inflexible regulatory system. The best way to meet regulatory objectives while ensuring continued economic growth and employment is by enacting a comprehensive and consistent set of policies that improve regulatory analysis, enhance the quality and transparency of scientific and technical inputs, eliminate waste and duplication and support the institutions and policies that work. These policies must be applied to all agencies, and we must ensure that regulators are sensitive to the needs of small business.

Statement of Pamela Gilbert on

"Examining Federal Rulemaking Challenges and Areas of Improvement

Within the Existing Regulatory Process"

Before the

Subcommittee on Regulatory Affairs and Federal Management of the

Committee on Homeland Security and Governmental Affairs

U.S. Senate

March 19, 2015

Chairman Lankford, Ranking Member Heitkamp, members of the Subcommittee, thank you for the opportunity to testify on the issue of improving the efficiency and effectiveness of the federal regulatory process. My name is Pamela Gilbert and I am a partner in the law firm of Cuneo Gilbert & LaDuca. I served as executive director of the U.S. Consumer Product Safety Commission from 1996 through May, 2001. I am testifying on my own behalf and all the opinions expressed are my own.

When we discuss effective regulation, it is crucial that we remember what happens when the regulatory system breaks down. The public, the news media, and public officials from both parties and every geographic region rise up, and ask how it could have happened and commit to changes so that the same thing never happens again.

We saw this last year when the National Highway Traffic Safety Administration oversaw recalls involving more than 60 million vehicles. The record-breaking number of recalls began when it was discovered that General Motors waited for over a decade to recall cars with a deadly ignition switch defect that has now been linked to scores of deaths and serious injuries. I sat in hearings held by the Senate Commerce Committee in which Senator after Senator asked NHTSA's then-acting administrator "what went wrong?"

In 2007, the U.S. experienced a different "year of the recall," in which hundreds of consumer products were recalled under the supervision of the CPSC. Many of them were toys with household names that we all grew up with and gave to our children and grandchildren to play with, such as Barbie Dolls, Thomas the Tank, and Easy-Bake Ovens. The relatively unknown CPSC was all of a sudden front page news and a topic of conversation at the playground and at the water cooler. Americans throughout the country, in red states and blue states and purple states, wanted to know what this federal agency was doing to keep children safe. Congress responded by passing, by an almost unanimous vote, the Consumer Product Safety Improvement Act (CPSIA), the most far-reaching reform of the agency since its founding in 1973.

Congress established the federal regulatory system to protect the public health, safety and welfare. American consumers expect that this system is working to keep the products they purchase safe, the air they breathe clean and the vehicles they drive free from defects. American businesses thrive, in part, because consumers have confidence in the safety of the marketplace. Just ask the executives at General Motors and Mattel if they wished that the problems with their products had been caught and remedied before the issues got out of hand the way they did. Nobody benefits when the regulatory system fails.

The message I want to share today is that our current regulatory system is already burdened with insufficient resources and bureaucratic requirements that add unnecessary cost and inefficiencies.

These burdens have real costs. Unsafe cribs killed innocent babies; children were sent to hospital emergency rooms to undergo painful and repeated surgeries after swallowing tiny magnet in toys; scores of people have been injured and killed in defective cars. The pain to families is incalculable. Companies suffer financial losses and reputational harm as well.

The Importance of Effective Regulations

A critical function of government is to protect us from preventable hazards and harm. We expect our government to keep contaminated food off the grocery store shelves and out of restaurants; to ensure employers follow health and safety rules, obey labor standards, and prevent toxic emissions from poisoning our air, water, and communities, to keep unsafe drugs off the market and hazardous toys out of the hands of children. The system of standards and safeguards that has been put in place in this country over the past hundred years has encouraged our businesses to innovate, produced broadly shared prosperity, and given us among the highest living standards on the planet.

Our system of public protections has made this country a safer, better place to live. Workplace fatality rates have dropped dramatically. Our air and water is less polluted. Cars are substantially safer than just a few decades ago. Tainted food is a public health emergency, not a regular occurrence. American companies produce and import safer toys in response to the work of the CPSC .

Corporations and their trade associations, ideological advocates and other parties with vested interests like to claim that our regulatory system is overly-burdensome, costing the U.S. jobs and economic prosperity. These parties are well-funded, which gives them a big megaphone to reach the public. "Deregulation" becomes a popular notion when it is disconnected from the real-life results of regulatory failures. As a result, we are in danger of losing sight of the importance of rule-making as a critical dimension of democratic practice and economic success. Regulation is fundamentally about making the right rules to balance society's multiple and often conflicting interests. Regulation, in concert with healthy markets and effective social policy, is essential for securing the common good.

The Impact of Cost-Benefit Analysis and Other Process Requirements on Delaying the Regulatory Process

Agencies expend substantial time and staff resources to address the extensive requirements for assessing the costs and benefits of regulations as required in statutes and in several Executive

Orders issued over the past two decades[1]. Over this period, there has been an increasing shift in the federal regulatory process to rely on cost-benefit analysis as the primary basis for regulatory decision-making. This shift is concerning because cost-benefit analysis has substantial inherent flaws, including limited ability to quantify and value the potential benefits of regulations, the tendency to overestimate future compliance costs that are based on industry estimates that inflate cost estimates and ignore potential cost savings due to innovation, and the practice of discounting the value of future benefits for current actions that may actually increase public protections in future decades. In addition, as CPSC Commissioner Robert Adler noted in an op-ed in the *New York Times*, "... health and safety agencies rarely impose new costs on society when we issue safety regulations. We simply re-allocate who pays the costs."[2] Indeed, when cost-benefit analysis is a factor in preventing health and safety agencies from protecting the public, the public ends up paying the price. As a result, cost-benefit analysis is a truly distorted approach to regulatory decision-making that is tilted heavily against adoption of new regulations, particularly those identified by agency experts as the most effective in protecting the public.

Likewise, judicial review of agency cost-benefit analyses is another significant factor that "chills" rulemaking. Given the highly subjective nature of cost-benefit analysis, it is no surprise that even the most ardent supporters of the practice have repeatedly cautioned that allowing courts to second-guess agency expertise is harmful and inappropriate.[3] While agency compliance with the previous Executive Orders related to regulatory analysis is not subject to judicial review, codification of those analytical requirements would result in judicial review. This would, in turn, result in a flood of litigation disputing agency cost estimates with industry cost figures, force judges to intrusively investigate highly technical agency cost calculations, and pressure agency officials to adopt regulations that are least likely to offend regulated industries, and thus end up in court, rather than the regulations that are the most effective at protecting the public.

Rather than allowing the results of cost-benefit analyses to drive regulatory decision-making, agencies need to give primacy to the legislative mandates that provide the basis for regulations. As the 2008 ABA report to the President notes in considering the utility of cost-benefit analysis "the rulemaking proceedings within which it [cost-benefit analysis] is conducted must ultimately culminate in a decision that implements the normative values embodied in the agency's enabling legislation"[4]

It is worth noting, however, that despite these significant limitations, the evidence from cost-benefit analyses of major regulations consistently finds that the economic value of these

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[1] For example, Executive Orders 12866(58 FR 51735; October 4, 1993), 13563 (76 FR 3821, January 21, 2011) and13579 (76 FR 41587, July 14, 2011)

[2] "Safety Regulators Don't Add Costs, They Decide Who Pays Them," by Robert S. Adler, *The New York Times*, October 16, 2011.

[3] Cass Sunstein, *Arithmetic of Arsenic*, 90 Geo. L.J. 2255, 2258-59 (2002).

[4] American Bar Association Section of Administrative Law and Regulatory Practice; *Improving the Administrative Process, A Report to the President-elect of the United States*; 2008.

regulations far outweigh their costs. For example, the most recent draft report to Congress from the Office of Management and Budget on the benefits and costs of regulations finds that the benefits of major regulations issued over the past decade outweigh the costs by a factor of four to ten[5].

The CPSC Experience

The experience of the Consumer Product Safety Commission is instructive regarding the impact of extensive regulatory process requirements such as cost-benefit analysis on the ability of agencies to issue timely regulations. Though as an independent agency the CPSC is not subject to the Executive Order regulatory review requirements, the cost-benefit requirements added in 1981 to the Consumer Product Safety Act required analyses that exceed the scope and stringency of the Executive Order requirements. As a result, for more than 30 years, while the CPSC was required to comply with these requirements, the agency was able to issue only *nine* consumer product safety rules, or approximately one rule every three years.

As I stated previously, in 2008 Congress passed the CPSIA in response to a crisis of public confidence in the safety of toys and other children's products. A key cause of this crisis was the inability of the CPSC, due to the incredibly extensive and practically paralyzing analytical requirements, to address the hazards posed by unsafe children's products. The CPSIA, acknowledging this impediment, directed the CPSC to enact a series of mandatory safety standards for children's products, including toys, cribs, infant walkers, baby bath seats, toddler beds and bed rails, and portable play yards, among others, under strict time deadlines. In order to enable the Commission to proceed expeditiously to protect children, the CPSIA directed CPSC to bypass its existing burdensome regulatory requirements and proceed under the streamlined procedures of the Administrative Procedures Act. In fact, every time Congress has stepped in over the decades to direct the CPSC to enact product safety standards in response to a public uproar, which also occurred after deaths from automatic garage door openers and lawn darts, the legislation has required the Commission to use APA procedures in order to protect the public in a timely fashion. This pattern should tell us something – even Congress agrees that CPSC's burdensome regulatory requirements stand in the way of an effective and efficient regulatory response.

CPSC Case Study

In recent years, I have been involved in a CPSC rulemaking, first as a consultant to a company that invented a landmark safety technology and now, as a consultant to a national consumer organization that stands as a good example of the regulatory paralysis that can occur at the Commission. In October 2011 the agency's three Democratic Commissioners and two

[5] Office of Management and Budget; *Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities*; 2014. The report finds that benefits of major regulations issued between 2003 and 2013 range from $217 to $863 billion while the costs of these rules were estimated between $57 and $84 billion.

Republican Commissioners unanimously voted to publish an Advance Notice of Proposed Rulemaking (ANPR) to develop a standard to address lacerations and amputations caused by table saw injuries. The agency vote came *eight years* after receiving a petition to address this hazard.

According to a CPSC study of table saw injuries in the U.S. in 2007 and 2008, there are over 37,000 table saw injuries treated in hospital emergency rooms every year. Astonishingly, approximately 4,000 of those injuries, or about 10 a day, are amputations. In 1999, an inventor, working in his garage, invented a safety technology that stops a spinning saw blade in milliseconds after coming in contact with human flesh. That inventor started a company that produces table saws with this injury-mitigation technology. The company has sold tens of thousands of safer table saws, and they have testimonials from thousands of their customers about table saw injuries that did not occur.[6] From this experience, we know a safety technology exists that can work to prevent tens of thousands of serious, life-altering injuries every year. The CPSC has known about this potential safety benefit for over a decade. We are into the fourth year of the CPSC ANPR on table saws, and still, the staff has been unable to issue a Notice of Proposed Rulemaking, which is the next step in the CPSC regulatory process. (Although CPSC's three-step rulemaking process was changed by the CPSIA so that the first step is now discretionary, the three-stage process is still used.[7] In contrast, most agencies have a two-step process.)

You may wonder why it is taking CPSC so long to move forward on table saw safety. One reason is that the trade association that represents the majority of the table saw industry in the U.S., made up largely of foreign-owned companies, is opposed to a table saw safety regulation. The trade association submitted comments to the CPSC, stating that, since a new voluntary table saw safety standard became effective in 2007, the Commission could not issue a safety standard without assessing the effectiveness of that new standard. The industry made this claim even though the so-called "new" standard required the same safety device that has been used on table saws since they were first marketed – blade guards that have been shown not to be effective in preventing the tens of thousands of emergency-room visits from table saw injuries every year. But because CPSC staff thought its cost-benefit analysis of a new table saw standard would be called into question if the agency did not conduct yet another study of table saws, the Commission decided to do a survey of table saw users. In order to conduct a survey, the Paperwork Reduction Act requires approval of the Office of Information and Regulatory Affairs at OMB. It took over one year for CPSC to receive that approval. I understand that the survey is finally underway. In the meantime, ten amputations occur *every* day.

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[6] "SawStop Testimonials", 2013 http://www.sawstop.com/why-sawstop/testimonials

[7] CPSC issued an advanced notice of proposed rulemaking for window coverings in January of 2015. Federal Register," *Corded Window Coverings; Request for Comments and Information*" Jan, 16,2015 https://www.federalregister.gov/articles/2015/01/16/2015-00566/corded-window-coverings-request-for-comments-and-information

Streamlining the Regulatory Process

It simply takes too long to modernize rules so that they reflect current scientific and technical evidence about needed public protections. And as more obstacles, duplicative analysis, and legal challenges have been put in place to slow or prevent scientific knowledge and technical evidence from being translated into public action, children and elderly people develop preventable cancers, toddlers are run over in driveways, workers are debilitated by respiratory diseases, and dangerous products continue to kill and maim.

Over time, both Congress and the executive branch have laden the process of informal rulemaking with multiple requirements for regulatory analysis. These include the Regulatory Flexibility Act, the Paperwork Reduction Act, Unfunded Mandates Reform Act, and numerous executive orders. The cumulative effect of the impact of these requirements has been unfortunate. The addition of too many analytical requirements deters the initiation of needed rulemaking. In 1992, the American Bar Association (ABA) House of Delegates highlighted these concerns when it unanimously called upon the President and Congress to "exercise restraint in the overall number of required rulemaking impact analyses" and "assess the usefulness of existing and planned impact analyses."[8] The ABA reiterated this call to streamline the regulatory process in its 2008 report, suggesting that the current patchwork of analytical requirements found in various statutes and Executive Orders be replaced by one coordinated regulatory structure[9].

Finally, agencies need adequate resources to fulfill their statutory missions in a timely and efficient manner. The steady accumulation of statutory requirements that have lengthened the rulemaking process, without a corollary increase in resources, is part of why delays in the current rulemaking process are so prevalent. If the committee is contemplating adding further statutory requirements on top of the existing ones, it is crucial that agencies are provided the resources they need to comply with these new requirements. Asking agencies to do more, without more resources, is a recipe for more delays and fewer regulations intended to protect the public.

Conclusion

In the United States' system of "checks and balances," Congress passes the laws and the executive branch executes them. In a perfect world, the lag time between the passage of legislation and promulgation of rules would be short, so that a president who signs a piece of legislation would also be responsible for its implementation. In the real world, one Congress creates new regulatory authority and it is likely that a very different Congress and/or president will oversee the rules that implement that law. This time lag creates the space for all manner of mischief.

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[8] American Bar Association Section of Administrative Law and Regulatory Practice; *Report to the House of Delegates – Recommendation*; 1992.
[9] *Op. Cit.*

Government scientists and career civil servants have the scientific and technical expertise and regulatory experience to develop the rules that protect public health and safety while balancing myriad competing economic and political interests. Regulated industries should weigh in, and do. Public interest groups, citizens, and communities hurt by the absence of effective regulation should also be heard but rarely have the time and resources to devote to a process that occurs primarily behind closed doors over years. Extensive multiple and in some cases redundant analytical requirements stymie the ability to issue the rules needed to respond to Congress's legislative mandates.

We have many successes to celebrate in our regulatory history – cleaner air, purer water, safer drugs and products. But our rulemaking system needs reform. As the experience at the Consumer Products Safety Commission has demonstrated, timely and effective response to threats to public health, safety and welfare can only occur if agencies are not bogged down with nonproductive, extensive analytical requirements, and are provided with specific deadlines for action and the resources necessary to carry out those actions.

Thank you for the opportunity to present this testimony. I would be pleased to answer any questions.

Post-Hearing Questions for the Record
Submitted to the Honorable John Graham
From Senator Heidi Heitkamp

"Examining Federal Rulemaking Challenges and Areas of Improvement within the Existing Regulatory Process"
March 19, 2015

1. The Obama Administration has made significant efforts to promote a culture of retrospective review throughout the executive agencies. We have seen agencies propose and finalize rules which would relieve the burden of paperwork hours, and create financial savings for both the government and business. On March 17, 2015, executive agencies turned in their updated retrospective review plans to the Office of Information and Regulatory Affairs, presenting regulations they are in the process of and planning to update.
    a. In your opinion, how is the current retrospective review process working? Are we focusing enough funding and effort to allow agencies to target those regulations in need of change?
    b. What holes in the system still need to be filled?
    c. What do the agencies need to get to a position where they are performing this review efficiently and effectively on a permanent basis?

Answer: Since the most burdensome regulations have large one-time compliance costs (often capital costs) when a regulation takes effect, retrospective review is typically too late to avoid the lion's share of the burden. Thus, a strong focus on retrospective review, if it comes at the expense of softer review of new regulations, is not necessarily a wise approach. It is well known that OIRA staffing has been declining for many years and thus OIRA is not well positioned to take a central role in review of numerous labor-intensive reviews of existing regulations. Agencies have more staffing resources but little incentive to engage in a large number of retrospective regulatory reviews. What might work is a process where an independent commission nominates rules for retrospective review, and agencies perform the reviews under a judicially reviewable process. In this model, OIRA plays a more limited, coordination function. I also have sympathy with the legislative proposal that would permit new discretionary rules only if agencies are in the process of modernizing or removing an equal number of existing rules.

2. Out of the five themes that you listed in your testimony, which one or two would you advise this subcommittee to prioritize for legislative action this Congress?

Answer: My first priority would be a judicial review mechanism under the Information Quality Act for regulatory use of poor-quality information. My second priority would be a

regulatory analysis requirement for new legislation from Congress, with the Congressional Budget Office empowered to play the analytic role.

3. There has been a criticism that OIRA is not staffed at a level that is appropriate for its responsibility. Many people believe that it is understaffed. Can you speak to the staffing level of OIRA?
    a. Should there be additional employees at OIRA?
    b. Do federal agencies have the resources and staff necessary for the effective promulgation of quality regulation?

Answer: During the 2001-2006, my experience was that the "big" regulators in town – EPA, Labor, DOT, HHS and DHS – did not have any staffing or resources shortages regarding regulatory analysis or rulemaking. OIRA needs to be at about 60 FTE in order to oversee the new regulatory activities of the Cabinet-level agencies.

4. Your first theme focused on Congressional impact analysis prior to passing legislation. You listed Congressional Budget Office as a possible resource for conducting such an analysis. Is there another federal entity that would be appropriate or should we create a new entity?

Answer: In addition to the CBO, one could consider the GAO playing the regulatory analysis role for Congress. I would consider a completely new entity only if there were powerful arguments against an expanded role for CBO or GAO.

Post-Hearing Questions for the Record
Submitted to the Honorable John D. Graham
From Chairman James Lankford

"Examining Federal Rulemaking Challenges and Areas of Improvement Within the Existing Regulatory Process"
Thursday, March 19, 2015
United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. In your written testimony, you stated that "regulatory complexity tends to favor large companies over small ones." What is an example in which a large company fares much better than a small company, in the same industry?

   Answer: A complex regulatory scheme such as REACH – the EU's regulatory system for industrial chemicals – favors large companies over small ones because small companies do not have the scientific and regulatory staffs that are required to prepare the large registration dossiers required by REACH. Abelkop, Adam D.K., Botos, Agnes, Wise, Lois R., and Graham, John D., "Regulating Industrial Chemicals: Lessons for U.S. Lawmakers From the European Union's REACH Program", Environmental Law Reporter, 42, November 2012, 11042-11065.

2. Currently, federal regulation is very expansive. What are the benefits of the Federal government leaving some areas of regulation to the States? Are there particular areas of regulation that States are better equipped to address?

   Answer: There are several classic rationales for state regulation. Innovation can occur at the state level, and the federal government can learn from the successes of the states before it enacts a national regulation. If a severe problem exists in one state (e.g., the smog in LA in the 1960s), it may make sense to allow one state to regulate more stringently than other states. When regulated entities are highly variable with respect to cost and benefit of control, state and local regulation is likely to be more nuanced and cost-effective than federal regulation. On the other hand, as US industry increasingly competes in a global economy, and as efforts are made to harmonize US regulations with regulations in Europe, Asia and Latin America, it is more practical if the US has a uniform regulatory system. Free trade agreements would be even more difficult to negotiate if all 50 states were add the negotiating table.

3. In your experience at OIRA, did you observe agencies issuing "interpretive" rules to circumvent notice and comment procedures, when the rule really more resembled a "legislative"? If so, please describe.

Answer: Yes, and I have discussed this behavior in my co-authored paper with Paul Noe. Graham, John D., Noe, Paul, "Due Process and Management for Guidance Documents: Good Governance Long Overdue", Yale Journal on Regulation, Volume 25(1), Winter 2008, 103-112.

4. You testified that, in order to minimize the burden duplicative forms put on small businesses, you have to make the Paperwork Reduction Act and make it "meaningful." What changes would you suggest in making the Act more meaningful?

   Answer: If an agency imposes an information-collection burden and the burden is not worth the utility of the information, a judicial review opportunity should be available to the party incurring the burden. Such opportunities exist to some extent for regulations but not for most information-collection burdens.

5. Given the role guidance documents play in "back-door" rulemaking, if OIRA had adequate resources, would you recommend that OIRA review significant guidance documents?

   Answer: Yes, OIRA should review significant guidance documents.

Post-Hearing Questions for the Record
Submitted to Mr. Neil Eisner
From Chairman James Lankford

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Thursday, March 19, 2015
United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. Under Perez v. Mortgage Bankers Association, what would prevent an agency from revising an interpretive rule to a rule of legislative substance, where the resulting rule should be subject to notice-and-comment rulemaking?

Answer: Agencies must follow the "notice-and-comment" procedures in the Administrative Procedure Act to issue a "legislative" rule, one that has the "force and effect of law." If an agency revises an interpretive rule without using the "notice-and-comment" procedures, the resulting document would not be a legislative rule. There are many informal actions that could stop an agency from trying to enforce an interpretation as if it had a legislative effect (e.g., complaints to a higher government official), and a well-run agency would consider the problems that would be created by an adverse court decision. Ultimately, however, judicial review may be the only way to prevent an agency from enforcing an interpretation as if it were a legislative rule.

2. During your tenure at the Department of Transportation, did you find negotiated rulemakings to produce better, more efficient rules? If so, please illustrate with an example.

Answer: Yes, negotiated rulemaking did produce better, more efficient rules. A good example is the first one that the Department of Transportation conducted, a Federal Aviation Administration (FAA) rulemaking on flight and duty time limitations for cockpit crews. Before trying negotiated rulemaking, the FAA had issued two notices of proposed rulemaking; both were very controversial, met significant opposition from different regulated entities, and were withdrawn. The agency then used negotiated rulemaking and successfully developed a final rule. Since retiring from my Federal government position, I have twice worked as a facilitator on Department of Energy negotiated rulemakings; my experience there has further convinced me that negotiated rulemaking can be a very effective tool if used appropriately.

3. When you developed a rule through negotiated rulemaking, how did you ensure that the stakeholders partaking in the negotiation represented diverse perspectives?

Answer: It is a basic tenet that negotiated rulemaking should not be used if the agency cannot ensure that the diverse perspectives can be adequately represented on the negotiating committee.

At the Department of Transportation, we used a multi-step process to help ensure we would have representation of all of the affected interests:

- Before making a decision to proceed, the agency would preliminarily identify the interests affected and organizations, companies, individuals, etc. who the agency thought could adequately represent those interests.
- The agency would then use a neutral convenor to talk with each of the potential representatives and also ask them if they could identify other interests or necessary representatives for the convenor to talk to.
- The convenor would then submit a report to the agency on, among other things, whether he or she believes all affected interests can be effectively represented and, if so, by whom.
- If the agency decides to proceed, it would issue a public notice on its preliminary thoughts about using negotiated rulemaking, including the issues, affected interests, and a list of representatives. It also would ask for public comment on all aspects of the matter, including whether additional or different representatives are necessary.
- After public comment is addressed, the agency would decide whether to proceed and, if so, whether changes are necessary. Additional representatives have been added as a result of public comments.
- Because the negotiated rulemaking meetings are open to the public under the Federal Advisory Committee Act, the agency would also stress that affected individuals may attend the meetings (and on-line participation is possible), may be given opportunities to address the committee, and may consult with the members of the committee that are representing their interests. The agency would also stress to the representatives that they represent their interests, not just their particular employer.

The Department has conducted a number of negotiated rulemakings, and I am not aware any complaints that there was a perspective that did not have representation.

4. During your time at the Department of Transportation, what were the differences, roughly, in personnel and resources allocated to the promulgation of new rules, versus personnel and resources allocated to retrospective review and repeal of existing rules?

Answer: My perspective was limited in that I did not know or observe all the people working on rulemaking in the Department, and I never saw any studies that identified or provided data on how personnel or resources were allocated. It is also difficult to estimate the amount of time agencies spend evaluating the effectiveness of their existing rules as part of their daily implementation activities. Based on my experience at FAA and for the American Bar Association study I worked on and noted in my prepared remarks, I would estimate that agencies like FAA and the predecessor of the Pipeline and Hazardous Materials Safety Administration, spent a greater proportion of their time and resources on reviews in the 1970's and 1980's than they do now, and those hours and resources were substantial but well less than 50 percent of their

regulatory hours and resources. In addition, I believe there are significant differences among agencies, at least partly due to appropriated resources. For example, I believe NHTSA has specific budgetary resources supporting the excellent reviews it does on the effectiveness of its existing rules. The allocation of agency time and resources can also vary significantly from year to year. For example, recent Administrations have periodically required short-time frame reviews of all of the agencies' existing rules; in order to effectively comply, the agencies may have to devote almost 100 percent of their regulatory personnel to the project. Similarly, new authorizing statutes may impose deadlines necessitating moving resources from retrospective reviews to the preparation of new rulemakings. Overall, I think that even an agency with a plan to regularly review all of its rules over a set time period such as five or ten years would devote much less than half of its time and resources to retrospective reviews, perhaps in the neighborhood of 10 percent.

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From Senator Heidi Heitkamp

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    a. In your opinion, how is the current retrospective review process working? Are we focusing enough funding and effort to allow agencies to target those regulations in need of change?
    b. What holes in the system still need to be filled?
    c. What do the agencies need to get to a position where they are performing this review efficiently and effectively on a permanent basis?

Answer:

a. From what I have seen of the Obama Administration effort, it is focusing attention on the need to perform retrospective reviews and that has helped identify some necessary and important fixes. That is valuable. However, it can also force agencies to try to do too much in too little time, ineffectively using limited agency resources and severely affecting agencies' efforts to meet other requirements. Moreover, effective reviews can take considerable time and money, and the agencies have not been provided with the necessary resources. In addition, the efforts of recent Administrations to periodically impose short-term requirements to review all existing rules can have significant adverse effects on the efforts of some agencies to have effective programs for thoroughly reviewing all their rules on a regular basis.
b. The biggest hole is the lack of adequate funding. In addition, many agencies appreciate the need for retrospective reviews. However, even the best of agencies may also need help establishing the culture for reviews, especially among senior officials who may focus on creating something new (their project) rather than fixing something old (someone else's project).
c. To get reviews on a permanent basis, the agencies need the resources. Perhaps the best way to do this would be to provide appropriations that can only be used for

retrospective reviews. The agencies could be required to report as part of the budget process how they effectively used the prior year's money as well as what they plan for the next year. Agencies also need the ability to effectively evaluate costs and benefits of existing rules. To do this, the agencies may need data from the regulated entities. This, in turn, may require some necessary balancing with the objectives of the Paperwork Reduction Act, which may require Congressional support.

2. Towards the end of your testimony, you described agency collaboration on rulemaking. You mentioned that DOT worked with many other rulemaking departments and agencies. It appears these interagency relationships lead to more productive rulemaking and the exchange of best practices. What can Congress do to promote these relationships between agencies?

Answer: Some collaboration results from statutory or executive order requirements, but many agencies voluntarily collaborate because they see the benefits. Limited resources may be an obstacle, especially when there is pressure on the agency to act quickly. So Congress should consider both these constraints when imposing deadlines. Another possible obstacle involves "turf" wars, where agencies have some overlap or disagree on the limits to their authority. Clarification of the legislation would help, when that is possible. Giving OMB some oversight and the necessary resources could help in this area, especially where common rules could be quite valuable but difficult to achieve because of the number of agencies involved.

a. Where are the gaps in information sharing between agencies?

Answer: There are probably many areas where agencies do not know they have overlaps in reporting requirements. To the extent that the regulated industries tell the agencies about this, perhaps it is not being brought to the attention of the officials who would want to or could fix the problem. Congress might be able to address this by requiring that proposed or final rules or paperwork forms provide the name of a "paperwork" official who would respond to this. Alternatively, Congress could provide OMB with the resources necessary to do a government-wide study of the problem and direct necessary fixes.

3. Agency retrospective review of regulations is something that we have heard a lot about. In your testimony, you mention that the DOT established retrospective reviews of existing regulations. Can you briefly describe the DOT retrospective review process?

Answer: In 1998, DOT developed an organized and open approach to its retrospective reviews. With some limited exceptions explained in its public plan, the Department published a schedule for all of its rules (based on its parts or sections in the Code of Federal Regulations) for review year-by-year over a 10-year period. The plan advised the public how they could comment on the

schedule and participate in the reviews and provided annual, but very brief updates of the reviews in the semi-annual Regulatory Agenda. In 2008, the Department published a new, 10-year schedule for all of its rules for review. Periodic retrospective review requirements imposed by different Administrations as well as limited resources affect the implementation of the 10-year plans, but the Department has tried to work within those constraints. Further details on the retrospective reviews can be found at http://www.dot.gov/regulations/dot-retrospective-reviews-rules.

4. In your testimony, you mention that before Congress considers changing the Administrative Procedure Act (APA), there are certain circumstances that we should keep in mind which happen at the agency level and impact the outcome of regulations. Specifically, you go on to say outside influences or political appointees with a final decision making authority could be the reason(s) for an agency to handle a regulation in a less than satisfactory manner. From where we sit, my colleagues and I are not usually privy to internal agency politics. Do you have any thoughts on how members of Congress can approach regulatory decisions that are the result of political and outside influence?

Answer: This type of problem is difficult to effectively address. The best I can recommend is that members be aware of it and consider the effects of any legislative efforts to impose more requirements. The President, directly or through other appointed individuals, has the power to modify or stop agency-level decisions. He may have good justification for doing that. However, those who disagree with the final decision may think, for example, that it was based on an inadequate analysis and want to impose additional requirements on agencies. The initial agency decision and the underlying analysis may have been very well done. My concern is that imposing additional burdens on the rulemaking process may not fix the problem and may increase the difficulty of issuing "good" rules. Even "openness" requirements that may help the public better understand the internal "politics" -- such as the Executive Order 12866 requirements that any changes made during the OMB rulemaking review process be noted in a public document – can be avoided.

Post-Hearing Questions for the Record
Submitted to Mr. Drew Greenblatt
From Chairman James Lankford

"Examining Federal Rulemaking Challenges and Areas of Improvement Within the Existing Regulatory Process"
Thursday, March 19, 2015
United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. You testified that the Securities and Exchange Commission places a regulatory burden on you, albeit indirectly, through requiring your publicly traded clients to disclose any elements of conflict minerals up the supply chain. Are there other regulations with which you must comply indirectly?

Because manufacturing is an energy-intensive practice, regulations that will increase the cost of energy significantly impact manufacturers. As an example, the Environmental Protection Agency's (EPA) implementation of National Ambient Air Quality Standards (NAAQS) for Ozone is done through the regulation and approval of state implementation plans. The agency purports no direct effects on small entities because states are not small entities. An updated analysis by NERA Economic Consulting and commissioned by the National Association of Manufacturers (NAM) finds that EPA's December 2014 proposed ozone rule could reduce GDP by $140 billion annually and eliminate 1.4 million job equivalents per year. In total, the costs of complying with the rule from 2017 through 2040 could top $1 trillion, making it the most expensive regulation ever issued by the U.S. government.

2. In your experience, have you or any of the small businesses you represent ignored a non-binding guidance document? If so, did you/they face any consequences from the agency issuing the guidance?

Manufacturers strive to comply with all requirements through both strict regulatory language and agency guidance. Failure to comply has real consequences, even with a guidance document since agency enforcement is based on such guidance. As companies, we do not have the luxury of testing legality or challenging guidance unless it threatens the existence of a firm. As a result, agency guidance is de facto *the law, whether the agency intended it to be or not.*

3. Would you, as a small business owner, find it meaningful if, before an agency issued a significant guidance document, they held a notice and comment period?

While manufacturers and other regulated entities would benefit from a requirement that significant guidance documents be subject to notice and comment, comprehensive reform of our regulatory system is needed if we seek to transform our regulatory system so that agencies issue smarter regulations that more effectively achieve desired outcomes. My written testimony provides a number of reforms recommended by the NAM that would improve the system through which modern rulemaking is conducted, including legislation that would impose additional requirements for the issuing of guidance documents and informal interpretations.

Post-Hearing Questions for the Record
Submitted to Mr. Drew Greenblatt
From Senator Heidi Heitkamp

"Examining Federal Rulemaking Challenges and Areas of Improvement within the Existing Regulatory Process"
March 19, 2015

1. The Obama Administration has made significant efforts to promote a culture of retrospective review throughout the executive agencies. We have seen agencies propose and finalize rules which would relieve the burden of paperwork hours and create financial savings for both the government and business. On March 17, 2015, executive agencies turned in their updated retrospective review plans to the Office of Information and Regulatory Affairs, presenting regulations they are in the process of and planning to update.
    a. In your opinion, how is the current retrospective review process working? Are we focusing enough funding and effort to allow agencies to target those regulations in need of change?

Retrospective reviews should provide agencies an opportunity to analyze, revise and improve techniques and models used for predicting more accurate benefits and costs estimates for future regulations. However, the promise of a significant burden reduction through the review of existing regulations has not materialized. Agencies highlight retrospective review "successes" that are nothing more than modifications of recently issued regulations, and many of the initiatives had been ongoing projects or the result of litigation. The Administration has laid the foundation for what could become a successful retrospective review program, but agencies must be incentivized to actually change the way they operate.

The Office of Information and Regulatory Affairs (OIRA) has been tasked with overseeing agency retrospective reviews. Congress and the Office of Management and Budget should allocate significantly more resources to OIRA. If retrospective review is a priority, then OIRA should have more resources to ensure that agencies are engaged in thorough reviews.

    b. What holes in the system still need to be filled?

New regulations are too often poorly designed and analyzed and ineffectively achieve their benefits. They are often unnecessarily complex and duplicative of other mandates. Their critical inputs—scientific and other technical data—are sometimes unreliable and fail to account for significant uncertainties. Regulations are allowed to accumulate with no real incentives to evaluate existing requirements and improve effectiveness. In addition, regulations many times are one-size-fits-all without the needed sensitivity to their impact on small businesses.

As I pointed out in my written testimony, the paperwork burden imposed by federal agencies excluding the Department of Treasury increased 62.1 percent—from 1.509 billion hours to 2.446 billion hours—in the 10 years ending FY 2013, and 82 million hours were added through agency discretion. In May 2013, George Washington University's Regulatory Studies Center reviewed EPA's retrospective review plan and found that, for initiatives where EPA actually quantified costs or savings, 40 percent would actually increase costs to manufacturers. This is especially troubling for manufacturers, and particularly small manufacturers, as they are disproportionately burdened by environmental regulations, and poorly designed regulations are exceptionally harmful to our abilities to expand our businesses and provide more for our employees.

c. What do the agencies need to get to a position where they are performing this review efficiently and effectively on a permanent basis?

To truly build a culture of continuous improvement and thoughtful retrospective review of regulations, it must be institutionalized, a position aligned with the desires of the Administration to change the "culture" of how agencies regulate. One of the best incentives for high-quality retrospective reviews of existing regulations is to sunset rules automatically that are not chosen affirmatively to be continued. When issuing new regulations, agencies must include plans for retrospective review as required. A November 2014 report by the Administrative Conference of the U.S. found that no major rule it reviewed included plans for conducting a future retrospective analysis. Retrospective review initiatives undertaken by agencies should have clear and quantifiable objectives. Agencies should identify all regulatory requirements at both the federal and state level and work with other federal and state agencies of jurisdiction to streamline those requirements.

2. In terms of compliance with international, federal, state and local regulations, can you speak to instances where Marlin Steel has had to navigate conflicting regulations? If so, how did that impact Marlin Steel?

Federal regulators fail to consider cumulative burdens that are imposed on manufactures and other regulated entities. Agencies should engage in a comprehensive interagency process for effectively estimating cumulative burdens. The consideration of cumulative burdens would also provides agencies an opportunity to consider international, state and local regulatory requirements and account for those as new regulations are designed.

Because of the significant challenges facing manufacturing in the United States, federal policies must be more attuned to the realities of global competition. When considering a new regulation or reviewing existing requirements, agencies must first define the problem, which should include early participation by all stakeholders. They must engage in a bottom-up interagency analysis of how agencies use regulations, guidance and paperwork requirements to accomplish objectives. It is vital to identify all inefficiencies and determine how to eliminate efforts and processes that create no value or assist in meeting objectives. Finally, agencies must institutionalize these best

practices, including regular reprioritizations and organized abandonment of less useful methods, procedures and practices.

3. Has there been a specific incident or point in time when either a regulation or the amount of regulations posed a threat to Marlin Steel's bottom line?

Manufacturers recognize that regulations are necessary to protect people's health and safety, but we need a regulatory system that effectively meets its objectives while supporting innovation and economic growth. The cost burdens associated with poorly designed and inefficient regulations greatly harm Marlin Steel's bottom line. If I am spending money to comply with a requirement that, through poor design, is not advancing health or safety, then that money is wasted. I am not able to invest that money in my employees (through higher pay or more benefits) or newer capital that would improve worker safety or Marlin Steel's productivity.

4. What do you see as the biggest regulatory burden that businesses at all levels are facing?

Manufacturers and other businesses are often asked which regulation is the most burdensome. It is a difficult question to answer because the cumulative costs of federal, state and local regulations are extremely complex. New regulations are simply added on top of the complicated array of requirements that are already in place. The costs of poorly designed and inefficient regulations are an extra weight holding manufacturers down as we try to move forward, find new markets, grow our businesses and create new jobs. There is a failure within the federal government to truly understand the impact of regulatory requirements, such as paperwork and recordkeeping, on the public. A small manufacturer or any regulated entity in the United States should not have to be on constant guard for the next burdensome and poorly designed requirement issued by an agency. Our regulatory system should be designed to promote coordination within and between agencies, and regulations should be designed to most effectively meet regulatory objectives to minimize unnecessary burdens.

Post-Hearing Questions for the Record
Submitted to Ms. Pamela Gilbert
From Senator Heidi Heitkamp

"Examining Federal Rulemaking Challenges and Areas of Improvement within the Existing Regulatory Process"
March 19, 2015

1. The Obama Administration has made significant efforts to promote a culture of retrospective review throughout the executive agencies. We have seen agencies propose and finalize rules which would relieve the burden of paperwork hours, and create financial savings for both the government and business. On March 17, 2015, executive agencies turned in their updated retrospective review plans to the Office of Information and Regulatory Affairs, presenting regulations they are in the process of and planning to update.
    a. In your opinion, how is the current retrospective review process working? Are we focusing enough funding and effort to allow agencies to target those regulations in need of change?

    ANSWER:
    While I appreciate the need to update regulations to relieve unnecessary burdens on government and the public, I am concerned that the process of retrospective review can divert badly-needed resources away from the health and safety mission of the agencies. If Congress and the Executive Branch continue to require federal agencies to conduct retrospective reviews on an ongoing basis, federal agencies should be fully funded and staffed to comply with this mandate to ensure that it does not impede the agencies' ability to promulgate new regulations and meet their statutory obligations.

    b. What holes in the system still need to be filled?

    ANSWER:
    In addition to the lack of funding for retrospective review that I reference above, I also believe that there should be more emphasis on agencies identifying regulatory weaknesses or gaps that need to be strengthened as well as identifying specific regulations that should be improved to be more effective at achieving statutory aims. While much of the retrospective review effort has been premised on the need to repeal rules, agencies should be encouraged on an equal basis to assess and strengthen old rules that require updating to ensure they provide adequate public protections.

c. What do the agencies need to get to a position where they are performing this review efficiently and effectively on a permanent basis?

ANSWER:
In order to perform the review efficiently, agencies need dedicated funding that is specifically allocated to retrospective review. In order for the review to be effective, federal agencies should use notice and comment rulemaking, as the Obama administration is currently doing. In this way, the retrospective review process is consistent with the process for promulgating most new rules. It also provides an opportunity for the public to engage in the process. Congress should avoid codifying retrospective review efforts in ways that would short-circuit or avoid entirely the notice and comment rulemaking process.

2. You were the Executive Director of the CPSC during the Clinton Administration. When we look at the regulatory impact on business, we classify their regulatory burden in terms of man hours and costs incurred. In your estimation, how many man hours did it take the CSPC to meet their statutorily required review and analysis, what were the costs incurred to meeting these standards?

ANSWER:
I do not know the number of hours spent or the costs incurred by CPSC in meeting its statutory requirements. I do know that those requirements often mean that the CPSC cannot perform its mission in a timely manner. For example, the agency has been trying to enact a furniture flammability standard since CPSC was founded over 40 years ago. In a more recent example, it has been almost four years since the Commission voted to begin an Advanced Notice of Proposed Rulemaking on a relatively straightforward standard to prevent lacerations and amputations on table saws, and still the agency has not even issued a proposed rule, which is only the second step in its three-step rulemaking process. It is clear that the CPSC's onerous regulatory burdens make it difficult, and in some cases impossible, for CPSC to enact critical safety measures to protect consumers.

3. During your testimony you discussed the need to streamline the regulatory review and analysis process. We hear similar concerns from the business community from a slightly different angle. One idea you touched on was the American Bar Association's recommendation in 2008 that the regulatory review framework be moved from the current patchwork of statutes to one coordinated structure.
   a. If we were to go down that road, how would you approach the task, what are the first moves?

ANSWER:
I would explore using as a model some of Congress's current efforts to streamline regulatory review requirements for certain agencies or in certain regulatory contexts. For example, your committee has recently passed legislation that would streamline the permit

approval process for infrastructure and energy projects. That model could prove instructive for streamlining notice and comment rulemaking. I would also explore ways to remove layers of regulatory review rather than add additional layers. It would be helpful to place hard caps on the length of regulatory reviews at the Office of Management and Budget, which frequently misses the 90/120 day deadline for review specified in Executive Order 12866. Similarly, to address delays and paralysis in the regulatory process, Congress could consider measures to allow regulations to proceed to the next stage of the rulemaking process by default once a certain period of time has elapsed. Finally, Congress should look for ways to potentially curtail judicial review of regulations rather than expand it.

b. How do we ensure that, in the quest for a perfect rulemaking framework, we do not miss common sense improvements that would make today's flawed system better?

ANSWER:
That is an excellent question. Some of the proposals I mentioned in my answer to (a) above could be a good start for making common sense improvements.

c. Do you envision a structure where we would cherry pick sections from the current statutes, or would you advocate a start-from-scratch approach?

ANSWER:
I do not believe that it is necessary to start from scratch by replacing the Administrative Procedure Act (APA). Instead, there should be a re-appraisal of the myriad statutes adopted after the APA that have significantly lengthened rulemaking requirements for agencies and harmed agency efficiency and effectiveness.

d. What changes are needed for independent agencies regulatory process? How do we ensure they are effectively managed in this process?

ANSWER:
I believe Congress should proceed cautiously when seeking to change the rulemaking process at independent agencies. In particular, rulemaking at independent agencies with multiple-member commissions, such as the CPSC, necessarily involves finding consensus and approval from a majority of commissioners. Broad rulemaking reforms, such as requiring the Office of Management and Budget (OMB) to review independent agency regulations, would significantly and harmfully disrupt the commission decision-making structure. Further, requiring OMB to review independent agency rules would politicize the agencies and sacrifice their very independence by subjecting their rules to a regulatory review process that is designed to align regulations with White House regulatory priorities.

4. I believe that there is a place for the review of pending regulations in our rulemaking process. In order to ensure that our regulations promote efficiency and are effective at driving to the root of

problems without overly encumbering the regulated party. It is important to have safeguards against poorly written regulations. However, there can be too much of a good thing. Excessive or unneeded review becomes inefficient and ineffective.

a. Regarding rulemaking review and cost benefit analysis, how do we determine where the line between inefficient and efficient is?

ANSWER:
Cost-benefit analysis can result in significant inefficiencies for agencies. First, imposing detailed requirements for cost-benefit analysis by statute leads agencies to expend considerable time and resources on highly speculative determinations such as the potential job impacts due to a regulation or indirect costs of a regulation. If such requirements are in turn subject to court challenge and judicial review, as is often the case when imposed by statute, then the inefficiencies for agencies become even greater. Second, cost-benefit analysis should not be dispositive or the sole grounds upon which agencies base their regulatory decision-making. In other words, agencies should not be required to meet a cost-benefit test when putting forth new regulations. This would make the rulemaking process far more inefficient as agencies would be justifiably concerned that any cost-benefit analysis produced to meet a cost-benefit test would result in significant litigation risk given that the methodology underlying regulatory cost-benefit analysis is highly subjective and involves malleable assumptions.

b. In your opinion, where do we move from effective management and oversight into a situation where we are doing more harm than good?

ANSWER:
I believe that overly prescriptive analytical requirements for agencies, particularly in a "one-size-fits-all" approach that applies to all agencies and is judicially enforceable by court challenge, would clearly result in more harm than good.

c. What kind of metrics could this subcommittee use in determining the potential impacts of review requirements?

ANSWER:
As I stated in my written testimony, the history of rulemaking at the CPSC is instructive in gauging the impact of regulatory review requirements. To briefly summarize, where the CPSC has developed and finalized consumer product safety rules in compliance with the extensive and lengthy rulemaking procedural requirements under the Consumer Product Safety Act (CPSA), the CPSC has only been able to produce one safety rule roughly every three and a half years. In stark contrast, where the CPSC has been directed by Congress to bypass the procedural requirements in the CPSA for certain regulations, such as most recently in the Consumer Product Safety Improvement Act, the CPSC has been able to finalize those regulations far more quickly, thereby protecting consumers as Congress intended in a more efficient manner.

In terms of assessing the impact of current review requirements, the subcommittee may wish to request studies of agencies' ability to meet statutory deadlines in promulgating regulations, and, if agencies are missing such deadlines on a consistent basis, what role review requirements play in preventing agencies from meeting those deadlines.

d. When you looked at rulemaking as the head of an agency, what benchmarks did you use to determine that review was being performed effectively?

ANSWER:
The benchmarks we used at CPSC to determine whether we were being effective was how many lives would be saved and injuries prevented.

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