

ACCOUNTABILITY AND TRANSPARENCY REFORM
AT THE OFFICE OF INFORMATION AND REGU-
LATORY AFFAIRS

HEARING
BEFORE THE
SUBCOMMITTEE ON
GOVERNMENT OPERATIONS
OF THE
COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES
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ACCOUNTABILITY AND TRANSPARENCY REFORM AT THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS

Tuesday, March 15, 2016

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT OPERATIONS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to call, at 2:27 p.m., in Room 2154, Rayburn House Office Building, Hon. Mark Meadows [chairman of the subcommittee] presiding.

Present: Representatives Meadows, Jordan, Walberg, Buck, Carter, Connolly, and Maloney.

Also Present: Representative Chaffetz.

Mr. MEADOWS. All right. The Subcommittee on Government Operations will come to order. And without objection, the chair is authorized to declare a recess at any time.

Good afternoon. I want to welcome all of our witnesses and express my appreciation for your attendance and certainly for your testimony today.

Today's hearing will explore concerns and complaints about transparency and accountability at the Office of Information and Regulatory Affairs. Just about a year ago, we had a similar hearing where the administrator obviously testified, and in reviewing some of the transcripts, I was reminded of some of the moments in that where the communication between you and members of this committee was, I guess, less than clear. And so we posed some questions that seemed very forthright to us, but it seemed maybe to be confused. And so obviously this follow-up hearing hopefully will provide some clarity as we look at that.

For example, you know, can you send a list of either pre-proposed rules or other rules that are undergoing the informal review process? And the administrator said, well, I don't know; what are you referring to? So, of course, I was referring to the same process that the GAO has referred to as an informal review at least as early as 2003, which is the time prior to the agency's formal submission of the rule to OIRA, during which OIRA frequently has had a significant influence over the development of the rule.

So this year, we wanted to bring back in some of the experts in, including a regulatory expert from GAO, to help us maybe wade through some of this messy process and possibly help us bridge the communication gap that may have resulted from my inability to articulate exactly what we were looking for.

GAO and regulatory experts have been calling for greater transparency and accountability from OIRA for more than a decade. In fact, in 2003 GAO issued a report that provided significant details on how OIRA's review process could be addressed but also raise several concerns about transparency and accountability.

And since then, GAO has issued reports and recommendations on how agencies and OIRA identify significant regulations and how they explain the cost-benefit analysis and improve retrospective regulatory reviews. By my count, there are about 17 open recommendations that OIRA has not yet addressed, and that would improve the Federal regulatory process.

Instead, OIRA is marred by consistently late reporting, incomplete analysis, poor data quality, and insufficient oversight of the Federal regulatory process. OIRA is quite possibly an agency overwhelmed by this responsibility and insufficient resources, but the public doesn't know because OIRA has failed to provide any insight into that process. So hopefully, we will be able to hear some on that today.

In that past year, the committee has experienced a frustration of this secretive regulatory process at OIRA firsthand. I want to emphasize that I use the word frustration and I could use something much more definitive in terms of making that analysis. During last year's hearing, several subcommittee members, myself included, requested that the administrator provide documentation on how OIRA conducted its reviews as it relates to the Waters of the USA rulemaking. This type of request is something that we would ask of any agency so that the committee can conduct its oversight responsibilities effectively.

In general, agencies provide the committee with the information it needs to understand what happened and why. Some agencies take longer than others, but generally, we receive the information in a relatively reasonable period of time.

Our experience with OIRA, however, has been different, and in the past year we have experienced an unprecedented effort in our opinion to obstruct the committee's oversight abilities and restrict access to information about the Federal regulatory process. OIRA's resistance to complying with the committee's simple requests raises more concerns than we had last year.

Persistent requests for transparencies and assistance with oversight from the public and now from Congress are apparently met with disregard from OIRA. This committee may need to look into other means to ensure that the agency is an effective regulatory gatekeeper and accountable to the taxpayers, and while the committee's investigation into OIRA's review of the WOTUS rulemaking is ongoing, it is really not the focus of this hearing.

The committee wanted to hold this hearing to explore policy concerns and maybe options, Administrator, to address those concerns. And so today, we ask our witnesses both where additional transparency and accountability at OIRA are needed, as well as what legislative efforts that the committee should consider to spread a little sunshine into the secretive deliberative process of the agency. Do you think that putting OIRA's regulatory review function into a statute would help OIRA better understand its obligations to Congress and the American people, or is OIRA overburdened with

the numerous obligations that you have? Does OIRA need more staff to conduct a more thorough review of the regulatory actions and meet its current obligations for transparency?

We just want to know how this committee can help crack OIRA open for public review and purview and Congress to better understand the important work that this agency does. So any thoughts or suggestions that the witnesses can offer us would be very helpful.

Mr. MEADOWS. And with that, I would now like to recognize my good friend Mr. Connolly, the ranking member of the Subcommittee on Government Operations, for his opening statement.

Mr. CONNOLLY. Thank you, Mr. Chairman.

And I am sorry for the delay. I was detained on the Floor after votes.

And thanks for holding another hearing on what is arguably one of the most influential and consequential Federal agencies that most Americans have never heard of. This relatively small and mostly anonymous office reviews and coordinates the issuance of vital Federal regulations that have an impact on our nation's economy, environment, public health, and safety.

A year ago, Mr. Chairman, this subcommittee gathered to discuss the challenges facing the Office of Information and Regulatory Affairs, OIRA. We reviewed the Government Accountability Office's recommendations and examined ways to make the regulatory review process more efficient and transparent. We reconvene today to check on the office's compliance and progress.

OIRA plays a key role in shaping hundreds of important rules such as those that safeguard food supply, guarantee buildings are accessible for the disabled, promote public safety, and protect the quality of our drinking water, about which we had a hearing this morning and into the afternoon, and we will have another one Thursday.

Despite the powerful impact this agency has on the lives of all Americans, OIRA operates mostly in the shadows. And from a good government point of view, greater transparency might be warranted. Unfortunately, there continues to be a documented lack of transparency within this small statutory office housed within the Office of Management and Budget. Over the years, GAO has repeatedly found that OIRA, under multiple administrations, has failed to meet the transparency requirements contained in the relevant Executive orders that prescribe the principles and procedures OIRA should follow when conducting regulatory review.

In last year's hearing, I mentioned GAO's recommendations issued in 2003 to address transparency challenges. GAO followed up with a report in 2009 again noting transparency issues and providing additional recommendations. To date, OIRA appears to have implemented only nine of those 25 identified recommendations. And obviously, today, we are going to hear from Mr. Shelanski about that progress or lack thereof.

Furthermore, I believe the public and OIRA would be best served if it provided a guidance to agencies to ensure that they consistently report changes suggested by OIRA in the rulemaking dockets, disclose information about all outside parties it meets with regarding rulemaking, and ensure that the informal rulemaking reviews,

which are in place to streamline and verify the process, are not misused to reduce the very transparency we are seeking.

Congress and the American people have a right to know why some rules sit under OIRA review for years when the review process is supposed to be 90 days. There are currently 31 regulatory actions that have been under OIRA review for more than 90 days, some considerably more.

In closing, I also do want to recognize that OIRA has an incredibly difficult challenge and a hardworking and dedicated core of career staff that is providing first-rate quantitative analysis weighing complex economic costs against potential benefits. And somebody has got to do that because sometimes we have rhetoric up here that presupposes all regulation is bad and none of it ever has any positive externalities. And that is flat out untrue, and experience tells us that.

So to have an independent agency that is doing that codification, doing that kind of analysis is critical, but as the chairman indicated and I certainly support, but transparency, in order to have validation, in order to have credibility, there has to be transparency.

And so I thank the chair for having another hearing on this matter, and I welcome our panelists and look forward to the testimony.

Mr. MEADOWS. I thank the gentleman from Virginia. I would also like to make note that we will hold the record open for 5 legislative days for any other members who would like to submit a written statement.

We will now recognize our panel of witnesses, and I am pleased to welcome the Honorable Howard Shelanski, Administrator of the Office of Information and Regulatory Affairs at the office of OMB; Ms. Michelle Sager, Director of Strategic Issues at the Government Accountability Office; Mr. Richard Williams, Vice President of Policy Research and Director of Regulatory Studies Program at the Mercatus Center at George Mason University; and Mr. Sam Batkins, is that correct?

Mr. BATKINS. Yes, it is.

Mr. MEADOWS. Batkins, Director of Regulatory Policy at the American Action Forum. Welcome to you all. And pursuant to committee rules, all witnesses will be sworn in before they testify, so I would like to ask you to rise. Please raise your right hand.

[Witnesses sworn.]

Mr. MEADOWS. Thank you. Please be seated and let the record reflect that all witnesses answered in the affirmative.

And in order to allow time for discussion, please limit your oral testimony to 5 minutes, but your entire written statement will be made part of the record.

And, Mr. Shelanski, we will recognize you for 5 minutes.

WITNESS STATEMENTS

STATEMENT OF HOWARD SHELANSKI

Mr. SHELANSKI. Thank you, Mr. Chairman.

Thank you for the invitation to appear before you today. I'm pleased to have this opportunity to discuss the role that the Office

of Information and Regulatory Affairs (OIRA) plays in the Federal regulatory process.

Regulatory process in the United States is premised on two principles: transparency and accountability. One of my priorities at OIRA has been to increase the transparency of the regulatory process by improving notice and predictability for the public. During my tenure, we have timely published each spring and fall the Unified Agenda and Regulatory Plan, which shows agency rulemaking activity for the year that follows.

To further promote transparency, OIRA maintains a rigorous process when it comes to the review of individual regulations. First and foremost, OIRA consistently upholds the established standards: the draft rules and their accompanying analyses must meet under applicable Executive orders, statutes, and published guidance.

While OIRA takes the time necessary to ensure thorough interagency review of regulations, we are mindful that unnecessary delays in the publication of rules are potentially harmful across the board, harmful to stakeholders wishing to comment on proposed rules, to businesses and other entities that must make plans to comply with rules, and to parties denied the benefits of regulation.

Under the Administrative Procedure Act, agencies must generally provide the public with an opportunity to comment on proposed rules before the agency can finalize those rules. OIRA plays an important role in this process by ensuring that agencies' regulatory proposals contain sufficient detail, explanation, and underlying analysis for the public to provide meaningful comments and response. Such transparency is essential to the public's ability to influence the regulations with which they must eventually live.

Once an agency drafts the final rule for publication, OIRA again plays an important role by ensuring that the agency takes account of the public comments on the earlier proposal, that the final rule logically follows from the proposed rule and those public comments and that the agency's final rule is well-grounded in the record evidence and meets applicable economic analytical requirements. Such accountability is essential to ensuring that agencies heed public comment and issue rules that are effective and efficient.

As the discussion above implies, when an agency submits a draft final or proposed rule to OIRA, the rule is not yet finished and may change during the review period. OIRA circulates the rules to other Federal offices and agencies for comment and examines the rule for the quality of its underlying evidence and analysis. OIRA then transmits the comments from other Federal agencies, as well as its own comments on the rule, back to the rulemaking agency. Once this process is concluded, OIRA concludes review and the rule goes back to the agency for publication in the Federal Register.

The Executive orders require the agency, upon request, to make publicly available both the version of the rule the agency originally submitted to OIRA, as well as the final published version so that the public can see any changes that occurred during interagency review.

To further ensure accountability and transparency in the regulatory review process, when an agency submits the rule to OIRA, the submission appears publicly the next day on OIRA's Web site

reginfo.gov. Stakeholders, therefore, have notice that OIRA is initiating review. This notice is important because, pursuant to Executive Order 12866, OIRA meets with any party interested in providing any input on a regulation under review.

The entities with which OIRA typically meets includes State and local governments, businesses, trade associations, unions, and advocates from environmental health and safety organizations. OIRA posts a searchable log of all such meetings on its Web site, and that log now includes both meetings that have already taken place and also upcoming meetings.

The Regulatory Right-to-Know Act, which calls for OMB to submit to Congress each year an accounting statement and associated report, promotes additional accountability. This report includes an estimate of the total annual benefits and costs of Federal rules and paperwork in the aggregate by agency and agency program and by major rule. OIRA issued its final 2015 report on the costs and benefits of Federal regulations earlier this month.

Finally, a hallmark of this administration's commitment to transparency and accountability is our retrospective review effort. Agencies submit reports on the status of their retrospective review efforts every 6 months. Agencies release their most recent reports on March 4 and will submit their next set to OIRA this summer. The agency's regulatory look-back efforts to date are expected to yield an estimated net 5-year savings of \$28 billion so far.

In conclusion, the United States is perhaps the most transparent and accountable regulatory system in the world. OIRA's review of executive branch regulations plays an important role in that system. OIRA will therefore continue its efforts to remain accessible to the public during regulatory review to work with agencies to provide the public with notice of planned regulatory activities and to ensure that the government regulates this effectively and efficiently as possible to the net benefit of all Americans.

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

[Prepared statement of Mr. Shelanski follows:]

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

**TESTIMONY OF HOWARD SHELANSKI
ADMINISTRATOR FOR THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES HOUSE OF REPRESENTATIVES**

March 15, 2016

Chairman Meadows, Ranking Member Connolly, and members of the Subcommittee:

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

As the Administrator of OIRA, it is my privilege to work with the dedicated OIRA staff, the first-rate leadership team at the Office of Management and Budget (OMB), and our excellent colleagues throughout the Government. We are all working to promote economic growth and job creation while protecting the health, safety, and welfare of Americans, now and into the future.

OIRA has a broad portfolio, but the largest area of OIRA's work is the review of regulations promulgated by Executive Branch departments and agencies. A set of Executive Orders (E.O.s)—most significantly E.O. 12866 and E.O. 13563—provides the principles and procedures for OIRA's regulatory reviews.

Regulatory process in the United States is premised to an unrivaled degree on two principles: transparency and accountability. One of my priorities as OIRA Administrator has been to increase the transparency of the regulatory process by improving notice and predictability for the

public. During my tenure we have timely published, each spring and fall, the Unified Agenda and Regulatory Plan that shows agency rulemaking activity for the year that follows.

In order to further promote transparency, OIRA maintains a rigorous process when it comes to the review of individual regulations. First and foremost, OIRA consistently upholds the established standards that draft rules and their accompanying analyses must meet under applicable executive orders, statutes, and published guidance. While OIRA takes the time necessary to ensure thorough inter-agency review of regulations, we are mindful that unnecessary delays in the publication of rules are potentially harmful across the board: harmful to stakeholders wishing to comment on proposed rules, to businesses and other entities that must make plans to comply with rules, and to parties denied the benefits of regulation.

Under the Administrative Procedure Act, agencies must generally provide the public with an opportunity to comment on proposed rules before the agency can finalize those rules. OIRA plays an important role in this process by ensuring that agencies' regulatory proposals contain sufficient detail, explanation, and underlying analysis for the public to provide meaningful comments in response. Such transparency is essential to the public's ability to influence the regulations with which they must eventually live.

Once an agency completes its review of the public comments on a proposed rule, the agency drafts a final rule for publication. OIRA again plays an important role by ensuring that the agency has addressed the public comments on the earlier proposal, that the final rule logically follows from the proposed rule and the public comments, and that the agency's final rule is well-grounded in the record evidence and meets applicable analytical requirements. Such accountability is essential to ensuring that agencies heed public comment and issue rules that are effective and efficient.

As the discussion above implies, when an agency submits a draft final or proposed rule to OIRA, the rule is not yet finished and may change during the review period. OIRA circulates the rule to other federal offices and agencies for comment and examines the rule for the quality of its underlying evidence and analysis. OIRA then transmits the comments from other federal

agencies as well as its own comments on the rule back to the rulemaking agency. A significant amount of back-and-forth discussion often ensues between OIRA staff and the agency staff as the agency responds to interagency comments. Once those discussions are complete and the agency makes any necessary changes to the rule, OIRA concludes review and the rule goes back to the agency for publication in the Federal Register. EO 12866 requires the agency upon request to make publicly available both the version of the rule the agency originally submitted to OIRA as well as the final, published version so that the public can see any changes that occurred during interagency review.

To further ensure accountability and transparency in the regulatory review process, when an agency submits a rule to OIRA the submission appears publicly the next day on OIRA's website, reginfo.gov. Stakeholders therefore have notice that OIRA is initiating review. This is important because pursuant to E.O. 12866, OIRA meets with any party interested in providing input on a regulation under review. The entities with which OIRA typically meets include State and local governments, businesses, trade associations, unions, and advocates from environmental, health, and safety organizations. As required in E.O. 12866, OIRA posts a log of all such meetings on its website. In April 2014, OIRA updated its website to make its database of E.O. 12866 meetings publicly searchable, and we recently expanded our disclosure policy to include not only meetings that have already taken place but also upcoming meetings. Over the past two years, OIRA has conducted nearly 900 such meetings at the request of various stakeholders.

Additionally, the Regulatory Right-to-Know Act, which calls for OMB to submit to Congress each year "an accounting statement and associated report," promotes further accountability. This report includes an estimate of the total annual benefits and costs of Federal rules and paperwork (1) in the aggregate; (2) by agency and agency program; and (3) by major rule. OIRA issued its final 2015 report on the costs and benefits of federal regulations earlier this month. The 2015 report shows that FY 2014 is one of the lowest cost years during the Obama Administration --the estimated annual costs were \$3.0 - \$4.4 billion and the estimated annual benefits are between \$9.8 - \$23 billion.

Finally, a hallmark of this Administration's commitment to transparency and accountability is our retrospective review effort. Retrospective review, which the President has advanced through E.O. 13563 and E.O. 13610, is a crucial way to ensure that our regulatory system remains modern, streamlined, and does not impose unnecessary burdens on the American public. The essential idea is to scrutinize existing rules and assess whether in practice they are achieving their objectives without imposing unnecessary costs. E.O. 13610 directs agencies to submit reports on the status of their retrospective review efforts to OIRA every six months. Agencies released their most recent reports on March 4 and will submit their next set to OIRA this summer. The agencies' regulatory lookback efforts to date are expected to yield estimated net five-year savings of \$28 billion.

To make the retrospective review process more open and accountable, OMB conducted numerous meetings with stakeholders—including State and local government officials, community groups, and representatives from numerous industries. Through these meetings, OMB has become better able to understand what approaches, themes, and specific areas of regulation should be part of agencies' retrospective review efforts. OMB has shared input from those meetings with agencies, which also engage in their own, ongoing stakeholder outreach on retrospective review.

In conclusion, the United States has perhaps the most transparent and accountable regulatory system in the world. OIRA's review of Executive Branch regulations plays an important role in that system. OIRA will therefore continue its efforts to remain accessible to the public during regulatory review, to work with agencies to provide the public with notice of planned regulatory activities, and to ensure that the government regulates as effectively and efficiently as possible to the net benefit of all Americans.

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

Mr. MEADOWS. Thank you.

Ms. Sager, you are recognized for 5 minutes.

STATEMENT OF MICHELLE SAGER

Ms. SAGER. Thank you. Chairman Meadows, Ranking Member Connolly, members of the subcommittee, thank you for inviting me here today to discuss GAO's work.

We have consistently found opportunities to improve regulatory transparency, and I am honored to represent GAO and share a selection of our findings. My written statement provides additional detail, as well as references to the multiple reports that inform my remarks today.

In the next few minutes, I will highlight findings from recent reports with a focus on, first, aspects of the regulatory review process that could be more transparent; and second, additional opportunities to enhance transparency and oversight of the rulemaking process.

First, our reports on cost-benefit analysis, rule development, and OMB's role in reviews of agencies' rules illustrates specific opportunities to increase the transparency of the regulatory review process. For example, with regard to cost-benefit analysis, our 2014 report found that reviews of agencies' rules sometimes did result in changes, but the transparency of the review process could be improved.

In that report, we made three recommendations to OMB. First, that OMB work with agencies to clearly communicate the reasons for designating significant regulations and explain the reason for any changes to an agency's initial assessment of a regulation's significance.

And second, we recommended that OMB encourage agencies to state in the preamble section of the Executive order definition of a significant regulatory action that applies to that particular regulation. OMB implemented the first recommendation in that report.

Second, additional opportunities do exist to enhance transparency and congressional oversight of the rulemaking process. OMB plays a very important role in this process through oversight and by providing guidance to agencies on how they should comply with the various requirements.

GAO reports covering a range of topics such as regulatory guidance, retrospective regulatory review, and exceptions for expediting the rulemaking process illustrate additional opportunities to enhance transparency. So, for example, retrospective analysis can help agencies evaluate how well existing regulations work in practice and also determine whether they should be modified or perhaps even repealed.

In a 2014 report, we found that agencies often did change their regulations in response to completed retrospective analysis, but they could improve reporting on their progress and also strengthen linkages between their retrospective review and agencies' performance goals.

We also concluded that OMB could enhance transparency of the information provided to the public. We made three recommendations in this report: first, that OMB improve reporting on retrospective regulatory review outcomes; second, to improve how these re-

views could be used to help agencies achieve their agency priority goals; and third, to ensure that OIRA monitor the extent to which agencies have implemented guidance on these reviews and then confirm that agencies have identified how they would assess the performance of regulations in the future. Staff from OIRA generally agreed with these three recommendations, and last year, the administrator indicated that the agency was indeed taking actions to address them.

In summary, as you see in my written statement, OIRA has implemented nine of the 25 recommendations in the selected reports outlined in the written statement. We believe that the other 16 related recommendations that have not been implemented still have merit and, if acted upon, would improve the transparency of Federal rulemaking. In a step in that direction, last year, the administrator noted that OIRA has worked with agencies to help them with their Executive order disclosure requirements.

Increased transparency of the rulemaking process holds potential benefits for your continued oversight, as well as for increased public awareness and understanding of the rulemaking process for the regulations that affect all of us as citizens and as taxpayers.

Chairman Meadows, Ranking Member Connolly, members of the subcommittee, this concludes my prepared statement. I look forward to any questions that you may have. Thank you.

[Prepared statement of Ms. Sager follows:]



United States Government Accountability Office

Testimony
Before the Subcommittee on
Government Operations, Committee on
Oversight and Government Reform,
House of Representatives

For Release on Delivery
Expected at 2:00 p.m. ET
Tuesday, March 15, 2016

FEDERAL RULEMAKING

Opportunities Remain for OMB to Improve the Transparency of Rulemaking Processes

Statement of Michelle Sager, Director, Strategic Issues

GAO Highlights

Highlights of GAO-16-505T, a testimony before the Subcommittee on Government Operations, Committee on Oversight and Government Reform, House of Representatives

Why GAO Did This Study

Federal regulation is a basic tool of government. Agencies issue regulations to achieve public policy goals such as ensuring that workplaces, air travel, foods, and drugs are safe; that the nation's air, water, and land are not polluted; and that the appropriate amount of taxes is collected. Congresses and Presidents have acted to refine and reform the regulatory process during the last several decades. Among the goals of such initiatives are enhancing oversight of rulemaking by Congress and the President, promoting greater transparency and public participation in the process, and reducing regulatory burdens on affected parties.

Congress has often asked GAO to evaluate the implementation of procedural and analytical requirements that apply to the rulemaking process. The importance of improving the transparency of the rulemaking process emerged as a common theme throughout GAO's body of work. Based on that body of work, this testimony addresses (1) GAO's prior findings and OIRA's progress to date on recent GAO recommendations to improve the transparency of the regulatory review process, and (2) other challenges and opportunities GAO has identified for increasing the transparency and oversight of the rulemaking process.

GAO has made 25 prior related recommendations of which OMB has implemented 9 to date.

View GAO-16-505T. For more information, contact Michelle Sager at (202) 512-6806 or sagem@gao.gov.

March 2016

FEDERAL RULEMAKING

Opportunities Remain for OMB to Improve the Transparency of Rulemaking Processes

What GAO Found

GAO has consistently found opportunities to improve the transparency of regulatory processes coordinated through the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA). Three GAO reports on OIRA's reviews of agencies' rules under Executive Order 12866 illustrate current and specific actions that would increase the transparency of that review process.

- In a 2014 report on cost-benefit analysis, GAO found that OIRA's reviews resulted in changes. However, in 72 percent of the 109 rules GAO reviewed, there was no explanation for why the rule was designated as significant.
- In a 2009 report on the development of rules, GAO found that documentation of OIRA's reviews could be improved. In reviews of 12 case studies, GAO found uneven attribution of changes made during the OIRA review period and differing interpretations regarding which changes required documentation.
- In a 2003 report, GAO examined 85 rules from nine health, safety, or environmental agencies. GAO found that, while the OIRA review process had significantly affected 25 of those rules, some agencies' files did not provide clear and complete documentation of changes made during OIRA's review. However, a few agencies exhibited exemplary transparency practices.

Four GAO reports covering the topics of regulatory guidance, retrospective regulatory review processes, and exceptions for expediting the rulemaking process further illustrate opportunities for OMB to enhance transparency.

- In a 2015 report on guidance development processes at four agencies GAO found that all four identified standard practices to follow when developing guidance. However, the four agencies addressed OMB's requirements on significant guidance to varying degrees.
- In 2007 and 2014 reports on retrospective regulatory reviews, GAO found that, while such reviews often resulted in changes, OMB and agencies could improve the reporting of progress to enhance the transparency and usefulness of information provided to the public.
- In a 2012 report on exceptions to proposed rules, GAO reviewed a generalizable sample of final rules published over an 8 year period. GAO found that, although agencies often requested comments on final major rules (rules with an annual impact of \$100 million or more) issued without a prior notice of proposed rulemaking, the agencies did not always respond to comments received.

GAO made 25 recommendations to OMB to address the transparency issues identified in these seven reports. OMB has implemented 9 of the recommendations. GAO believes that the other 16 recommendations that have not been implemented still have merit and, if acted upon, would improve the transparency of federal rulemaking. In a step in that direction, the OIRA Administrator in 2015 noted that OIRA has worked with agencies to help them with their Executive Order disclosure requirements.

United States Government Accountability Office

Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee:

I am pleased to be here today to discuss the federal rulemaking process, focusing in particular, at your request, on opportunities to improve the transparency of the regulatory review process coordinated through the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA).

Federal regulation is a basic tool of government. Agencies issue regulations to achieve public policy goals such as ensuring that workplaces, air travel, food, and drugs are safe; that the nation's air, water, and land are not polluted; and that the appropriate amount of taxes is collected. Given the sizable benefits and costs of these regulations, Congresses and Presidents have taken a number of actions to refine and reform the regulatory process during the past few decades. Among the goals of such initiatives are enhancing oversight of rulemaking by Congress and the President, promoting greater transparency and participation in the process, and reducing regulatory burdens on affected parties. OIRA is a key player in the regulatory process with its responsibility for ensuring that regulations are consistent with applicable law, the President's priorities, and the principles set forth in executive orders, among other things.

Congress has often asked us to evaluate the implementation of procedural and analytical requirements that apply to the rulemaking process.¹ Drawing on that body of work, my remarks today highlight seven relevant reports regarding (1) our prior findings and OIRA's progress to date on recent recommendations to improve the transparency of the regulatory review process under Executive Order 12866, and (2) other challenges and opportunities our work has identified for increasing the transparency and oversight of the rulemaking process. We have consistently found opportunities to improve the transparency of regulatory processes coordinated through OMB. We made a total of 25

¹Under the Congressional Review Act, we also provide the Congress with a report on each major rule containing our assessment of whether the promulgating federal agency's submissions to us indicate that it has complied with the procedural steps required by various acts and Executive Orders governing the regulatory process. A major rule is one that, among other things, has resulted in or is likely to result in an annual effect on the economy of \$100 million or more.

recommendations to OMB on these particular topics of which OMB has implemented 9 to date. The importance of increasing the transparency of the rulemaking process is a common theme throughout our body of work on federal regulation.

My testimony today is based on work that we have issued on the rulemaking process prepared at the request of Congress.² We used multiple methodologies to develop the findings, conclusions, and recommendations for these issued products. We conducted our work for these reports in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. A more detailed discussion of prior reports' objectives, scope, and methodology, including our assessment of data reliability, is available in the reports cited in the related products list at the end of this statement.

Aspects of the OIRA Regulatory Review Process Could Be More Transparent

Our reports on cost-benefit analysis in the rulemaking process, rule development and regulatory reviews, and OMB's role in reviews of agencies' rules under Executive Order 12866 illustrate specific actions that, if taken, would increase the transparency of the rulemaking process.

Cost-benefit Analysis

In our 2014 report on cost-benefit analysis in agencies' rulemaking processes, we found that OIRA's reviews of agencies' rules sometimes resulted in changes, but also concluded that the transparency of the review process could be improved.³ We found that in the majority of the 109 significant rules that we reviewed, the rulemaking process was not as transparent as it could be. For example, in 72 percent of these rules, there was no explanation for why the rule was designated as significant,

²A selected list of related GAO products is included at the end of this statement.

³GAO, *Federal Rulemaking: Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations' Significance Could Be More Transparent*, GAO-14-714 (Washington, D.C.: Sept. 11, 2014).

thus triggering additional oversight required by Executive Order 12866.⁴ We made two recommendations based on our review of the cost benefit analyses included in selected rules. We recommended that (1) OMB work with agencies to clearly communicate the reasons for designating a regulation as a significant regulatory action, and explain its reason for any changes to an agency's initial assessment of a regulation's significance; and (2) OMB encourage agencies to clearly state in the preamble of significant regulations the section of Executive Order 12866's definition of a significant regulatory action that applies to the regulation. While OMB staff did not state whether they agreed or disagreed with the recommendations, they took action in 2015 to implement the first recommendation.

Rules Development and Regulatory Reviews

In our 2009 report on the regulatory review process, we found that OIRA's reviews of agencies' draft rules often resulted in changes.⁵ Of the 12 case-study rules subject to OIRA review that we examined, 10 reviews resulted in changes, about half of which included changes to the regulatory text. Agencies used various methods to document OIRA's reviews which generally met disclosure requirements.⁶ However, we found that the transparency of this documentation could be improved. In particular, there was uneven attribution of changes made during the OIRA review period and differing interpretations regarding which changes were "substantive" and thus required documentation. Both of these issues had

⁴Executive Order 12866 defines significant regulatory actions as those that are likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. The order further directs executive branch agencies to conduct and submit to OIRA a regulatory analysis for economically significant regulations (those rules under the first item in the definition above).

⁵GAO, *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews*, GAO-09-205 (Washington, D.C.: Apr. 20, 2009).

⁶Executive order 12866 contains several transparency provisions that require both OIRA and agencies to disclose certain information about the OIRA review process.

been identified in our earlier work.⁷ We made four recommendations that OMB provide guidance to agencies to improve transparency and documentation of the OIRA review process, specifically that OIRA (1) define what types of changes made as a result of the review process are substantive and need to be publicly identified; (2) direct agencies to clearly state in final rules whether they made substantive changes as a result of OIRA reviews; (3) standardize how agencies label documentation of these changes in public rulemaking dockets; and (4) instruct agencies to clearly attribute those changes made at the suggestion or recommendation of OIRA. While OMB staff generally agreed with these four recommendations, to date, they have not implemented them.

OMB's Role in Reviews of Agencies' Draft Rules

In 2003, we examined 85 rules from nine health, safety, or environmental agencies and found that the OIRA review process had significantly affected 25 of those 85 rules.⁸ OIRA's suggestions appeared to have at least some effect on almost all of the 25 rules' potential costs and benefits or the agencies' estimates of those costs and benefits. The agencies' docket files did not always provide clear and complete documentation of the changes made during OIRA's review or at OIRA's suggestion, as required by the executive order, even though a few agencies exhibited exemplary transparency practices. We made eight recommendations in 2003 targeting aspects of the OIRA review process that remained unclear and where improvements could allow the public to better understand the effects of OIRA's review, including that the Director of OMB:

1. instruct agencies to document the changes made to rules submitted for OIRA review in public rulemaking dockets and within a reasonable time after the rules have been published;
2. define the types of substantive changes made during the review process that agencies should disclose;
3. disclose the reasons for withdrawal of a rule from OIRA review;

⁷GAO, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929 (Washington, D.C.: Sept. 22, 2003); *Regulatory Reform: Changes Made to Agencies' Rules Are Not Always Clearly Documented*, GAO/GGD-98-31 (Washington, D.C.: Jan. 8, 1998).

⁸GAO-03-929.

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4. reexamine OIRA policy that only documents exchanged by agencies with OIRA branch chiefs and above during the review process need to be disclosed;
 5. differentiate in OIRA's database which rules were substantively changed at OIRA's suggestion or recommendation and which were changed in other ways and for other reasons;
 6. define transparency requirements to also include the informal review period when OIRA says it can have its most important impact on agencies' rules;
 7. encourage agencies to use best practice methods of documentation that clearly describe changes; and
 8. disclose in OIRA's logs of meetings with outside parties which regulatory action was being discussed and the affiliation of the meeting participants.

OMB staff disagreed with the first seven of these eight recommendations but did implement the eighth.

Additional Opportunities Exist to Enhance Transparency and Congressional Oversight of Federal Regulations and the Rulemaking Process

Improvements made to the transparency of the regulatory process benefit the public and aid congressional oversight. Four relevant reports covering the topics of regulatory guidance, retrospective regulatory review processes, and exceptions for expediting the rulemaking process illustrate additional opportunities to enhance transparency of federal regulations. OMB plays an important role in these activities through oversight and by providing guidance to regulatory agencies about how to comply with various requirements.

Regulatory Guidance

Regulatory guidance, while not legally binding, provides agencies with flexibility to interpret their regulations, clarify policies, and address new issues more quickly than may be possible using rulemaking. However, concerns have been raised about the level of oversight for agencies' guidance, whether agencies seek feedback from affected parties on guidance, and how to ensure that agencies do not issue guidance when they should undertake rulemaking. Given both the importance of guidance and the concerns about its use, in 2007 OMB recognized the

need for good guidance practices. OMB established review processes for the guidance documents with the broadest and most substantial impact.⁹

In 2015, we reviewed guidance development processes at four departments—Agriculture (USDA), Education (Education), Health and Human Services (HHS), and Labor (DOL)—and 25 of their components.¹⁰ All four departments identified standard practices to follow when developing guidance and addressed OMB's requirements for significant guidance to varying degrees. Education and USDA had written departmental procedures for approval of significant guidance as required by OMB. DOL's procedures were not available to staff and required updating. HHS had no written procedures. Ensuring these procedures are available could better ensure that components consistently follow OMB's requirements.¹¹

Retrospective Review

We have long advocated the potential usefulness to Congress, agencies, and the public of conducting retrospective regulatory analyses.¹² Retrospective analysis can help agencies evaluate how well existing regulations work in practice and determine whether they should be modified or repealed. In 2007, we found that agencies had conducted more retrospective reviews of the costs and benefits of existing regulation than was readily apparent, especially to the public.¹³ We made seven recommendations to improve the effectiveness and transparency of retrospective regulatory review. These included that OMB develop guidance to regulatory agencies to consider or incorporate into their

⁹Office of Management and Budget, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432 (Jan. 25, 2007).

¹⁰GAO, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, GAO-15-368 (Washington, D.C.: Apr. 16, 2015).

¹¹We recommended that HHS and DOL ensure consistent application of OMB requirements for significant guidance. The agencies generally agreed with the recommendation. We did not address any recommendations to OMB.

¹²See, for example, GAO, *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO-14-268 (Washington, D.C.: Apr. 11, 2014); and *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791 (Washington, D.C.: July 16, 2007).

¹³GAO-07-791.

policies, procedures, or agency guidance that govern regulatory review activities the following elements:

1. consideration of whether and how they will measure the performance of new regulations;
2. prioritization of review activities based upon defined selection criteria;
3. specific review factors to be applied to the conduct of agencies' analyses that include, but are not limited to, public input;
4. minimum standards for documenting and reporting all completed review results and, for reviews that included analysis, making the analysis publicly available;
5. mechanisms to assess their current means of communicating review results to the public and identifying steps that could improve this communication; and
6. steps to promote sustained management attention and support to help ensure progress in institutionalizing agency regulatory review initiatives.

We also recommended that OMB

7. work with regulatory agencies to identify opportunities for Congress to revise the timing and scope of existing regulatory review requirements and/or consolidate existing requirements.

In 2011 and 2012, the administration issued new directives to agencies on how they should plan and conduct analyses of existing regulations that addressed each of our seven recommendations.¹⁴

In a 2014 report on reexamining regulations, we found that agencies often changed regulations in response to completed retrospective analyses, but could improve the reporting of progress and strengthen links between those analyses and the agencies' performance goals.¹⁵ We also concluded that OMB could do more to enhance the transparency and

¹⁴These directives included Executive Orders 13563, 13579, and 13610, along with related OMB memoranda. The three executive orders were published at 76 Fed. Reg. 3821 (Jan. 21, 2011), 76 Fed. Reg. 41,587 (July 14, 2011), and 77 Fed. Reg. 28,469 (May 14, 2012).

¹⁵GAO-14-268.

usefulness of the information provided to the public. Although we found that agencies posted their retrospective review plans online, obtaining a comprehensive picture of the agencies' progress was difficult because results were spread across multiple web sites. In addition, consistently providing links or citations to the supporting analyses and data, and including more detail on the methodologies and key assumptions used to estimate savings, would help Congress and the public to better understand the basis for projected results. We made three recommendations to OMB to (1) improve reporting on the outcomes of retrospective regulatory reviews, (2) improve how these reviews can be used to help agencies achieve their priority goals, and (3) ensure that OIRA, as part of its oversight role, monitors the extent to which agencies have implemented guidance on retrospective regulatory review requirements and confirm that agencies have identified how they will assess the performance of regulations in the future.¹⁶ Staff from OIRA generally agreed with the three recommendations, and the OIRA Administrator indicated last year that his agency was taking actions to address them.

Exceptions to Proposed Rules

The Administrative Procedure Act (APA), which spells out the basic rulemaking process, generally requires agencies to publish a notice of proposed rulemaking (NPRM) in the *Federal Register* and solicit public comments before finalizing regulations. However, the APA and other statutes permit exceptions to proposed rules to expedite rulemaking in certain circumstances, such as for an emergency or other "good cause" or when issuing rules about an agency's organization or management. In 2012, we reviewed a generalizable random sample of 1,338 final rules published over 8 years (from 2003 through 2010) to provide information on the frequency, reasons for, and potential effects of agencies issuing

¹⁶The GPRA Modernization Act of 2010 requires the 24 agencies identified in the Chief Financial Officers Act, or as otherwise determined by OMB, to develop agency priority goals (APG) every 2 years. Agencies are to identify the various regulations, as well as federal organizations, program activities, policies and other activities (both within and external to the agency) that contribute to each of their APGs and review and report on progress quarterly.

final rules without NPRMs.¹⁷ We found that agencies frequently used available exceptions to issue final rules without prior NPRMs.¹⁸

We also found that agencies, though not required, often requested comments on major final rules issued without an NPRM. However, they did not always respond to the comments received. This is a missed opportunity because we found that agencies often made changes to improve the rules when they did respond to public comments. To better balance the benefits of expedited rulemaking procedures with the benefits of public comments, and to improve the quality and transparency of rulemaking records, we recommended that OMB issue guidance to encourage agencies to respond to comments on final major rules issued without a prior notice of proposed rulemaking. OMB stated that it did not believe it necessary to issue guidance at that time and has not, to date, taken any action to implement our recommendation. We continue to believe that the recommendation has merit and urge OMB to reconsider its prior position.

In summary, OIRA to date has implemented 9 of the 25 recommendations we made to improve transparency and effectiveness of the Executive Order review process and other aspects of federal rulemaking. We believe that the other 16 related recommendations cited in this statement that have not been implemented still have merit and, if acted upon, would improve the transparency of federal rulemaking. In a step in that direction, the OIRA Administrator in 2015 noted that OIRA has worked with agencies to help them with their Executive Order disclosure requirements.

Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee, this concludes my prepared statement. Once again, I appreciate the opportunity to testify on these important issues. I would be pleased to address any questions you or other members of the subcommittee might have at this time.

¹⁷GAO, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, GAO-13-21 (Washington, D.C.: Dec. 20, 2012).

¹⁸Agencies did not publish an NPRM for about 35 percent of major rules and about 44 percent of nonmajor rules published from 2003 through 2010.

**GAO Contact and
Staff
Acknowledgments**

If you or your staff have any questions about this testimony, please contact Michelle Sager, Director, Strategic Issues, at (202) 512-6806 or sagerm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony are Tim Bober, Tara Carter, Andrea Levine, and Joseph Santiago.

Related GAO Products

Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices. GAO-15-368. Washington, D.C.: April 16, 2015.

Federal Rulemaking: Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations' Significance Could Be More Transparent. GAO-14-714. Washington, D.C.: September 11, 2014.

Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals. GAO-14-268. Washington, D.C.: April 11, 2014.

Federal Rulemaking: Regulatory Review Processes Could Be Enhanced. GAO-14-423T. Washington, D.C.: March 11, 2014.

Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments. GAO-13-21. Washington, D.C.: December 20, 2012.

Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews. GAO-09-205. Washington, D.C.: April 20, 2009.

Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews. GAO-07-791. Washington, D.C.: July 16, 2007.

Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention. GAO-06-228T. Washington, D.C.: November 1, 2005.

Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews. GAO-03-929. Washington, D.C.: September 22, 2003.

Regulatory Reform: Procedural and Analytical Requirements in Federal Rulemaking. GAO/T-GGD/OGC-00-157. Washington, D.C.: June 8, 2000.

Regulatory Reform: Changes Made to Agencies' Rules Are Not Always Clearly Documented. GAO/GGD-98-31. Washington, D.C.: January 8, 1998.

Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results. GAO/GGD-98-3. Washington, D.C.: October 2, 1997.

Related GAO Products

Regulatory Reform: Implementation of the Regulatory Review Executive Order. GAO/T-GGD-96-185. Washington, D.C.: September 25, 1996.

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Mr. MEADOWS. Thank you, Ms. Sager.
Dr. Williams, you are recognized for 5 minutes.

STATEMENT OF RICHARD WILLIAMS

Mr. WILLIAMS. Thank you. Chairman Meadows, Ranking Member Connolly, and members of the subcommittee, thank you for inviting me to testify today.

I want to offer my perspective as someone who has worked both at OIRA briefly and at an agency, the FDA. I know how difficult it is for economists at agencies to produce high-quality unbiased analysis, but also how difficult a job OIRA analysts have ensuring that regulations are solidly grounded in good analysis. When they are so grounded, regulations address real problems, actually help to solve those problems and with reasonable cost.

Good analysis helps the public to understand the likely effects of regulation, i.e., make them transparent. But the job for OIRA analysts is becoming much more difficult because of the growing imbalance between OIRA and the agencies they're expected to regulate. While Federal agencies have grown to twice the size that they were in 1980, OIRA, the arm of OMB that's supposed to oversee regulations, has been halved. Regulatory agencies now have about 280,000 employees versus about 40 in OIRA.

And OIRA only looks at a small percentage of the 3 to 4,000 regulations that we get each year. Between 2004 and 2014, they only looked at 8 percent, and they've only returned one regulation in the last 5 years. But even with those they do review, the record is not an encouraging one. In that same 10-year period, only 116 out of roughly 3,000 major rules had estimates of both benefits and costs, and many of those estimates were quite poor.

So where OIRA was reasonably effective at the outset, the growing imbalance between OIRA and the agencies is producing these poor results. It is now David versus Godzilla. Take one example from a recent rule produced under the Food Safety and Modernization Act. The food industry estimated that it would cost more than \$18 billion to comply with just one rule, the packaged food rule. Yet in its analysis of that rule, FDA claimed not to have any idea whether or not it would make an impact on food safety.

OIRA should have been in a position to stop this rule. This was a rule to reduce risk, and OIRA is at a disadvantage when they are reviewing risk-related rules. Assessing risk is an activity that virtually every American engages in every day, and they do so objectively. In agencies, regulations are often based on formalized risk assessments to determine the baseline risk and the amount of risk that will be reduced by the regulation. If these assessments are inaccurate, then the benefits of the rule will be inaccurate. In fact, time and again, agencies overstate risk or the amount of risk produced. So OIRA needs risk assessors to be able to review the analyses to make sure that benefits can be compared to costs.

But OIRA has another role to play beyond reviewing regulations: ensuring that the public has enough information and time to adequately comment on the rules that often take years to develop, run to thousands of pages, some including very complex analysis. Typically, the public gets 60 to 90 days to respond, and that's insufficient.

So what can help? First, I think to get better analysis you can restore OIRA to its original size, which was about 90. In addition, ensure that OIRA has qualified risk assessment—assessors on staff. Second, you can codify the economic Executive order a little, make it much more enforceable.

In terms of the public, it's important to let the public know what's coming and how to respond. The current system seems designed to inhibit public comment. To accomplish this, there are several things that can be done. First, have OIRA, in conjunction with GAO, enhance the Unified Agenda to make agencies include more information in proposals, which would include a statement of the problem, the legal basis, alternatives for solving the problem, and a preliminary discussion of the benefits and costs.

For bigger rules, agencies should be required to publish an advance notice of proposed rulemaking with an expanded discussion of what's in the Unified Agenda. This will give the public, particularly small businesses, much more time to formulate a constructive information-rich comment that clearly communicates and supports their claims, as the Federal Government asked them to do.

OIRA should also be charged with making it easier to find out when a particular industry has to comply with various rules from different agencies. So, for example, an industry can get regulations from the IRA, from EPA, and from OSHA, and they can have different dates that are all running together. OIRA could create online calendars by industry that would list the compliance dates for various rules. In fact, OIRA could go further. They could coordinate with agencies to make sure that no industry is faced with bunched up compliance dates.

OIRA has a long and distinguished history in helping to solve social problems, but they are simply outgunned as Congress has allowed this agency to dwindle in size and importance. But given the size and reach of the regulatory state, this is a much-needed check for the President to exercise some degree of control over the regulatory agencies

Thank you, and I welcome your comments.

[Prepared statement of Mr. Williams follows:]



TESTIMONY

DAVID VS. GODZILLA, OIRA AND THE FEDERAL AGENCIES**RICHARD WILLIAMS, PHD***Director, Program on Regulatory Studies, Mercatus Center at George Mason University*

House Committee on Oversight and Government Reform, Subcommittee on Government Operations
 Hearing: Accountability and Transparency Reform at the Office of Information and Regulatory Affairs

March 15, 2016

Chairman Meadows, Ranking Member Connolly, and members of the committee, thank you for inviting me to testify on ways to improve transparency and accountability at the Office of Information and Regulatory Affairs (OIRA).

This small agency, established in 1980 by President Carter to “regulate the regulators” and to give “OMB final word on many of the regulations issued by our government,”¹ has largely failed to achieve either goal. The myth persists that OIRA is a “little-known but extraordinarily powerful” agency that has been a “bottleneck” for protective regulations.² The data, however, simply do not support this notion.

There are three main issues that I will cover in my testimony:

1. Other federal agencies, and their associated rulemaking, have grown manyfold in the last four decades, but OIRA staffing has shrunk in the same time period, rendering oversight by OIRA spotty, at best. OIRA cannot perform its duties effectively in this imbalanced state.
2. OIRA also lacks necessary expertise in one key area.
3. Recommendations for reform can help rebalance the relationship between OIRA, stakeholders, and federal agencies, while improving government accountability and transparency in rulemaking.

1. Jimmy Carter, “Paperwork Reduction Act of 1980 Remarks on Signing H.R. 6410 Into Law,” The American Presidency Project, December 11, 1980.

2. Rena Steinzor, “A Solution to Regulatory Delay: End Centralized White House Regulatory Review,” *Huffpost Green*, *Huffington Post*, October 10, 2013.

For more information or to meet with the scholar, contact
 Robin Bowen, 703-993-8582, rbowen@mercatus.gmu.edu
 Mercatus Center at George Mason University, 3434 Washington Blvd., 4th Floor, Arlington, Virginia 22201

The ideas presented in this document do not represent official positions of the Mercatus Center or George Mason University.

THE GROWING IMBALANCE BETWEEN OIRA AND OTHER FEDERAL AGENCIES

Employment in federal regulatory agencies almost doubled between 1980 and 2016, from 146,000 employees to 280,000.³ When it was established in 1981, OIRA had 77 staff members, but in 2013, it had only 38.⁴ Today, most federal regulations are promulgated without OIRA review. In the decade ending in 2014, regulatory agencies issued more than 37,000 regulations, yet 92 percent of them were not reviewed by OIRA.⁵ For the typically 8 percent of rulemakings OIRA reviews, its primary job is to evaluate the content and quality of regulatory impact analyses, in particular the estimates of benefits and costs of a proposed regulation. Of the roughly 3,000 major rules that OIRA reviewed between 2004 and 2014, however, only 116 included estimates of both benefits and costs.⁶ The absence of such important information makes OIRA's job difficult, to say the least.

Thus, there is little factual basis for the myth of OIRA as a David holding back a regulatory Godzilla.

LACK OF AREA EXPERTISE

While OIRA has a generally excellent staff of professionals, a key weakness is its lack of expertise in risk assessment. The vast majority of regulations, both by number and costs on the economy, are risk related. These include worker safety, food safety, environmental, and transportation rules. In order to calculate the potential benefits of any rule, it is first necessary to have an estimate of the risk that the agency is attempting to manage. Risk includes the probability of something going wrong and predicting the negative outcome, which might be injury, illness, or death. Next, the agency needs to evaluate different regulatory options that would reduce those risks.

For regulations focused on risk reduction, federal agencies employ risk assessors to estimate the size of the risk and the expected risk reduction for regulatory options. These analyses are often long and fairly complex but not necessarily accurate. Unfortunately, it is common for risk analyses to be heavily biased, showing much higher risks or much greater risk reduction than is actually achieved.⁷ For example, the journal *Risk Analysis* recently published an article suggesting that the benefits of reducing particulate matter (PM) may be negligible.⁸ Nevertheless, EPA continues to regulate PM to lower and lower levels.⁹ Alternatively, many of these analyses leave out increases in risk (i.e., risk/risk trade-offs) that are a natural result of some regulations. For example, lowering the tolerance for mercury in fish might reduce one tiny risk but also might cause some consumers to switch to meats that present other health risks.¹⁰

When agencies bias risk estimates upward, or risk mitigation estimates downward, the benefits that they estimate will be biased upward. This means both that the regulatory impact analysis is flawed and that OMB's annual *Report to Congress on the Benefits and Costs of Federal Regulations* is inaccurate. Without on-staff risk assessors, OIRA is not in a position to review risk assessments, meaning it is unable to ascertain the accuracy of benefits estimates.

3. Carter, "Paperwork Reduction Act of 1980 Remarks"; Susan Dudley and Melinda Warren, "Regulators' Budget Increases Consistent with Growth in Fiscal Budget" (St. Louis and Washington, DC: Weidenbaum Center at Washington University and Regulatory Studies Center at George Washington University, May 19, 2015).

4. Curtis W. Copeland, "Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs," Congressional Research Service, June 9, 2009; Richard Williams and James Broughel, "OIRA Quality Control Is Missing for Most Regulations," Mercatus Center at George Mason University, October 1, 2014, <http://mercatus.org/publication/oira-quality-control-missing-most-regulations>.

5. Williams and Broughel, "OIRA Quality Control Is Missing for Most Regulations."

6. Ibid.

7. Office of Management and Budget, "Current Regulatory Issues in Risk Assessment and Risk Management," Regulatory Program of the United States, April 1, 1990–March 31, 1991, 13–26.

8. Louis Anthony Cox, "Miscommunicating Risk, Uncertainty, and Causation: Fine Particulate Air Pollution and Mortality Risk as an Example," *Risk Analysis* 32, no. 5 (2012): 765–67. For another example of a critique of benefit estimates, see Anne Smith, *Summary and Critique of the Benefits Estimates in the RIA for the Ozone NAAQS Reconsideration* (Washington, DC, NERA Economic Consulting, July 22, 2011).

9. Environmental Protection Agency, "Particulate Matter: Regulatory Actions," accessed March 10, 2016.

10. Richard Williams and Kimberly Thompson, "Integrated Analysis: Combining Risk and economic Assessments While Preserving the Separation of Powers," *Risk Analysis* 24, no. 6 (2004).

PROPOSED REMEDIES

Several reforms can help rebalance the relationship between OIRA and federal agencies to improve regulatory policy.

First, create incentives that make the content and quality of regulatory impact analyses important to the agencies. The *Unified Agenda of Regulatory and Deregulatory Actions*, which currently includes only a title and a brief description of what the agency intends to do, should be reformed to be more transparent and include the type of information for proposed rules that agencies currently provide for final rules. For example, just one final rule the EPA published in the *Unified Agenda* had sections on statement of need, summary of legal basis, alternatives, anticipated benefits and costs, and risks.¹¹ Yet proposed rules only get a title and a short abstract.¹² This is precisely the kind of information that should be in the *Unified Agenda* for proposed rules. This material would provide clearer information to the public on what the agency knows and the types of information it needs to refine its understanding of the problem, potential outcomes, and options.

A stronger incentive would be to require agencies to publish preliminary regulatory impact analyses for public comment before a proposed rule is published for notice and comment. Research from the Mercatus Center at George Mason University indicates that going a step further and establishing a statutory mandate for conducting regulatory impact analyses could significantly improve regulatory impact analyses and their use.¹³ Any of these options can contribute to a better-informed agency, a better-informed OIRA, and a better-informed public.

Second, Congress should consider changes in OIRA's logistical authority. With the volume of regulations on the books and in process at federal agencies, there is a great need for better information on which rulemakings will affect which industries and when. Currently, there is no government service providing the public with a means to easily match rulemakings with regulated parties. OIRA could create online calendars by industry that would track compliance dates for individual rules, along with links to the small business compliance guides. This would begin to show where agencies have compliance dates for specific industries "bunched up," much as midnight regulations bunch up at the end of presidential administrations.¹⁴ Transparency and accountability could be improved if all information associated with regulations, including the *Unified Agenda*, notices, proposed rules, and final rules, were searchable by industry and accessible through timely updates to RSS feeds.

Finally, OIRA could operate as "flow control" for industries by coordinating amongst all federal regulatory agencies to ensure that compliance dates are evenly spread out by industry.

CONCLUSION

OIRA is no longer any match for the huge number of agencies and regulations that they issue. Restoring OIRA to its original strength, adding risk assessment professionals, and tasking it with ensuring that multiple agency rules do not bog down compliance when agencies bunch up rules can help to ensure that the federal government only issues rules informed by sound analysis and that no industries face compliance dates that are overwhelming.

Thank you, and I welcome your questions.

11. Environmental Protection Agency, Office of Chemical Safety and Pollution Prevention, 40 C.F.R. § 770 (2013).

12. Environmental Protection Agency, Office of Chemical Safety and Pollution Prevention, 40 C.F.R. § 721 (2015).

13. Jerry Ellig and Rosemarie Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, July 2013).

14. See articles on midnight regulations at "Midnight Regulations," Mercatus Center at George Mason University, <http://mercatus.org/research/midnight-regulations>.

APPENDIX: POTENTIAL QUESTIONS ABOUT FEDERAL REGULATIONS FROM REGULATED PARTIES

IMPROVING THE IMBALANCE BETWEEN OIRA AND OTHER FEDERAL AGENCIES

One area that has been a consistent concern of Congress has been the effect of regulations on small businesses. That concern led to the Regulatory Flexibility Act of 1980 and its expansion, the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA). Small businesses and start-ups form a large part of the creative engine of the economy and are major employers (55 percent of all jobs), yet they are the least engaged in the regulatory process.¹⁵ This is largely due to necessity as they cannot afford expensive lawyers to monitor the *Federal Register* or meet with agencies to express concerns. Some of the questions an owner of a small business may consider are addressed in the appendix. Enhancing OIRA will help with some of these issues.

Think about the questions an owner of a small business might ask when first encountering the idea that the business must comply with federal regulations.

1. What regulations are already on the books that I have to comply with?

If you start reading the *Code of Federal Regulations* today, March 15, 2016, you should be finished about the same time in 2019 (an estimated 5,727 hours of reading over 100 million words).¹⁶ The regulations are found in 226 books.¹⁷

2. How will I know what regulations are coming up that are final or, if I do have the time, can comment on?

On average, you will have to read 70,000–80,000 pages of often dense legalese in the *Federal Register* each year.

3. If I do find something that will affect my business, how long will I have to read a proposed rule and prepare a comment on it?

Agencies take years to prepare regulations that can run to thousands of pages in length, but you will have only 30 to 60 days to get your comment in.¹⁸ Regulations may contain complex risk assessments and regulatory impact analyses, as well as lots of supporting documentation that you may need to understand in order to comment effectively. The federal government itself suggests that you write a “constructive, information rich comment that clearly communicates and supports its claims.”¹⁹ You should, of course, understand the laws and Executive Orders that the agency is operating under, including the authorizing statute, Executive Order 12866, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement and Fairness Act, the Unfunded Mandates Reform Act, the Paperwork Reduction Act, and any special acts that are applicable to the agency.²⁰

4. Does commenting make a difference?

It will, particularly if you agree with the agency. If you don’t agree, perhaps not so much. Shapiro concluded that agencies are “happy to clear up confusion in their proposals but less willing to make

15. “Small Business Trends,” Small Business Administration, accessed March 10, 2016.

16. Patrick McLaughlin, “The Code of Federal Regulations, the Ultimate Longread,” Mercatus Center at George Mason University, April 1, 2015, <http://mercatus.org/publication/code-federal-regulations-ultimate-longread-game-thrones-hunger-games>.

17. Office of the Federal Register, “Federal Register Facts,” July 15, 2010.

18. Office of the Federal Register, “A Guide to the Rulemaking Process,” 2011.

19. “Tips for Submitting Effective Comments,” *Regulations.gov*, accessed March 10, 2016.

20. See Jerry Ellig, *A Guide to Writing Public Interest Comments Using Economic Analysis* (Arlington, VA: Mercatus Center at George Mason University, 2014).

substantive changes to their rules.”²¹ Another author noted, “as a general matter, the changes that agencies make to proposed rules in response to comments tend to be small and painful, and they are often subtractive rather than innovative or additive.”²² Finally, to describe it from the agency’s point of view, “by the time the NPRM is issued, the agency has made a very substantial commitment to the draft rule it is proposing, and will be understandably reluctant to modify it very substantially afterwards.”²³

5. When the rule is made final, how will I know about it and know when I have to be in compliance?

Just like finding the proposed rule, you will have to read the *Federal Register* and read the final rules pretty thoroughly. SBREFA does require that agencies publish compliance guides for any rules that have a significant small business impact—that may be helpful to you.²⁴ You will have to ascertain from the final rule or the guide when you must be in compliance. It could be anywhere from immediately to years from publication. What may be more of a problem for you, however, is that you may have to comply with multiple regulations from multiple agencies at the same time. For example, if you were in the waste management industry in 2014, there were 4,600 regulatory requirements (where the agencies said you “must” or “shall” do something).²⁵ These came from 17 different regulations from three different agencies—and 7 of those regulations had compliance dates in just two out of the 12 months in 2014. No one in the federal government coordinates the requirements to space them out. This is a problem for small businesses as compliance with virtually all regulations has been financed out of retained earnings.

6. What happens if I don’t comply?

You must comply with every single regulation and every one is equally important. If you don’t comply you can be fined, your products can be seized, you can have your license or permit revoked, or, in some cases, you can be sent to jail.

21. Stuart Shapiro, “When Will They Listen? Public Comment and Highly Salient Regulations” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, September 2013), 14.

22. William F. West, “Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis,” *Public Administration Review* 64, no. 1 (2004): 67.

23. Richard Parker and Alberto Alemanno, “Towards Effective Regulatory Cooperation under TTIP: A Comparative Overview of the EU and US Legislative and Regulatory Systems” (Report, European Commission, May 13 2014), 47.

24. “Summary of SBREFA,” Small Business Administration, accessed March 10, 2016.

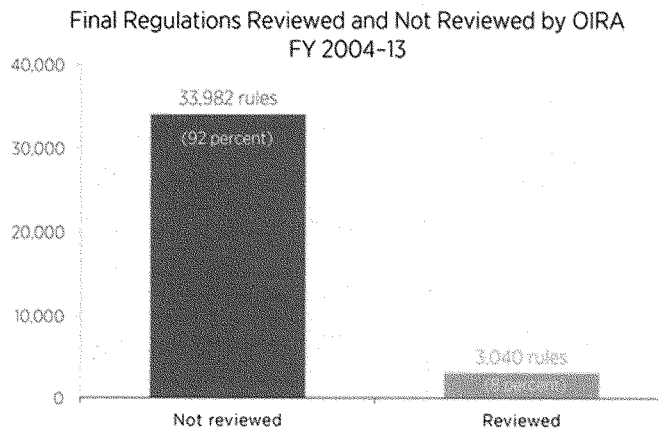
25. “Ask RegData a Question about US Federal Regulation,” RegData, regdata.mercatus.org.



OIRA Quality Control Is Missing for Most Regulations

Richard Williams ^[1], James Broughel ^[2] | Oct 01, 2014

Over the last decade, federal regulatory agencies finalized more than 37,000 regulations, yet 92 percent of rules escaped review by the Office of Information and Regulatory Affairs (OIRA), a small office tasked with reviewing significant regulatory actions promulgated by such agencies. Of the roughly 3,000 rules OIRA did review, only 116 have estimates of both benefits and costs appearing in OIRA's annual report. Relative to the cost of many of these regulations, expecting agencies to analyze benefits and costs before issuing a rule is a fairly low bar to set.



Source: Office of Management and Budget, "2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities" (July 2014).
Produced by James Broughel, Richard Williams, and Rizqi Rachmat, Mercatus Center at George Mason University, October 2, 2014.

[3]

The numbers suggest that the analysis of rules reviewed by OIRA is severely lacking in most cases. Of roughly 3,600 rules finalized last fiscal year, only seven had estimates of both benefits and costs appearing in OIRA's report.

By confirming that agency actions are consistent with executive orders ^[4] that set standards for regulatory analysis, OIRA is charged with ensuring that analysis meets minimal levels of quality and that agency rules are informed by those analyses. Each year OIRA puts out a report ^[5] with details on the costs and benefits of the US regulatory system, but the report provides little insight

because so many regulations escape review by OIRA. These missing rules also lack OIRA's critical quality control check.

Most rules that avoid OIRA review are not deemed "significant," meaning they aren't expected to have large economic impacts, raise novel legal issues, or meet certain other criteria signifying the importance of a regulation. Yet, even if any of these rules by themselves might be small, cumulatively their effects can be large. Even worse, the rules that have estimates of both benefits and costs in OIRA's report are not necessarily the ones that are most important to the American public. Of fiscal year 2013 rules, OIRA reports benefits and costs for [a rule](#) [6] that defined "gluten-free" for the purposes of labeling foods that are gluten-free, but four major regulations emanating from the Affordable Care Act do not have any benefit or cost information, and none of the regulations implementing the Dodd-Frank Act have estimates of both benefits and costs. This last point is not surprising, as independent agencies (including most financial regulators) do not have to comply with executive orders setting regulatory analysis standards. Still, these examples suggest the true costs to the public are simply not captured in OIRA's report.

OIRA performs an important role, but its staff is too small (38 at the end of 2013) relative to the hundreds of thousands of employees working in regulatory agencies to provide effective oversight. This means that there is no effective check on the vast majority of regulations, where there is often a total absence of analysis, analysis is ignored in the decision-making, or analysis is made to conform with a predetermined decision.

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- [4] <http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf>
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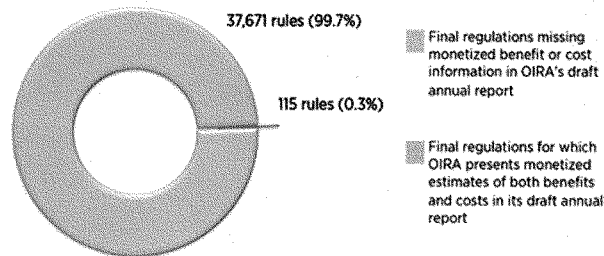


Government Report on Benefits and Costs of Federal Regulations Fails to Capture Full Impact of Rules

Richard Williams ^[1], James Broughei ^[2] | Dec 02, 2013

Each year, the Office of Information and Regulatory Affairs (OIRA) produces a report on the benefits and costs of federal regulations, using Regulatory Impact Analyses (RIAs) created by federal agencies. The OIRA report and the underlying agency RIAs together provide an estimate of the effects regulations are likely to have on the economy upon implementation.

Government Report on Benefits and Costs of Federal Regulations Fails to Capture Full Impact of Rules



Data note: chart represents fiscal years 2003–2012.
 Produced by James Broughei and Richard Williams, Mercatus Center at George Mason University.
 Source: Office of Management and Budget, "2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act" (April 2013).

[3]

OIRA's most recent [draft report](#) ^[4] for fiscal year 2003 through 2012 estimated that the major regulations the agencies evaluated would produce benefits ranging from \$192.7 to \$799.7 billion (2001\$), at a cost of \$56.6 to \$83.7 billion (2001\$).

While at first glance it might appear the regulatory system is working well for the American public, these numbers are misleading. As required by presidential executive order, agencies must present an assessment of the potential benefits and costs for all regulations that are deemed to be significant by the Administrator of OIRA. There were 3,203 significant rules reviewed by OIRA in FY2003–FY2012. Within this group, OIRA presents dollar estimates of benefits and costs for only a small fraction of the total regulations the agency reviewed. Of 37,786 rules finalized in FY2003–FY2012, only 115 rules had estimates of monetized benefits and costs in OIRA's draft report. This is less than one-third of one percent of all final regulations, an abysmal record. Even worse, there are no rules in the report from independent regulatory agencies that have dollar estimates for both benefits and costs.

Furthermore, even though many of the regulations promulgated by agencies are not "significant" in nature (i.e., their impact on the economy is less than \$100 million in any given year), the aggregate effects of thousands of these "nonsignificant" regulations being implemented year after year can be substantial, and agencies should make an effort to measure these effects.

A snapshot of a very small number of regulations may imply the US regulatory system is better than it is. Until we have estimates of benefits and costs for all regulations produced on an annual basis, however, OIRA's benefit and cost figures produce little meaningful information for the public.

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- [4] http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf

Mr. MEADOWS. Thank you, Dr. Williams.
 Mr. Batkins, you are recognized for 5 minutes.

STATEMENT OF SAM BATKINS

Mr. BATKINS. Thank you, Chairman Meadows, Ranking Member Connolly, and members of the committee.

At the outset, I just want to reiterate some of the testimony we have heard today and note that OIRA does play a critical role in our regulatory process. When you consider that 40 or 50 employees have to review the work of tens of thousands of regulators reviewing roughly 400 rulemakings annually, sometimes highly technical, it is a testament that we've had, I think, six administrations help to establish and advance the work of OIRA, three Democrats and three Republicans to help advance the work of OIRA.

With that said, there are obviously transparency and reporting concerns at the Office of Information and Regulatory Affairs. And if you look—take a look back at the last 20 or 30 years of regulatory reform, you'll find sometimes OIRA is very much at the center of those reform efforts, but all of them have transparency and reporting issues, and you can sort of just go down the litany, you know, some of which has been well litigated in the past, issues with the Unified Agenda, the Congressional Review Act, the Unfunded Mandates Reform Act, the Information Collection Budget, which reports on cumulative paperwork totals as part of the Paperwork Reduction Act. OIRA reports to Congress and implementation of Executive Orders 13563 and 13610.

On the Unified Agenda it's again well-known that in 2012 there just for some reason wasn't a spring Unified Agenda for whatever reason, and to our knowledge that's the only instance when there weren't two Unified Agendas published in a calendar year.

With regard to the Congressional Review Act, there was a recent report from the Administrative Conference of the United States, which found thousands of rulemakings that were never submitted to GAO as part of the CRA process, which would then, I guess in practice, could deprive Congress of its oversight ability under the CRA. Now, agencies do have a responsibility to submit rules to GAO under the CRA, but OIRA also has a responsibility to label rules as major under the CRA procedure as well.

With regard to the Information Collection Budget, I know that's a somewhat obscure report on paperwork, but it's—has been more than 500 days since our last update of the Information Collection Budget.

And finally, on implementation of Executive Orders 13563 and 13610, which were ostensibly designed to modify, streamline, expand, or repeal the existing regulatory state, we saw op-eds in the Wall Street Journal about moving to a 21st century regulatory system and streamlining and repealing redundant regulation. And if you actually look at the 4 to 500 rulemakings contained in these reports, you will find notable examples of rulemakings that do cut costs and paperwork. But from our account, they are often dwarfed by all the new rulemakings that, for example, implements the Affordable Care Act. And we sort of struggle to understand how implementation of the Affordable Care Act constitutes retrospective review designed to streamline or eliminate red tape.

And there are some other notable examples as well. Department of Education's Gainful Employment Rule, which has billions of dollars in costs and millions of paperwork hours, is also included in these retrospective reports.

In addition to the controversial Waters of the United States Rule, which has found its way in EPA and DOD's section of the report, along with CAFE standards, the 2017 to 2025 CAFE standards. And by our account the last report that was issued, if you include the regulatory costs and the regulatory cost-cutting measures, it contains roughly \$16 billion in costs and 6.5 million in new paperwork burden hours.

And finally, an issue which I'm sure the committee is familiar with of midnight regulation, this is something that Administrator Shelanski has already issued a memorandum to agencies sort of outlining the procedure for regulations during this presidential transition year. Similar memos were issued in 2008. Of course, that at the time did not stop sort of the flood of regulations that happened during that time, and there's a lot of quantified evidence showing that flood of regulation.

And just to give you an idea of how quickly things can run through the process with a willing executive, we found some Department of Energy regulations in 2000 and 2008 where the entire life of the rulemaking from proposed rule to final publication in the Federal Register was less than the comment periods for some notable regulations during the proposed cycle, so the entire history of rulemaking of just, you know, about 100 days.

So, finally, another issue again related to the Congressional Review Act is the carryover provision, which, by our calculation and by the Congressional Research Service calculation, this year will be somewhere around mid- to late May, which means that any regulation issued after that date Congress and the next administration could review in 2017, which there is certainly an incentive for the administration to have sort of a mini-rush in regulation during this spring so as to avoid any review under the CRA in 2017. We haven't seen any evidence of that so far, but that's something that we'll certainly be monitoring this spring going forward.

Thank you.

[Prepared statement of Mr. Batkins follows:]

Accountability and Transparency Reform at the Office of Information and
Regulatory Affairs

United States House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Government Operations

Sam Batkins, Director of Regulatory Policy*
American Action Forum

March 15, 2016

*The views expressed here are my own and not those of the American Action Forum.

Chairman Meadows, Ranking Member Connolly, and Members of the Committee thank you for the opportunity to appear today. In this testimony, I wish to highlight the following points:

- The Office of Information and Regulatory Affairs (OIRA) remains a critical agency for regulatory oversight, but full transparency remains elusive. Unified Agendas and Reports to Congress are often late, if published at all, and there is strong evidence that the administration hides data on unfunded mandates and fails to comply with the Congressional Review Act.
- Under Executive Orders 13,563 and 13,610, the administration endeavors to “modify, streamline, expand, or repeal” burdensome regulations. These reports are rarely on time and were a month late this year. Furthermore, a review of the administration’s reports finds that there is more expansion than repeal. Agencies often list new regulations that add hundreds of millions of dollars in economic burdens in these allegedly “retrospective” reports.
- There is more the nation can do on regulatory modernization to reduce unnecessary burdens while ensuring essential public health protections. Balanced regulatory reform that retrospectively examines past rules and prospectively evaluates the costs, benefits, and regulatory alternatives is an international standard practice, not a partisan exercise.

Let me provide additional detail on each in turn.

Transparency at OIRA

Despite several laws and executive orders laying the groundwork for heightened transparency at OIRA, recent troubling events cloud what many view as a secretive government entity. From the Unified Agenda to missing reports to Congress, there is plenty of room for improvement, especially considering that OIRA sometimes fails to follow the law when it violates many of these transparency measures.

It should be stressed, however, that OIRA serves a vital function in the federal regulatory process. By ensuring agencies work together on rulemakings, scrutinizing benefit-cost analyses, and providing an essential review of major regulation, OIRA has withstood attacks during the past six presidential administrations. OIRA might have transparency and reporting issues, like many agencies in the federal government, but its task is vital to ensuring a well-functioning regulatory system. That its model has been replicated in other countries, is a testament to the foundational design of executive review.

Yet, in recent years, it appears OIRA has played in the political realm almost as much as the policy world. In 2012, the administration decided that they weren’t going to publish a spring edition of the Unified Agenda of Regulatory and Deregulatory Actions. This, despite the clear language of governing executive orders and the Regulatory Flexibility Act: “During the months

of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda.”¹

Instead, the administration opted to publish a single agenda on December 21, 2012 (the Friday before Christmas), the latest an agenda has ever been published. To our knowledge, 2012 was the only year when an administration failed to publish two regulatory agendas.² Each subsequent agenda has been released not with an eye toward transparency, but to avoid scrutiny. The next “spring” agenda was published on July 3, with the fall agenda released before Thanksgiving. The spring 2014 agenda was released the Friday night before Memorial Day and the fall agenda on the Friday before Thanksgiving.

How can an agenda on federal regulations that regulators have compiled since 1996 possibly be a controversial or political exercise? Releasing a calendar of pending rulemakings should be viewed as ministerial standard practice, not some game designed to hide the ball on federal regulation. OIRA and the administration should return to traditional “spring” and “fall” publication dates for the Unified Agenda and ensure that all pending rulemakings are included. The administration issued its data call for 2016’s spring agenda on February 19, 2016, so it appears the agenda is somewhat on time for the spring.

OIRA and the Office of Management and Budget (OMB) also have a responsibility to release the annual “Information Collection Budget” (ICB) of the U.S., which outlines the amount of federal paperwork imposed on Americans and agency violations of the Paperwork Reduction Act. Like the Unified Agenda, it appears the administration has also played “hide-and-go-seek” with this report. The administration released the 2011 report in September of 2011 and then waited until January of 2013 to post the 2012 report. Then, no other data was reported until September 2014, when the 2013 and 2014 reports were released. It is now nearly 500 days since the last update of this “annual” report.

This report is critical because it supposedly represents an accurate account of the nation’s paperwork burden. Unofficial figures place the time that businesses and individuals spend complying with reporting and recordkeeping requirements at 11.4 billion hours.³ To put this in context, it would take more than 5.7 million Americans, working full-time (2,000 hours a year), to complete this annual paperwork. To monetize 11.4 billion hours: assuming the average wage rate of a compliance officer, costs would exceed \$372 billion to meet only part of the nation’s regulatory burden. The ICB is an obscure, but important piece of the nation’s regulatory picture and there are no sound excuses for delaying or avoiding publication.

Beyond the Unified Agenda, there are compliance concerns with the Unfunded Mandates Reform Act (UMRA) and the Congressional Review Act (CRA). For both the Unified Agenda and OIRA’s website, agencies and OIRA are supposed to certify whether the rule would result in

¹ Regulatory Flexibility Act, 5 U.S.C. § 602, available at <https://www.law.cornell.edu/uscode/text/5/602>.

² American Action Forum, “Publication Dates of the Unified Agenda of Federal Regulation,” available at bit.ly/1TZV2AT.

³ Office of Information and Regulatory Affairs, “Government-Wide Totals for Active Information Collections,” available at 1.usa.gov/1Lawcf7.

unfunded private sector or intergovernmental mandates. Despite the myriad of exemptions in the law, it appears that OIRA routinely omits whether a rule contains unfunded mandates.

Take a 2014 rule that requires new vehicles to install rear-view cameras. The aim of this measure was to prevent death and injury to pedestrians, typically young children, while the car is in reverse. The rule may very well generate benefits exceeding its costs, but its burdens could total more than \$900 million annually, enough to trigger UMRA. However, the Unified Agenda and OIRA's website report that the rule contains no unfunded mandates. See below:

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OIRA Conclusion of EO 12866 Regulatory Review

<p>RIN: 2127-AK43 View EO 12866 Meetings</p> <p>Title: Federal Motor Vehicle Safety Standard No. 111: Rearview Mirrors</p> <p>Agency/Subagency: DOT / NHTSA</p> <p>Concluded Action: Consistent with Change</p> <p>Legal Deadline: Statutory</p> <p>Publication Date: 04/07/2014</p> <p>Major: Yes</p> <p>Regulatory Flexibility Analysis Required: No</p> <p>Federalism Implications: No</p> <p>International Impacts: No</p>	<p>Received Date: 12/25/2013</p> <p>Stage: Final Rule</p> <p>Concluded Date: 03/31/2014</p> <p>Economically Significant: Yes</p> <p>Related To Homeland Security: No</p> <p>Small Entities Affected: No</p> <p>Affordable Care Act (PPACA, P.L. 111-148 & 111-152): No</p> <p>Dodd-Frank Act (Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203): No</p>
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Yet, the rulemaking itself acknowledges UMRA status, “[T]oday’s final rule would result in expenditures by the private sector of over \$100 million annually.”⁴ Even GAO acknowledged that the measure contained unfunded mandates: “NHTSA determined that this final rule will result in expenditures by the private sector of over \$100 million annually.”⁵ This was not an isolated incident. AAF found several other instances where the administration omitted critical data on unfunded mandates, either in the Unified Agenda or on OIRA’s website.⁶

There are also thousands of instances where agencies and OIRA are failing to comply with the CRA. In a recent report from the Administrative Conference of the United States, Curtis Copeland found 43 major and significant rules that were never submitted to Congress or GAO, as required by the CRA.⁷ This raises serious legal issues because under 5 U.S.C § 804, the OIRA Administrator makes the finding of major rule status. Furthermore, 5 U.S.C § 801 clearly states, “Before a rule can take effect,” federal agencies must submit reports to each House of Congress. The Copeland report outlines 1,200 rules published between 2012 and 2013 that could be in legal limbo because of improper procedure. Furthermore, recent work from AAF found more than

⁴ 79 Fed. Reg. 19,242, available at <http://www.federalregister.gov/a/2014-07469/p-662>.

⁵ Government Accountability Office, “Federal Motor Vehicle Safety Standards; Rear Visibility,” available at <http://www.gao.gov/assets/670/663984.pdf>.

⁶ American Action Forum, “Administration Data Hiding Unfunded Mandates,” available at bit.ly/1W3S4t7.

⁷ Administrative Conference of the United States, “Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress,” available at 1.usa.gov/10XLRtN.

2,000 rules that weren't submitted to GAO between 2014 and 2015. Despite assurances from OIRA Administrator Howard Shelanski, it's clear this problem has not been solved.

Transparency issues don't end with the CRA or UMRA, however. Under the Regulatory Right to Know Act, the administration "shall prepare and submit to Congress, with the budget" a report outlining "total annual costs and benefits" of federal regulation.⁸ Nothing in the law limits reporting to cabinet agencies and the language is clear: the report on costs and benefits is to be submitted with, in a temporal sense, the federal fiscal budget.

Despite these legal implications, the current administration rarely complies with this requirement, and as of this writing, it has still not submitted a draft 2016 report to Congress. In 2010 and 2011, the administration published the preliminary report with the budget, and after taking public comment, published the final report later in the year. Then in 2012, the administration waited more than a year to publish the final report. It replicated this practice in 2013, 2014 and 2015. Legislative history reveals that there was good reason the "with the budget" language was included in the Regulatory Right to Know Act. Congress and the nation were to be given a view of the administration's fiscal and regulatory record. OIRA has now decoupled these two aspects and has attempted to hide its regulatory record, just as it does with the Unified Agenda.

The reports to Congress are hardly contentious policy documents. They do not receive widespread media attention. For example, the 2014 report received just 11 substantive comments.⁹ There are no good reasons why OIRA and the administration should refuse to follow the law and delay publication.

Finally, there are only a few months left in President Obama's term and with this reality brings the possibility of a rush of "midnight regulation." This is generally defined as the period after Election Day, but before the next president takes office. Historically, it has been defined as time of increased regulatory activity, especially during the transitions in 2000 and 2008. OIRA Administrator Howard Shelanski has already pledged to limit a surfeit of regulation during the midnight period. In a memo to agencies, "Regulatory Review at the End of the Administration," he urged: "agencies should strive to complete their highest priority rulemakings by the summer of 2016 to avoid an end-of-year scramble that has the potential to lower the quality of regulations that OIRA receives for review and to tax the resources available for interagency review."¹⁰ Yet, previous pledges were made in 2008 and that didn't curb OIRA's review of 213 rulemakings during the midnight period from November 2008 to January 2009. For comparison, OIRA concluded review of just 109 rulemakings between November 2015 and January 2016.

There is another possible deadline looming for the administration that could force an early uptick in rulemaking activity. Under the Congressional Review Act (CRA), rules issued within 60 legislative days of the end of a Congressional session "carryover" to the next Congress. Last year, AAF calculated the date at which President Obama's regulations could be reviewed under

⁸ Regulatory Right to Know Act, 31 U.S.C § 1105, available at 1.usa.gov/1R0Vzfn.

⁹ Office of Management and Budget, "Public Comments," available at 1.usa.gov/1U8bQV5.

¹⁰ Office of Information and Regulatory Affairs, "Regulatory Review at the End of the Administration," available at 1.usa.gov/1TH9753.

the CRA by the next Congress (based on current House and Senate calendars). AAF estimated any regulation issued on May 17, 2016 or later could be reviewed and rescinded by the next Congress.¹¹ A report from the Congressional Research Service confirmed this date in a paper released earlier this year.¹²

Is this deadline giving the administration a reason to hurry rules before the CRA takes effect? Based on some evidence from OIRA reviews in February, yes. OIRA concluded review of 15 “economically significant” regulations last month, far more than any comparable presidential election year since 1996.¹³ One month hardly indicates a trend, but if March and April are equally active, it could portend a mini-rush of regulation before the CRA carryover period takes effect.

Implementation of Executive Order 13,563

Despite reform attempts, every year Democrats and Republicans bemoan the current state of regulation. President Obama continued the reform tradition when he issued Executive Order 13,563, demanding that the “regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.” It also called on regulators to look back at existing regulations to “modify, streamline, expand, or repeal” those that were redundant or ineffective.

After more than five years of regulatory reform, it’s clear that regulators have sought to expand regulations more than modify. Retrospective review reports are filled with more new proposals designed to address current issues, than regulatory reviews designed to examine whether past rules succeeded or failed. For example, energy efficiency standards are included in retrospective reports, even though they are implementing new standards. The Department of Education continues to insist the new “Gainful Employment” regulation that adds billions of dollars in costs and millions of burden hours was somehow designed to scrutinize “existing significant regulations.” It clearly was not. Likewise, how is the controversial “Waters of the United States” joint rule from the Department of Defense and EPA a retrospective rulemaking?¹⁴

Regulators either engage in an honest attempt to examine the regulatory state by looking back at past rules and measuring their costs and benefits, or they add new burdens that address current problems. Too often, it is the latter. In the 2015 retrospective reports, the administration managed to add \$2.9 billion in regulatory costs, even though the reports are ostensibly deregulatory in nature. The most recent report once again doubles-down on additional regulatory burdens: \$16 billion in net costs and 6.5 million additional paperwork burden hours. For example, with all the problems that the Department of Veterans Affairs has had in the past, they managed to list just one specific rulemaking. By comparison, the Department of Transportation listed 43 rulemakings, planning to cut \$800 million in costs and remove 21.5 million hours of paperwork.

¹¹ American Action Forum, “May 17, 2016: Regulation Day for Obama Administration,” available at bit.ly/1PUyxpX.

¹² Congressional Research Service, “Agency Final Rules Submitted After May 16, 2016, May Be Subject to Disapproval in 2017 Under the Congressional Review Act,” available at <http://bit.ly/1Sx5LSj>.

¹³ American Action Forum, “Charting Midnight Regulation Before Dawn: Part 2,” available at bit.ly/1LOUR8T.

¹⁴ Department of Defense, “January 2016 Retrospective Update,” available at 1.usa.gov/1W6ATXR.

The cabinet-wide success of retrospective review is incredibly uneven. Typically, agencies just implement new regulation under the guise of retrospective review. Take the Department of Energy's inclusion of efficiency standards for external power supplies. The rulemaking imposes \$3.3 billion in long-term costs;¹⁵ it isn't retrospective. If it is, then all new rulemakings are retrospective. New greenhouse gas standards are retrospective because they "look back" at previous regulations addressing emissions at power plants and then add new standards. Thankfully, EPA has not included these measures in its retrospective reports, but it did include its "Tier 3" rulemaking, which imposes \$1.5 billion in annual burdens; EPA also added its 2017 to 2025 vehicle efficiency standards, at an annual cost of \$10.8 billion. Incredibly, the administration has even included new Affordable Care Act regulations in its retrospective reports. How can implementing a new health care law qualify as retrospective review designed to "eliminate red tape?"¹⁶

On its website touting the success of retrospective review, OIRA proclaims, "The regulatory lookback effort to date has achieved an estimated \$28 billion in net 5-year savings."¹⁷ We have never seen an itemized list of these savings, but we suspect the final annual cost savings reach \$7.1 billion, with another \$484 million in proposed annual savings. The agency's five-year savings figure is likely accurate, but regulatory costs and benefits are typically reported as annual figures. By contrast, measures that increase burdens in these reports will add \$17.2 billion in annual costs. Thus, on net, the regulatory burden will increase by more than \$10 billion annually because of rulemakings contained in these supposedly "retrospective" reviews. Just three of the largest rulemakings contained in these retrospective reports could impose \$13.2 billion in annual burdens.

Essential Principles of Regulatory Reform

It is because regulatory reform has failed so often in the past that we continue to talk about its place in the future. Broadly, regulatory reform should contain three principles:

- Codify the current informal executive orders on benefit-cost analysis and apply those principles to all federal agencies, with the prospect of judicial review if agencies fail to conduct the legally required analyses.
- Insert intelligible principles in future legislation that limit new regulation, enhance benefit-cost guidelines, and place a timeline for reviewing the efficacy of new rules.
- Create a formal system to retrospectively analyze the past regulations of all agencies. A formal bipartisan commission with diverse expertise could examine existing regulations and submit recommendations to Congress.

Currently, there is nothing stopping the next administration from ending the process of centralized review and abolishing generations-old principles of benefit-cost analysis. Despite the success of benefit-cost analysis, it is not applied equally across the federal government, and even

¹⁵ 79 Fed. Reg. 7,850, available at <http://www.federalregister.gov/a/2014-02560/p-180>.

¹⁶ Cass Sunstein, "Washington is Eliminating Red Tape," available at on.wsj.com/IRP7NLd.

¹⁷ Office of Management and Budget, "Making All Levels of Government More Efficient and Effective Through Retrospective Review," available at 1.usa.gov/1pqHIP1.

within the executive branch, agencies sometimes omit crucial information or fail to consider regulatory alternatives. Codifying the current executive orders on reform, and extending their scope to powerful independent agencies, would enshrine sound analysis into law across all regulatory agencies. By inserting language on judicial review, another branch of government would be able to exercise important oversight.

Too often, agencies take the broad authority that Congress grants and abuse that power. For instance, in the last few years alone, federal courts have struck down more than a dozen regulations that exceeded the scope that Congress contemplated.¹⁸ I first broached the idea of an “upstream” approach to regulation in 2011:

“This approach would insert specific guidelines into all major legislation imposing federal mandates, including: 1) requiring agencies to conduct reviews of regulations once implemented, 2) demanding agencies rescind duplicative rules, 3) placing a limit on the number of regulations an agency could promulgate during implementation of a particular law, 4) establishing regulatory ‘pay as you go’ that would require the elimination of a rule whenever a new rule is adopted, and 5) prohibiting new regulations where costs exceed benefits.”¹⁹

Congress does not have to adopt all five reforms, but including more specific guidelines for agencies could reform the regulatory process and give agencies a greater margin for error when challenged in court. This upstream approach would abolish the current “whack-a-mole” tactics that target controversial rules and instead focus on crafting sound rules before they become contentious.

There must also be a formal structure to evaluate past regulations to determine whether these measures are still generating significant benefits at an acceptable cost. This is not a partisan exercise. The OECD recommends that nations “adopt a dynamic approach to improve regulatory systems over time to improve the stock of existing and the quality of new regulations.”²⁰

Currently, there are more than 9,300 federal paperwork requirements, totaling 11.4 billion hours of compliance time for Americans. This is not solely the fault of the current administration, but generations of regulatory accumulation that policymakers have often overlooked. Whether addressing these burdens is conducted by an independent commission or an independent agency, there must be an outside arbiter that forces regulators to examine past rules. The current agency led process will produce piecemeal reforms at best and completely ignore past rules at worst. Without an effort to rescind or amend duplicative rules, any regulatory reform effort will garner only partial success.

The House of Representatives has already considered a piece of legislation that would address past cumulative burdens and future rulemakings. The Searching for and Cutting Regulations that are Unnecessarily Burdensome Act, or SCRUB, would establish an independent commission to identify duplicative regulations and allow Congress to vote on repeal or amendment. It would

¹⁸ American Action Forum, “President’s Regulatory Record in the Courts,” available at bit.ly/21WQTzc.

¹⁹ Regulation Magazine, “Obama, Ryan, and the Future of Regulatory Reform,” available at bit.ly/1Yo4YDF.

²⁰ OECD, “Guiding Principles for Regulatory Quality and Performance,” available at bit.ly/1Yo54Lv.

also establish a “cut-go” pool for regulators, where they would remove an older duplicative rule if they want to implement a new rule. As AAF found, a 15 percent reduction in regulatory costs, which SCRUB sets, could generate approximately 1.5 billion fewer paperwork hours and anywhere from \$48 billion to \$90 billion in annual cost savings.²¹

Embedded in the SCRUB Act is a form of a regulatory budget, an idea meriting increased attention on Capitol Hill. Whatever the form of a regulatory budget, cumulative or “one-in, one-out,” recent evidence reveals that it can generate tremendous savings without adverse health and safety impacts. For example, the United Kingdom adopted a regulatory budget five years ago and it has saved roughly \$1 billion in costs.²² Meanwhile, particulate matter pollution and greenhouse gas emissions continue to decrease in the U.K. It is legally doubtful that OIRA could adopt a regulatory budget unilaterally, but AAF proposed the idea of a flexible paperwork budget, which might be more palatable, legally and practically.²³ Regardless of the scope, a flexible regulatory budget could allow Congress to gain greater oversight of the regulatory system while still allowing agencies to meet their legal obligations.

Conclusion

OIRA has played a critical role in managing the nation’s regulatory apparatus for more than a generation. Although critiques of the agency are justified, mainly on transparency grounds, its status as a gatekeeper for federal regulation is vital. However, OIRA cannot serve the American people and the regulatory system if it continues to miss deadlines and misrepresent data. Better analysis in the future will serve regulations and our economy well, but broader reform would deliver even greater benefits.

Thank you. I look forward to answering your questions.

²¹ American Action Forum, “SCRUB Act Could Save \$48 Billion, 1.5 Billion Hours,” available at bit.ly/1ns1zX2.

²² American Action Forum, “Why Critics of a Regulatory Budget Have it Wrong,” available at bit.ly/1p2WVji.

²³ RegBlog, “Can a Regulatory Budget Trim Red Tape,” available at <http://bit.ly/1K3IGAG>.

Mr. MEADOWS. Thank you, Mr. Batkins.

The chair recognizes the gentleman from Georgia, Mr. Carter, for 5 minutes.

Mr. CARTER. Thank you, Mr. Chairman, and thank all of you for being here.

Mr. Shelanski, would you agree that part of the core mission of OIRA is to ensure that agencies analyze less-burdensome means of fulfilling policy objectives?

Mr. SHELANSKI. One of the things that we ask agencies to do is to analyze regulatory alternatives when such are available.

Mr. CARTER. And to analyze less-burdensome ones, correct?

Mr. SHELANSKI. When there's a less-burdensome alternative available, we ask them to —

Mr. CARTER. Okay. Well, as you may be aware, the Department of Labor has proposed a very complex Fiduciary Rule. You are familiar with that?

Mr. SHELANSKI. Yes, I am, sir.

Mr. CARTER. Okay. Yet OIRA has not ensured that the Department of Labor has analyzed any less-burdensome options to the currently proposed rule. In fact, the Department of Labor openly refused to do that, openly refused to analyze any other options. Don't you see that as being a direct conflict to what the core mission of OIRA is?

Mr. SHELANSKI. Thank you, Congressman Carter. The rule is still under review at OIRA, and so we have an ongoing review on the Conflict of Interest rule, or the Fiduciary Rule as you referred to. So that review is not yet complete. And I can assure you that all of the input, all of the public comment, all of the relevant issues are being seriously considered during that review, which is, as I said —

Mr. CARTER. So before the Department of Labor implements this rule, you are telling me that it has got to be approved by OIRA?

Mr. SHELANSKI. The rule is—the final rule is currently under review in my office that has to—we have to complete that review before they can publish it in the Federal Register and implement it.

Mr. CARTER. How long have you been reviewing this particular rule?

Mr. SHELANSKI. I'd have to check how long we've had it. We've had it for a good bit of time.

Mr. CARTER. A good bit of time being?

Mr. SHELANSKI. Again, I would have to check exactly when it came in.

Mr. CARTER. Okay. So I just want to make sure I am clear on this now. So the Fiduciary Rule that Department of Labor is proposing, you have to approve it first before it can be published by the Department of Labor and become the rule, the law?

Mr. SHELANSKI. Yes, we have to conclude review on this final rule just as we did on the proposed rule, so it's back with us for a second time and they cannot publish the rule in the Federal Register until my office concludes review.

Mr. CARTER. And again, I want to make sure I understand the core mission. The core mission of OIRA is to make sure that agencies are looking at less-burdensome means for fulfilling policy objectives —

Mr. SHELANSKI. The core —

Mr. CARTER.—right?

Mr. SHELANSKI. One of the elements of our core mission is to find by the Executive orders and relevant statutes is to make sure the agency has analyzed and considered regulatory alternatives —

Mr. CARTER. This is certainly a case where we have asked the Department of Labor to look at some less-burdensome rules, so we are depending on you to fulfill this core mission, okay?

Mr. SHELANSKI. Understood, sir.

Mr. CARTER. Understood, okay. Let me ask you something. Have you received any instructions from the Department of Labor or the White House regarding any kind of timeline for the review of this particular Fiduciary Rule?

Mr. SHELANSKI. We clearly want to complete our review within a reasonable period of time —

Mr. CARTER. That is not what I asked, okay. I am sorry. I will try to be succinct. Have you been given any instructions from the Department of Labor or from the White House regarding a timeline for the review of this Fiduciary Rule? Yes or no?

Mr. SHELANSKI. No.

Mr. CARTER. No, you have not. Have you received any kind of communication from the White House or from the Department of Labor regarding the importance of getting this Fiduciary Rule done as quickly as possible?

Mr. SHELANSKI. Yes, of course.

Mr. CARTER. You have? Can you make that communication available to us, to this committee?

Mr. SHELANSKI. The communication comes in the form of a conversation sometimes, which is we're submitting —

Mr. CARTER. Do you have anything in writing?

Mr. SHELANSKI. Probably not, no.

Mr. CARTER. Probably not, but it comes in the form of communication.

Mr. Chairman, how do we handle something like that? Because I would be really interested in knowing what exactly has been communicated.

Mr. MEADOWS. Well, certainly emails and other types of messages would have to be preserved, so is it the —

Mr. SHELANSKI. Yes, I've preserved —

Mr. MEADOWS.—gentleman's testimony that there was none of that, that it was all verbal?

Mr. SHELANSKI. Mr. Meadows, I would have to go back and check. I mean, these come in the form of conversations. When we receive briefings on a rule, we'd really like to move this forward so that the industry has notice of what's coming so that they will have the opportunity to plan their compliance with any rule.

This is rather standard. I mean, I work in the White House so it's rather normal that I would have conversations with other officials in the White House bearing on policy issues. So —

Mr. CARTER. Okay. Well, let me ask you this way then. Have you received any directions from the White House or from the Department of Labor to make this happen, to make this rule—to let this rule go through?

Mr. SHELANSKI. Both the White House policy offices and the Department of Labor are absolutely aware that we must be left independently to review this rule. And I have received no order about any specific outcome from our review process from —

Mr. CARTER. I am going to ask you again, if you have anything in writing, will you please make that available to this committee?

Mr. SHELANSKI. I will go back and see what I have and I will

Mr. CARTER. That —

Mr. SHELANSKI.—consult—but I would ask you to please route any such requests through our Legislative Affairs Office, and they will come back to me and, you know, endeavor to get you all the information you need.

Mr. CARTER. Okay. Can I have one final one?

Mr. MEADOWS. [Nonverbal response.]

Mr. CARTER. Okay. One final question. Would you agree, Mr. Shelanski, that one of the core missions is to ensure that the agency addresses any concerns raised by other agencies?

Mr. SHELANSKI. Absolutely. That is a core function —

Mr. CARTER. So the SEC has raised 30—excuse me. The SEC has raised 26 concerns, 26 regarding the Department of Labor's Fiduciary Rule, yet the Department of Labor rejected the majority of them. Have you and OIRA—have you addressed any of these that have been raised by the SEC or is that what you are doing now?

Mr. SHELANSKI. As I say, we have the rule under review. All concerns are being considered.

Mr. CARTER. Including the 26 concerns by the SEC?

Mr. SHELANSKI. All of the substantial interagency concerns are dealt with during the review process.

Mr. CARTER. Okay. Thank you, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman.

The gentleman from Virginia has been very kind to let the chairman of the full committee Mr. Chaffetz be recognized for a series of questions.

Mr. CHAFFETZ. Thank you, Chairman. And I appreciate Mr. Connolly. Thank you for your generosity and cooperation.

Mr. Shelanski, I want to understand what you believe your duty and obligation is to respond when Congress sends you a letter. And specifically, I am talking about the Oversight and Government Reform Committee. I am the chairman of this committee. I have sent you on the Waters of the United States two letters and a subpoena, and yet we still have an incomplete document production. That subpoena was July of last year. What do you feel your duty and obligation is to respond when we send you a letter?

Mr. SHELANSKI. So, first of all, let me say that I think the oversight function that this committee and all congressional committees perform are vitally important. And so I fully agree with and support and would endeavor to get you all the information you need for your lawful oversight functions. I believe that's a critical function.

We do respond to all correspondence that were received from Congress. We have a process that that goes through. And it's my understanding that we have a very robust ongoing discussion be-

tween your staffs in your offices and the Legislative Affairs Office and General Counsel's Office at OMB to respond to your requests.

Mr. CHAFFETZ. I don't want to have any more staff discussions. My question is what duty do you believe you have to respond to us?

Mr. SHELANSKI. I believe it is my duty to turn over all documentation to our General Counsel's Office and our Legislative Affairs Office that is currently engaged in the process of producing documents and witnesses for you.

Mr. CHAFFETZ. So in the case of WOTUS, the Waters of the United States, when is it reasonable for us to expect you to produce a full, complete, 100 percent document production? What is a reasonable time for your response?

Mr. SHELANSKI. Again, I am not personally involved with —

Mr. CHAFFETZ. What do you mean you are not personally involved? You are in charge of this organization so —

Mr. SHELANSKI. I am not personally involved with the process that has been ongoing for months between the General Counsel's Office of OMB and the Legislative Affairs Office.

Mr. CHAFFETZ. So who do we —

Mr. SHELANSKI. The process —

Mr. CHAFFETZ. Who do we call before this committee that will take accountability here, general counsel? What is his name or her name?

Mr. SHELANSKI. Again, I do not have personal involvement with the negotiations that are ongoing.

Mr. CHAFFETZ. We are not here to negotiate. Why should we—you gave us a very—you said we have a valuable constitutional duty. Why should we have to negotiate what you are going to give to us?

Mr. SHELANSKI. My understanding is that there is a process in place, Mr. Chaffetz, by which you have received thousands of pages of documents —

Mr. CHAFFETZ. No, most of those —

Mr. SHELANSKI.—witnesses for transcribed —

Mr. CHAFFETZ. Let me —

Mr. SHELANSKI.—interviews, and all of my documents are turned over. Again, I am not personally involved in the negotiations that you and your office —

Mr. CHAFFETZ. Give me some names. Who are the people that are involved?

Mr. SHELANSKI. I would refer you to our Legislative Affairs Office —

Mr. CHAFFETZ. No, no, no.

Mr. SHELANSKI.—for all that information.

Mr. CHAFFETZ. See, this is the runaround we get. I issued a subpoena in July of last year. Why shouldn't I hold somebody in contempt?

Mr. SHELANSKI. My understanding is that subpoena is the process of being answered. You have already done one transcribed interview —

Mr. CHAFFETZ. I am asking you what a reasonable amount of time is to get a response.

Mr. SHELANSKI. Again, the process is ongoing.

Mr. CHAFFETZ. Seven months, is that reasonable?

Mr. SHELANSKI. Again, I refer you to our Legislative Affairs Office. It is managing this process —

Mr. CHAFFETZ. Give me some names, Mr. Shelanski.

Mr. SHELANSKI. I'd be —

Mr. CHAFFETZ. You are saying you are not responsible, but you are the administrator of this office so —

Mr. SHELANSKI. Mr. Chaffetz, I am responsible for turning over all of my documentation and getting you all the information, all the information to our General Counsel's Office. They have been working with your offices for months. I am not going to step outside of a robust, ongoing process —

Mr. CHAFFETZ. So you don't believe that your responsibility is to respond to Congress. You believe your responsibility is to respond to an attorney at the White House?

Mr. SHELANSKI. I disagree with your characterization.

Mr. CHAFFETZ. Well, I am just trying to repeat what you just told me. You said your responsibility is to give it to the General Counsel.

Mr. SHELANSKI. I have turned over all of my documentation, everything that I have on that rule. They are in a robust process that has been going on with your office that you were participating in that is ongoing, that has led to a large document production —

Mr. CHAFFETZ. It is not a large —

Mr. SHELANSKI.—and ongoing document production and witnesses.

Mr. CHAFFETZ. It is not a large—most of which we have. The overwhelming majority is publicly available documents. I can go to the internet and get it, you know, just download it.

What we have asked for is the list of people and the documents themselves. I am asking a simple question. What is a reasonable amount of time for Congress to get that information?

Mr. SHELANSKI. My understanding is that this is a process that has been ongoing that has been producing you documents. I have turned everything over that I have to the people that I work with at the offices —

Mr. CHAFFETZ. So you believe that the general counsel has 100 percent of the documents?

Mr. SHELANSKI. The general counsel has 100 percent of my documents. I am only involved with my documents. I'm not —

Mr. CHAFFETZ. See, this administration is just playing hide-the-documents. I am trying to figure out how and where are these documents and who—give me the name of the general counsel.

Mr. SHELANSKI. I believe that your office is deeply involved with the General Counsel's —

Mr. CHAFFETZ. No, no, no —

Mr. SHELANSKI.—Office —

Mr. CHAFFETZ.—did you misunderstand my question? My question is give me the name of the person.

Mr. SHELANSKI. I'm going to refer you to our Legislative Affairs Office. You —

Mr. MEADOWS. Mr. Shelanski, you have got to answer the question. Either you don't know or you have to answer the question.

Mr. CHAFFETZ. You are under oath. Do you know that person's name?

Mr. SHELANSKI. Yes, I do.

Mr. CHAFFETZ. Then what is his name.

Mr. SHELANSKI. It's a her.

Mr. CHAFFETZ. What is her name?

Mr. SHELANSKI. Her name is Ilona Cohen, as your staff well knows.

Mr. CHAFFETZ. Well, I am asking you the questions. Why do I have to spend 3 minutes trying to get you to give me a name.

Mr. SHELANSKI. Mr. Chaffetz, we have had a very robust back-and-forth —

Mr. CHAFFETZ. You can keep using that word robust. I know you trained up on it. I asked you a simple question. I send you a subpoena, I send you letters. We shouldn't have to yank you up here.

Mr. SHELANSKI. And I gave you a very simple answer. I've turned over all of my documents to the people who are working closely with your office and producing those documents, 4,000 pages of documents, at least one transcribed interview, so I've heard, and more of them scheduled. There is an ongoing process, so I do not think it is a fair characterization that you have not received an answer.

Mr. CHAFFETZ. Well, I expect to get 100 percent of the documents so —

Mr. SHELANSKI. A hundred percent of my documents are turned over. I am not personally involved with —

Mr. CHAFFETZ. Turned over to—not to us.

Mr. SHELANSKI. To our Legislative Affairs Office and our General Counsel's Office that is working with your office to get you —

Mr. CHAFFETZ. That is not —

Mr. SHELANSKI.—what you need.

Mr. CHAFFETZ.—an acceptable answer.

Mr. SHELANSKI. Well, I'm —

Mr. CHAFFETZ. You are failing in your duty to respond to Congress, and I quite frankly don't understand why we shouldn't hold you personally in contempt of Congress.

Mr. SHELANSKI. That's certainly your prerogative —

Mr. CHAFFETZ. I yield back.

Mr. SHELANSKI.—Mr. Chaffetz.

Mr. CHAFFETZ. Yes, it is. I will yield back.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the ranking member of the subcommittee, Mr. Connolly, for a series of questions for 5 minutes.

Mr. CONNOLLY. I thank the chair, and welcome to the panel.

Let me begin. Ms. Sager, since '03 GAO has had seven reports, I believe, on OIRA, is that correct, containing a total of 25 recommendations over the course of the seven reports?

Ms. SAGER. Correct. We focused on —

Mr. CONNOLLY. You have got to turn on your mic.

Ms. SAGER. We focused on seven reports in the written statement that had—specific aspects of those reports had recommendations to OMB, to OIRA related to transparency.

Mr. CONNOLLY. And about nine of those recommendations have been implemented to your satisfaction?

Ms. SAGER. That's correct.

Mr. CONNOLLY. And why have 16 not been implemented?

Ms. SAGER. In those cases, either OIRA disagreed with the recommendation or there are some where they may have taken action and we are still trying to get documentation to close the recommendations.

Mr. CONNOLLY. Mr. Shelanski, can you highlight for us the ones with which you disagree?

Mr. SHELANSKI. We have ongoing discussions with GAO. I would reiterate what Ms. Sager said. We have responded directly on a number where we have actually adopted the recommendations. There are several others where we are doing things that are very much in the spirit of the recommendation but not the specific thing that GAO is doing, and I can give you an example there. An example would be, for—on getting agencies to talk in their preambles about the basis for a significance determination. We haven't felt that a formal guidance is necessary, but we've encouraged agencies

Mr. CONNOLLY. All right.

Mr. SHELANSKI.—to put that kind of information —

Mr. CONNOLLY. I think it would be useful if you could subsequently submit to the committee that status because it sounds bad that 16 of 25 are not being implemented. If some of them are in progress, I think we would like to know where you object and why with the remainder just for our illumination so it is not a transparency issue; it is, you know, a substantive issue.

Going back to this issue of WOTUS, I guess the minority staff were under the impression that this would not become a WOTUS hearing. But since the issue came up, Mr. Shelanski, I wouldn't want to leave the impression that your office has been entirely uncooperative with this committee. Your staff came to meet with the committee staff on January 29 to discuss subpoena compliance, is that correct?

Mr. SHELANSKI. Again, I'm not directly involved with the subpoena compliance beyond turning over any documents —

Mr. CONNOLLY. Are you aware whether your staff meets with our staff or not?

Mr. SHELANSKI. I am aware there's a process —

Mr. CONNOLLY. Well, did they meet on the 29th of January or not?

Mr. SHELANSKI. I don't know if they met with you on the 29th of January, Mr. Connolly.

Mr. CONNOLLY. Okay. After that meeting, it is my understanding that your staff agreed to make rolling productions available on a monthly basis. Are you aware of that?

Mr. SHELANSKI. I want to make one clarification. The general counsel of OMB is not my staff, and the Legislative Affairs Office of OMB are not my staff. Those are peer separate offices with OMB. I do not direct their operations, so I think I need to clarify that. They handle these matters for the Office of Management and Budget, so in working with them, I am working through the normal process for subpoena compliance.

Mr. CONNOLLY. Mr. Shelanski, I have been a corporate officer in the private sector. I have been the chief elected officer in the public sector. I have run things. And even if something is handled by my

legal department, if I am in charge, I make it my business to know whether we are in compliance, especially if I know I am going to be testifying before a committee. I am actually trying to help you here, Mr. Shelanski, but, you know, you are wiping your hands of this and saying it is someone else's responsibility as if you have nothing to do with it frankly plays into the hands of your critics.

Mr. SHELANSKI. Let me be very clear. I will happily, willingly, and eagerly do anything that I am advised to do, I am told to do that your staffs and our staff agree constitute compliance with the subpoena.

Mr. CONNOLLY. Mr. Shelanski —

Mr. SHELANSKI. For that reason —

Mr. CONNOLLY. Mr. Shelanski, I am actually trying to help you. It was left out there that you are uncooperative with this committee. I am trying to establish for the record that there is another side to that story. In fact, your office has produced 4,000 pages to this committee. Now, maybe that is not to the full satisfaction of somebody or maybe they didn't find what they wanted, but it is not like you haven't been meeting with this committee and cooperating. But it is not helpful to me or you for you to wash your hands of it saying, well, I don't know anything about that.

Mr. SHELANSKI. No, here's what I know. I —

Mr. CONNOLLY. When you are under subpoena. How can the head of an office under subpoena tell this committee I am unaware of it, I don't know, not my business?

Mr. SHELANSKI. That's not what I said, Mr. Connolly. What I said is this —

Mr. CONNOLLY. It comes damn close to what you said, Mr. Shelanski.

Mr. SHELANSKI. Well, then let me—if I may, I'd like to clarify. I am aware that we have a very serious process underway to comply. If we did not, I would be very concerned and I would be going internally to say what are we doing to comply. But something different is going on. I've turned over all of my documents and I have been informed and am regularly informed not of a specific date that a meeting takes place but that there are ongoing conversations and ongoing document productions to this committee. If that were not happening, I'd be gravely concerned. But not only that, every time I am told we have a request for you to do X, I said fine, tell me what to do. I'm ready to do what I—what the process dictates. And this is a cooperative process, I have been led to believe, between the people on your committee and the people in the Office of Management and Budget.

Mr. CONNOLLY. Yes, how is that working out for you? You just heard how cooperative that is. But I can't help somebody that doesn't want to cooperate.

One final point, Dr. Williams, I found your testimony helpful in terms of specifics in how to improve the process and thank you, and I expect nothing less from one of the outstanding universities in the world, George Mason University, which just so happens to be located in the 11th District of Virginia.

Mr. WILLIAMS. Thank you, Mr. Connolly.

Mr. CONNOLLY. But thank you. I wish we had a little more time to explore because I would like the opportunity to sort of work with

you and Mr. Shelanski on how practical some of those suggestions might be because I think you make a—and then I will end. But I think you make a really good point. How can we possibly expect Mr. Shelanski and his colleagues at OIRA to really fulfill their mission with only 40 people —

Mr. WILLIAMS. Precisely.

Mr. CONNOLLY.—when you were talking about this immense enterprise. And we can argue whether there should be more or less regulation, but whatever the number, it is still gargantuan, and one wonders whether just the sheer volume of it is something that we need to take a look at in terms of the role of OIRA. So I thank you for your testimony, and we are going to certainly follow up on that.

Mr. WILLIAMS. Great.

Mr. CONNOLLY. Thank you, Mr. —

Mr. WILLIAMS. I will tell you in my short time at OIRA I found the job depressing because it is so overwhelming.

Mr. CONNOLLY. Thank you.

Mr. MEADOWS. I thank the gentleman from the 11th District of Virginia, home of George Mason.

The chair recognizes the gentleman from Ohio, Mr. Jordan, for a series of questions.

Mr. JORDAN. Thank you, Mr. Chairman. And I probably will just use a minute or two here. But I wanted to follow up. I think it was about a year ago that Mr. Shelanski was in front of the committee and we asked him a few questions, so I kind of want to go back there.

But first of all, Mr. Shelanski, what exactly is the core mission of OIRA? What exactly do you do?

Mr. SHELANSKI. Well —

Mr. JORDAN. Because agencies come up with rules that have to be put in place when laws are passed and legislation is done. Tell me exactly what OIRA does. So tell the committee what OIRA does.

Mr. SHELANSKI. When the agency has finished a rule, and it can be either a proposed rule or a final rule, they submit that rule to OIRA. If it's a rule that is determined to be significant, we bring it in for review. And we do two things when we have it in for review, two primary things. We circulate it to other Federal agencies for their comments so that we get the interagency views so that there aren't conflicts or duplication amongst agencies or problems with jurisdiction. And the other thing we do is we look at the rule carefully to make sure it's grounded in the evidence, that it—you know, if it's an economically significant rule, that it has a good cost-benefit analysis with it.

Mr. JORDAN. Is your evaluation of the proposed rule or maybe the final rule, is it focused on the substance of the rule and/or did the agency comply with notice, public comment, cost-benefit? Is it all of the above or just parts of that?

Mr. SHELANSKI. Certainly, when it's a proposed rule that the agency is bringing forward for the first time before it's had public notice and comment, we're very focused on the substance.

Mr. JORDAN. Okay.

Mr. SHELANSKI. And the reason we're focused on the substance is that rule's going to go out for public comment, and it's going to be a notice of proposed rulemaking.

Mr. JORDAN. So it is a two-step thing? So you are going to —

Mr. SHELANSKI. It's a two-step thing.

Mr. JORDAN.—look at the substance first. Then, the agency is going to send it out for public comment and notice it and public comment and —

Mr. SHELANSKI. Right.

Mr. JORDAN.—you will get that feedback back? Then are you going to look to see if they actually complied with the process they are supposed to go through to make sure this rule is appropriate?

Mr. SHELANSKI. Yes, that's exactly what we do. So we look at the substance again when the rule comes back because the agency will often make changes between the proposed version and the final version. But the other thing that has happened in that time is probable one of the hallmarks of the U.S. regulatory system. It's the public comment. And the important factor is the public comments are part of the administrative record. Those are documents that remain part of the record, so we make sure when an agency brings a final rule back to us of two things that tie very closely to process. One is that they do not ignore the substantive and important public comments that they've —

Mr. JORDAN. Right.

Mr. SHELANSKI.—received. And the second thing is that the actual rule that they put forward, the substance of that rule logically follows from what the public had notice might happen.

Mr. JORDAN. My understanding—is it accurate to summarize it is a two-step process. Step one, look at the substance. Step two, make sure that when it is an important rule they are going through the proper notification, proper public comment, proper notice and everything else?

Mr. SHELANSKI. Both of those factor in, yes.

Mr. JORDAN. Okay. So the GAO issues a report a few years ago, December 2012. What GAO found, very first sentence, agencies do not publish a notice of proposed rulemaking enabling the public to comment on a proposed rule for about 35 percent of major rules and about 44 percent of non-major rules published in about a 10-year time frame, 8-year time frame prior to that. Do you know anything about that? Because that would sound like it just went contrary to what you just described.

Mr. SHELANSKI. So this relates to a particular kind of rule, if I'm recalling correctly, the GAO report. Agencies under the Administrative Procedure Act are allowed to do some rules directly to final, and that is permissible under some circumstances.

Mr. JORDAN. So directly to final. So what part of this—if an agency goes directly to final, what part of that two-step process that you just described did they do an end run around?

Mr. SHELANSKI. So this is where —

Mr. JORDAN. Both parts?

Mr. SHELANSKI. No. So —

Mr. JORDAN. Just the second part?

Mr. SHELANSKI. Some—and that's—what GAO was concerned about is sometimes they did not do the second step. The —

Mr. JORDAN. Okay. And do you have to sign off on that?

Mr. SHELANSKI. No. What we have to sign off on —

Mr. JORDAN. Did you make an issue of it?

Mr. SHELANSKI. Yes, absolutely.

Mr. JORDAN. Well, then, why did it happen 35 percent of the time for major rules?

Mr. SHELANSKI. Yes, so one of the things we've been trying to do since the time that that report was issued was to get agencies to commit ahead of time when they are legally able to do what's called an interim final rule to make sure it's truly interim and that they, in fact, do then put the rule out for public comment and finalize the rule in light of that public comment.

Mr. JORDAN. If GAO would do a study now, what percentage of major rules are not following the notice and public comment process?

Mr. SHELANSKI. I would hope it's a greatly reduced number. I don't know what the number would be. I don't think it's a common occurrence.

Mr. JORDAN. Are you actively—are you cataloguing that? I mean, does OIRA know when an agency is not going to follow notice and public comment for—I am using GAO's descriptive word here—major rules? Do you know that?

Mr. SHELANSKI. So the number of interim final rules that fall into this category I think is, to begin with, a rather small number. What fraction don't then go through the comment period I don't know. We've been working very hard to give agencies —

Mr. JORDAN. Well, we would like to know that, and it seems like if you are the folks who oversee how the rules are done and making sure they are supposed to be done right, if 35 percent of the time major rules are going through the notice and public comment process, we would need to know that. So if you could get that information and get it to us, that would be helpful.

Mr. SHELANSKI. And just to clarify for the record, it's not 35 percent of all major rules. It's 35 percent I think at the time of this particular category of regulations if I'm —

Mr. JORDAN. That is not what the sentence says.

Mr. SHELANSKI. Yes, I would have to —

Mr. JORDAN. It says “for about 35 percent of major rules and about 44 percent of non-major rules.”

Mr. SHELANSKI. Well, I will certainly go back and look, and I think you're absolutely right; this is an area that if those numbers remain anything close to what they are, we need to do more on —

Mr. JORDAN. Well, I'm sorry, Mr. Chairman. I said 2 minutes and here I am taking 6 so I appreciate the indulgence.

For the fact that—this would seem to be something that you would be jumping, kicking, and screaming and, you know, making all kinds of noise about that 35 percent of the time they are not doing what they are supposed to do, and it is the very thing that OIRA was created to make sure they did.

Mr. SHELANSKI. Right. And so my—since I have been in office in 2013 —

Mr. JORDAN. And more importantly—sorry to interrupt, but more importantly, you can't tell me what that percentage is now. We

know it was 35 percent for a significant time frame when this report came out. We don't know what that is now. We don't know if it is higher, lower. We don't know.

Mr. SHELANSKI. I would hope that it's significantly lower. It's not something that's happening very often.

Mr. JORDAN. Well, we don't want to go on your hope. We want you to give us the information.

Thank you, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes himself for a series of questions.

So let me follow up on one point, Mr. Shelanski. You just said that you review the public comment. You were telling Mr. Jordan you review the public comment?

Mr. SHELANSKI. We don't read all of the public comments ourselves. What we do is we make sure that the agencies have —

Mr. MEADOWS. So what percentage of the public comments do you review?

Mr. SHELANSKI. Well, we—the agencies submit to us what's called a Response to Comment as part of these rules.

Mr. MEADOWS. So you don't actually review public comment?

Mr. SHELANSKI. We review an awful lot of them. I mean, sometimes there are millions of them that are —

Mr. MEADOWS. Well, the reason why I ask is because we have had, you know, a transcribed interview where someone under oath said, "We don't get involved in the review of public comments." So how do you reconcile your testimony with sworn transcript?

Mr. SHELANSKI. Well, it's exactly what I just said. We make sure that the agencies have responded to public comment. That's what we do. But there is a form of —

Mr. MEADOWS. But that is not what you said.

Mr. SHELANSKI. Well —

Mr. MEADOWS. So what you are telling me is you don't review public comment, is that correct?

Mr. SHELANSKI. It is not —

Mr. MEADOWS. You just make sure they review public comment?

Mr. SHELANSKI. And more than just review it. They can't just say we've reviewed it. They have to —

Mr. MEADOWS. So how do you determine that if —

Mr. SHELANSKI. We read in the document they submit to us as part of a final rule package what their response to the comments are.

Mr. MEADOWS. So they do a response to the comments. So what you are doing is reviewing their response to public comment —

Mr. SHELANSKI. If they produce —

Mr. MEADOWS.—not reviewing public comment?

Mr. SHELANSKI. They produce a summary of public comment and they show what their responses are, and we review to make sure that they weighed in.

And I would add that one of the very important functions that we do when we're under—when we have a rule under review is we meet with the public. We're required to under the Executive order

Mr. MEADOWS. What percentage of the public?

Mr. SHELANSKI. Well, in the last 2 years, we've had 900 meetings with stakeholders, 900.

Mr. MEADOWS. And that would represent what percentage?

Mr. SHELANSKI. Of the interested parties? Since we —

Mr. MEADOWS. Yes.

Mr. SHELANSKI. Since we take any meeting that anybody requests, it's, I presume, a pretty —

Mr. MEADOWS. So you will meet with 100 percent of the people that ask you —

Mr. SHELANSKI. We do not turn down meeting requests. We have accepted —

Mr. MEADOWS. So your testimony is you meet with 100 percent of the people that ask? How do you do that with a staff of 45 people?

Mr. SHELANSKI. Like I say, we've had 900 meetings in the last 2 years.

Mr. MEADOWS. Okay. The ranking member was trying to help you out, Mr. Shelanski, because, honestly, some of your testimony is incongruent and so I will put it that way because it seems to be conflicted. At your previous hearing we talked about resources. Dr. Williams has talked about, you know, it is just overburdened, yet you said that you are adequately resourced in the previous hearing. So is your perceived—and I will use that word gently—perceived lack of complying to the subpoena a resource issue?

Mr. SHELANSKI. Again, I want to clarify that I fully wish to comply with every —

Mr. MEADOWS. But you are not.

Mr. SHELANSKI. I fully —

Mr. MEADOWS. If your testimony is—because on the January 29 meeting that he has talked about where you actually came in and talked about subpoena compliance with staff, actually you provided a few rolling document productions. But the other part of what you agreed to do during that meeting has not been done.

Mr. SHELANSKI. Can I clarify that I was not part of that meeting? When you say you —

Mr. MEADOWS. Yes, you can —

Mr. SHELANSKI. I just want to clarify —

Mr. MEADOWS. You are an agency. Okay. Your name is on the subpoena.

Mr. SHELANSKI. I understand that, which is why —

Mr. MEADOWS. And so ultimately —

Mr. SHELANSKI.—I turned —

Mr. MEADOWS.—if someone is not complying with a subpoena, it is not the general counsel, it is not your staff, it is you because your name is on the subpoena.

Mr. SHELANSKI. And it —

Mr. MEADOWS. And I am trying to help you out here.

Mr. SHELANSKI. I—let me just say I hope that I am fully complying with the subpoena. I intend to fully comply with the subpoena. I would never do anything but fully comply with a subpoena from this office. I want to make that very clear.

Mr. MEADOWS. But that has not been your testimony today because you have referred to the general counsel. You said it is up to the general counsel to determine —

Mr. SHELANSKI. We don't —

Mr. MEADOWS.—and yet their name is not on the subpoena.

Mr. SHELANSKI. That is—actually, what I said was my understanding was there was an—I want to be very clear about this. My understanding was there is an ongoing process to reply to the subpoena and to comply with the subpoena. I have turned over everything I have into that process. For all I know, you have all of it. So it's really hard for me to know what more I can do here.

Mr. MEADOWS. All right. So your testimony is you have turned it all over to general counsel, every one of your documents, and it is your belief today that they have turned all of that over to this committee?

Mr. SHELANSKI. It is my belief —

Mr. MEADOWS. That is your—in preparing for this hearing, that is what you were told?

Mr. SHELANSKI. No. What I was told was there is ongoing discussion and turning over of document s—

Mr. MEADOWS. You know, ongoing is a long word. It doesn't quantify when it is going to get—there are ongoing processes to try to balance our budget. It doesn't mean that it is getting done.

Mr. SHELANSKI. Well, all I can say is that I have—it has been my wish and my request that the subpoena be fully complied with. I've turned over all of my documents. And I will —

Mr. MEADOWS. What about the scope and the parameters of what you are even looking to provide to this committee? We have asked you for that, and yet you haven't provided that scope and what we are looking at. We have asked for custodians. We have gotten very little information. Those would seem to be the easy answers that the ranking member and I could get within 24 hours of you going back and saying we need to let the committee know the scope of what we are looking at and the custodians who are charged with it and who all is involved. And we have been getting information that you haven't even reached out to them.

Mr. SHELANSKI. It is my understanding that every effort has been made to obtain the information you have requested. I certainly have turned over everything I have and that it is in my power to turn over—

Mr. MEADOWS. Okay.

Mr. SHELANSKI.—to turn over.

Mr. MEADOWS. All right. Let me put it this way. You are in charge. It is the opinion of some that you are not being compliant with providing information to this committee. I will be tenacious until we actually get your compliance. And I want to make sure I am clear here because some of my questions from a year ago and the responses you gave me are not—I guess I didn't articulate them properly because the answers you gave me are not bared out with fact. Does that make sense?

Mr. SHELANSKI. Since I don't know what you're referring to —

Mr. MEADOWS. Well —

Mr. SHELANSKI.—I can't comment —

Mr. MEADOWS.—so let me share with you just one exchange, and this is one of three that we have but I will share with you. When we were talking about the informal review process and the fact that there may be some dialogue that goes on between you and an

agency, now, that particular one we were talking about, WOTUS, but today, I am talking about any of them, not just the WOTUS ruling.

And I said, “Basically we have had a number of hearings here in this committee on the Waters of the USA on the proposed rule, and I believe that your testimony here today is that it has not been officially submitted to you, is that correct?” And you said, “Yes, that is correct.” “And so you have had no dialogue with them?” is what I asked. And you said, “I have had no dialogue with the EPA.” And I went on further. I said, “Informal or formal?” “I have had no dialogue whatsoever with the EPA on the Waters of the USA.” “Okay. How about deliberations?” I ask. And you said, “Well, no deliberations, no discussions.”

And so in follow up to Mr. Carter’s response today, I ask, “So if I were to ask you for all of your records,”—and so I assume that you turned over all of your records to general counsel. “So if I were to ask you for all of your records, would we find zero records, zero emails, nothing with the EPA with regards to the rulemaking on the proposed rule?” Your response was “We concluded review on the proposed rule, the EPA took it from there. The next I will hear about is when they submit the final rule.”

Now, you actually changed that to say that you actually hadn’t had the formal rule at that particular time because you came back and corrected that. But here is my concern, the committee has emails where actually the administrator has had direct communication with OIRA and there were lines that were marked out and edited for the proposed rule. So that is my concern. You are saying there is nothing, and yet we have evidence that there was something.

Mr. SHELANSKI. I think it’s important to draw a very clear distinction here. Of course I had discussions and interaction with —

Mr. MEADOWS. But that was not your testimony.

Mr. SHELANSKI. Sir—sir —

Mr. MEADOWS. I mean, I couldn’t have been much clearer. I said, “Informal or formal?”

Mr. SHELANSKI. I need to finish my answer because —

Mr. MEADOWS. Sure. Go ahead.

Mr. SHELANSKI.—this is vitally important.

Mr. MEADOWS. It is.

Mr. SHELANSKI. When we had the proposed rule under review, when we had the proposed rule under review formally submitted, I of course had correspondence with the EPA and interactions, and I would expect that you have those documents. When the agency had the proposed rule back in its hands and we had concluded review on the proposed rule, I don’t think I had any correspondence or interaction or discussion with the EPA —

Mr. MEADOWS. So you are doubling down that you never have discussion with an agency informally before it goes into the formal process?

Mr. SHELANSKI. Are we talking about WOTUS or are we talking about —

Mr. MEADOWS. You know, it is your agency. Let me just tell you, I am trying to make it clear. Ms. Sager, do they—your GAO report seemed to indicate that there is this informal review process that

sometimes goes back and forth with an agency. Can you illuminate that any?

Ms. SAGER. There are conversations between OIRA and the agencies about the nature of proposed rules, yes.

Mr. MEADOWS. So how do you reconcile what the GAO is telling me with your testimony here, Mr. Shelanski?

Mr. SHELANSKI. Well, Mr. Meadows, you've moved back and forth between the specific case of —

Mr. MEADOWS. No, sir, I think I have been —

Mr. SHELANSKI. You have.

Mr. MEADOWS. Well, let me just tell you. It is not my agency, so please enlighten me because let me tell you, what it smells like here is that you are not being truthful with this committee.

Mr. SHELANSKI. So let me separate two things and be very plain about it. My answer on WOTUS was correct. I had no interaction with WOTUS during—between the proposed and final rule with EPA on the clean water rule. Are there occasions, as Ms. Sager said, when agencies come and brief us on rules that they have not yet formally submitted? Yes, there are. And I've said that before in testimony.

Mr. MEADOWS. But in my direct questioning I was trying to get to that very exact point and you gave an answer that was not —

Mr. SHELANSKI. But I realize that now. Last time we had the occasion to speak about the issue, Mr. Meadows, I was not clear on whether you were asking about proposed rules or talking about separately as informal rules because we don't have a category that we keep of informal review, okay? What we do is sometimes an agency will say we're developing a rule or we have a rule we're going to submit in 2 months; we'd like to come in and brief you about it. We do have those discussions, as Ms. Sager said, but we don't have the rule at that point. We're not actually reading the rule, and we're not involved in helping them develop the rule. We're getting briefed on the scope of the rule.

Mr. MEADOWS. All right. Let me interrupt you. If you are having discussions with them, how could that not be helping them develop the rule? Why are you having the discussion? Is it what did you have for breakfast?

Mr. SHELANSKI. No, it's more —

Mr. MEADOWS. If you are not helping them—how do you have a discussion if you are not helping them develop the rule?

Mr. SHELANSKI. So they're going to want to know what we will expect from them when the review process starts.

Mr. MEADOWS. That is helping them develop the rule.

Mr. SHELANSKI. Okay. I mean, we're not setting—we're not making policy decisions for them. They'll come to us and say we have a rule on a particular topic. Here's what—here's the direction the rule is going often with not terribly much specificity, and we'll tell them, okay, we're going to need certain kinds of analysis, we're going to need certain things to be an element of the rule package. But it would not be the proper role of OIRA, for example, to tell, you know, HUD what their policy decisions should be in a particular rule.

Mr. MEADOWS. That is not what I was asking. The problem is your testimony today is in direct conflict with the testimony you

gave just about a year ago because this was the exact line of questioning that I was trying to get to. And either it was my inability to articulate it properly or your inability to comprehend it properly, but somehow, we miscommunicated. And what I am concerned about is it took other witnesses here for you to finally agree to what we already knew.

Mr. SHELANSKI. Well, Mr. Meadows, I was not certain 5 minutes ago whether you were talking about a particular rule or —

Mr. MEADOWS. Okay.

Mr. SHELANSKI.—generally, and I believe I've made —

Mr. MEADOWS. Well, they have called votes, and so, Dr. Williams, Mr. Batkins, you both gave some very good—as my good friend Mr. Connolly has indicated, some good analysis. What we would love to do is follow up. So we don't keep you here any longer, we will submit some questions for that.

I recognize the ranking member for a closing statement.

Mr. CONNOLLY. I thank the chair.

I guess I would just say, you know, Harry Truman used to have a sign on his desk "The buck stops here." It was an acknowledgment that there had to be some ultimate authority where decisions got made and responsibility taken. You know, I don't know Mr. Shelanski's commitment to his mission, and he has a long and distinguished career, but what is untenable is to assert that even though I am the head of an agency, I have outsourced responsibility for compliance with a subpoena and the overall relationship with a committee to somebody else, and my only job is to hand over the raw documents and I am done. I don't take responsibility for dates, for meetings, for what information if any is provided, and whether or not we are, in fact, in compliance with a subpoena. That is not a tenable position, and I can assure you on a bipartisan basis that is going to be the point of view on this committee.

And so I urge Mr. Shelanski to think about that because I think we could avoid some problems by the taking of responsibility and by more awareness by Mr. Shelanski of in fact what meetings take place, who is at them, and what got agreed to even if he isn't in that meeting. And I just respectfully submit that to the gentlemen in question because I think you are going to have real problems on this committee. And we already have a philosophical divide about the value and role of regulation, but to be eclipsed in that philosophical debate by an administrative hurdle that is not defensible makes no sense to me. But that is just me.

Thank you, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman for his eloquent remarks.

Mr. Shelanski, maybe what we can do is from this point forward believe that you are going to comply with the subpoena and all the documents and that we set the scope of when that would be along with timetables and how we are going to do that. That is what we will look for.

Additionally, what I would ask with regards to the GAO recommendations which GAO recommendations that you plan not to implement, the ones that you do plan to implement and at what timetable are we going to look at that. I am going to check. I will follow up. I promise you I will follow up on that.

And then, Mr. Batkins and Dr. Williams, my apologies for not getting any further questions with you, but we will submit some for the record and ask you to respond back to this committee. And we appreciate your interest in this very valuable topic.

And if there is no further business before the committee, the committee stands adjourned.

[Whereupon, at 3:45 p.m., the subcommittee was adjourned.]

