July 15, 2015

Chairman Marino
Ranking Member Johnson
U.S. House Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Re: House and Senate OIRA Oversight Hearings

Dear Chairman Marino and Ranking Member Johnson,

Through its oversight of the White House Office of Information and Regulatory Affairs (OIRA), Congress should insure that the federal regulatory system, to the extent required by law, protects the environment and keeps people safe. By any objective measure, that is not happening. Too often, the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), the Food and Drug Administration (FDA), and other agencies are impeded or even blocked from satisfying their congressionally mandated duty to defend public health, safety, and the environment. The pattern of recent industrial catastrophes—including the BP oil spill in the gulf, massive oil train explosions from Illinois to West Virginia, and tainted steroid injections from the New England Compounding Pharmacy—provides a stark reminder of the harmful consequences of our weakened regulatory system.

Unfortunately, the many proposals to "reform" the regulatory system now pending before Congress would impair our agencies even more. In this letter, we focus on three antiregulatory proposals now before you and explain how each would put the American public at risk.

Extending OIRA review authority to independent regulatory agencies

This proposal would allow the president to subject independent agencies to the kind of centralized regulatory review that OIRA currently conducts for executive-branch agencies under Executive Orders 12866 and 13563. The White House would be given unprecedented influence over independent agencies' regulatory decision-making, allowing future presidents to block or dilute the work of independent agencies they oppose. Congress explicitly designed independent regulatory agencies to be institutionally insulated from excessive political interference from the president. Subjecting these agencies to executive order requirements—especially oversight by OIRA, which is without question the most potent conduit for presidential influence over new rules— would thoroughly undermine Congress's careful and deliberate institutional design.

Center for Progressive Reform
455 Massachusetts Ave., NW #150-513
Washington, DC 20001
www.progressivereform.org
(202) 747-0698
phone/fax
info@progressivereform.org

Independent regulatory agencies oversee some of the most important and complex aspects of the U.S. economy, including guarding against banking abuses and protecting consumers against unsafe products. By designing independent regulatory agencies to be insulated from undue political pressure, Congress also sought to ensure that these agencies would be able to use their unique expertise on policy matters to develop the best solutions to the social problems that Congress meant for them to address. OIRA review of independent agency rulemakings would undermine this structure by giving the White House an easy way to override independent agency expertise in response to lobbying from business or other outside interests.

One currently pending bill that would establish OIRA review authority over independent agencies is the Independent Agency Regulatory Analysis Act (S. 1607). This bill would also subject independent agencies to several new time-consuming and resource-intensive analytical requirements that are irrelevant to protecting the public interest and that would needlessly delay critical safeguards. In particular, S. 1607 would require that all independent agencies' "economically significant" rules undergo a highly subjective and politicized analytical test known as quantitative cost-benefit analysis. This analysis, which has often served to protect regulated entities at the expense of the public, is in many cases not required or even envisioned by the regulations' authorizing statutes. Independent agencies would have to satisfy this requirement even though they operate under a wide variety of statutory standards, which, while different in their specifics, are all oriented toward protecting people and their surroundings.

Codifying "one size fits all" regulatory "lookback" requirements

Over the last few years, several bills have been introduced that would require new processes and procedures for conducting burdensome, one-size-fits-all "lookbacks" for existing agency regulations. These include the Regulatory Improvement Act of 2015 (H.R. 1407 and S. 708) and the Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act of 2015 (H.R. 1155 and S. 1683).

No one denies that agencies should regularly review and assess their regulations, and many already do. Such reviews are arguably more beneficial and productive than the highly speculative *ex ante* cost-benefit analyses that agencies perform for many of their rules.

But, the recent lookback proposals have serious defects. First, these proposals would make government more sluggish by duplicating programs that already exist. For lookback programs of all shapes and sizes already abound in our government. The Regulatory Flexibility Act, for example, requires agencies to review every rule that has "a significant economic impact upon a substantial number of small entities" within 10 years after the final rule is published. Further, Executive Order 13563 requires agencies to conduct similar resource-intensive reviews on an ongoing basis for all significant rules.

In addition, several procedures are already in place for third parties to independently evaluate agencies' existing regulatory programs. For instance, federal law establishes a network of independent Inspectors General for every major executive and independent agency, which, among other things, audits and evaluates the effectiveness of agencies' regulatory programs. In addition, Congress created the Government Accountability Office (GAO), an independent agency that works to aid Congress's oversight of the federal government. A key component of

the GAO's work is to audit and evaluate specific regulatory programs in response to requests from members of Congress. As part of this effort, the GAO maintains a "High Risk List," which it updates at the start of each new Congress in order to bring "attention to agencies and program areas that are high risk due to their vulnerabilities to fraud, waste, abuse, and mismanagement, or are most in need of transformation."

Second, programs requiring burdensome one-size-fits-all lookback procedures are conceptually flawed. Last year, Michelle Sager, the Director of Strategic Issues at the GAO, testified before the U.S. Senate Committee on Homeland Security and Governmental Affairs that agencies already conduct discretionary lookbacks of their existing regulatory programs, and that these discretionary reviews were more effective than the mandatory ones in terms of producing meaningful policy changes. As she put it, "discretionary reviews generated additional action more often than mandatory reviews, which most often resulted in no changes."

Third, the regulatory lookback proposals are highly biased. Their required methodologies focus heavily or even exclusively on ways to reduce regulatory costs with nary a thought on how to improve public safety. Instead of providing an honest accounting of existing rules' impacts, these lookbacks would likely generate results that are meaningless or unhelpful. After all, many of the regulatory lookbacks that already occur tend to find that existing rules are either not imposing undue costs or indeed need to be strengthened. For instance, a 2011 Center for Progressive Reform white paper reviewed 38 regulatory lookbacks conducted by the EPA and OSHA under the Regulatory Flexibility Act and found that every review concluded that there is a "continued need" for the regulation, meaning that a significant risk to public health, safety, or the environment exists and that the controls called for in the regulation continue to be successful in reducing that risk. Likewise, many regulatory programs end up on the GAO's High Risk List because they are inadequate and need to be strengthened—not weakened or rescinded. For instance, the GAO included "Transforming EPA's Process for Assessing and Controlling Toxic Chemicals" because it found that the agency was failing to effectively implement key chemical assessment programs, including the Integrated Risk Information System (IRIS) program and the Toxic Substances Control Act (TSCA).

Rather than add duplicative and wasteful lookback requirements, Congress should consider providing agencies with the necessary resources so that they can conduct discretionary lookbacks that are better tailored to the individual regulations undergoing review.

<u>Regulatory budgeting or regulatory "pay-go"</u>

The most extreme of all the antiregulatory reforms, this proposal would place an arbitrary cap on new safeguards that is purportedly aimed at limiting the total cost of regulations on polluting industries. Depending on how the cap is designed, agencies would be prohibited from issuing new rules, no matter how beneficial they are, unless they first identify and eliminate an existing rule that involves greater or equal costs for industry.

Regulatory budgeting would prohibit agencies from taking any actions that add new regulatory costs without offsetting those costs by eliminating existing regulations. If the agency sought to regulate a harmful activity, it would have to drop an existing protection against some other risk. Alternatively, the agency could choose not to act, and leave the existing safeguard in place, at the

price of leaving some other hazard unaddressed. In either case, people and the environment would be left unprotected against an identifiable and preventable risk. While agencies would face a cap on regulatory costs, regulated industries would of course face no similar "cap" on their ability to impose new and unique harms on public health, safety, and the environment.

Under standard economic theory, a rule that creates more benefits than costs is a "good deal" for society, and a rule that creates fewer benefits than costs is not. Administrations from both parties have implemented this insight by requiring executive agencies to subject their biggest rules to a technical form of cost-benefit analysis to the extent permitted by their authorizing statutes.[1] Regulatory budgeting completely ignores this lesson, and thus is even more extreme than cost-benefit analysis in its disregard for regulatory benefits. For example, suppose a cost-benefit analysis determines that a rule will cost $100 million to implement but will yield $200 billion in benefits. Regulatory budgeting would block adoption of this rule—even though it is a huge net plus for society—unless the agency finds a different rule to repeal that costs $100 million or more to implement. Under regulatory budgeting, it is irrelevant that the repealed rule might be on an entirely different subject matter or that it might also generate far more benefits than costs. There should not be a limit on the amount of net good a government can provide to its people.

Regulatory budgeting would also be subject to several complex and intractable implementation problems that would render the proposal almost impossible to put into practice. For example, would there be a single cap for the entire government? If so, how would it be set? If set on an agency-by-agency basis, how would the budgets be changed to account for a reorganization of existing agencies or to accommodate the creation of new ones? The answers to these and other crucial implementation questions defy simple resolution.

Conclusion

Thank you for attention to these criticisms of the antiregulatory proposals discussed above. At your request, we would be happy to discuss these views with you further.

Sincerely,

Robert R.M. Verchick
President, Center for Progressive Reform
Gauthier ~ St. Martin Eminent Scholar Chair in
Environmental Law
Loyola University, New Orleans*

James Goodwin
Senior Policy Analyst
Center for Progressive Reform

* University affiliation is for identification purposes only.

[1] To be sure, as noted above, the use of cost-benefit analysis in regulatory decision-making is problematic in part because it treats the protection of individuals and the environment as just another asset that is worthy of protection only if the "value" of human beings or the environment is greater than the cost of protection. More broadly, cost-benefit analysis in practice cannot give due weight to qualitative benefits that it inevitably commodifies.