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BEFORE THE COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENT AFFAIRS
UNITED STATES SENATE

HEARING ON ‘A REVIEW OF REGULATORY REFORM PROPOSALS’
SEPTEMBER 16, 2015

Chairman Johnson, Ranking Member Carper, and Members of the Committee, thank you for inviting me here today to share with you my views on the proposed regulatory reform legislation under consideration by this Committee. In my testimony, I will measure these proposals against each of the three principles that undergird administrative procedure—accountability, fairness, and productivity. None of the proposed regulatory reforms would improve the productivity of agencies. Instead, to varying degrees, the proposed bills would reduce productivity. Likewise, the bills vary concerning the extent to which they address gaps in accountability and fairness that might exist in the current system. For the most part, however, the proposed legislation would reduce agency productivity for little or no net gain in accountability and fairness.

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My work on regulation and administrative law includes ten books, seven book chapters, and over fifty-five articles (as author or coauthor). My latest book (co-authored with Joe Tomain), was published in 2014 by the Oxford University Press and addressed the importance of government institutions, including the regulatory state, for promoting democratic values. I have served as consultant to government agencies and have testified before Congress previously on regulatory subjects.

I. THE BENEFITS OF REGULATION

All regulations share the same starting point: A provision in a statute passed by both Houses of Congress and signed by the President that authorizes or directs an agency to regulate. Whenever an executive or independent agency issues a rule, it is acting pursuant to authority provided in duly enacted legislation for achieving a specified policy goal, although that authority often leaves room for the exercise of at least some agency discretion, enabling agency experts to apply their specialized knowledge and skills to designing the most effective policies for achieving the statutorily specified goal. The legislation from which agencies derive their authority to regulate reflect a determination by a majority of both Houses of Congress and the President that there is pressing national problem that merits the government's attention, and that regulation is an appropriate response to that problem because it will promote the public interest in some way, such as by protecting health and the environment.

It is a good thing that Congress has directed agencies to issue regulations to achieve important social goals because these regulations have produced enormous benefits for the American people.[1] Consider the following:

[1] *See* Sidney A. Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* (Ctr. for Progressive Reform, White Paper 1109, 2011), *available at* http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

- The White House Office of Management and Budget (OMB) estimates that regulatory benefits exceed regulatory costs by about 8 to 1 for significant regulations.[2] The Environmental Protection Agency (EPA) estimates that the regulatory benefits of the Clean Air Act exceed costs by a 25-to-1 ratio.[3]

- The failure to regulate some hazards related to the workplace, the environment, product safety, food safety, and more, and the failure to enforce existing regulations on such hazards results in thousands of deaths, tens of thousands of injuries, and billions of dollars in economic damages every year. Sometimes, the damages reach a catastrophic scale. The BP Oil Spill caused tens of billions of dollars in damages.[4] The Wall Street collapse may have caused trillions. Regulation to prevent catastrophe can be far cheaper, and less painful, than cleaning up damage to lives, property, and the environment later.[5]

- Dozens of retrospective evaluations of regulations by the EPA and the Occupational Safety and Health Administration (OSHA) have found that the regulations were still necessary and that they did not produce significant job losses or have adverse economic impacts for affected industries, including small businesses.[6]

Individual examples of regulatory successes paint an even more compelling portrait. The EPA estimates Clean Air Act rules saved 164,300 adult lives in 2010, and will save 237,000 lives annually by 2020. The National Highway Traffic Safety Administration's vehicle safety standards have reduced the traffic fatality rate from nearly 3.5 fatalities per 100 million vehicle miles traveled in 1980 to 1.41 fatalities per 100 million vehicle miles traveled in 2006. An Endangered Species Act recovery program developed by the U.S. Fish and Wildlife Service

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[2] OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, DRAFT 2014 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 11, *available at* https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/draft_2014_cost_benefit_report-updated.pdf.

[3] ENVTL. PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020, 7-9 (Mar. 2011), *available at* http://www.epa.gov/oar/sect812/feb11/fullreport.pdf.

[4] *See* Aaron Smith, *BP: We've Spent $2 Billion on Clean-Up*, CNNMONEY, June 21, 2010, *available at* http://money.cnn.com/2010/06/21/news/companies/bp_oil_spill/index.htm. In June of 2010, Credit Suisse predicted that the total costs would be around $37 billion, with $23 billion in clean-up costs and $14 billion in settlement claims. Linda Stern, *Gulf Oil Spill Could Cost BP as Much as $37 Billion*, MONEYWATCH.COM, June 8, 2010, *available at* http://moneywatch.bnet.com/economic-news/blog/daily-money/gulfoil-spill-could-cost-bp-as-much-as-37-billion/728/.

[5] OFFICE OF MGMT & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, FISCAL YEAR 2012: ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT 47 (2011), *available at* www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/spec.pdf. The Congressional Budget Office (CBO), which employs a different methodology for calculating costs than does the OMB, estimates the costs of TARP to be $19 billion. CONG. BUDGET OFFICE, REPORT ON THE TROUBLED ASSET RELIEF PROGRAM—MARCH 2011, 1 (2011), *available at* http://www.cbo.gov/ftpdocs/121xx/doc12118/03-29-TARP.pdf. *See also* BARBARA BUTRICA, KAREN E. SMITH, & ERIC TODER, HOW WILL THE STOCK MARKET COLLAPSE AFFECT RETIREMENT INCOMES? 1 (The Urban Institute, Older Americans' Economic Security Report No. 20, 2009), *available at* http://www.urban.org/uploadedpdf/411914_retirement_incomes.pdf.

[6] Sid Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* 10, 20-30 (Ctr. for Progressive Reform, White Paper 1109, 2011), *available at* http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

helped increase the Bald Eagle population from just 400 nesting pairs in 1963 to 10,000 nesting pairs in 2007, enabling the Service to remove Bald Eagles from the Endangered Species List.[7]

II. PRINCIPLES OF ADMINISTRATIVE PROCEDURE

While it is important that agencies protect the public, those protections must be achieved in an accountable and fair manner. The role of administrative procedures is to ensure sufficient accountability and fairness. But it is possible to have too much of a good thing. While it is always possible to add more procedures, we must also consider the impact of doing so on an agency's capacity to protect the public.[8] Administrative procedure must "comport with efficiency while also ensuring fairness and negating the fear of unchecked power."[9] We must achieve an appropriate balance between accountability, fairness, and the capacity of agencies to complete their statutory mission. In the design of administrative procedure, "[i]t is equally important . . . to provide mechanisms that will not delay or frustrate substantive regulatory programs."[10]

In short, administrative procedure seeks to advance the principles of accountability, fairness, and productivity, and the administrative state will work best when those procedures are designed in a way that properly balances these mutually competing principles. In recent decades, Congress, the president, the judiciary, and even the agencies themselves have imposed numerous new analytical and procedural requirements that must be satisfied during the course of a rulemaking. In most cases, these requirements are defended as necessary for advancing accountability and fairness, but their steady accumulation comes at the cost of productivity. At some point, however, the system can be thrown out of a balance, ultimately preventing agencies from fulfilling even their core missions of protecting the people and the environment. For this reason, the American Bar Association (ABA) recommends for "the President and Congress to: exercise restraint in the number of rulemaking impact analyses; assess the usefulness of existing and planned analyses; and ensure agencies' adherence to recommendations of the ABA and the Administrative Conference of the U.S. (ACUS) pertaining to such impact analyses requirements."[11]

When considering new analytical and procedural requirements, policymakers should carefully evaluate them through the lens of the three principles outlined above. Among other things, this evaluation should ascertain the degree of overlap between the proposed accountability mechanism and existing accountability mechanisms, and whether the new accountability mechanism is necessary to promote an acceptable level of fairness and accountability. Next the evaluation should assess the extent to which the new accountability mechanism will further deteriorate agency productivity. Finally, the review should identify whether a less burdensome alternative is available for addressing the identified an accountability or fairness problem.

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[7] *Id*. at 5-6.
[8] *See* Sidney A. Shapiro, *Paul Verkuil and Pragmatic Adjustment in Government*, 32 CARDOZO L. REV. 2459, 2459 (2011).
[9] Paul R. Verkuil, *The Ombudsman and the Limits of the Adversarial System*, 75 COLUM. L. REV. 845, 855 (1975).
[10] Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279 (1978).
[11] Sec. of Admin. L. & Reg. Practice, Am. Bar Assoc., Policy: Regulatory Impact Analyses, http://www.americanbar.org/groups/administrative_law/policy.html (last visited Sept. 13, 2015) (follow the hypertext link "Regulatory Impact Analyses" to download a copy of the Section's statement of policy).

In addition, to ensure that administrative procedure remains in proper balance, policymakers should strive to review on an ongoing basis the existing stock of analytical and procedural requirements, both individually and collectively. For example, this review could assess whether existing requirements are duplicative, thereby resulting in the waste of scarce public resources and the unnecessary delay of public protections.

Finally, I add a special word of caution. Frequently, observers of the regulatory system—either intentionally or mistakenly—conflate regulatory outcomes with which they happen to disagree with inadequate accountability and fairness in administrative process. These concepts are, of course, distinct. Whatever one may think of their substance, these rules are generally the product of a process that offers adequate accountability and fairness measures. Accordingly, the problem is not with the process, but rather with the underlying statute. Regulatory reform will not fix statutes that one opposes; availing oneself of the normal legislative process to amend or repeal those statues instead offers the proper course of action.

III. Our Regulatory System Is Out of Balance

As currently constituted, the rulemaking process contains far more mechanisms for promoting the goals of fairness and accountability than is needed. As a result, rules can take several years, if not decades to come to fruition, and scarce public resources are wasted. During these unnecessary delays, the risks these rules are meant to address do not pause or evaporate into the ether; rather, they continue unabated, threatening the health and security of families and businesses across the country.

In developing regulatory proposals, agencies are subject to a thick web of analytical and procedural requirements and their final decision-making is then subject to judicial review by federal appellate courts. If anything, there are too many of these overlapping and duplicative requirements, resulting in the need to conduct years of analysis before significant rules may be adopted. In addition, existing federal laws that govern the rulemaking process provide numerous opportunities for interested stakeholders to participate to make their views known, inform the agency if its regulatory proposals reflect factual misunderstandings, and protect their interests. Finally, even after a rule is completed, agencies have several tools at their disposal to make "back end" adjustments that enable tailored implementation for the purposes of minimizing unintended negative consequences.

The Administrative Procedure Act (APA) requires agencies to provide persons potentially affected by their regulations a fair opportunity to influence the rulemaking process. Under traditional APA rulemaking, a regulatory proposal is meant to start the discussion, not end it. Indeed, the agency must solicit and actually *consider* comments it receives from the public on the proposal. If the agency discovers during the comment process that it has strayed beyond its statutory authority, neglected relevant considerations, or misunderstood the science on which it based its proposal, the APA requires the agency to revise the rule accordingly before finalizing it, or not adopt the rule at all. This is not some hollow exercise. Rather, the courts strictly enforce it. If an agency adopts a rule without taking into account relevant public comments, the court in a

challenge to the validity of the rule has the power to send the rule back to the agency and block its implementation.

The APA has provided these protections during the rulemaking process for affected interests since 1946, but statutes and executive orders adopted beginning in the 1980s have added multiple layers of new rulemaking procedures and analytical requirements not required by the APA. As a result, the rulemaking process has become an inordinately complex, time-consuming, and resource-intensive process:

- As of 2000, an agency was subject to as many as 110 separate procedure requirements in the rulemaking process.[12] Additional procedural requirements have been added since 2000.[13]

- A flowchart developed by Public Citizen to document the rulemaking process covers several square feet, and, because of the complexity involved, it still requires tiny font in order to include every last rulemaking step.[14]

Regulated businesses not only take full advantage of the many existing participatory opportunities; all of the available evidence demonstrates that corporate and business entities dominate the rulemaking process in doing so. For example, when Professor Wendy Wagner and her coauthors examined 39 hazardous air pollutant rulemakings at the EPA, they found that industry interests had an average of 84 contacts per rule, while public interest groups averaged 0.7 contacts per rule. [15] These included meetings, phone calls, and letters.

Similarly, representatives of corporate interests are far more likely to lobby the Office of Information and Regulatory Affairs (OIRA), a relatively obscure bureau in the White House that wields significant influence over agency rulemaking due to its role under Executive Order 12866 of reviewing the largest or most controversial pending agency rules. A 2011 CPR white paper found that over a nearly 10-year period OIRA hosted 1,080 meetings, with 5,759 appearances by outside participants.[16] Sixty-five percent of the participants represented regulated industry interests as compared to just 12 percent that appeared on behalf of public interest groups.

Despite the numerous accountability and fairness mechanisms that already exists, the push for still more mechanisms continues, as the various bills under consideration in today's hearing demonstrate. Worse still, this accumulation of wasteful and time-consuming procedural and analytical requirements ignores the fact that agencies have the authority, which they regularly deploy, to make back-end adjustments in the implementation of completed rules to avoid

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[12] *See* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. L. REV. 533 (2000) (documenting that executive orders and statutory requirements could require as many as 110 different requirements for rulemaking), *available at* http://www.law.fsu.edu/journals/lawreview/downloads/272/Seid.pdf.
[13] *See, e.g.*, Exec. Order No. 13,586, 76 Fed. Reg. 3,821 (Jan. 18, 2011).
[14] *See* PUBLIC CITIZEN, THE FEDERAL RULEMAKING PROCESS, *available at* http://www.citizen.org/documents/Regulations-Flowchart.pdf.
[15] Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA's Toxic Air Regulations*, 63 ADMIN. L. REV. 99, 225 (2011).
[16] Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 20110), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

unintended consequences. The mechanisms for achieving these adjustments take various forms, including exceptions, time extensions, variances, and waivers.[17] To see such back end adjustments in action, one needs only to conduct a quick review of the table of contents for each day's edition of the *Federal Register*. In the September 10 edition, I found the following examples: Exemption applications from the Federal Motor Carrier Safety Administration's commercial driver's license standards; petitions for waivers of compliance with the Federal Railroad Administration; and petitions for modifications of existing mandatory safety standards with the Mine Safety and Health Administration. While opponents of regulations often cite the number of pages in the *Federal Register* to support their claim that the regulatory system is out of control, these particular pages are all dedicated to responding businesses' requests for regulatory relief.

The back-end adjustment process has several advantages over efforts to craft a perfect and omniscient regulation at the outset. First, it permits agencies to preserve relatively stringent baseline regulatory standards while still accommodating concerns that the application of these stringent rules will cause irrational or unfair results in particular cases. Regulators can make case-by-case adjustments instead of initially watering down standards in anticipation that a general rule may be counterproductive or irrational in some circumstances. Second, a back-end process addresses the delays caused by analysis requirements and the difficulty of undertaking analysis in light of informational and methodological problems. The availability of these adjustments can avoid delay in the issuance of a rule of widespread applicability because an agency can promulgate a rule and rely on regulated entities to alert it to implementation problems by filing individual requests for relief. Further, a back-end process gives regulated entities a strong incentive to produce evidence that an adjustment in a rule is justified. A process that relies on back-end adjustments to fix regulatory flaws gives those who are most likely to possess the relevant information an incentive to bring that information to the agency's attention. Unlike rulemaking, in which regulators must attempt to anticipate problems before they occur as they write general rules, incremental adjustments permit regulators to consider concrete problems, one at a time, in the context of specific circumstances. The back-end process allows agencies to make adjustments in response to circumstances that they did not anticipate when they wrote a rule.

Third, a back-end adjustment process can increase the legitimacy of the regulatory program that contains the back-end process by reducing the frustrations likely to result from the application of regulatory requirements in ways that produce harsh or anomalous results. Finally, but hardly least of all, a back-end process is one of the ways that regulators can take costs into account. A back-end adjustment process that authorizes hardship-based adjustments makes cost a relevant consideration without relying on a cost-benefit test that yields a misleading impression of analytical precision.

To be sure, careful analysis of both the need for and consequences of regulation is important. But, the regulatory process has become so ossified by needless or duplicative procedures and analyses that larger rulemakings commonly require several years—possibly more than a decade—to complete. As Professor Richard Pierce of the George Washington University Law

[17] *See* Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179 (2004).

School has observed, "[I]t is almost unheard of for a major rulemaking to be completed in the same presidential administration in which it began. A major rulemaking typically is completed one, two, or even three administrations later."[18]

The EPA told the Carnegie Commission that it takes about five years to complete an informal rulemaking.[19] A Congressional report found that it took the Federal Trade Commission five years and three months to complete a rule using more elaborate hybrid rulemaking procedures.[20] (Remarkably, these reports are several decades old and thus do not take into account the additional analytical requirements that have been imposed since their publication.) More recently, OSHA estimates in a rulemaking flowchart on its website that its most complex rules might take up to 12.5 years to complete.[21] Last month, the libertarian R Street Institute issued a report that found that delay has become so pervasive in the rulemaking process that agencies failed to meet more than 1,400 statutorily-imposed rulemaking deadlines between 1995 and 2014—or just under 50 percent of the deadline that were in effect during that period.[22]

The fact that it may take five years or longer to complete the process for adopting important rules should be no surprise, as the following time schedule for significant rules indicates:

- 12-36 months to develop a proposed rule
- 3 months for OIRA review of the draft proposal
- 3 months for public comment
- 12 months to review comments and write final justification
- 3 months (or more) for OIRA review of the final rulemaking
- 2 months delay under the Congressional Review Act
- 12-36 months for judicial review (assuming a court stays the rule)

TOTAL: 47-95 months (3.9-7.9 years)

This estimate of 4 to 8 years assumes the comment period only takes 3 months, which is usually not the case, and that an agency can respond to rulemaking comments, which can number in the hundreds or even thousands, in 12 months. It also assumes the agency does not have to (1) hold an informal hearing, (2) utilize small business advocacy review panels under the Small Business Regulatory Enforcement Fairness Act (SBREFA), (3) consult with advisory committees, and (4) go through the Paperwork Reduction Act process at OIRA. Although some of these activities might be undertaken simultaneously with the development of a rule or responding to rulemaking comments, these activities have the potential to delay a rule by another 6-36 months.

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[18] Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 912 (2007).
[19] CARNEGIE COMM'N, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 108 (1993).
[20] FEDERAL TRADE COMM'N, 98th Cong., 2nd Sess., 155-66 (Comm. Print 98-cc 1984).
[21] OCCUPATIONAL SAFETY & HEALTH ADMIN., THE OSHA RULEMAKING PROCESS (2012), *available at* https://www.osha.gov/OSHA_FlowChart.pdf.
[22] Scott Atherley, *Federal Agency Compliance with Congressional Regulatory Deadlines* (R Street Policy Study No. 39, August 2015), *available at* http://www.rstreet.org/wp-content/uploads/2015/07/RSTREET39.pdf.

Meanwhile, with each passing year, the human and economic costs of these kinds of regulatory delays keep accruing. For example, the delay in regulating toxic pollution might cause death or disease in humans, damage to fragile ecosystems, or massive clean-up costs for future generations. Other human and economic costs may be less obvious, but are no less important. For example, unregulated power plant emissions of mercury will cause developmental delays for some American children. Not only will they and their families suffer as a result, but taxpayers will end up footing the bill for providing special education to children who suffer brain damage. Also less obvious are the social costs of regulatory delay. For example, each instance of delay feeds public disillusionment with the nation's democratic institutions, as voters conclude that they cannot rely on the federal government to prevent serious health, safety, and environmental threats.

Several currently pending rulemaking illustrate the pervasive problem of regulatory delay:

- According to a recent story in the *Washington Post*, it took the Department of Agriculture more than two years merely to propose an update to a regulation so that the derogatory term "midget" was eliminated as the recognized designation for small raisins.[23] This was not a controversial regulation, nor does it impose significant costs on affected industries. The long timeline was simply a reflection of the number of rulemaking procedures that the Department of Agriculture had to use in order to develop a notice of proposed rulemaking. Among other things, agency officials had to ensure compliance with the Regulatory Flexibility Act and the Paperwork Reduction Act. The comment period on the rule is open until October 20. It is unclear when the agency will be able to issue a final rule after that.
- OSHA has been working on an update to the existing silica standard to protect workers against harmful exposures to silica dust for nearly 20 years. (The agency has known for over 40 years that the existing standard is inadequate.) OSHA estimates that its proposed update, which it released in September 2013, would save nearly 700 lives and prevent 1,600 new cases of silicosis—and often fatal disease caused by excessive silica exposures—every year.
- The EPA has struggled for years to develop a rule that will impose needed controls on stormwater pollution. A form of "nonpoint source" water pollution, stormwater from developed urban and suburban areas has become a leading cause of degraded water quality, and one that remains largely unaddressed at all levels of government. The EPA has been developing a rule to establish comprehensive stormwater controls since at least 2009. The agency has made little progress in that time, however, and even a proposal seems years away from completion.
- The EPA has also made little meaningful progress in addressing another form of non-point source water pollution: manure and other wastes from concentrated animal feeding operations (CAFOs). This waste stream poses a threat to human health and wildlife and put our nation's waterways—including the Chesapeake Bay, Great Lakes, and

[23] Lisa Rein, *The Official Reference to Small Raisins as 'Midgets' is Almost Gone. It's Taken the USDA More than Two Years*, WASH. POST'S FEDERAL EYE, Sept. 3, 2015, *available at* http://www.washingtonpost.com/blogs/federal-eye/wp/2015/09/03/the-official-reference-to-small-raisins-as-midgets-is-almost-gone-its-taken-the-usda-more-than-two-years/.

Mississippi River—at risk. In the early 2000s, the EPA took another look at its CAFO regulations, which had not been updated since the 1970s. Despite some early progress, the agency still has not instituted the kind of comprehensive program needed for addressing CAFO wastes. A final, nationwide CAFO waste rule does not appear to be forthcoming anytime soon.

- The EPA, OSHA, and the Department of Homeland Security all have failed in their role of protecting Americans against disasters at chemical plants, such as the explosion at a fertilizer storage facility that levelled a large swath of West, Texas in April 2013. Following the disaster in Texas, President Obama issued an executive order, directing those agencies to begin developing new regulatory safeguards aimed at preventing similar catastrophes in the future. Despite the obvious hazards these facilities pose to communities across the country, precious little progress has been achieved. As a result, the occurrence of another, potentially larger scale explosion is a question of "when" and not "if."

IV. EVALUATING THE REGULATORY REFORM PROPOSALS

Regulatory process reform proposals must be evaluated according to whether and what extent they properly balance the competing administrative law principles of fairness, accountability, and productivity. This evaluation should not be conducted in a vacuum; rather, these proposals must be considered in light of the current state of the regulatory system.

Taking these considerations into account, I have serious reservations about each of the proposals bills as currently drafted. If enacted, each would only throw the regulatory system even more out of balance, further subverting the principle of administrative productivity. One other blanket criticism I have for all of the bills is that most of them do not authorize additional funding for agencies to carry out the bill's provisions, which many cases would be labor-intensive and time-consuming. I would be curious to see the Congressional Budget Office's estimates for the costs of carrying out the bill, and I would encourage the committee to consider including revisions to the bills to ensure that these costs are paid for.

I discuss my more specific concerns with each bill below. Where applicable, I offer suggestions on how they might be revised to isolate and give greatest effect to their best features.

A. The Regulatory Improvement Act

As compared to the other bills under consideration today, this proposed legislation is not primarily focused on establishing new rulemaking procedures agencies to undertake.[24] The greater concern about this bill is that it would likely reduce the accountability and fairness of the

[24] This is not to say that implementation of this bill is unlikely to impose costly burdens on agencies. For example, the commission created by the bill would have broad authority to subpoena agencies for large swaths of information related to their existing rules. Complying with these subpoenas could be time-consuming and resource-intensive. Moreover, once enacted into law, the commission's recommendations would impose on agencies a tight, judicially enforceable timeline to implement those recommendations. Depending on the nature of these recommendations, this process is likely to be time-consuming and resource-intensive as well, inhibiting the ability of agencies to continue carrying out their affirmative mission of protecting people and the public.

administrative system. First, it would ask nine Commissioners to judge the success of rules from across the government. Although the Commissioners may have some expertise, as the bill requires, it is doubtful that any of Commissioners or staff would have the breadth of experience and expertise to perform knowledgeable review of the rules under consideration.

Second, while it is true that the Commission's judgment will be informed by its consultation and public comment, this does not alleviate the expertise gap since the Commissioners ultimately would have to make judgments about this input. Moreover, it is notable that the bill does not require that the Commission consult with the agency that produced the regulation in the first place. Finally, rulemaking and OIRA's review is now dominated by industry interests,[25] and the same would be true of the Commission's review process, creating an unfair process. The fact that the bill exempts the Commission from the Federal Advisory Committee Act (FACA) reduces accountability and fairness further.

As the bill recognizes, the commission's recommendations must be enacted through legislation before they can take effect, since these recommendations would effectively revise existing laws. The bill establishes expedited procedures for legislative consideration of the regulatory review commission's recommendations that provide little opportunity for elected members of Congress carefully to consider and deliberate on the recommendations before they would be presented for an up-or-down vote.

Overall, the process created by the Regulatory Improvement Act would be duplicative of the numerous regulatory review programs that are already in place. 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. Furthermore, 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.

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. Congress would be better off providing agencies with greater resources to conduct these reviews on a discretionary basis and in a form that can be tailored to the unique circumstances of the rule that is under review. Indeed, Michelle Sager, the Director of Strategic Issues at the GAO, last year testified before this committee 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

[25] Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 20110), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

reviews generated additional action more often than mandatory reviews, which most often resulted in no changes."[26]

B. The Independent Agencies Regulatory Analysis Act

This bill would allow the president to subject independent agencies to a form of centralized regulatory review that is similar to what OIRA currently conducts for executive-branch agencies under Executive Orders 12866 and 13563. While the White House would not have the same gatekeeping power that it enjoys under those executive orders to stop, stall, or change executive branch agencies' rules for political reasons, this bill would still give it unprecedented influence over independent agencies' regulatory decision-making, allowing future presidents to block or dilute the work of independent agencies they oppose. Among other things, the bill would give OIRA up to 90 days to review independent agencies' draft proposed and final rules to determine whether those agencies adequately complied with all of the bill's various analytical requirements. OIRA would have the authority to issue a report outlining all of the faults it found with the agencies' analyses, and this report would be made part of the rulemaking record where it could be used as part of a challenge to the final rule during judicial review. Independent agencies will of course be reluctant to earn an unfavorable report on their pending rules, giving OIRA significant influence to extract changes and concessions from the independent agencies, either in the form of changes to the rules themselves or by undertaking additional burdensome analyses.

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 intent.

Moreover, this oversight is unnecessary for the purpose of accountability. Congress requires independent agencies to be politically diverse with members from both political parties. This puts the commissioners who are not from the President's political party in a position to object to proposed rules with which they disagree. This arrangement allows the agencies to remain independent of the President and yet be subject to an important substitute accountability mechanism.

Congress should also recognize that cost-benefit analysis provides less accountability than its supporters claim. Because of the difficulties of estimating regulatory costs and benefits, especially benefits, agencies are seldom able to pinpoint precise costs and benefits. Instead, they almost always identify a range of benefits and costs, and these estimates, again particularly benefit estimates, can vary widely between the minimal and maximum estimate, often by orders

[26] Michelle Sager, Director, Strategic Issues, U.S. Gov't Accountability Off., Testimony Before the Subcomm. on Efficiency & Effectiveness of Fed. Programs & Fed. Workforce, S. Comm. on Homeland Security & Gov't Affairs,113th Cong., Hearing on a More Efficient and Effective Government: Improving the Regulatory Framework, Mar. 11, 2014, *available at* http://www.hsgac.senate.gov/subcommittees/fpfw/hearings/a-more-efficient-and-effective-government-improving-the-regulatory-framework (follow hypertext link "Download Testimony (217.7 KB)" to download testimony).

of magnitude. While cost-benefit analysis can provide some information to agencies, it is not a magic bullet fix to accountability.

Independent agencies already conduct a wide variety of economic and other analyses for the pending rulemakings. The bill would displace these efforts with one-size-fits-all analytical requirements that risk wasting scarce public resources without improving the quality of agency decision-making. Some independent agencies, such as the Commodity Futures Trading Commission, voluntarily submit some rules to OIRA for limited review, pursuant to a memorandum of understanding. Perhaps the committee could consider a bill that encourages other independent agencies to enter into such voluntary compacts. By and large, however, OIRA review does little to improve quality of decision-making by executive branch agencies. I have little confidence that extending OIRA review to independent agencies would add much value to their rulemakings.

C. The Smarter Regulations Through Advance Planning and Review Act

This bill would amend the APA to create a comprehensive and potentially burdensome one-size-fits-all regulatory lookback process for all agencies to conduct for all of their major rules. The biggest problem with this proposal is its distinct lack of flexibility; all rules would be subject to the same lookback framework regardless of whether that framework is well suited to an effective and meaningful evaluation of the rule's consequences. Another problem is that the framework's focus is biased against stronger public safeguards. For example, when conducting the mandated lookbacks for their major rules, agencies are required to determine whether the rule should be eliminated or weakened. However, the bill would not allow agencies to determine that a rule should be strengthened or expanded as a result of the lookback.

As with the Regulatory Improvement Act, the lookback process established by this bill would be duplicative of the numerous regulatory lookback programs that agencies already must conduct for their rules. The one-size-fits-all requirements of the bill also would displace the discretionary reviews that agencies conduct, which would be particularly unfortunate, since, as noted above, these discretionary reviews yield more meaningful results.

Parenthetically, I would also criticize the bill's use of the outdated definition of a "major rule." The economic threshold that the bill relies on for defining a major rule—$100 million or more in an annual economic impact—was first defined several decades ago. That number has not been adjusted for inflation since. If it was, the economic threshold would be much higher—closer to $700 million. Because the economic threshold is far too low, the definition of a major rule now covers many much smaller rules that certainly do not warrant the burdensome procedural requirements called for in the bill.

My recommendations for this bill would be to build more flexibility into its requirements. In particular, the bill should be aimed at encouraging discretionary reviews and to maximize the effectiveness of those reviews. I agree with the bill's essential thrust that retrospective reviews of existing rules can be extremely valuable. To maximize this value, agencies would benefit from increased resources and sufficient flexibility to design these reviews to account for the unique characteristics of the rules undergoing the review.

Another recommendation would be to amend the bill's design to encourage agencies to conduct early planning for the deployment of back-end adjustments during the rule's implementation phase, and if an agency lacks such authority, the legislation should provide it. As noted above, these back-end adjustments ensure that agency rules are suitably strong enough to achieve their regulatory goals, while providing agencies with the opportunity to tailor implementation to avoid any undesirable and unfair consequences. Agencies already deploy these mechanisms, but perhaps a revised version of this bill would enable agencies to deploy them even more effectively. In particular, the bill could seek to find ways to ensure that back-end adjustments are most effectively targeted toward small businesses that are subject to the rule's requirements.

D. The Early Participation in Regulations Act

This bill would amend the APA to impose a one-size-fits-all mandate requiring all agencies to conduct an "Advanced Notice of Proposed Rulemaking" for all of their pending "major" rules. The bill risks wasting scarce agency resources, delaying critical safeguards, and providing well-resourced corporate interests to block, dilute, or delay rules they find inconvenient.

One problem with the bill is that it would require agencies to include in the advanced notice of proposed rulemaking several detailed analyses and statements, some of which may not even be knowable to the agency at the time the advanced notice is issued. Some of the bill's requirements also appear duplicative of requirements already mandated by the Unfunded Mandates Reform Act and the Regulatory Flexibility Act.

Agencies are free to and already voluntarily conduct advanced notices of proposed rulemakings that are flexible and tailored to the unique circumstances of the particular rulemaking. Agencies as varied as the Occupational Safety and Health Administration, the Environmental Protection Agency, and the Consumer Product Safety Commission frequently issue advanced notices for their rulemakings. When tailored to the particular rulemaking at issue, these advanced notices are much more likely to generate useful public feedback that actually improves the rulemaking.

My recommendation would be to amend the bill to include greater flexibility for agencies to conduct discretionary advanced notices of rulemaking. For example, perhaps the bill could enable agencies to use advanced notices to narrow down relevant issues to streamline the rulemaking process going forward. In particular, the process could be used to establish a set of agreed upon facts related to the rulemaking and to clarify what issues are under dispute, so that the subsequent public comment period (and any potential judicial review) can be simplified. Over all, though, I agree that advanced notices can be useful, provided they are deployed effectively in appropriate cases. To enable agencies to use this tool more, Congress should strive to provide additional resources.

E. The Principled Rulemaking Act

The bill would drastically overhaul the APA by mandating that agencies satisfy several of the burdensome procedural and analytical requirements contained in Executive Orders 12866 and 13563. The bill would also expand on these orders by including additional procedural and

analytical requirements and extending compliance to independent regulatory agencies. The bill's design and intent is similar to the Regulatory Accountability Act and indeed incorporates many of its most troublesome features. Perhaps the most troubling aspect of the bill is that it appears to make agency compliance with all of these requirements judicially reviewable, which would encourage endless litigation.

Much of the bill is focused on outlining "rulemaking considerations" on which agencies must base pending rules. Critically, many of these required considerations appear to function as a "super-mandate," rewriting literally dozens of environmental, health, and safety laws by forcing agencies to adopt new decision-making criteria when deciding whether and how to regulate. As a result, some of these provisions would override popular laws such as the Clean Air Act, the Clean Water Act, the Federal Food, Drug, and Cosmetic Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act by requiring agencies. Before Congress amends such important bills, it should give careful consideration of the impact of such a super-mandate in each and every piece of legislation, most of which have provided enormous benefits to the American public without any evidence of significant disruption or excessive costs to the industries being regulated. This is truly a case of not fixing what is not broke.

As noted previously, the super-mandate that an agency's rule must pass a cost-benefit analysis does not provide a high level of accountability. While cost-benefit analysis can provide useful information about the impact of a rule in some instances, it cannot tell us what to do or what is appropriate level of regulation because of the impossibility of accurately estimating costs and benefits. Congress recognized this essential shortcoming of cost-benefit analysis when it enacted many of the existing public interest laws, because almost none of this legislation requires an agency rule to pass a cost-benefit test, and this bill would override that considered judgment.

Another of the rule's troubling considerations would impose a "least burdensome" requirement similar to the one that has rendered the Toxic Substances Control Act (TSCA) to be an ineffectual tool for protecting people and the environment against harmful chemicals.

Yet another troubling provision in the bill would impose burdensome scientific objective requirements on agencies that would potentially enable judicial interference in agency science and technical matters. The bill does not define the concept of objectivity, nor does it explain how an agency might demonstrate compliance with this requirement. In fact, the concept of "objectivity" is difficulty to define since there is almost always a degree of uncertainty about scientific understandings. A scientific study does not lack objectivity because another study disputes it. Instead, agencies must do their best to understand the totality of the scientific evidence. As a result, regulatory judgments inevitably are a mixture of policy and scientific judgments. As such, they cannot be entirely "objective," assuming what the bill means by "objective" is that a regulatory decision is not made using any policy judgments whatsoever.

Given the reality of how regulatory science works, the bill invites industry challenges to agency science during judicial review that would reduce accountability and fairness. Generalist judges would be empowered to second-guess the scientific judgments of agency experts on complex matters of science, medicine, and technology on the basis of the problematic concept of "objectivity."

F. All Economic Regulations are Transparent Act

This bill would create several new reporting requirements for agencies and OIRA on pending rulemakings. The risk is that these new reporting requirements would actually undermine regulatory transparency. First, by imposing on agencies several new reporting requirements on a monthly basis, the bill would inundate the public with reams of data about the agencies' pending regulations and their impacts. Few in the general public would have the ability to realistically review all of these data and identify information that is truly important to them. Second, bill would generate misleading information about agencies' pending regulations, which would ultimately undermine meaningful public debate over these regulations and about the regulatory process in general. In particular, the bill's reporting requirements are designed to provide a biased view of pending regulation by highlighting in myriad ways their costs all while providing little or no information about their benefits.

The most basic problem with the bill is that it imposes a default delay of up to six months on all new rulemakings. As noted above, rulemakings already take several years to more than a decade to complete; such additional delay would be contrary to public's interest in a productive regulatory system.

This bill could perhaps be improved if the agencies' reports were due on an annual basis or every six months, rather than monthly. The required disclosures in each report would also need to be scaled back significantly and provisions would be needed to include information about regulatory benefits so that the public would get a complete picture of the rule's potential impacts.

V. CONCLUSION: NOW IS THE TIME TO REINVIGORATE OUR REGULATORY SYSTEM

As explained above, the regulatory system has become out of balance with an excess of procedural requirements undermining the administrative law principle of productivity. As currently drafted, the one-size-fits-all requirements that would be imposed by the proposed bills discussed above threaten to exacerbate this problem.

To restore greater productivity to the regulatory system, Congress should consider ways that it can reinvigorate agencies, enabling them to carry out their statutory missions of protecting people and the environment in a more timely and effective manner. Here are some places to start:

Provide agencies with the resources they need. One of the reasons that regulatory agencies cannot fulfill their statutory missions is that financial resources and available personnel have been reduced or maintained at constant levels in recent years. This has been occurring as the agencies' missions have become more complex, forcing these agencies to effectively do more with less. Many agencies' budgets have stagnated for decades, while the job at hand – more food and imported toys to inspect, for instance – has grown. And the situation is getting worse, not better. For example, past rounds of sequestration hundreds of millions of dollars from the EPA's already historically low budget. Among other things, these cuts have forced the agency to scrap several air pollution monitoring sites and scale back its program for assessing the human health impacts of several potentially harmful chemicals.

Provide agencies with enhanced legal authority. For many regulatory agencies, the statutes under which they operate have not been reviewed or refreshed in decades. The intervening years have revealed shortcomings in those statutes while new public health, safety, and environmental issues that were not initially addressed by the original statutes have emerged. In some cases, agencies lack the authority they need to tackle these issues. It is time to end the political gridlock that has prevented the adoption of legislative changes to accommodate shifting social needs.

Free agencies from unnecessary analytical requirements. Over the past few decades, the rulemaking process has become encumbered by a growing number of analytical requirements. These analytical obstacles draw upon agencies' already stretched resources and distract them from focusing on their regulatory missions without meaningfully improving the quality of agency decision-making. Regulatory process legislation of the kind introduced in Congress during the last few years would exacerbate this situation, creating a rulemaking process so laden with unnecessary and unhelpful requirements that the process would become completely dysfunctional. Perhaps that is the true aim of those who advocate an overhaul of regulatory process requirements – to construct a system that is so burdensome for agencies to navigate that they become incapable of adopting even urgently needed regulatory protections whose social benefits greatly exceed their costs. Even taking the reformers' aims at face value, they have misdiagnosed the problems with existing regulatory processes and proposed solutions that are ill-equipped to achieve the socially optimal levels of regulation they seek.

Thank you. I'd be pleased to answer any questions you might have.