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"Shining Light on the Federal Regulatory Process"
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Chairman Gowdy, Ranking Member Cummings, and Members of the Committee, my name is Paul Noe, and I am the Vice President for Public Policy for the American Forest & Paper Association and the American Wood Council. Thank you for the honor to testify before you on regulatory transparency. This is a fundamentally important issue that goes to the heart of our governmental system -- due process, fundamental fairness and accountability, and we applaud the Committee for doing the hard work of addressing it.

I have been involved in regulatory policy in Washington for over 32 years, including the privilege of having served as counsel to Chairmen Fred Thompson, Ted Stevens and Bill Roth on the Senate Governmental Affairs Committee, and as a drafter of agency good guidance practices when I served as Counselor to Administrator John Graham at the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget (OMB). My experience working for the heavily regulated forest products industry for the last nine years further reinforces my appreciation of the importance of transparency and accountability in our regulatory process. Today, I would like to focus on a handful of specific agency problems and offer some solutions regarding the need for: (1) better compliance with good guidance practices; (2) stronger compliance with presidential orders on benefit-cost analysis, such as Executive Order 12866, by interpreting regulatory statutes to allow for balancing the benefits and costs of regulations to maximize societal well-being; (3) greater transparency about the key information supporting regulatory decisions; and (4) better compliance with the Congressional Review Act.

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are

committed to continuous improvement through the industry's sustainability initiative - *Better Practices, Better Planet 2020*. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over $200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

The American Wood Council (AWC) is the voice of North American wood products manufacturing, representing over 75 percent of an industry that provides approximately 400,000 men and women in the United States with family-wage jobs. AWC members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC also advocates for balanced government policies that affect wood products. AF&PA and AWC work together to advance policies of issues of mutual concern, including regulatory reform.

I. The Need for Better Good Guidance Practices.

The forest products industry has seen both sides of the coin on agency guidance. In some instances, questions of implementation can be appropriately, effectively and efficiently resolved through guidance. In others, the use of agency guidance may lack appropriate transparency and due process, even to the point of inappropriately and unlawfully substituting for regulation. Accordingly, AF&PA and AWC support legislative and administrative efforts that ensure transparency, due process and effective management for significant agency guidance.

A. Background[1]

President Reagan's Executive Order 12291, which firmly established OMB review of rules, was quite broad in scope and applied to virtually all "rules" -- including both regulations (legally binding legislative rules) and agency guidance (non-binding interpretive rules and policy statements). When President Clinton replaced the Reagan Order in 1993 with Executive Order 12866, it honed in on "significant" regulatory actions. Given the vastness of federal regulatory activity, and the limited resources of OIRA, it was eminently sensible to try to sort the significant agency activity from the insignificant. The problem is that while the Clinton Order applied to significant regulations, it neglected guidance documents – covering only rules that "the agency intends to have the force and effect of law." But there is no doubt that guidance documents can be quite significant. In fact, agencies issue over 3400 regulations

[1] See John D. Graham and Paul R. Noe, "Due Process and Management for Guidance Documents: Good Governance Long Overdue," 1 Yale J. on Reg. 103 (2008).

annually, but the volume of guidance documents is orders of magnitude larger,[2] and nobody actually knows how many there are.

Starting in 2002, as part of its obligation to provide recommendations for reform under the "Regulatory Right-to-Know Act," OIRA requested public comment on problematic agency guidance and regulations, and received public nominations of 49 problematic guidance documents in need of reform.[3] OIRA received further public comments on problematic guidance in response to its request for public comment on its draft Report to Congress on the Costs and Benefits of Federal Regulation in 2004 and 2005[4] and on the proposed Bulletin.[5] The public response was striking – hundreds of comments from a wide array of groups raised concerns – small businesses, farmers, state and local governments, homebuilders, colleges and universities, large businesses, hospitals, trade associations, funeral directors, public interest groups, think tanks, bird watchers, and others. A cursory review of the Preamble to the OMB Bulletin, the comments that OMB received and posted on its website, and the scholarly literature[6] provide many examples.

Although guidance documents may not properly carry the force of law, they are a key component of regulatory programs. As the scope and complexity of regulatory programs has grown, agencies increasingly have relied on guidance documents to provide direction to their staff and to the public. That generally is to the good, and I want to clearly acknowledge that agency guidance often is both very important and very helpful to the regulated community and others. As OMB stated:

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[2] *See, e.g.,* Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1469 (1992) (noting that the formally adopted rules of the Federal Aviation Administration are two inches thick, but the corresponding guidance materials, over forty feet; Part 50 of the Nuclear Regulatory Commission's regulations on nuclear plant safety, in loose-leaf edition, is 3/16 of an inch, but the supplemental technical guidance is 9 3/4 inches; and the formally adopted regulations of the IRS occupy one foot of shelf space, but Revenue rulings and similar publications, about twenty feet); *see also* H. Comm. on Gov't. Reform, "Non-Binding Legal Effect of Agency Guidance Documents," H.R. Rep. No. 106-1009 (2000) (noting that between March 1996 through 1999, NHTSA had issued 1225 guidance documents, EPA 2653, and OSHA 1641).

[3] OMB, Key to Public Comments, https://www.whitehouse.gov/omb/inforeg_key_comments (last visited June 24, 2016); *see also*, OMB, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities*, at pp. 75-85 https://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2002_report_to_congress.pdf (last visited June 24, 2016).

[4] OMB, *Peer Review and Public Comments on the 2005 Draft Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, http://www.whitehouse.gov/omb/inforeg/2005_cb/toc.html (last visited June 24, 2016); OMB, *Public Comments on 2004 Draft Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, https://www.whitehouse.gov/omb/inforeg_2004_cb_list_2004cb/ (last visited June 24, 2016).

[5] OMB, *Comments on Proposed Bulletin on Good Guidance Practices*, https://www.whitehouse.gov/omb/regpol_good_guid_c-index/ (last visited June 24, 2016).

[6] *See, e.g.*, Robert A. Anthony, *"Interpretive Rules, Policy Statements, Guidances, Manuals and the Like –Should Federal Agencies Use Them to Bind the Public?"* 41 Duke L.J. 1311 (1992); Robert A. Anthony, *"'Interpretive' Rules, 'Legislative' Rules and 'Spurious' Rules: Lifting the Smog*," 8 Admin. L.J. (Spring 1994).

> "Agencies may properly provide guidance to interpret existing law through an interpretative rule, or to clarify how they will treat or enforce a governing legal norm through a policy statement. . . . Guidance documents, properly used, can channel the discretion of agency employees, increase efficiency by simplifying and expediting agency enforcement efforts, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties."[7]

Unfortunately, many concerns have been raised that agency guidance practices should be better managed, more consistent, transparent and accountable. These concerns are reinforced by the GAO report that Congress requested on implementation of the OMB Bulletin by four cabinet departments.[8] Moreover, there is growing concern that, in some cases, guidance documents essentially are being used in lieu of regulations -- without observing the procedural safeguards for regulations. As the D.C. Circuit put it:

> "The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations."[9]

The concern about the need for better management, transparency and due process for the development and use of guidance documents inspired OIRA to develop the OMB Bulletin for Agency Good Guidance provisions, supplemented by a provision in Executive Order 13422 for OMB review of agency guidance. In pertinent part, E.O. 13422 provided:

> "Significant Guidance Documents
> Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with advance notice of any significant guidance documents. . . . Upon the request of the Administrator, for each matter identified as, or determined by the

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[7] OMB, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, at p. 72 https://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2002_report_to_congress.pdf

[8] U.S. Government Accountability Office, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, GAO-15-368 (April 2015) (reviewing implementation of OMB Bulletin for Agency Good Guidance Practices by the departments of Health and Human Services, Labor, Education and Agriculture and finding significant deficiencies).

[9] Appalachian Power Co. v. EPA, 208 F.3d 1015, 1019 (D.C. Cir. 2000) (striking down emissions monitoring guidance as requiring notice and comment through legislative rulemaking procedures).

> Administrator to be, a significant guidance document, the issuing agency shall provide to OIRA the content of the draft guidance document, together with a brief explanation of the need for the guidance document and how it will meet that need. The OIRA Administrator shall notify the agency when additional consultation will be required before the issuance of the significant guidance document."

Together, Executive Order 13422 and the OMB Bulletin establish the first government-wide "rules of the road" to manage the development and use of guidance documents. The E.O. 13422 gave clear authority to OMB to review significant agency guidance documents, a streamlined version of how OMB reviews significant agency regulations. The agencies, in turn, were required to give OMB advance notice of their upcoming significant guidance documents. OMB would be responsible for ensuring that other interested agencies in the federal family received notice, and occasionally, an opportunity to provide input into the most important guidance documents.

The OMB Bulletin on Good Guidance Practices fit hand in glove with E.O. 13422. First, agencies must implement written procedures for the approval of significant guidance documents by appropriate senior officials. Agency employees should not depart from significant guidance documents without appropriate justification and supervisory concurrence. Second, significant guidance documents must have standard elements, such as information identifying the document as guidance, the issuing office, the activity and persons to whom it applies, the date of issuance, title and docket number.

Most notably, agencies are directed to avoid inappropriate mandatory language. This provision was intended to help curb the problem of "regulation by guidance document" criticized in the Appalachian Power decision and others. It also will obviate wasteful litigation and increase fairness and accountability in the exercise of regulatory power.

The Bulletin also establishes public access and feedback procedures. For example, agencies are required to maintain on their Web sites a current list of their significant guidance documents, and to provide a means for the public to electronically submit comments on significant guidance documents, or to request that they be created, reconsidered or modified. Finally, the Bulletin establishes pre-adoption notice and comment requirements for guidance documents that rise to the level of being "economically" significant.

When President Obama took office, he retained the OMB Bulletin, but he rescinded E.O. 13422. To substitute for the good guidance provisions of E.O. 13422, the OMB Director issued a memo to restore the regulatory review process to what it had been under Executive Order 12866 between 1993 and 2007. The memo stated: "During this period, OIRA reviewed all significant proposed or final agency actions, including significant policy and guidance documents. Such agency actions and documents remain subject to OIRA's review under Executive Order 12866."

My understanding is that, under that approach, OIRA reviewed little guidance, and when it did, the practice was ad hoc and disorganized. This comes as no surprise since there

was no written authority for the practice -- and no procedures governing it. The problem is that:

- OIRA desk officers had to *already know* the guidance existed, and
- They had to get permission to call in a guidance.

The shortcomings of this approach are obvious. It is impossible to review what you don't know exists. The review process is broken when the first time OIRA desk officers know about an important guidance document is when they read about it in the Washington Post. How many significant guidance documents do you think an OIRA desk officer might not know about before it was issued? Plenty, I can assure you. And would it be clearly unreasonable for agencies to feel that OMB had no business looking at their draft guidance without any explicit authorization? It was no accident that the provision for OIRA review of guidance was elevated into an Executive Order rather than simply being added to the Bulletin.

Ignoring guidance inadvertently can undermine OMB's authority to review regulations, similar to how it undermines court review, as the D.C. Circuit explained in Appalachian Power. The agency could issue broad, open-ended legislative rules that pass through interagency review (and court review, and for that matter, Congressional review). Then the agency could follow with guidance "expanding the commands in the regulations" to a degree that would have raised concerns if those details had appeared in the regulations. In fact, one might wonder how OMB's abstention from managing and coordinating significant guidance documents may have contributed to the growth in "spurious rules" cases in the courts, which increasingly have criticized agencies for issuing binding rules without observing the public notice and comment procedures that Congress required in the Administrative Procedure Act.[10]

B. The Precedent for Good Guidance Practices

Even before the OMB public comment process, there was a strong foundation for the good guidance practices in E.O. 13422 and the OMB Bulletin that was rooted in the recommendations of leading authorities that stood for decades. This foundation

[10] The growth in so-called "spurious rule" court cases in the 1990s may not be a coincidence. See, e.g., Gen. Elec. Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002) (striking down PCB risk assessment guidance as a spurious rule requiring notice and comment); Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) (striking down emissions monitoring guidance as spurious rule requiring notice and comment); U.S. Chamber of Commerce v. Dep't of Labor, 174 F.3d 206 (D.C. Cir. 1999) (striking down OSHA Directive as a spurious rule requiring notice and comment). *See also,* OMB, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3435 (Jan. 25, 2007); OMB, *Key to Public Comments*, https://www.whitehouse.gov/omb/regpol_good_guid_c-index/ (last visited June 24, 2016).

includes the work of many authorities – including the Executive Branch,[11] Congress,[12] the courts,[13] the American Bar Association,[14] and legal scholars.[15]

First, the Administrative Conference of the United States (ACUS)[16] issued recommendations for the development and use of agency guidance documents. As far back as the mid-1970s, for example, ACUS recognized the importance of ensuring a notice and comment process for the most significant guidance documents. ACUS Recommendation 76-5 states:

> "Before an agency issues, amends or repeals an interpretive rule of general applicability or statement of general policy which is likely to have a substantial impact on the public, the agency normally should utilize the procedures set forth

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[11] Recommendations of the Administrative Conference of the United States, *Agency Policy Statements*, Rec. 92-2, 1 C.F.R. § 305.92-2 (1992), *available at* http://www.law.fsu.edu/library/admin/acus/305922.html (stating that agencies should not issue statements of general applicability intended to be binding without using legislative rulemaking procedures and that agencies should afford the public a fair opportunity to challenge the legality or wisdom of policy statements and to suggest alternative choices); Recommendations of the Administrative Conference of the United States, *Interpretive Rules of General Applicability and Statements of General Policy*, Rec. 76-5, 1 C.F.R. § 305.76 (1992), *available at* http://www.law.fsu.edu/library/admin/acus/305765.html (stating that agencies should utilize APA notice and comment procedures for interpretive rules of general applicability or statements of general policy likely to have a substantial impact on the public); *The Food and Drug Administration's Development, Issuance, and Use of Guidance Documents*, 62 Fed. Reg. 8961 (Feb 27, 1997) (notice) (establishing FDA's original good guidance practices); OMB, *Draft Report to Congress on the Costs and Benefits of Federal Regulations*, 67 Fed. Reg. 15,014, 15,034-35 (Mar. 28, 2002) (detailing concerns over soliciting public comments on problematic agency guidance practices and specific examples of guidance documents in need of reform).

[12] *See, e.g.*, U.S. Government Accountability Office, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, GAO-15-368 (April 2015); Congressional Review Act of 1996, 5 U.S.C. §§ 801-808 (2000) (providing fast-track procedures for Congressional resolutions of disapproval of rules and incorporating the APA definition of "rule" to cover guidance documents); *Food and Drug Administration Modernization Act of 1997*, 21 U.S.C. § 371(h) (2000) (establishing FDA good guidance practices as law); Congressional Accountability for Regulatory Information Act, H.R. 3521, 106th Cong. § 4 (2000) (proposing to require agencies to notify the public of the non-binding effect of guidance documents), H. Comm. on Government Reform, Non-Binding Legal Effect of Agency Guidance Documents, H.R. Rep. No. 106-1009 (2000) (criticizing "backdoor" regulation); *Food and Drug Administration Modernization and Accountability Act of 1997*, S. Rep. No. 105-43, at 26 (1997) (raising concerns about the lack of transparency and consistency in the use of guidance documents).

[13] *See, e.g., supra* note 10.

[14] ABA, *Annual Report Including Proceedings of the Fifty-Eighth Annual Meeting* 57 (1993) (recommending notice and comment for guidance documents likely to have a significant impact on the public); ABA, *Recommendation on Federal Agency Web Pages* 1 (2001), http://www.abanet.org/adminlaw/federa02.pdf (recommending that agencies post on their Websites, *inter alia*, all important policies and interpretations).

[15] *See, e.g.,* Robert A. Anthony, "*Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 Admin. L.J. I (1994); Robert A. Anthony*, Interpretive Rules, Policy Statements, Guidances, Manuals and the Like-Should Federal Agencies Use Them to Bind the Public?* 41 Duke L.J. 1311 (1992); *see also*, OMB, *Final Bulletin for Agency Good Guidance Practices*, at pp. 2-3 & n. 2, 6.

[16] ACUS is a federal advisory agency charged with providing recommendations on administrative procedure issues. ACUS has made hundreds of recommendations on administrative procedure issues, and most were adopted by agencies or by Congress. *See* Florida State University College of Law, *ABA Administrative Procedure Database*, www.law.fsu.edu/library/admin/acus/acustoc.html (last visited June 24, 2016).

> in the Administrative Procedure Act subsections 553(b) and (c) .... Where there has been no prepromulgation notice and opportunity for comment, the publication of an interpretive rule of general applicability or a statement of general policy... should include ... an invitation to interested persons to submit written comments."[17]

ACUS Recommendation 92-2 later added:

> "Agencies should not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures.... Policy statements of general applicability should make clear that they are not binding.... Agencies that issue policy statements should examine, and where necessary, change their ... procedures ... to allow as an additional subject requests for modification or reconsideration of such statements."[18]

In 1993, the American Bar Association (ABA) reaffirmed the ACUS recommendations on the use of informal notice and comment procedure for significant guidance documents.[19] In 2001, the ABA further recommended that agencies "explore means to maximize the availability and searchability of existing law and policy on their websites" and include "their governing statutes, all agency rules and regulations, and all important policies, interpretations, and other like matters which members of the public are likely to request."[20]

Moreover, Congress produced what became a model for OMB's Good Guidance Practices.[21] In the Federal Food and Drug Administration Modernization Act of 1997, Congress directed the FDA to issue regulations establishing good guidance practices.[22] Congress was particularly concerned about public knowledge of, and access to, FDA guidance documents; the lack of a systematic process for adopting guidance

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[17] Recommendations of the Administrative Conference of the United States, *Interpretive Rules of General Applicability and Statements of General Policy*, Rec. 76-5, 1 C.F.R. § 305.76-5 (1992), available at http://www.law.fsu.edu/library/admin/acus/305765.html.

[18] ACUS, *Agency Policy Statements*, Rec. 92-2, 1 C.F.R. § 305.92-2 (1992), *available at* http://www.law.fsu.edu/library/admin/acus/305922.html

[19] ABA*, Annual Report Including Proceedings of the Fifty-Eighth Annual Meeting* 57 (1993) ("[T]he American Bar Association recommends that: Before an agency adopts a nonlegislative rule that is likely to have a significant impact on the public, the agency provide an opportunity for members of the public to comment on the proposed rule and to recommend alternative policies or interpretations, provided that it is practical to do so; when nonlegislative rules are adopted without prior public participation, immediately following adoption, the agency afford the public an opportunity for post-adoption comment and give notice of this opportunity.").

[20] ABA, *Recommendation on Federal Agency Web Pages* 1 (2001), http://www.abanet.org/adminlaw/federa02.pdf.

[21] As OMB stated in its Preamble (pp. 4-5), FDAMA and FDA's implementing regulations, as well as the recommendations of the former Administrative Conference, informed the development of the Bulletin.

[22] *Food and Drug Administration Modernization Act of 1997*, 21 U.S.C. § 371(h) (establishing FDA good guidance practices as law).

documents and for allowing public input; and inconsistency in the use of guidance documents.[23] Those same concerns apply to other agencies as well.

C. **The Need for Action**[24]

The case for Congressional action is strong. The OMB Bulletin has been in effect since early 2007 in both Republican and Democratic administrations. Over eleven years is more than enough time for the agencies to have fully complied with basic good guidance practices. Yet clearly they have not, as shown by Congressional oversight, including hearings by Senator Lankford[25] and others. Moreover, in 2015, the U.S. Government Accountability Office issued a report[26] on how four major departments – the Departments of Agriculture, Education, Health and Human Services, and Labor and their 25 component agencies – have complied with the OMB Bulletin. The report showed those departments and their component agencies generally had a long track record of failing to comply with basic good government requirements of the Bulletin, including the following:

- All components claimed they did not issue any economically significant guidance (and thus were not required to conduct pre-adoption notice and comment);
- Only six of 25 components had written procedures to ensure consistent application of guidance (p.25);
- HHS had no written procedures for approval of significant guidance, and DOL's procedures were not available to its staff;
- Nearly half of the components did not regularly evaluate whether issued guidance remained effective;
- HHS did not post significant guidance was not posted on a departmental website as required by OMB;
- Public online access to guidance was difficult to find and they failed to use of metrics to improve dissemination.

GAO concluded with the following recommendations:

- HHS and DOL should ensure consistent application of OMB requirements for significant guidance; and

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[23] *Food and Drug Administration Modernization and Accountability Act of 1997*, S. Rep. 10543, at 26 (1997).

[24] See Paul Noe, "Shining the Light on Regulatory Dark Matter," AF&PA Blog (Feb. 6, 2018), http://www.afandpa.org/media/blog/bloga/2018/02/06/shining-the-light-on-regulatory-dark-matter-due-process-and-management-for-agency-guidance-documents

[25] See, e.g., U.S. Senate Committee on Homeland Security & Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management, *Hearing on Examining the Use of Agency Regulatory Guidance, Part II (June 30, 2016),* 114th Cong. 2nd Sess., Washington DC.

[26] U.S. Government Accountability Office, Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices, GAO-15-368 (April 2015).

- All four departments should strengthen use of internal controls in guidance production processes and improve online guidance dissemination.

It is evident that more should be done to improve the development and use of agency guidance. For example, Congress could elevate good guidance practices into statute. An excellent first step would be enactment of the "Guidance Out Of Darkness Act," H.R. 4809, sponsored by Congressman Walker. The GOOD Act would require federal agencies to post all of their guidance in a centralized, accessible location on their website. This is a common sense and long overdue requirement of the OMB Bulletin that the agencies have failed to comply with.[27]

The Administration also could do more to promote good guidance practices. In fact, the Department of Justice (DOJ) recently provided leadership by issuing a memorandum in November to prohibit improper guidance documents at DOJ[28] and also by more recently issuing a memorandum to curb improper use of guidance in civil enforcement cases.[29]

Yet, more can and should be done. For example, the Office of Management and Budget could do more to promote good guidance practices on a government-wide basis by updating the Bulletin. First, OMB should have procedures for the agencies to inform it and other agencies about their intentions to use guidance, coordinate with other interested agencies, receive input, and be transparent. Basic procedures are needed for OMB and other agencies to get a "heads up" during the development of agency guidance. Also, the resources should be provided to do the job right. Second, the agencies could follow the recommendations of the Administrative Conference of the United States and the ABA Administrative Law Section to provide streamlined pre-adoption notice-and-comment for significant guidance documents – not just "economically significant" guidance – or allow public comment after issuance where there is a need for prompt action. My understanding is that FDA does this already and the practice has been generally successful.

[27] Congress also might want to investigate whether agencies have complied with the requirement in 5 U.S.C. 552(a)(1)(D) to publish in the Federal Register statements of general policy and interpretations of general applicability.

[28] Memorandum from Attorney General Jeff Sessions to all Components, "Prohibition on Improper Guidance Documents" (Nov. 16, 2017), https://www.justice.gov/opa/press-release/file/1012271/download

[29] Memorandum from Associate Attorney General Rachel Brand to Heads of Litigating Components, "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases" (Jan. 25, 2018), https://www.justice.gov/file/1028756/download

II. Curtail the Evasion of Presidential Orders on Benefit-Cost Analysis by Interpreting Regulatory Statutes to Allow for Full Benefit-Cost Balancing.

A. Background

While efforts to promote the use of benefit-cost analysis[30] have been longstanding, over time a remarkable consensus has emerged. In the Executive Branch, there is a striking similarity among the principles for benefit-cost balancing and centralized review of regulation required by every president for over 37 years, from Ronald Reagan to Donald Trump. The Judicial Branch, and the Supreme Court in particular, has clarified that benefit-cost analysis can have a central role in a host of regulatory programs, and if agencies ignore this invitation, they could jeopardize the very regulations they want to promote. In Congress, there is a renewed interest in requiring benefit-cost analysis by statute that is greater than any time in the past 20 years.

On their face, probably the greatest consensus on the "cost-benefit state"[31] is reflected in the Executive orders governing regulatory analysis and review. Going back to 1981, President Reagan's Executive Order 12291 established general requirements that, "to the extent permitted by law:

- "[r]egulatory action shall not be undertaken unless the ***potential benefits to society for the regulation outweigh the potential costs to society***," and
- "[r]egulatory objectives shall be chosen to ***maximize the net benefits to society***" (Emphasis added).

Similarly, President Clinton's E.O. 12866, issued in 1993 and still in effect, requires that agencies, to the extent permitted by law:

- "propose or adopt a regulation only upon a reasoned determination that the ***benefits of the intended regulation justify its costs***," and
- "in choosing among alternative regulatory approaches, . . . select those approaches that ***maximize net benefits*** (including potential economic, environmental, public health and safety, and other advantages; distributive

[30] Benefit-cost analysis (BCA) is "[a] systematic quantitative method of assessing the desirability of government projects or policies when it is important to take a long view of possible side-effects." OMB Circular A-94, "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs," Appendix A (1992). BCA involves calculating and comparing the benefits and costs of regulatory options, including an account of foregone alternatives and the status quo, with the goal of identifying the option that would maximize societal welfare. As Justice Breyer explained, "every real choice requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs." Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009). The term "benefit-cost analysis" can be used interchangeably with "cost-benefit analysis."

[31] I adopt the definition of the "cost-benefit state" advanced by President Obama's former OIRA Administrator, Cass Sunstein – "that government regulation is increasingly assessed by asking whether the benefits of regulation justify the costs of regulation." Cass R. Sunstein, The Cost-Benefit State: The Future of Regulatory Protection, Chicago, IL, American Bar Association, Section of Administrative Law and Regulatory Practice (2002).

effects; and equity) unless a statute requires another regulatory approach" (Emphasis added).

President Obama's E.O. 13563 (2011) reaffirms the Clinton order and reiterates virtually verbatim the two provisions listed above, as well as others. E.O. 13563 also more strongly embraces quantitative benefit-cost balancing than the Clinton order by elevating both provisions to general principles" that the agencies "must" execute and by adding a new principle promoting quantitative benefit-cost analysis and risk assessment:

- "In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."

Thus, there has been strong bipartisan consensus that benefit-cost balancing should play a central role in the question of whether and how to regulate. As the Clinton Administration explained in OMB's first Report to Congress on the Costs and Benefits of Federal Regulation (Sept. 30, 1997):

> "[R]egulations (like other instruments of government policy) have enormous potential for both good and harm. Well-chosen and carefully crafted regulations can protect consumers from dangerous products and ensure they have information to make informed choices. Such regulations can limit pollution, increase worker safety, discourage unfair business practices, and contribute in many other ways to a safer, healthier, more productive and more equitable society. Excessive or poorly designed regulations, by contrast, can cause confusion and delay, give rise to unreasonable compliance costs in the form of capital investments, labor and on-going paperwork, retard innovation, reduce productivity, and accidentally distort private incentives.
>
> The only way we know how to distinguish between regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs. Such analysis can also often be used to redesign harmful regulations so they produce more good than harm and redesign good regulations so they produce even more net benefits." (p. 10)

While this remarkable political consensus is laudatory, insufficient progress has been made over the last 37 years. There are many reasons why presidential orders directing agencies to implement regulatory statutes through benefit-cost balancing have been far less effective than intended. This includes the severe and chronic under-funding of OIRA (which now has far more responsibilities and less than half the staff it had under President Reagan);[32] institutional limitations of the agencies and OMB; and political

[32] When OIRA was created in fiscal year 1981, it had a full-time equivalent (FTE) ceiling of about 97 staff; by fiscal year (FY) 2016, OIRA had about 47 staff. See Susan Dudley & Melinda Warren, G.W. Regulatory Studies Center and Washington University in St. Louis, "Regulators' Budget from Eisenhower to Obama: An Analysis of the U.S. Budget

dysfunctions, including interest group dynamics and Presidential electoral politics.[33] But one of the greatest yet most readily addressable impediments to the cost-benefit state is that ***the regulatory agencies have interpreted their statutes to limit their ability to fully engage in benefit-cost balancing and to maximize societal well-being, as required by the President***.[34]

Why? Agencies have interpreted their regulatory statutes in ways that circumvented the presidential orders and the requirement to maximize net benefits to society, sometimes relying on selected pieces of legislative history to limit their interpretations of the statutory text. Of course, none of that legislative history met the Bicameralism and Presentment requirements for legislation and thus did not require or authorize non-compliance with the presidential benefit-cost orders.

While only a small minority of statutes explicitly ***mandate*** benefit analysis-cost,[35] and a very small minority ***prohibit*** it,[36] the challenge has been what agencies should do when implementing the large majority of regulatory statutes that are ***silent or ambiguous*** on cost-benefit balancing. One problem that may have contributed to agency evasion of the presidential orders is that, in earlier Supreme Court case law from 1981 and 2001, there was some misleading dicta that some claimed established a "presumption" against

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for Fiscal Years 1960 through 2017" (May 2016), at p. 20 (Table A-3). In contrast, the agency staff dedicated to writing, administering and enforcing regulations rose from 146,000 in FY1980 to over 278,00 in FY2016. As OIRA's budget was reduced from about $14 million in 1981 to $8 million in FY2016 in constant 2009 dollars, the agencies' budgets increased from about $16.4 billion in FY1980 to over $61 billion in FY2016 in constant 2009 dollars. At the same time, OIRA's statutory responsibilities have grown through a wide variety of requirements, including: the Small Business Regulatory Enforcement Fairness Act, the E-Government Act, the Unfunded Mandates Reform Act, the Congressional Review Act, the Information Quality Act, the Regulatory Right-to-Know Act, the Small Business Paperwork Relief Act, and a variety of appropriations riders. See Comment Letter on Federal Regulatory Review from Paul R. Noe, American Forest & Paper Association, to OMB's Office of Information and Regulatory Affairs (March 16, 2009), citing Comment Letter on Federal Regulatory Review from Rosario Palmieri, National Association of Manufacturers, to OMB's Office of Information and Regulatory Affairs (March 16, 2009).

[33] See, e.g., John D. Graham and Paul R. Noe, "Beyond Process Excellence: Enhancing Societal Well-Being," in Achieving Regulatory Excellence, Brookings Institution Press (2016) (discussing the institutional impediments in the Executive Branch to ensuring that regulations do more good than harm -- such as bureaucratic turf battles among the agencies, failure to utilize both internal and external expertise, bias, the mismatch between the vast volume of regulation and OIRA's shrinking resources, the large volume of "stealth regulation" such as guidance not submitted for OIRA review, lack of support for OIRA by varying administrations or leaders, and lack of judicial review for benefit-cost balancing – as well as the political impediments in the Executive Branch and Congress to ensuring that regulations do more good than harm).

[34] John D. Graham and Paul R. Noe, "A Paradigm Shift in the Cost-Benefit State," University of Pennsylvania Law School RegBlog (April 26, 2016). https://www.regblog.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/

[35] See Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (providing for EPA to mitigate unreasonable environmental effects).

[36] See Whitman v. American Trucking Associations, 531 U.S. 457 (2001) (Section 109 of Clean Air Act does not grant EPA the authority to consider cost in setting National Ambient Air Quality Standards).

benefit-cost balancing unless it was clearly authorized in the regulatory statute.[37] But more recently, the Supreme Court has made quite clear that agencies have broad discretion to implement their regulatory statutes through benefit-cost balancing.[38]

Shortly after President Reagan's groundbreaking Executive Order 12291 imposed a cost-benefit test on regulations -- and three years before the Chevron USA v. Natural Resources Defense Council (1984)[39] decision deferring to EPA's interpretation of an ambiguous statute -- the Supreme Court held, in American Textile Manufacturers Institute v. Donovan (1981),[40] that the Occupational Safety and Health Administration was not ***required*** to engage in cost-benefit analysis in setting "feasible" public health and safety standards. But the majority also asserted in dicta that "when Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute."[41]

Twenty years later, in Whitman v. American Trucking Associations (2001), an unanimous Supreme Court found it "implausible" that the modest standard to set national ambient air quality standards at a level "requisite to protect public health with an adequate margin of safety" gave the EPA the discretion to determine whether costs should moderate the health standards. Writing for the Court, Justice Scalia stated that, to prevail in their quest to have the EPA take costs into account, the industry respondents would have to show a "textual commitment" of authority for the EPA to consider costs in standard setting, and "*that textual commitment must be a clear one*." Yet, in a prescient concurring opinion, Justice Stephen Breyer warned that the Court should resist

> ***"a presumption, such as the Court's presumption that any authority the [Clean Air] Act grants the EPA to consider costs must flow from a "textual commitment" that is "clear."*** … In order better to achieve regulatory goals- for example, to allocate resources so that they save more lives or produce a cleaner environment- regulators must often take account of all of a proposed regulation's adverse effects, at least where those adverse effects clearly threaten serious and disproportionate public hard. Hence, I believe that, other things being equal, ***we should read silences or ambiguities in the language***

[37] See, e.g., Jonathan Cannon, "The Sounds of Silence: Cost-Benefit Canons in Entergy Corp. v. Riverkeeper, Inc.," 34 Harv. Envir. L. Rev. 425 (2010); Amy Sinden, "Cass Sunstein's Cost-Benefit Lite: Economics for Liberals," 29 Colum. J. Envtl. L. 191, 240 (2004).

[38] E.g., compare John D. Graham and Paul R. Noe, "A Paradigm Shift in the Cost-Benefit State," University of Pennsylvania Law School RegBlog (April 26, 2016). https://www.regblog.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/ with Amy Sinden, "Supreme Remains Skeptical of the 'Cost-Benefit State,'" University of Pennsylvania Law School RegBlog (Sept. 26, 2016) http://www.regblog.org/2016/09/26/sinden-cost-benefit-state/; and see John D. Graham and Paul R. Noe, "A Reply to Amy Sinden's Critique of the 'Cost-Benefit State,'" University of Pennsylvania Law School RegBlog (Sept. 27, 2016) http://www.regblog.org/2016/09/27/graham-noe-reply-critique-cost-benefit-state.

[39] 467 U.S. 837 (1984).

[40] 452 U.S. 490 (1981).

[41] 452 U.S. at 509.

of regulatory statuses as permitting, not forbidding, this type of rational regulation."[42] (Emphasis added).

Finally, in Entergy Corp. v. Riverkeeper, Inc. (2009), the Supreme Court disposed of the dicta relating to a purported "presumption" against cost-benefit balancing.[43] Riverkeeper involved a challenge to an EPA regulation under section 316(b) of the Clean Water Act, which required that the EPA adopt a standard to "reflect the best technology available for minimizing adverse environmental impact." The EPA, with the strong encouragement of the White House Office of Management and Budget (OMB), based its standard on cost-benefit analysis. Although the statutory provision was silent on the use of cost-benefit analysis, the Supreme Court applied Chevron deference in holding that "it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden." Aligning the issue of agency authority to use cost-benefit analysis with Chevron, the Court reasoned that "it is eminently reasonable to conclude that" the Clean Water Act's "silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree." In so doing, the Court disavowed the purported "presumption" against benefit-cost analysis embodied in American Textile and limited American Trucking to "the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion." The Court concluded that the Clean Water Act's silence "cannot bear that interpretation."[44]

Riverkeeper raised the ante for agencies that ignore cost-benefit analysis. Although Riverkeeper did not *require* the agency to use cost-benefit analysis, its logical corollary is that an agency must now provide a reasoned explanation if it should choose to regulate in a way that would do more harm than good, or provide a reasoned explanation why the agency is indifferent to that outcome. Otherwise, the agency's regulation could be vulnerable to an arbitrariness challenge under the Administrative Procedure Act.

That became quite clear in the Supreme Court's decision in Michigan v. EPA (2015),[45] which involved a challenge to the EPA's decision to regulate hazardous air pollutants, such as mercury, from power plants. Section 112(n) of the Clean Air Act authorizes the EPA to regulate hazardous air pollutants from power plants only if it concludes that regulation is "appropriate and necessary." In reaching that conclusion, the EPA had said that cost was irrelevant. The Court held that the EPA strayed beyond the bounds of reasonable interpretation in concluding that cost is not a relevant factor in determining whether to regulate under the "capacious" phrase, "appropriate and necessary."

[42] 531 U.S. at 490.
[43] 556 U.S. 208 (2009).
[44] 129 S. Ct. at 1508.
[45] 135 S. Ct. 2699 (2015).

Writing for a 5-4 majority in Michigan, Justice Antonin Scalia bluntly stated, "no regulation is 'appropriate' if it does significantly more harm than good." Quoting Justice Breyer's concurring opinion in Riverkeeper, Justice Scalia further reasoned that:

> "Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions. It also reflects the reality that "too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." Against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether "regulation is appropriate and necessary" as an invitation to ignore cost."[46]

Notably, although the dissenters argued that the EPA could (and did) consider cost at the later stage in developing its regulation, all nine Justices agreed on the principle that, unless Congress states otherwise, "an agency ***must take costs into account*** in some manner before imposing significant regulatory burdens." (Emphasis added).[47]

The wisdom in Justice Breyer's American Trucking concurrence supporting cost-benefit balancing has prevailed. The Supreme Court now defers to agency interpretations of "silences or ambiguities in the language of regulatory statutes as ***permitting, not forbidding***, this type of rational regulation."[48]

B. The Need for Action

The importance of clarifying agency authority to use cost-benefit balancing should not be underestimated. The majority of environmental statutes -- and, to my knowledge, the majority of ***all*** regulatory statutes -- are silent or ambiguous on cost-benefit analysis. And agencies too often interpret such statutes as only allowing limited consideration of costs and benefits.

Within the broad range of relevant ambiguous statutes, three categories merit consideration – statutory provisions that: (1) are silent or ambiguous on the consideration of costs and lack a broad "omnibus factor,"[49] (2) do not explicitly require benefit-cost analysis but authorize consideration of costs and/or contain one or more

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[46] 576 U.S. at ___, Slip Op. at 7-8 (emphasis added).

[47] Under longstanding principles of administrative law, an agency may not lawfully neglect an important aspect of a problem. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Michigan v. EPA made clear that, unless Congress states to the contrary, cost is an important aspect of the problem of whether or not to regulate.

[48] American Trucking, 531 U.S. at 490 (Justice Breyer, concurring) (emphasis added).

[49] The term "omnibus factor" is used to capture broad, open-ended statutory decisional criteria that typically are intended to allow the regulatory agency to consider any factor important for determining the regulatory standard that might not otherwise be captured in the other decisional criteria specified by Congress.

broad omnibus factors, such as anything that the agency head considers "appropriate," "necessary," "relevant," "feasible," "reasonable," "in the public interest," etc., and (3) authorize benefit-cost analysis but are ambiguous on the extent or rigor of the benefit-cost balancing that may be done. (For examples of statutory provisions in each of these categories, see the Appendix attached to this testimony.) I believe that the Supreme Court decisions in Entergy Corp. v. Riverkeeper, Inc. and Michigan v. EPA advance benefit-cost balancing in interpreting all three subcategories of ambiguous statutes.

President Trump should take an historic step to enhance societal well-being by directing agencies, including independent agencies, to reexamine their statutory interpretations in light of Riverkeeper and its progeny and -- unless prohibited by law -- implement those statutes through cost-benefit balancing. As the Supreme Court has concluded, it is "eminently reasonable" to ensure that regulations do more good than harm.[50]

III. Greater Transparency on Information Supporting Regulatory Decisions.

Agencies should be more transparent about key information – whether developed by third parties or by the agency -- supporting regulatory decisions. Key agency information and analyses that support important regulatory decisions, such as benefit-cost analyses and risk assessments, should be reproducible. Congressman Meadows' "CLEAR" Act (the "Comprehensive Listing of Evidence for Assessments of Regulations Act," H.R. 4230) relates to that concern. The CLEAR Act requires disclosure of research source code and data used by a Federal agency in assessing the costs and benefits of new regulations. It is important to protect personal and confidential information from disclosure, as section 2(a)(2) acknowledges.

Benefit estimates can be very hard for the public to understand, given the complexities and facets that are often hidden in the "black box." This challenge is especially true for benefit assessments under various environmental statutes, such as the Clean Air Act. In fact, according to the recent 2017 annual report from the Office of Management and Budget, $182 to $684.1 billion[51] or 80% of monetized benefits[52] (and 70% of costs) associated with Federal regulations reviewed by OMB over the last decade come from air regulations. The report goes on to caution that aggregate estimates of benefits and costs are "subject to some methodological variations and differing assumptions" over time that is especially true for EPA's air pollution regulations.[53] This observation highlights the importance of Agencies revealing the various inputs to these analyses working backwards from the monetized estimate to the underlying assumptions about

[50] Riverkeeper, 129 S. Ct. at 1508.
[51] Office of Management and Budget, Office of Information and Regulatory Affairs, Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act (2017), at p. 11.
[52] Id, p. 12;
[53] Id., p. 21 & note 39.

studies used, cause and effect assumptions, model choices, treatment of confounding variables in modeling approaches, and distinguishing between associations and true causality, which has a much higher scientific standard to demonstrate.

IV. Better Compliance with the Congressional Review Act.

A. Background

Congress intended the reach and power of the Congressional Review Act (CRA) to be great because it felt there was an imbalance between Congress and the regulatory state – the so-called "fourth branch of government." Article I, Section 1 of the Constitution is quite clear: "***All*** **legislative powers** herein granted shall be vested in a Congress of the United States . . ." (emphasis added). The legislative and policymaking power of the regulatory state has become enormous. The vast majority of "laws" governing our country are no longer enacted by the people's elected representatives in Congress, but are promulgated by agencies as regulations.

To put this is context, the Competitive Enterprise Institute publishes a chart they call the "Unconstitutionality Index," which compares the annual output of agency rules versus Congressional statutes. The contrast is quite striking: over a 15-year period, agency rulemaking output exceeded Congressional legislation by a factor varying from 12-fold to 51-fold, as shown in the following chart:

The Unconstitutionality Index			
Public Laws vs. Agency Rulemakings			
Year	**Final Rules**	**Public Laws**	**THE "INDEX"**
2003	4148	198	21
2004	4101	299	14
2005	3975	161	25
2006	3718	321	12
2007	3595	188	19
2008	3830	285	13
2009	3503	125	28
2010	3573	217	16
2011	3807	81	47
2012	3708	127	29
2013	3659	72	51
2014	3554	224	16
2015	3410	115	30
2016	3853	211	18
2017	**3281**	**117**	**28**

Index: https://cei.org/blog/2018-unconstitutionality-index-28-federal-agency-rules-every-law-congress-passes

Moreover, the Judiciary has upheld practically every delegation by Congress to the agencies over the past 80 years so long as Congress identifies "an intelligible principle." The courts also have accorded great deference to agency interpretations of their statutes under Chevron[54] and deference to agency interpretations of their regulations under Auer v. Robbins.[55]

During the New Deal, Congress developed the legislative veto to curb the administrative state and added legislative veto provisions to hundreds of different statutes,[56] but the the Supreme Court declared the one-House legislative veto unconstitutional in INS v. Chadha (1983).[57] Consistent with the Bicameralism and Presentment Clauses of the Constitution, the Congressional Review Act was an effort to restore Congress' legislative and policymaking authority. As the joint statement of the bill managers stated:

[54] 467 U.S. 837 (1984).
[55] 519 U.S. 452 (1997).
[56] See Paul J. Larkin, Jr., "Reawakening the Congressional Review Act, 41 Harv. J. of Law & Pub. Policy 187 (2017), at 194-96.
[57] 462 U.S. 919 (1983).

> "As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments. In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress that balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency."[58]

In the CRA, Congress created a new chapter in the Administrative Procedure Act, chapter 8, of Title 5 of the United States Code. The CRA provides expedited procedures for Congress to review and possibly invalidate agency rules. After Congress receives a rule, a member can introduce a resolution to disapprove the rule, and the resolution is referred to the relevant committee. However, only 30 Senators or Representatives can discharge the resolution of disapproval from committee to the floor. In the Senate, there is no filibuster. A resolution can be brought up at any time, and it is not subject to amendment, point of order, or motion to postpone consideration. Debate is limited to a maximum 10 hours, evenly divided, and a motion to further limit debate is in order and not debatable.[59]

If a resolution of disapproval is signed into law by the President, the rule is invalidated, and "a new rule that is ***substantially the same*** as such a rule may not be issued" unless specifically authorized by a new statute.[60]

The CRA also is very broad in scope. First, the CRA adopts the definition of "agency" in the Administrative Procedure Act (APA), 5 USC § 551(1). This includes independent regulatory agencies. Moreover, the CRA adapts the APA definition of a "rule" at 5 USC § 551(4). While the CRA has an exclusion for rules of particular applicability, a covered "rule" includes "the whole or part of an agency statement of general . . . applicability and future effect designed to ***implement***, ***interpret***, or ***prescribe law*** or ***policy*** . . . ." This includes not only legally binding regulations developed through notice and comment (known as "legislative rules"), but also ***agency guidance*** (known as interpretive rules or policy statements). As the legislative history states, the definition of a covered "rule" does not turn on whether a given agency must normally comply with the notice-and-comment provisions of the APA. Covered rules include those developed through: (1) formal rulemaking, under 5 USC § 556, § 557; (2) "informal" rulemaking, under 5 USC § 553; ***(3) "publication rules" -- statements of general policy and interpretations of general applicability required to be published in the Federal***

[58] Cong. Rec. S. 3683 (daily ed. April 18, 1996).
[59] 5 U.S.C. § 802(d)(2).
[60] 5 USC § 801(b).

Register under 5 USC § 552(a)(1)(D); and (4) all other rules that do not meet the procedural specifications of the first three classes (including guidance documents such as agency memoranda, frequently asked questions, letters, bulletins, circulars, manuals, etc.).[61]

In the CRA, Congress exercised broad authority over all of those rules. The first provision of the CRA states: "***Before*** a rule can ***take effect***, the Federal agency promulgating such rule shall submit" to each House of Congress and to GAO a report containing a copy of the rule and a concise statement relating to the rule, including whether it is major, and the proposed effective date of the rule.[62] Moreover, ***the clock to introduce a joint resolution of disapproval*** *using* Congress' expedited review procedures ***does not start to run*** until "the ***later of*** the date on which the rule is published in the Federal Register or ***Congress receives the report submitted under § 801(a)(1)***.[63] In short, ***every "rule" -- legislative rule, interpretive rule, and policy statement -- that has not yet been properly submitted to Congress for its review is available for being considered under the Congressional Review Act today.[64] Moreover, agency non-compliance with the CRA submission requirement has called into question whether any rule that was not been submitted to Congress since the CRA was enacted is legally in effect.[65]***

B. The Need for Action

Various reports indicate that agencies have failed to comply with the Congressional Review Act. In many cases, agencies have submitted their major regulations to Congress, but this commonly does not appear to be the case for many guidance (interpretive rules and policy statements), and to a lesser extent for non-major regulations. Most frequently, agencies have failed to submit to Congress rules that were not published in the Federal Register (which is common for informal agency interpretive rules and policy statements). Some researchers have counted thousands of rules that were not sent to Congress as required by the CRA.[66] The Pacific Legal Foundation

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[61] See Cong. Rec., S 3687 (daily ed. April 18, 1996).

[62] 5 USC § 801(a)(1)(A).

[63] 5 USC § 802(b)(2).

[64] See Larkin, "Reawakening the Congressional Review Act," supra note 56, at 214-15, 252; Todd F. Gaziano, Pacific Legal Foundation, Congressional Testimony, "Rulemakers Must Follow the Rules, Too: Oversight of Agency Compliance with the Congressional Review Act," before the House Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary (Sept. 28, 2017).

[65] Id.

[66] See, e.g., Curtis W. Copeland, "Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress" (July 15, 2014), available at https://www.redtaperollback.com/wp-content/uploads/2017/05/CurtisCopelandCongressionalReviewActManyRecentFinalRulesWereNotSubmittedtoGAOandCongress07-15-2014.pdf; Congressional Research Service, "Congressional Review Act: Rules Not Submitted to GAO and Congress," Report R40997, (Dec. 29, 2009), available at https://redtaperollback.com/wp-content/uploads/2017/04/CRS122909.pdf; U.S. Government Accountability Office, "Federal Rulemaking:

launched a project tracking rules that have not been submitted to Congress, and they list on their website about 17 such significant rules.[67] The Brookings Institution also has issued a report finding that about 348 significant rules issued during the last two decades were not properly submitted to both Houses of Congress and the U.S. General Accountability Office (GAO), as required under the CRA.[68] Thus, the issue of agency non-compliance with the Congressional Review Act is ripe for Congressional inquiry.

V. Conclusion.

In summary, the lack of transparency and accountability in our rulemaking process is longstanding and ripe for reform. To name just a handful of examples: (1) agencies should follow good guidance practices in developing and using guidance; (2) unless prohibited by law, agencies should interpret their regulatory statutes to fully comply with the longstanding presidential orders to ensure that their regulations provide benefits that justify the costs and maximize societal well-being; (3) agencies should disclose to the public the key information underlying important regulatory decisions; and (4) agencies should better comply with the Congressional Review Act.

Regulatory transparency is foundational to good government and long overdue. Thank you again for the honor to testify before you. I would be happy to address any questions you may have.

Perspectives on 10 Years of Congressional Review Act Implementation," GAO-06-601T (March 30, 2016), available at http://www.gao.gov/assets/120/113245/pdf

[67] See https://www.redtaperollback.com/rules/

[68] See Philip A. Wallach & Nicholas W. Zeppos, "How Powerful is the Congressional Review Act," Brookings Institution (April 4, 2017), available at https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/.

APPENDIX – Categories of Regulatory Statutes

1. Silent or Ambiguous on Costs and Lack an Omnibus Factor		
Statue	**U.S. Code**	**Regulatory Authority**
Clean Water Act	33 USC § 1326(b)	"… reflect the ***best*** technology available for minimizing adverse environmental impact." Entergy v. Riverkeeper: "best" in § 1326(b) can mean most cost-effective; benefit-cost balancing upheld.
Resource Conservation and Recovery Act	42 USC § 6901	"establish such standards . . . as may be ***necessary*** to protect human health and the environment" See MI v. EPA: refusal to consider cost in determining whether Clean Air Act regulation was "appropriate and necessary" was arbitrary and capricious under that "capacious" phrase.
2. Authorize Consideration of Cost and/or Include an Omnibus Factor		
Clean Air Act	42 USC § 7412(n)	determine whether regulation is "***appropriate and necessary***" MI v. EPA: refusal to consider cost was arbitrary and capricious under the "capacious" phrase of § 7412(n), "appropriate and necessary." "No regulation is 'appropriate' if it does significantly more harm than good."
Clean Water Act	33 USC § 1314(b)(2)	use "***best*** technology ***economically achievable***" (BAT). In assessing BAT, "take into account . . . the ***cost*** of achieving such effluent reduction, ***non-water quality environmental impacts (including energy requirements)***, and ***such other factors as the Administrator deems appropriate***."

3. Clearly Authorizes Benefit-Cost Analysis, But Ambiguous on Extent or Rigor of Benefit-Cost Balancing		
Energy Policy Conservation Act	42 USC § 6295(o)	Energy conservation standards must be ". . . ***economically justified*** . . . considering . . . (I) the ***economic impact*** . . .; (II) the ***savings*** in operating costs . . . ***compared to any increase in the price of, or in the initial charges for, or maintenance expenses*** . . .; (III) . . . ***savings*** likely to directly result from the imposition of the standard . . . (IV) any ***lessening of the utility or performance*** of the covered products . . . ; (V) the impact of ***any lessening of competition*** . . . ; (VI) the ***need for national energy and water conservation***; and (VII) ***other factors as the Secretary considers relevant***."
Dodd-Frank Act	15 USC § 78c(f)	Whenever SEC is required to consider whether an action is "***necessary and appropriate in the public interest***, the Commission shall also consider, in addition to the protection of investors, whether the action will promote ***efficiency, competition, and capital formation***." Business Roundtable v SEC, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011) (SEC's "failure to apprise itself – and hence the public and Congress – of the economic consequences of a proposed regulation makes promulgation of the rule arbitrary and capricious").