

# REGULATORY REFORM TASK FORCES CHECK-IN

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## JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON  
GOVERNMENT OPERATIONS

AND THE

SUBCOMMITTEE ON HEALTHCARE,  
BENEFITS, AND ADMINISTRATIVE RULES

OF THE

COMMITTEE ON OVERSIGHT  
AND GOVERNMENT REFORM  
HOUSE OF REPRESENTATIVES

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## REGULATORY REFORM TASK FORCES CHECK-IN

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**Tuesday, October 24, 2017**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON GOVERNMENT OPERATIONS, JOINT  
WITH THE SUBCOMMITTEE ON HEALTHCARE, BENEFITS,  
AND ADMINISTRATIVE RULES  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,  
*Washington, D.C.*

The subcommittee met, pursuant to call, at 10:05 a.m., in Room 2154, Rayburn House Office Building, Hon. Mark Meadows [chairman of the subcommittee on Government Operations] presiding.

Present: Representatives Meadows, Jordan, Hice, Sanford, Massie, DesJarlais, Grothman, Mitchell, Blum, Krishnamoorthi, Maloney, Norton, Kelly, Lawrence, and Plaskett.

Also present: Representative Palmer.

Mr. MEADOWS. The Subcommittee on Government Operations and the Subcommittee on Healthcare Benefits and Administrative Rules will come to order. And, without objection, the chair is authorized to declare a recess at any time.

It is not every day that we get to hold hearings and highlight good news about Federal regulations. Certainly, in July, the administration announced in the course of just 5 months, Federal Government was able to achieve a reduction in the net regulatory cost. Bravo. While still issuing new regulations, this administration actually has saved \$22 million, and I would like to reiterate, \$22 million American taxpayer dollars, over this course.

And to put that in abstract terms, at the end of the Obama administration, it would have taken someone 3 years and 177 days to read through the entire Code of Federal Regulations. As of today, that number has been reduced to 2 years and 217 days. This amounts to an over 25 percent decrease in the size of the CFR.

Now, this type of progress is shrinking the Federal regulations, is really unheard of. And it is thanks to the President's regulatory reform agenda. In January, President Trump issued an Executive Order 13771, which established a one in, two out, process where agencies must repeal two regulations for every new regulation that the agency issues.

The order also directed the agencies that they must achieve a net regulatory cost of zero in the fiscal year 2017. By all accounts, the agencies will continue to surpass this goal. And, in February, President Trump issued a second Executive Order that provided a process by which the agencies would implement the one in, two out, requirement. The Executive Order 13777 requires each agency to des-

ignite a Regulatory Reform officer, and to implement regulatory reforms at their agency, and to establish a Regulatory Reform Task Force to review the agency's regulations to determine whether they should be repealed or replaced.

Now, in September, I joined leadership from this committee and the House Judiciary Committee to request briefings from 24 agencies on the work of their task force. The results from these briefings are indeed impressive. Those agencies have begun comprehensive reviews, not only for their regulations, but guidance documents, policies, information collections, and other written materials that impose burdens on the public.

Many agencies have already started to clean house by starting the process to repeal and amend regulations. And this kind of kick in the pants change-out our out of control regulatory footprint was badly needed. The committee will be hearing today from three of those agencies that enthusiastically embrace this effort and have developed a strong and effective task force.

We look forward to you sharing some of your best practices with the committee today, and others seeking to do the same in their agencies.

We will also hear from a panel of regulatory experts to understand how these changes have been seen in unprecedented levels of regulatory relief and what the process means for the future of the Federal regulatory state.

I look forward to working with my colleagues on both sides of the aisle to consider how we can support and improve upon this effort. I'd like to thank each of you for being here today as witnesses, and for your valuable work on this particular area. We look forward to hearing from you and seeing where this work takes us.

We are waiting on the ranking member at this particular point, so what I would do is—we will go ahead and actually swear in our witnesses, if we could, at this point.

All right. So I would first like Ms. Joo Chung, the Director of Oversight and Compliance in the Office of the Deputy Chief Management Officer at the Department of Defense. Welcome.

Mr. Giancarlo Brizzi, is that right? Oh, man, I get an A for today. The Principal Deputy Associate Administrator at the Office of Government-wide Policy at the General Services Administration.

And the easiest name out there, Dr. James Owens, the Acting General Counsel at the Department of Transportation.

Pursuant to committee rules, we ask that all witnesses be sworn in before they testify. So if you would please rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth.

All right. Thank you. Please be seated, and let the record reflect that all witnesses answered in the affirmative.

In order to allow time for discussion. We would ask that your oral testimony please be limited to 5 minutes, but your entire written statement will be made part of the record. And, as a reminder, there is kind of a clock in front of you there, and so if it comes out with a big hammer, that means stop. And we also will remind you,



there's a red button, so if you'll press that so we can hear you and we can take the notes accordingly.

So, Ms. Chung, we will recognize you for 5 minutes.

**PANEL I:**

**WITNESS STATEMENTS**

**STATEMENT OF JOO CHUNG**

Ms. CHUNG. Thank you. Good morning, Chairman Meadows, Chairman Jordan, Ranking Member Connolly, Ranking Member Krishnamoorthi, and members of the sub-committees. Thank you for this opportunity to provide information about the Department of Defense's regulatory reform task force and DOD's regulatory reform efforts under Executive Order 1377 and 13771.

My name is Joo Chung, and I'm the Director of Oversight and Compliance in the Office of the Deputy Chief Management Officer at the Department of Defense. With our regulatory reform efforts, the Department is committed to more faithfully hearing to the regulatory principles that Federal agencies should promulgate only those regulations that are required or necessary, and that do not unduly burden the American people.

On April 20, 2017, the Department of Defense established its regulatory reform task force, and I was designated as its regulatory reform officer. The task force was established to conduct a comprehensive retrospective review of all of its 716 existing codified regulations, including 350 defense Federal acquisition regulation supplement clauses and provisions to make recommendations for the Secretary on whether they should be repealed, replaced or modified, in accordance with law.

The DOD task force is composed of senior leaders, and there are three subgroups that have been established under the task force to aid in the review of the defense Federal acquisition regulation clauses and provisions, the regulations under the Army Corps of Engineers, and the regulations under the Defense Health Agency TRICARE Rules.

The task force's efforts can be divided into three phases. First, the establishment. Second, the review and recommendations of the rules by the task force. And, third, the implementation and sustainment of the reform efforts. In order to review all 716 codified regulations at a steady and actionable rate, the task force established a biweekly schedule of a review with a goal of concluding its review by the end of 2018.

At the outset, the task force established scheduled reviews by topic in order to evaluate regulations for consolidation and to eliminate unnecessary, outdated, or ineffective rules, which is a priority set forth in Executive Order 1377. The task force has sent two reports to the Secretary, one on May 24, and one on September 30. At the time of the second progress report, the task force had reviewed 120 regulations and 19 defense Federal acquisition regulation supplement clauses.

So far, the Department has identified approximately over \$10 million in savings, and has identified 88 rules that it may be able to repeal, subject to final review by the Office of Management and Budget.

Most of the task force's recommendations thus far have been to eliminate or modify unnecessary, outdated, or ineffective regulations, and several reviews have resulted in recommendations to consolidate rules into a single DOD level rule, which will provide the public with one governing unifying regulation and consistent application of rules on the public.

To provide an opportunity for public engagement, the task force published notices for comment, being reviewed by the task force and the three subgroups, and has updated its public facing website to provide additional transparency.

DOD understands that a key component of the regulatory reform efforts is the implementation and sustainment efforts. To that end, the Department's components have already started the implementation phase of those recommendations that have been approved, and the task force is closely tracking those regulatory actions. Currently, the task force has reviewed 17 percent of its codified regulations, and we are on track to meet our goal to review all of the codified regulations by the end of 2018.

Mr. Chairman, regulatory reform is a part of the Secretary's overall reform strategy. And DOD believes that the deregulatory actions and cost savings of our reform efforts will help reduce unnecessary burdens on the public and promote agency accountability.

I thank the Chairman, ranking members, and the subcommittees, for this opportunity to discuss the regulatory reform efforts, and I'm happy to take any further questions. Thank you.

[Prepared statement of Ms. Chung follows:]

**Statement of**

**Joo Y. Chung  
Director of Oversight and Compliance  
Office of the Deputy Chief Management Officer  
Department of Defense**

**before the**

**Subcommittee on Government Operations and the  
Subcommittee on Healthcare, Benefits, and Administrative  
rules of the Committee on Oversight and Government Reform  
on  
“Regulatory Reform Task Forces Check-In”**

**October 24, 2017**

Good Morning Chairman Meadows, Chairman Jordan, Ranking Member Connolly, Ranking Member Krishnamoorthi, and Members of the Subcommittees. Thank you for this opportunity to provide information about the Department of Defense (DoD) Regulatory Reform Task Force (Task Force) and DoD's regulatory reform efforts under Executive Orders (EO) 13777 and 13771.

My name is Joo Chung, and I am the Director of Oversight and Compliance, in the Office of the Deputy Chief Management Officer, at the Department of Defense. The Department of Defense firmly supports the regulatory reform initiatives set forth in EOs 13777 and 13771, which promote the prudent management and control of cost of regulations and agency accountability. With its regulatory reform efforts, the Department is committed to more faithfully adhering to the regulatory principles that federal agencies should promulgate only those regulations that are required or necessary and that do not unduly burden the American people.

In accordance with EO 13777, on April 20, 2017, the Department of Defense established its Regulatory Reform Task Force, and the Deputy Secretary of Defense designated me as the Department of Defense's Regulatory Reform Officer and the Chair of the DoD Regulatory Reform Task Force. The Task Force was established to conduct a comprehensive, retrospective review of all of its 716 existing, codified DoD regulations, including 350 Defense Federal Acquisition Regulation Supplement (DFARS) contract clauses and solicitation provisions to make recommendations to the Secretary of Defense regarding their repeal, replacement, or modification, consistent with applicable law.

The DoD Task Force is composed of senior leaders of the Department, including representatives from the three Military Departments, the Under Secretaries of Acquisition, Technology, and Logistics, and Personnel and Readiness, the Deputy Chief Management Officer, and the Office of General Counsel. Additionally, three subgroups under the Task Force have been established to aid in the review of the provisions of the DFARS, the regulations of the Army Corps of Engineers, and the amendments to the Defense Health Agency TRICARE regulation.

The Task Force's efforts can be divided into three main phases, which include the: 1) establishment of the Task Force; 2) review and recommendations of the rules; and 3) implementation and sustainment of the reform efforts. In order to review all 716 codified regulations at a steady and actionable rate, the Task Force established a biweekly schedule of review with the goal of concluding its reviews by December 2018. At the outset, the Task Force scheduled reviews of regulations by topic in order to evaluate regulations for consolidation and to eliminate unnecessary, outdated, or ineffective regulations, which is a priority set forth in EO 13777.

The Task Force convened its first meeting on April 27, 2017, and has been meeting on a biweekly basis to rigorously evaluate existing regulations and make recommendations to the Secretary of Defense on a quarterly basis on whether the regulations should be repealed, replaced, or modified to alleviate unnecessary regulatory cost and burden. The process of review begins with an assessment of the regulation by DoD Components. Prior to the presentation by the DoD Component at the Task Force meeting, DoD Component subject matter experts, attorneys, and regulatory experts convene together to formulate a recommendation in accordance

with the legal and policy requirements under the Administrative Procedure Act and EOs 13777, 13771, 12866, and 13563.

In accordance with EO 13777, the Task Force sent its first progress report and set of recommendations to the Secretary of Defense on May 24, 2017. In that first report, the Task Force identified 34 regulations for repeal, one regulation for revision, and one regulation for retention with a projected cost savings of \$545,296.00. On September 30, 2017, the Task Force sent forward its second progress report and set of recommendations that included an additional 54 regulations for repeal, 9 more regulations for revision, 5 regulations for modification, and 13 regulations for retention with a projected costs savings of \$10,013,500.00. At the time of the second progress report, the Task Force had reviewed 120 regulations including 19 DFARS contract clauses and solicitation provisions. Subject to final analysis and review by the Office of Management and Budget, the DoD Components have identified a projected cost savings of \$10,558,796.00, and DoD anticipates that it may repeal 88 (73 percent) of the regulations that have been reviewed by the Task Force.

Most of the Task Force's recommendations thus far have been to eliminate or modify unnecessary, outdated, or ineffective regulations, which is the highest priority listed in EO 13777, and which we believe will have been a great benefit to the Department and the public. Several reviews have resulted in recommendations to consolidate rules into a single DoD-level rule, which will provide the public with one governing regulation promoting consistent application of rules on the public.

To provide an opportunity for public engagement, the Task Force published notices for comments on the rules being reviewed by the Task Force and the three subgroups. In addition, the Department has updated its regulatory website at <http://open.defense.gov/Regulatory-Program/> to provide additional transparency and information to the public. The website includes Frequently Asked Questions, copies of approved progress reports and recommendations, and a membership list.

In order to educate and provide guidance to our workforce on the regulatory reform efforts, the Task Force has provided DoD Components with guidelines for regulatory principles and conducting cost analyses of rulemaking. Additionally, the DFARS subgroup, with the help of an Office of Management and Budget economist, has developed a cost estimation tool to standardize compliance costs of rulemaking. We are beta testing the tool now and looking to see if the cost estimation tool can be standardized as part of our business process as well as shared with other government agencies.

DoD understands that a key component of these reform efforts will be the implementation of the recommendations and to ensure that target dates are not missed. To that end, the Department has started to work on the implementation phase of those recommendations that have been approved. The Task Force is tracking the status of each of the regulatory actions, which may be at different phases of implementation, and holding our Components accountable for necessary actions. Currently, the Task Force has reviewed 17 percent of its codified regulations, and is on track to meet its goal to review all of DoD's codified regulations by the end of 2018. We also have

institutionalized this reform effort and will continue to apply scrutiny to our regulatory actions on an ongoing basis.

Mr. Chairmen, DoD believes that the deregulatory actions and the cost savings that will be produced as a result of DoD's reform efforts will help reduce unnecessary burdens on the public and ensure the Department continues to meet its fiduciary responsibilities to the American public. Not only have the reform efforts helped streamline the Department's regulatory program and processes, but these initiatives have promoted agency accountability which supports the Department's overall mission. I thank the Chairmen, Ranking Members and the Subcommittees for the opportunity to discuss the Department's regulatory reform efforts. This concludes my prepared remarks and I defer to the Chairmen for further questions.



Mr. MEADOWS. Thank you, Ms. Chung.  
Mr. Brizzi, you're recognized for 5 minutes.

#### **STATEMENT OF GIANCARLO BRIZZI**

Mr. BRIZZI. Chairman Meadows, Chairman Jordan, Ranking Member Connolly, Ranking Member Krishnamoorthi, and members of the subcommittees, it is a pleasure to you appear before you today to discuss GSA's regulatory reform task force and regulatory reform activities, in accordance with the Executive Order 13771, reducing regulation and controlling regulatory costs. And Executive Order 13777, enforcing the regulatory reform agenda.

My name is Giancarlo Brizzi and I am the General Services Administration's Principal Deputy Associate Administrator in the Office of Government-wide Policy. As one of the Federal Government's central management agencies, GSA strives, through its regulations, to provide a policy framework that affords agencies the flexibility to accomplish their missions in the most effective manner while adhering to laws, executive orders, government-wide memoranda, and other applicable requirements, and sound management practices.

GSA accomplishes this through four comprehensive regulations. The Federal property management regulation, the Federal management regulation, the Federal travel regulation, and the GSA acquisition regulation. Building on the intent and spirit of the executives orders, GSA expanded the scope of its review to include nonregulatory policies and practices. This provides an opportunity to review GSA's day-to-day work activities that will lead to better service for our customer agencies, and ultimately the American people.

GSA is fully committed to complying with Executive Order 13771, and is currently pursuing a number of deregulatory actions that will reduce the burden on vendors doing business with the Government. EO 13777 required GSA to appoint a regulatory reform officer, establish a regulatory reform task force, and evaluate existing regulations and make recommendations to the agency head regarding the repeal, replacement, and modification.

Accordingly, GSA formally established its regulatory reform task force, comprised of GSA's regulatory reform officer, regulatory policy officer, senior procurement executive, and two operational subject matter experts. It was important that GSA's task force have both policy and operational perspectives as it reviewed our regulations, internal policies and practices.

GSA's regulatory reform task force established four working groups consisting of subject matter experts to review regulatory and nonregulatory policies and practices that will result in recommending proposals in alignment with the objectives of EO 13777.

GSA's task force working groups are organized around the agency's primary functions and guidelines or regulations. The working group's solicited reform proposals within the agency in the case of travel from 17 other Federal agencies that volunteered to contribute to the review. To ensure public engagement, each of the four working groups published a notice in the Federal Register to solicit reform proposals from the public. These activities have generated over 2000 regulatory reform comments, including nearly

1800 proposals generated by GSA's internal working groups, and input from other Federal agencies.

Examples of regulatory reform proposals currently under review are being pursued, include making it easier for vendors to do business with GSA. More specifically, GSA is looking for ways to remove outdated requirements in the GSA acquisition regulation that require contractors to submit multiple reports or redundant information. Other proposals under consideration are nonregulatory but important nonetheless. Include making regulations more accessible to users on mobile devices or simplifying internal forms.

We are optimistic that regulatory and nonregulatory efforts, such as these, will, in the aggregate, have a significant impact on improving GSA's regulatory and operational landscape. After the working groups finish their initial reviews, they may seek clarifications from the submitters to ensure full understanding, and will ultimately make recommendations to the task force.

The task force will then consider the recommendation, consult with necessary internal/external advisers, and then will make a formal recommendation to the GSA administrator. I'm grateful for the opportunity to update the subcommittees on GSA's regulatory reform task force, and look forward to working with the committee and subcommittees as GSA continues its efforts.

Thank you for your time today, and I welcome any questions.

[Prepared statement of Mr. Brizzi follows:]

**Written Statement for the Record  
Giancarlo Brizzi  
Principal Deputy Associate Administrator  
Office of Government-wide Policy  
U.S. General Services Administration**

**House Committee on Oversight and Government Reform  
Subcommittee on Government Operations and  
Subcommittee on Healthcare, Benefits, and Administrative Rules  
Joint Hearing: “Regulatory Reform Task Forces Check-In”  
October 24, 2017**

Chairman Meadows, Chairman Jordan, Ranking Member Connolly, Ranking Member Krishnamoorthi, and Members of the Subcommittees, it is a pleasure to appear before you today to discuss GSA’s Regulatory Reform Task Force and regulatory reform activities in accordance with Executive Order (EO) 13771, *Reducing Regulation and Controlling Regulatory Costs*, and Executive Order 13777, *Enforcing the Regulatory Reform Agenda*. My name is Giancarlo Brizzi and I am the U.S. General Services Administration’s (GSA) Principal Deputy Associate Administrator in the Office of Government-wide Policy.

As one of the Federal Government’s central management agencies, GSA strives through its regulations to provide a policy framework that affords agencies the flexibility to accomplish their missions in the most effective manner while adhering to laws, executive orders, Government-wide memoranda, and other applicable requirements and sound management practices. GSA accomplishes this through four comprehensive regulations: the Federal Property Management Regulation and its successor regulation, the Federal Management Regulation; the Federal Travel Regulation; and the GSA Acquisition Regulation.

Building on the intent and spirit of the Executive Orders, GSA expanded the scope of its review to include non-regulatory policies and practices. This provides an opportunity to review GSA’s day-to-day work activities that will lead to better service for customer agencies, and ultimately, the American people.

GSA is fully committed to complying with EO 13771, *Reducing Regulation and Controlling Regulatory Costs*. Since EO 13771 may exempt many GSA regulations as they are “related to agency organization, management, and personnel,” GSA has focused on the GSA Acquisition Regulation, which affects companies doing business with the Government, in implementing EO 13771. As such, GSA is currently pursuing a number of deregulatory actions that will reduce the burden on vendors doing business with the Government.

EO 13777 required GSA to appoint a Regulatory Reform Officer; establish a Regulatory Reform Task Force; and evaluate existing regulations and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law, for the reasons outlined within the Executive Order.

Accordingly, the Acting GSA Administrator, Mr. Timothy Horne, designated Mr. Michael Downing, GSA’s White House Liaison and Deputy Chief of Staff, as the Regulatory Reform Officer and Chair of the Regulatory Reform Task Force. GSA formally established its Regulatory Reform Task Force on April 26, 2017, which includes GSA’s Regulatory Policy Officer; GSA’s Senior Procurement Executive, who serves as the Senior Policy Official; and two operational subject matter experts. It was important that GSA’s Task Force had both policy and operational perspectives as we reviewed our regulations, as well as GSA’s internal policies and practices.

GSA’s Regulatory Reform Task Force established four working groups consisting of subject matter experts to review regulatory and non-regulatory policies and practices that will result in recommending proposals in alignment with the objectives of EO 13777. GSA’s Task Force working groups are organized around the agency’s primary functions and regulations:

1. The Federal Property Management Regulation and the Federal Management Regulation. These regulations govern oversight in areas such as personal and real property, aviation, transportation, and public buildings use and space.
2. The Federal Travel Regulation, which includes requirements for travel by Executive

branch civilian employees and others authorized to travel at Government expense.

3. Policies relating to the leasing of buildings, land, and worksites for the Federal Government. This includes leasing-related regulations in the Federal Management Regulation and GSA Acquisition Regulation and non-regulatory policies, such as the GSA Leasing Desk Guide.
4. Acquisition, including the GSA Acquisition Regulation and non-regulatory internal policies. It does not include the Federal Acquisition Regulation itself, which is under the purview of the Office of Management and Budget's Office of Federal Procurement Policy.

GSA's Regulatory Reform Task Force solicited reform proposals from within the agency, and in the case of travel, from 17 other Federal agencies that volunteered to contribute to the review. To ensure public engagement, each of the four working groups published a notice in the *Federal Register* on May 30, 2017, soliciting reform proposals from the public. This public comment period was originally scheduled to end 60 days after publication of the *Federal Register* notices, but GSA extended the deadline by two weeks to August 14, 2017, to accommodate extension requests from various groups and individuals who wanted to submit comments.

These activities have generated over 2,000 regulatory reform comments, including over 200 comments submitted in response to the *Federal Register* notices and nearly 1,800 proposals generated by GSA's internal working groups and other Federal agencies. The majority of the comments, approximately 1,200, are focused on the Federal Travel Regulation and were submitted by the working groups and other Federal agencies.

GSA's Task Force working groups are currently reviewing and prioritizing proposals in their respective areas. The Task Force has provided the teams with guidance for prioritizing proposals for consideration, directing them to consider whether a proposal is in alignment with the Executive Order's objectives and GSA's ability to implement the proposal, the amount of

time needed to implement the proposal, the practicality of the proposed change, and the impact of the proposal.

The Task Force received several proposals to eliminate regulatory requirements that are explicitly required by statute, meaning GSA cannot pursue these actions without legislative changes. Conversely, other proposals entail repealing, replacing, or modifying non-regulatory policies applicable to GSA's internal operations that the agency could implement on its own in a relatively short period of time.

Examples of regulatory reform efforts currently under review or being pursued include making it easier for vendors to do business with GSA. More specifically, GSA is looking at ways to remove outdated requirements in the GSA Acquisition Regulation that require contractors to submit multiple reports or redundant information. Vendors spend a great deal of time compiling, printing, mailing, and uploading information from paper copies into various systems with every applicable contract modification. With the adoption of electronic submission and automated processes for distribution of the information, the burden to industry can be greatly reduced. Other proposals under consideration are non-regulatory, but important nonetheless; include making regulations more accessible to users on mobile devices or simplifying internal forms. We are optimistic that regulatory and non-regulatory efforts such as these will in the aggregate have a significant impact on improving GSA's regulatory and operational landscape.

After the working groups finish their initial review and prioritization of comments, they may seek clarifications from the submitters to ensure full understanding. They will then make recommendations to the Task Force on which regulations to address and whether or not to propose any legislative changes. The Task Force will review the recommendations, consult with any necessary internal or external advisors, and then will make a formal recommendation to the GSA Acting Administrator.

I am very grateful for the opportunity to update the Subcommittees on GSA's Regulatory Reform Task Force and look forward to working with the Committee and Subcommittees as GSA continues its efforts. Thank you for your time today and I welcome any questions.

Mr. MEADOWS. Thank you. Dr. Owens, you're recognized for 5 minutes.

#### STATEMENT OF JAMES OWENS

Mr. OWENS. Good morning, Chairman Meadows, Chairman Jordan, Ranking Member Connolly, Ranking Member Krishnamoorthi, and members of the sub-committees. I am James Owens, Acting General Counsel of the Department of Transportation. I am grateful for the opportunity to present to you the Department's progress on regulatory reform under Secretary Chao's leadership.

DOT has one of the largest rulemaking portfolios in the Federal Government. To carry out its responsibilities, the Department embraces a regulatory philosophy that emphasizes transparency, stakeholder engagement, and regulatory restraint. Our goal is to allow the public to understand how we make decisions, which includes being transparent in the way we measure the risks, costs, and benefits of engaging in or deciding not to engage in a particular regulatory action.

The Department also embraces the notion that there should be no more regulations than necessary. We emphasize consideration of nonregulatory solutions and have rigorous processes in place for continual reassessment of existing regulations.

The executive orders issued by President Trump at the beginning of this administration have been instrumental in helping the Department achieve regulatory reform goals. In response to the executive orders, the Department formed a regulatory reform task force. Our task force consists of two components, a working group that meets with each of our operating administrations once per month, and a leadership council. Senior career and noncareer officials are members of the task force.

In carrying out its work, the task force is guided by three principles. First, reduce the unnecessary regulatory burdens on the public without compromising safety. Second, further stretch taxpayer dollars by streamlining the infrastructure permitting process. And, third, enable innovation by removing unnecessary regulatory barriers to transformative technologies.

Through our ongoing review and revision of DOT regulations, we have been able to save the American public significant time and money without reducing the safety of our Nation's transportation system. DOT rules issued in fiscal year 2016 under the previous administration imposed an estimated \$3.2 billion in annualized costs. In contrast, rules issued under this administration in fiscal year 2017 resulted in approximately \$21.9 million in annualized cost savings.

In addition, rules anticipated to be issued in 2018 are currently projected to yield substantially increased annualized cost savings. In effect, we hope not only to continue to save the American taxpayers money, but to save them more money and faster. Approximately 12 percent of DOT rulemaking actions issued in the previous administration were deregulatory. We expect that in fiscal year 2018, the number of deregulatory actions will increase to approximately half of all DOT rulemakings.

One of the Department's goals in reducing regulatory burden is to streamline the permitting process to further stretch taxpayer dollars by enabling faster, better, and more efficient infrastructure development. The Department has sought stakeholder input to assist in this effort. And in June 2017, we published a request for public comment asking for input to help identify obstacles to infrastructure projects. In response, we received over 200 comments containing over 1,000 ideas, and we are currently reviewing those ideas.

Other steps the Department is taking to expedite project delivery, included proposal to encourage public private partnership in transit project delivery, and the issuance of updated guidance to help streamline environmental reviews. Another of the Department's goals in reducing regulatory burden is to enable innovations that will transform transportation. We believe that the transportation of the future will be better, faster, cheaper, and safer than it is today. And we are eager to do what we can to make that a reality.

This administration is committed to enabling innovative and new uses of transportation technology, whether that involves automated vehicles, unmanned aircraft systems, or other emerging technologies. Although the Department has made great progress in implementing the administration's regulatory reform agenda, our work continues, and we anticipate continued deregulatory progress in fiscal year 2018, including plans to consider potential burdens caused by nonbinding agency guidance documents.

Thank you, again, for the opportunity to discuss with you the Department's regulatory reform agenda. I would be pleased to answer any questions you may have.

[Prepared statement of Mr. Owens follows:]



STATEMENT OF  
JAMES OWENS  
ACTING GENERAL COUNSEL  
U. S. DEPARTMENT OF TRANSPORTATION  
BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
SUBCOMMITTEE ON GOVERNMENT OPERATIONS  
AND  
SUBCOMMITTEE ON HEALTH CARE, BENEFITS, AND ADMINISTRATIVE RULES  
U.S. HOUSE OF REPRESENTATIVES

*Regulatory Reform Task Forces Check-In*

OCTOBER 24, 2017

Good morning Chairman Meadows, Chairman Jordan, Ranking Member Connolly, Ranking Member Krishnamoorthi, and members of the Subcommittees. I am James Owens, Acting General Counsel of the U.S. Department of Transportation (DOT or the Department). Thank you for inviting me to testify today on the subject of our agency's progress implementing President Trump's Executive Order (EO) 13771, *Reducing Regulation and Controlling Regulatory Costs*, and EO 13777, *Enforcing the Regulatory Reform Agenda*. I am grateful for the opportunity to present the work of the Department, under the leadership of Secretary Chao, in the area of regulatory reform and to describe what our Agency is doing to reduce regulatory burdens and costs of compliance consistent with our safety mission.

Background

DOT has one of the largest rulemaking portfolios in the Federal Government. The various components of the Department of Transportation—nine operating administrations and the Office of the Secretary—have important statutory responsibilities for a wide range of regulations. For example, DOT regulates safety in these transportation sectors: aviation, motor

carrier, railroad, motor vehicle, transit, pipeline safety, and commercial space. The Department also regulates aviation consumer protection and economic issues, and manages a huge grant-making apparatus for highways, airports, mass transit, the maritime industry, railroads, motor transportation, and vehicle safety. Additionally, the Department assists in crisis management and relief efforts. The Department does this by providing regulatory relief (such as waivers) and transportation services (such as air traffic control) to crisis-affected areas to ensure that personnel and supplies can quickly access those areas to provide the appropriate crisis response. Finally, DOT has to handle its own internal management as a major employer and property owner - developing policies that implement a wide range of regulations that govern programs such as acquisition and grants management, access for people with disabilities, environmental review, energy conservation, information technology, occupational safety and health, property asset management, seismic safety, security, and the use of Department aircraft and vehicles.

To carry out its responsibilities in accordance with principles of good governance, the Department embraces a regulatory philosophy that emphasizes transparency, stakeholder engagement, and regulatory restraint. Our goal is to allow the public to understand how we make decisions, which necessarily includes being transparent in the way we measure the risks, costs, and benefits of engaging in—or deciding not to engage in—a particular regulatory action. It is our policy to provide an opportunity for public comment on such actions to all interested stakeholders.

The Department also embraces the notion that there should be no more regulation than necessary. We emphasize consideration of non-regulatory solutions and have rigorous processes in place for continual reassessment of existing regulations. These longstanding processes provide that regulations and other agency actions are periodically reviewed and, if appropriate,

are revised to ensure that they continue to meet the needs for which they were originally designed, and that they remain cost-effective and cost-justified.

#### Regulatory Reform Task Force

EO 13771 and EO 13777, which were issued by President Trump at the beginning of this Administration, are instrumental in helping the Department achieve these goals. Under EO 13771, unless prohibited by law, beginning with fiscal year 2017, and by the end of each fiscal year thereafter, for each new significant regulation we finalize, we must finalize at least two “deregulatory actions” as defined in guidance issued by the Office of Management and Budget. In addition, unless prohibited by law, each agency must meet its regulatory cost allowance by sufficiently offsetting the incremental costs of new significant regulations with cost savings from deregulatory actions. EO 13777 institutionalizes this process by directing each federal agency to establish a Regulatory Reform Task Force to evaluate existing regulations and make recommendations for their repeal, replacement, or modification.

It is important to note that, as OMB guidance makes clear, EO 12866 remains the primary governing EO regarding regulatory planning and review. Accordingly, among other requirements, except where prohibited by law, agencies must continue to assess and consider both the benefits and costs of regulatory and deregulatory actions when making regulatory decisions and issue regulations only upon a reasoned determination that the benefits justify costs.

In response to EO 13771 and EO 13777, the Department formed a Regulatory Reform Task Force (RRTF), consisting of senior career and non-career DOT leaders, and quickly began work to further the President’s regulatory reform agenda. The Department’s RRTF consists of two components: a working group and a leadership council. The working group coordinates

with leadership in the Office of the Secretary and DOT operating administrations to conduct reviews and develop recommendations for deregulatory action. The working group meets once a month with each of the Department's operating administrations and presents recommendations to the leadership council. The leadership council meets approximately every six weeks to act on the working group's recommendations, and ultimately submits final RRTF recommendations to the Secretary. This system allows the RRTF to quickly and effectively implement the President's regulatory reform agenda.

In carrying out its work, the RRTF is guided by three principles: (1) to reduce the regulatory burden on the public without compromising safety; (2) to streamline permitting; and (3) to enable innovation.

#### Reduction in Regulatory Burden

Through our ongoing review and revision of DOT rules and regulations under EO 13771 and EO 13777, we have been able to save the American public significant time and money over the last nine months without reducing the safety of our nation's transportation system. DOT rules issued in fiscal year 2016, under the previous Administration, imposed an estimated \$3.2 billion in annualized costs on the public. In contrast, rules issued under this Administration in fiscal year 2017 resulted in \$21.9 million in annualized cost savings. In addition, rules anticipated to be issued in 2018 are currently projected to yield substantially increased annualized cost savings. In effect, we hope not only to continue to save the American taxpayers money, but to save them more money, faster—all while advancing the agency's mission.

This reduction in regulatory costs was not only due to decisions to halt costly and inefficient rules from going forward, but also a result of a significant increase in deregulatory

actions undertaken by the Department, as reflected in the *Unified Agenda of Federal Regulatory and Deregulatory Actions* (Unified Agenda). The Unified Agenda, which the Office of Management and Budget (OMB) compiles twice annually, synthesizes the regulatory agenda of each Federal entity into one Government-wide plan.<sup>1</sup> Approximately 12% of DOT rulemaking actions contained in the last Unified Agenda issued in the previous Administration (the Fall 2016 Unified Agenda) were anticipated to be deregulatory. In this Administration, the number of deregulatory actions anticipated in the Spring 2017 Unified Agenda increased to about 18% of the total DOT rulemakings. We anticipate additional deregulatory progress for Fiscal Year 2018 with the Fall 2017 Unified Agenda expected to further increase the number of deregulatory actions to approximately half of all DOT rulemakings.

#### Measures Used to Achieve Reduction in Regulatory Burden

This progress in advancing regulatory reform was accomplished through several measures, including: (1) reviewing regulatory actions planned during the last Administration; (2) identifying deregulatory actions and instituting new procedures to vet new rulemaking proposals; and (3) working with stakeholders.

First, shortly after it was formed, the RRTF scrutinized more than 130 then-planned regulatory actions to determine whether the regulatory burden imposed by those actions could be reduced or eliminated without compromising DOT's safety mission or DOT's other statutory goals. As a result of this review, seven rules were withdrawn and six rules were revised to reduce their burden. An additional five rules are currently in the process of being withdrawn and an additional three rules are in the process of being revised.

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<sup>1</sup> For more information on the Unified Agenda, see: [www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA\\_About.jsp](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA_About.jsp).

Second, the RRTF continues to review rulemakings and is taking an aggressive approach to reducing burdens and costs consistent with our safety mission. As part of this approach, the RRTF has instituted new procedures under which it thoroughly vets any new rulemaking proposal (including both significant and non-significant rules) to ensure that no unnecessary burdens are created and all feasible non-regulatory alternatives have been considered. The RRTF has also directed the Department's operating administrations and offices with regulatory authority to identify existing regulations and policies that impose unnecessary regulatory burdens on stakeholders and that could be repealed, replaced, or modified without compromising safety. This has resulted in the identification of at least 80 deregulatory actions, which are currently being evaluated by the Department.

Third, the Department has been proactive in seeking stakeholder input to assist in eliminating regulatory burdens. The Department published a Federal Register notice on October 2 asking for public input to identify additional deregulatory actions.<sup>2</sup> This notice also asks for public input to identify actions that the Department may take to alleviate or eliminate regulatory burdens or burdens on domestically produced energy resources, in accordance with EO 13783 (*Promoting Energy Independence and Economic Growth*). The Department anticipates that the ideas provided by the public in response to this notice will be extremely helpful in implementing the Administration's regulatory reform agenda.

Additionally, the Department recently received a letter from the U.S. Small Business Administration Office of Advocacy. This letter, which is a result of roundtable meetings that the Office of Advocacy hosted with small businesses all over the country, identifies small business' concerns with DOT regulations in the areas of aviation, commercial trucking, and railroads. The

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<sup>2</sup> *Notification of Regulatory Review*, 82 FR 45750 (Oct. 2, 2017).

RRTF is currently evaluating these concerns to determine how the Department can decrease the regulatory burden on small businesses consistent with our safety mission.

#### Permit Streamlining

One of the Department's goals in reducing regulatory burden is to streamline the permitting process to further stretch taxpayer dollars by enabling faster, better, and more efficient infrastructure development. Infrastructure affects every aspect of our nation's transportation system from the airports that allow aircraft passengers to fly between our country's cities to the roads, bridges, tunnels, and railroads that enable surface transportation. Just like it has been proactive in seeking stakeholder input in eliminating regulatory burdens, the Department has also sought stakeholder input to assist in its effort to streamline the permitting process. In June 2017, the Department published a request for public comment asking for input to help identify obstacles to infrastructure projects.<sup>3</sup> In response, the Department received over 200 comments containing over 1,000 ideas. The Department is currently reviewing these comments.

In addition to its public outreach efforts, the Department is taking other steps to expedite project delivery. For example, in late July, the Federal Transit Administration (FTA) proposed experimental procedures to encourage flexibility in public-private partnerships constructing transit projects. Along the lines of the Federal Highway Administration's (FHWA) pilot program to evaluate new public-private partnership approaches to project delivery – known as SEP-15 – FTA invoked its own statutory authority to permit recipients of FTA funding to seek relief from certain FTA requirements or practices. The practice is designed not only to

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<sup>3</sup> *Transportation Infrastructure: Notice of Review of Policy, Guidance, and Regulation*, 82 FR 26734 (June 8, 2017).

encourage public-private partnerships and expedite project delivery, but also to yield lessons learned that may prove beneficial throughout FTA's program.

We also issued updated guidance to implement a provision of the FAST Act that allows a DOT operating administration to apply the categorical exclusions (CEs) of another Departmental operating administration for certain multimodal projects. A CE is a category of actions that does not usually have significant environmental impacts, and thus does not require an environmental assessment or impact statement under the National Environmental Policy Act. Each operating administration establishes its own CEs, but sometimes one operating administration is implementing a multimodal project and another operating administration's CE would be more appropriate. Our updated guidance enhances DOT's ability to take advantage of the FAST Act's authority to apply CEs across the Department.

The Department also makes robust use of pre-existing structures, with a renewed emphasis on project delivery. We continue to participate on the Federal Permitting Improvement Steering Council, and we continue to lead the Infrastructure Permitting Improvement Center (IPIC). Through IPIC, DOT tracks priority projects that require the most complex environmental reviews, provides transparency through an online permitting dashboard, and assists project sponsors throughout the process. We also collaborate with agency partners through the Transportation Rapid Response Team, a forum for agencies with approval authority over the same project to address permitting issues early during the process, and keep things moving. Therefore, even as it charts new territory, the Administration continues to make robust use of existing processes as well.



Enabling Innovation

Another of the Department's goals in reducing regulatory burden is to enable innovations that will transform transportation. We believe that transportation of tomorrow will be safer, faster, and cheaper than today. Every mode of transportation is affected by transformative technology. Whether we are talking about drones, automation generally, unmanned vehicles, commercial space, supersonic travel, or other emerging technologies, we are looking forward to new and promising frontiers that will change the way we move on the ground, in water, through the air, and into space. This Administration is committed to fostering innovation by lifting barriers to entry and enabling innovative and exciting new uses of transportation technology. The Department is also committed to enabling the safe testing and experimentation of new technologies to gather data necessary to further support rulemakings that will allow widespread use of transformative technologies.

The Department has a number of pending deregulatory or enabling regulatory actions that will further enable innovation in the transportation sector. For example, the National Highway Traffic Safety Administration (NHTSA) is working on reducing regulatory barriers to technology innovation, including the development of autonomous vehicles. Autonomous vehicles are expected to significantly increase safety by reducing the likelihood of human error when driving, which today accounts for the overwhelming majority of accidents on our nation's roadways.

Similarly, the Federal Aviation Administration (FAA) is working to enable, safely and efficiently, the integration of unmanned aircraft systems (UAS) into the National Airspace System. UAS are expected to continue to increase safety by performing a range of activities including the provision of information that is difficult or even impossible for a human to obtain,

as well as other dangerous tasks that today are performed by human beings. In both cases, the Department hopes to be proactive in providing innovators the guidance they need to make long-term investments, while avoiding creating a regulatory thicket which becomes a barrier to new entrants into the transportation space.

#### Next Steps

Although we have made significant strides in implementing the Administration's regulatory reform agenda, our work is ongoing. The Department remains focused on alleviating unnecessary regulatory burdens to spur economic activity and foster innovation. The Department is currently working to complete its portion of the Fall 2017 Unified Agenda, and as discussed earlier, the RRTF anticipates that the Unified Agenda will show additional deregulatory progress for Fiscal Year 2018. The RRTF also plans to monitor progress on existing deregulatory initiatives and to continue developing recommendations for future action.

In addition, the RRTF plans to consider potential burdens caused by agency guidance documents. Guidance documents are issued by the Department's operating administrations and offices with regulatory authority to provide advice to the public regarding how best to comply with a particular law or regulation. While this advice is not legally binding, the Department's operating administrations and regulatory offices often have significant expertise and extensive relationships in the areas that they regulate. Consequently, even non-binding guidance that is promulgated by the Department may result in action by the regulated entities.

Conclusion

Thank you again for the opportunity to discuss with you the Department's regulatory reform program. As I know you appreciate, it would be inappropriate for me to discuss specific actions we might take concerning ongoing rulemakings, but I would be pleased to answer any questions you have about our overall regulatory program or the many positive steps we have taken to reduce regulatory burdens and costs of compliance consistent with our safety mission.

Mr. MEADOWS. Thank you, Dr. Owens. Thank all of you for your insightful testimony here. We're going to—since we went ahead and started, I'm going to go ahead and recognize our ranking members for their opening statements. I first recognize the gentleman from Illinois, Mr. Krishnamoorthi, for his opening statement.

Mr. KRISHNAMOORTHY. Thank you, Chairman Jordan, and Chairman Meadows, for convening this hearing. I'd also like to thank Ranking Member Connolly, who couldn't be here, but he has displayed incredible leadership on this committee as well. I would like to commend all our witnesses for participating today. So thank you very much.

There's an old saying that there is no Republican or Democratic way to pick up the trash or fill a pothole. The only thing that matters is that you deliver for your constituents. I think that is a good mindset to have as we look to improve efficiencies and cut unnecessary regulations. This shouldn't be done with any partisan preconceptions, but rather with a dispassionate and a rational mindset.

In my career as a small businessman, we made our business decisions based on facts and numbers. If a product wasn't selling, we would investigate why. If we had to change our products or services, we did so because our research told us that what we hadn't been doing—what we had been doing wasn't working. We did this because we had a clear goal in mind. We wanted to sell the best products and services, and keep making money for our shareholders.

No matter how brilliant I thought my ideas were, I would be letting down my partners and our customers if I insisted on selling a product that our customers didn't want to buy. I strive to bring that mindset to Congress as well.

If a policy or a change in regulation moves us toward what my constituents sent me here to do, I'd be happy to support it. I don't think many people in Schaumburg, Illinois, my home town, expected that my first major legislation to be co-lead by a Republican in rural Pennsylvania, named Representative Thompson. But that's what we had to do because we had a shared goal of improving career and technical education.

That is why today I'm particularly troubled by recent administrative moves to undermine, for instance, health protections and the coverage that millions of Americans have come to depend on. The Department of Health and Human Services recently decided to cut its open enrollment period in half because it appeared to be a move that was based on ideology, not practical circumstances.

Shutting down the website on the first day of enrollment period and cutting down the enrollment period in half would only serve to hurt our customers of that service, not help them.

So, today, I hope that the testimony that we hear shows that agencies are making decisions based on facts and not ideology. I hope we hear the testimony that you provide today showed that agencies are devising effective regulation, not deregulation at any cost.

I'm very grateful to the chairman for calling this hearing so we can further investigate the reasons behind administrative actions and the policy goals that they serve, and provide comment and in-

sight on how agencies can more effectively serve the American people.

I look forward to discussing this more with the witnesses. Thank you, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman. The chair recognize the gentlewoman from the great state of Illinois, and my dear friend, Ms. Kelly, for her opening remarks.

Ms. KELLY. Thank you, Mr. Chairman, for holding this hearing to example the agency regulatory reform task force as established by the current administration under Executive Order 13777, and to evaluate implementation of Executive Order 13771, which requires agencies to propose the repeal of two regulations in order to issue a new rule. And thank you to the witnesses.

Since January 20, this Congress and the administration have overturned, delayed, or repealed dozen of regulations that were issued during the Obama administration. Under this administration, employees have fewer requirements to protect their employees from exposure to toxic chemicals, airlines can be more opaque regarding baggage fees, and people with mental disabilities can more readily purchase guns. Important rules to ensure clean air and water are being rolled back.

All of this is being done under the guise of cost savings, but I fear that it is being done without considering the impact on all Americans. To get an overview of how Executive Order 13777 and 13771 are being implemented, and what direction the White House or the Office of Management and Budget has given to agencies to execute these two executive orders, the committee should hear from Director Mulvaney, a former member of this committee, and Office of Information and Regulatory Affairs, Administrator Neomi Rao.

It is critical that we understand that overarching strategies to this administrations's regulatory agenda, considering the aggressive steps this administration has taken to repeal, or otherwise halt rules that were carefully crafted under the previous administration. The administration's regulatory task forces were established ostensibly to identify costly and necessary regulations that can be repealed. The administration has not provided Congress with membership lists for the task forces, and we are forced to glean what information we can from public reporting.

These task forces appear to be filled with industry lobbyists acting on behalf of special interests, and agencies are moving to repeal regulations that benefit industry with little regard to health and safety of the public. It is also unclear with whom these task forces are meeting. Whether they are balancing the interests of industry with those of consumers and other parties, and which rules these task forces have recommended for repeal.

We do not know which, if any, rules have been repealed that is a suggestion of the task forces. The opaqueness of these task forces from their members to their actions is of great concern. Further, Congress has no way of knowing to what extent members of the task forces are subject to conflicts of interest laws and executive orders, if at all. And if any ethics waivers have been issued to the these members.

I'm not taking a second look—I am not against taking—excuse me—a second look at the regulations. There may be some that need

to be repealed and some that need to be strengthened. However, any regulatory action undertaken by agencies must be done in a transparent manner with public input from all stakeholders, not just those who would benefit from a regulatory repeal. Congress must be assured agencies are not repealing existing regulations at a cost of the health and well-being of Americans.

I look forward to hearing from our witnesses today, and thank the chairman, again, for holding this important oversight hearing.

Mr. MEADOWS. I thank the gentlewoman. Again, as we back and forth, we ask that, members, if you will just be very cognizant of the clock. And I'll be gentle on my gavel, but I want to make sure that we get everybody in to ask questions.

So the chair recognizes the gentleman from Michigan, Mr. Mitchell for 5 minutes.

Mr. MITCHELL. Thank you, Mr. Chair. And there you go, any hope of a bipartisan committee meeting just went by the wayside. Let me ask you for a brief response, if I can. Do any of you believe that the executive orders has in some way hindered your ability to effectively protect the American people?

Mr. BRIZZI. No, sir.

Mr. MITCHELL. Dr. Owens?

Mr. OWENS. No, sir.

Mr. MITCHELL. Ms. Chung?

Ms. CHUNG. No, sir.

Mr. MITCHELL. So, to be clear, you don't believe the executive order to clean up outdated, duplicative regulations that somehow put the American people at massive risk of some form? We're good on that point right? At this point?

The task forces are required to review regulations on a variety of broad categories, including eliminate jobs—or job creation, to look at the cost benefit analysis, deal with duplicative regulations. Have your agencies created additional criteria by which you look at what regulations you're going to consider? How else are you analyzing those?

Mr. OWENS. We have not created new additional considerations. We continue to look at the traditional cost benefit analysis in determining which rules to move forward with and which rules not to move forward with.

Mr. MITCHELL. Mr. Brizzi.

Mr. BRIZZI. Sir, we have not changed the criteria, though we have added new criteria for which we look at, not just on regulations, we are doing a much more comprehensive review to include internal policies and practices. We want to make sure that we can target things that have a high impact with relative ease in implementation. So there are a number of factors that we look at.

Mr. MITCHELL. You refer to high impact, Mr. Brizzi, define—give a definition of high impact, please.

Mr. BRIZZI. Yes, sir. Those items that could have a large influence on the, either constituents, whether it's small businesses or large businesses doing business with the Government, making their life easier in terms of doing business with us, or it could be internal management regulations that have an impact on Federal employees who abide by those.

Mr. MITCHELL. Ms. Chung.

Ms. CHUNG. We have also not changed our criteria. We've looked at all of our regulations under the existing cost benefit analysis that is required for all regulatory actions.

Mr. MITCHELL. Thank you. One of the concerns that has arisen from some of the comments already today is that somehow the review of these regulations has been turned over to political ideologists. I'd ask each of you, maybe starting with Ms. Chung, have career staff been directly engaged in this process, and how extensively, please?

Ms. CHUNG. Our task—the DOD task force is primarily composed of career staff. I'm a career official. And we're primarily, a majority, are composed of career officials.

Mr. MITCHELL. Let me ask you, Ms. Chung, in selecting people for the task force, was there some political ideology to determine who would be selected in your Department?

Ms. CHUNG. No, sir. We decided to take a comprehensive approach to look at all of our regulations, so we decided to, naturally, look to appointing people on the task force that had the most regulations.

Mr. MITCHELL. I would hope—

Ms. CHUNG. That we have members from the three departments, members from the Under Secretary that have the most regulations, and general counsel, of course. We have a working level group as well that—composed of subject matter experts that review the regulations before they go to the task force. So that's how we've conducted our processes, sir.

Mr. MITCHELL. Mr. Brizzi.

Mr. BRIZZI. Yes, sir. The committee or the regulatory reform task force that GSA is comprised of five members, three of which are career employees, two are political. But most of the work and review is being conducted by working groups comprised of career individuals or subject matter experts in that particular field or regulation that they are reviewing.

Mr. MITCHELL. And Dr. Owens.

Mr. OWENS. Our task force includes both career and noncareer officials. Our working group consists of senior career experts, including the assistant general counsel for regulations, the executive director for policy, and the career deputy general counsel. And then we work very closely with career experts in the different operating administrations as part of the general review process going forward.

Mr. MITCHELL. Dr. Owens, in terms of your task force, you didn't give me much of a breakdown in terms of career folks versus political appointees. Can you give me an estimate what that is?

Mr. OWENS. So on the working group we have four noncareer appointees and three career appointees. We additionally have a leadership group that is comprised of the regulatory reform officer and other senior political leadership, but that is more of a review body that receives recommendations from the working group, and ultimately from career staff.

Mr. MITCHELL. So it's an accurate description, in your opinion, that much of the review of these regulations is driven by long term career staff, they are subject matter experts and know this better than a whole lot of us political folks?

Mr. OWENS. Absolutely. We could not do our jobs without their career experts and their professional assistance.

Mr. MITCHELL. Ms. Chung?

Ms. CHUNG. Yes, absolutely. I would support that statement.

Mr. MITCHELL. Mr. Brizzi?

Mr. BRIZZI. Yes, sir.

Mr. MITCHELL. Thank you, sir. I yield back.

Mr. MEADOWS. Thank you. The chair recognizes the gentleman from Illinois, Mr. Krishnamoorthi, for 5 minutes.

Mr. KRISHNAMOORTHI. Thank you, Mr. Chairman. I'm concerned that agencies are rolling back regulation documents, not necessarily based on evidence, but based on a political agenda—well without full information.

Just last week the Department of Education announced it was repealing 72 guidance documents related to special education. These documents do everything from informing States on what processes they are to follow to receive grant funding, to ensuring that students with disabilities are included in all educational activities.

Some of these guidance documents have been on the books as far back as 1980. While the Department of Education put out a general request for comment on its regulatory reform plans, disability advocates had no opportunity to comment on the repeal of these same guidance documents. The Department, unfortunately, didn't have all the facts from everyone affected. I would like to ask each of our witnesses here today a similar question.

Ms. Chung, is the Department of Defense repealing or considering the repeal of any guidance documents, and if so, are you going to issue a notice for comment in the Federal Register to allow all interested parties to comment if you are planning to repeal any guidance documents?

Ms. CHUNG. Sir, while reviewing internal guidance documents is not a part of this, DOD's regulatory task force purview. The Department is considering those, and I'm happy to take that back for the record and provide you additional information on the process.

Mr. KRISHNAMOORTHI. Yes, thank you, Ms. Chung. Mr. Brizzi, is the GSA repealing or considering the repeal of any guidance documents?

Mr. BRIZZI. I'm not aware of any repeal of guidance documents, though, anything that were to come to consideration before the task force would be considered, discussed. And we would engage with stakeholders, whether it's other Federal agencies, or industry groups as to the perspective or impact they may have on those individuals.

Mr. KRISHNAMOORTHI. So you would issue a notice for comment in the Federal Register to allow all interested parties to comment if you intend to repeal any guidance documents?

Mr. BRIZZI. It would either be through a Federal Register notice or some other means, whether it's industry day or some type of a public engagement with those individuals. I'm not sure whether it would be a Federal Register notice, but some type of engagement.

Mr. KRISHNAMOORTHI. Dr. Owens, similar questions. Is the Department of Transportation repealing or considering the repeal of any guidance documents, sir?



Mr. OWENS. We're at the very beginning of our review of guidance documents. We want to be sure that all guidance documents that have been issued by the Department or will be issued in the future, are in compliance with statute, including the Administrative Procedure Act. We want to make sure that we're not creating new law through guidance documents.

We also are undertaking a review of our guidance documents, and where we determine that the guidance document may stray beyond the legislative requirements, we will put that out for notice and comment. We're also ensuring that significant guidance going forward will be put out for notice and comment before the—before it would come into effect.

Mr. KRISHNAMOORTHY. Got it. So if you do intend to repeal any of the guidance documents, you will put it out for notice and comment in the Federal Register?

Mr. OWENS. That would be my expectation, in most instances. There are obviously minor guidance documents, such as changes of forms and the like, that would not rise to the level of going up for notice and comment. But certainly anything that is significant, we would expect to seek public input.

Mr. KRISHNAMOORTHY. I would like to—thank you. I would like to ensure that if there is a repeal of any guidance documents that you do put it out for notice and comment because that is so important for stakeholders to have a say in your intended action. I have another similar question.

Ms. Chung, what is the Department of Defense doing to ensure the public has an opportunity to comment on changes to regulations undertaken by your regulatory reform task force?

Ms. CHUNG. Sir, the Department has published notices for comment for all of the reviews that the task force is conducting. We have received—and the published notices for comments for the subgroups with regulations that we're reviewing. For two of our subgroups we have received many comments, for example, in the regulations for the Army Corps of Engineers, we have already received over 1,000 comments, and we're currently reviewing all those comments for consideration.

In addition, we have published—we've updated our website on our regulatory reform website, which includes a frequently asked questions section. We have our most recent reports to the Secretary published. We have our membership lists. We have our various documents explaining our process and our terms of references on that website.

Mr. KRISHNAMOORTHY. Got it. Mr. Brizzi, can you answer the same questions, and then Dr. Owens.

Mr. BRIZZI. Yes. We have published Federal Register notices seeking comments on our four regulations. We have received a number of those comments and are going through the review process. Should it result in any type of change to a particular regulation, we would go through the regulatory process and do a Federal Register notice for public comment.

Mr. KRISHNAMOORTHY. Got it. Finally, Dr. Owens.

Mr. OWENS. So over the summer we published a Federal Register notice soliciting public comment on infrastructure improvement. We received over 1,000 ideas pursuant to that solicitation. A couple

of weeks ago we put out another Federal Register notice soliciting public comment on regulatory reform, generally. And we are looking forward to receiving those comments.

In addition, any substantive action the Department takes on rulemaking will go out for notice and comment pursuant to the APA.

Mr. KRISHNAMOORTHY. Thank you very much.

Mr. MEADOWS. The chair recognizes the gentleman from Georgia, Mr. Hice, 5 minutes.

Mr. HICE. Thank you very much, Mr. Chairman. And thanks to our panel for being here and each of you for your leadership with these executive orders.

I can only imagine in receiving an executive order and beginning to implement that, you're going to have some people within the agencies rather excited to update some regulations and probably some not so excited about it. So just kind of overall, have you received any push-back from career staff at your various agencies?

Ms. CHUNG. We have not at DOD. I think what has resonated very nicely with the DOD workforce is explaining why these regulatory reform efforts should be undertaken. And so going back to the regulatory principles and the philosophy has really resonated with the workforce. So we have not received any push-back.

Mr. BRIZZI. GSA, we have not received any push-back from either career or anybody else we have engaged with. In fact, if anything, they see this as an opportunity not to only review the regulations that we have, but more importantly, looking at all of our day-to-day activities, our guidance documents, and that's what they're really excited about. Those are the things that impact them on a day-to-day basis and an ability to voice their opinions and possibly achieve change and making their lives better.

Mr. HICE. Okay.

Mr. OWENS. At DOT we have been impressed by our career staff, they have been extremely supportive of our efforts. It's not only our efforts, it's their efforts as well. And without their support, without their expert guidance, we would not be able to move forward with this process.

Mr. HICE. Well, I am impressed with it as well, with each of your answers there. That's pretty fascinating. So with regulations—with being duplicative or burdensome or whatever it may be, you're receiving no push-back. Why? In one or two sentences, why is it that your agencies are excited to proceed with doing away with these?

We'll just go down the line again. Ms. Chung.

Ms. CHUNG. I'll be honest. I think it's very satisfying at the Department to unify certain policies and requirements under one regulation. And it's—I think the workforce is satisfied in that unity that this brings.

Mr. BRIZZI. At GSA, on the onset, we took a lot of time to consider the process of which we would go through the regulatory review. And we approached it in a manner that allowed input from not only the employees that are dealing with it day-to-day, but also engaging other agencies, which had never been done before. And that's what has the employees excited, they're not just looking at it from their own input but from the stakeholder perspective as well. Again, that's what has them excited.

Mr. OWENS. At Transportation our career experts have a long tradition, a long culture of pursuing cost benefit analysis, of seeking a data-driven process to improve all of our regs, to improve safety. And so as we have been working with them and they understand that we are working through and following sound science in all of our analysis, we have extreme support from them.

Mr. HICE. Well, thank you. And I appreciate—you know, it's the stakeholders out there that are living under these regulations, and it's encouraging to me to have some government agencies excited about helping people who are just suffocating under so much regulatory burdens. So let's just continue that—you guys are doing great with this, let's continue. As far as the transparency to the public, are your changes online or are there plans to put them online for the public to see?

Ms. CHUNG. Yes, sir. Our regulatory reform efforts are on our website—our regulatory reform website. And our recommendations to the Secretary, our reports are on the website. Our process of how we conduct our reviews are on the website.

Mr. BRIZZI. From a transparency perspective, the Federal Register notices, the comments that we received are public and available. Additionally, the transparency that we have undertaken is working with the agencies. Those agencies are impacted by our internal management regulations, and so they are part of the process. They're seeing the recommendations, they're going through them and they're doing the analysis with us, and then putting forward recommendations for change.

Mr. HICE. What about the general public?

Mr. BRIZZI. We're also engaging stakeholders, such as small businesses and large businesses, those who do business with the Government, such as reverse industry day where they came in, walked us through what they're doing when we're going through the acquisition process. And that input was extremely valuable, and us looking at what we're doing, how we could possibly shape it to improve it for them.

Mr. HICE. All right. Mr. Owens.

Mr. OWENS. We value transparency at Transportation. We have published our task force reports on the Internet. We also publish a monthly Internet report of all of our rulemakings and where they stand. We also have continual outreach to external stakeholders and to the public. We want to solicit all good ideas and we want to make sure the public is engaged in our process.

Mr. HICE. Well, again, thank you very much for what you're doing. And I yield back, Mr. Chairman.

Mr. MEADOWS. The chair recognizes Ms. Kelly for 5 minutes.

Ms. KELLY. Thank you, Mr. Chairman. I'm concerned that the Executive Order 13771, which requires the repeal of two rules for every one rule issued, will impair the health, safety, and welfare of the American public. The executive order does not apply to, and I quote, "regulations issued with respect to a military function."

Ms. Chung, why was this provision added to the executive order?

Ms. CHUNG. I believe that that is an exception as well in the Administrative Procedure Act, and so the executive order was following that line of rationale.

Ms. KELLY. But you don't know the rationale?

Ms. CHUNG. It's an exemption under the Administrative Procedure Act.

Ms. KELLY. It seemed that the President did not want to impose heavy deregulatory burdens on the military. Ms. Chung, is all of the Department of Defense exempted from Executive Order 13771, or some—or are some things does—affected by the order?

Ms. CHUNG. No, the entire Department of Defense's activities is not exempted from the executive order. We are—the regulations that we're reviewing, all of the 716 are reviewed under the criteria for 13771. And we work with the Office of Management and Budget in identifying significant rules under that order.

Ms. KELLY. Okay. Did the Department of Defense advise the President not to apply the executive order to military regulations?

Ms. CHUNG. To my knowledge, no.

Ms. KELLY. Had Executive Order 13771 been applied to military regulations, what impact would that have had had they been applied?

Ms. CHUNG. So currently when we look at the rules under 13771, there could be an exemption that applies to the regulation as being exempt as a military function. So some of those rules could meet that exemption. As a whole, all of the regulations that we're reviewing, they do not wholly meet that exemption. So we are working with OMB to determine which rules would meet that exemption or which would not.

Ms. KELLY. Okay. It seems to me that Executive Order 13771 could have had a serious impact on our military, and similarly, could be having a serious impact on regulations which keeps the average American safe.

Mr. OWENS, do you think that Executive Order 13771 is having or will have an impact on safety regulations the Department of Transportation is issuing?

Mr. OWENS. No, ma'am. Safety is our number one priority, and our intention is to—in identifying unnecessary regulatory burdens, we are looking to remove those burdens without compromising safety.

Ms. KELLY. Thank you. Do you think there would be more safety regulations issued by DOT if the executive order did not apply to the Department, and just how does—just as how it does not apply to the military?

Mr. OWENS. I do not think that there would be more safety regulations in the absence of the executive order. Again, we take safety extremely seriously. We apply a cost benefit analysis to everything we do, which the Department has always done. And any time that the safety benefits or the overall benefits to society exceed the costs, that is a rulemaking we want to engage in.

Ms. KELLY. Okay. Thank you. And I'm glad to hear that safety is number one, because I have concerns that Executive Order 13771 is putting Americans in harm's way, and should be repealed immediately. Thank you. I yield back.

Mr. MEADOWS. The chair recognizes the president of—the gentleman from Alabama, Mr. Palmer, which is not on either of the subcommittees, but I ask unanimous consent that he be allowed to fully participate in today's hearing.

Without objection, so ordered.

The chair recognizes Mr. Palmer.

Mr. PALMER. Thank you, Mr. Chairman. I just have a few questions, and some of it is follow-up. But in a broader sense of considering some of the reports that have been issued showing that regulations cost our economy approximately \$1.9 trillion a year. Some of the feedback I've gotten from private sectors that they're dealing with obsolete regulations, they're dealing with duplications, and in some cases, contradictions.

Ms. Chung, is there an effort to take a broader look at the regulations to eliminate the obsolete, you know, what I guess you could call the low hanging fruit?

Ms. CHUNG. Yes, sir. That was the approach that we took at the outset is to schedule our reviews by topics in order to review regulations that are of similar requirements to identify rules that we could consolidate and that we could eliminate, if they were outdated. So that was certainly one of the first ways that we were looking at the regulations.

Mr. PALMER. What I found in talking with people is that business is not necessarily adverse to regulations. What they find problematic is the lack of clarity in some cases. Again, I've been told that they're getting contradictory answers. They could call one regulator one week and get an answer and, you know, a few weeks later call the same agency, different regulator and get a different answer. Is that part of the process that we want to bring clarity to our regulations?

Ms. CHUNG. Yes, sir. Certainly that is within what we want to do. One of the goals that we want to achieve in the Department is to unify the requirements within our components, and that's—for example, we have been looking at components that have different regulations on the same topic, and consolidating those requirements into one rule so that there is one governing rule, and the public understands what that rule and requirement is. So certainly that is the effort.

Mr. PALMER. Mr. Brizzi, if we just kind of simplify this. The objective here is not just about saving the economy money, it's bringing predictability, it's sensible regulation. Would that be a fair way of describing what we're trying to do?

Mr. BRIZZI. Yes, sir. GSA is supporting other internal—or other agencies across the Government. We don't like to think of it in terms of deregulatory or making new regulations, it's about getting the right regulations in place and protecting the taxpayer in terms of funds, making sure that we protect employees across the Federal Government by understanding what it is and how they need to adhere to laws and guiding principles from the administrations. So it's about getting the right regulations.

Mr. PALMER. Well, the reason I keep pounding on this, Mr. Chairman, is that we're talking about saving the taxpayers money, but really what we're talking about are consumers because regulatory costs, some people call it a hidden tax. It's not a hidden tax, I mean, at least a tax might go to build a bridge or a road or fund a school. It's just a hidden cost. And, again, the reports indicated that the average household is spending about \$15,000 per year in regulatory costs that's added to their burden, and that's particularly a problem for low income families.

So when we talk about regulatory reform, that's one of the things that I think we want to do. We want to make sure that we have the right regulations, that these are clearly written so that we reduce the amount of burden that's passed on to families. That's a primary goal of mine while I'm in Congress is to try to bring, to our regulatory regime, clarity, and to reduce the burden on families, because I just think it's a great idea to, you know, as far as the burden on taxpayers. But it's really just an overall cost of living issue that—when we have regulations on top of regulations, you lack clarity. Some of them are obsolete, Ms. Chung, that is just an unnecessary cost.

And I hope that as we continue to do this that we're not compromising public safety, I don't think we are. I think what we're doing is we're trying to remove a tremendous burden on families.

Mr. Chairman, I appreciate the opportunity to participate in this hearing, and I yield back.

Mr. MEADOWS. I thank the gentleman. The chair recognize the gentlewoman from Michigan, Mrs. Lawrence for 5 minutes.

Mrs. LAWRENCE. Thank you, Mr. Chair. The Department of Transportation is tasked with keeping Americans safe on the road and the skies, however, I am concerned that the executive order will inhibit the permits ability to do that.

A 2012 highway transportation bill required the Department to write a rule about rear seatbelt reminders. This rule would alert drivers of individuals in the back seat, such as children, are not buckled up. This rule has been delayed and not yet implemented. It was supposed to be finalized in 2015 and it still has not been.

To put some reality to my concern, in 2016 over 200 children in Michigan—in Michigan alone—died in car crashes. Over 140 of those children were under the age of 10. This seatbelt rule could have saved some of their lives.

Mr. Owens, would it be possible for the Department to finalize this rule, given the regulatory budgeting requirement in Executive Order 13771?

Mr. OWENS. We are, at DOT, we are committed to completing all rulemakings mandated by Congress, and so we will move forward with every single rulemaking. In terms of a cost analysis—in terms of the cost analysis for the two for one in the executive order, that's a different matter that we are focused first and foremost on ensuring that we have our rulemakings done.

We will, of course, endeavor to do so in the most cost beneficial manner possible so that we can maximize the benefits of society and minimize the costs. But I can assure you that anything that is a mandatory rulemaking, something that Congress has required us to do, we will move forward on.

Mrs. LAWRENCE. Where are you with the rear seat regulation? Where are you?

Mr. OWENS. I don't have that information in front of me, but we can get back to you on that.

Mrs. LAWRENCE. So, Mr. Owens, when the Department of Transportation task force is undertaking a review of regulations, is it looking at ways to improve public safety or is it just looking at reducing the regulatory burdens? And my concern is that, in your quest, and you've outlined eloquently, all three of you. How all

hands are on deck, and this is a full Department engagement, but yet still we have a mandate from Congress that has not been fulfilled.

So please tell me, is it one or the other, or what is happening here to improving safety or reducing the regulatory business? And when you answer this, please be honest, because my concern when so many of the people from the departments come, you'll say what you think will be nice to hear. If you don't have the manpower, because I'm concerned, 2015, and we still haven't achieved it, and lives are being lost as a result of rear seats not being mandated for children and others, but yet still you sit here so eloquently and talk about how engaged you are in the regulatory reform.

So please answer that question for me.

Mr. OWENS. Thank you. We are committed to safety, as our Secretary has said on many occasions, safety is our number one priority at the Department of the Transportation. We are committed to moving forward with all safety rules, rules that are going to create significant benefits for society.

We are——

Mrs. LAWRENCE. But you have not fulfilled the requirement that I'm speaking of?

Mr. OWENS. I can't speak to what occurred in the prior administration, but I can tell you that right now, we are looking at every one of the rules that has been mandated by Congress, and we want to move forward with them, and we're conducting the analysis necessary to ensure that we can do so in the best possible way.

Mrs. LAWRENCE. That's not really answering, Mr. Owens.

Answer that question. When you're all engaged with the regulatory burdens, reducing them, and improving safety, are those two different lanes? Are they combined, so you do one or the other? And do you have the manpower—I'm asking that again—to fulfill this? Because I don't want this rule to continue to sit, and you're very excited about looking at regulatory business, which if you protect the employees, updating regulations, creating efficiency and reducing costs, I'm all for that. But I am extremely concerned about safety issues, and you not complying in a timely manner.

Mr. OWENS. Thank you. There is no conflict between the EO and safety. We are able to pursue both. And I can't speak to our manpower resources, but I can say that we do have resources to move forward. I certainly share your understanding that rulemaking can take, under the APA, can take a very long time. But I can assure you that we're moving forward with all of our mandatory rulemakings with all the energy we can.

Mrs. LAWRENCE. I would think, Mr. Chairman, that while we're looking at reducing costs and creating effectiveness, effectiveness means timely response to safety concerns and clearly mandates that you've already received from Congress. Saying it's a long time is not acceptable to me, so that should be one of your top priorities, because it does impact safety.

Thank you, Mr. Chairman.

Mr. MEADOWS. I thank the gentlewoman. The chair recognizes the gentleman from Iowa, Mr. Blum, for 5 minutes.

Mr. BLUM. Thank you, Chairman Meadows. Thank you to our panelists for being here today. I appreciate it very much. I am a

small businessman from the private sector for the last 30 years of my life, so the private sector feels the brunt of overregulation. And that's why these two executive orders from the President are exciting to me, and, I know, very, very well-received in the private sector.

I have a kind of a philosophical question, I guess, for each of you. Why does it take an executive order for our agencies to take a regulation, even one, off the books?

You know, Ronald Reagan often said, "The closest thing we have to eternal life on this planet is a government program or a government regulation." Why does it take an executive order?

Ms. CHUNG. You know, at the Department of Defense, we did take on an initiative to conduct a regulatory reform effort prior to these executive orders under the prior executive orders.

However, I think that the executive orders do provide—strengthen agency leadership support and formalizes the process that may not exist. So I think it just strengthens leadership engagement.

Mr. BLUM. What does that mean, in layman's terms—

Ms. CHUNG. So—

Mr. BLUM. —that a small business person in eastern Iowa can understand?

Ms. CHUNG. While we were—

Mr. BLUM. And I'm being respectful. But I'm not sure what you just said.

Ms. CHUNG. Okay. So we were conducting a regulatory reform initiative looking at our business process on a regulatory program, quite honestly, a few years ago, kind of looking—

Mr. BLUM. As a result of an executive order?

Ms. CHUNG. As a result of existing requirements, executive orders and law.

When these executive orders were issued, it really strengthened the agency leadership and galvanized the workforce and formalized the reform effort into a task force.

So, I think philosophical—

Mr. BLUM. So it takes an executive order to strengthen the agency's leadership? I would say that isn't leadership. If it takes somebody in the Oval Office to say, "you shall do this," that's not leadership. That's just following orders. That's being a good foot soldier, correct?

You see, people in the real world don't understand this; why it takes executive orders, why it takes the President of the United States to say "take a regulation off the books." Is there no incentive to do it?

Ms. CHUNG. I mean, we were looking at our regulations to see if they were unnecessary and outdated.

Mr. BLUM. Looking is fine, but—

Ms. CHUNG. And reviewing them and putting them into process. But, yes, sir, you know, it does, sometimes executive orders do strengthen the leadership and commitment to it.

Mr. BLUM. Sir?

Mr. BRIZZI. For GSA, we have always been looking at our regulations and looking for improvements and ways we can make them better, stronger, easier. So we have conducted reviews. And, in fact,



a lot of various regulations have been updated because of those internal reviews.

I would say particularly with this executive order, it did bring a new level of enthusiasm, if you will, and prioritized, brought it up to the forefront in terms of reviewing the regulations. But I would also add that we kind of approached it in a different manner in that we just didn't look at our regulations, but also seized upon the opportunity to look at our internal procedures, policies, and ways that we can change and make it easier.

Mr. BLUM. Is there awareness within government of what these—we all want clean air, clean water, all these types of things. But is there an awareness within an agency of what this does to people out there trying to make a living? Trying to meet their payroll? Trying to provide for their families? Is there an awareness of it? Just be honest.

Mr. BRIZZI. For GSA, I believe that there is an awareness.

We do interact with industry a lot. They do come in and speak to us with regards to our regulations and how it does impact them. As also, any time we do make any updates to any regulations, past or present and future, we do announce them on the Federal Register. We do get public feedback and engage. So there is awareness.

We don't always necessarily act on it, because we have to weigh different factors. But we do engage and get that input from—

Mr. BLUM. I'm glad to hear you engage. That's good. Dr. Owens.

Mr. OWENS. I think the Department of Transportation it's fair to say, has had a long history of applying what's called retrospective regulatory reviews, and has long tried to clean up its regulatory structure.

I can say that with the new administration, with those of us who joined in January and later, whether or not an executive order had been in place, we would have been making moves to improve and reform our regulatory state, including removing unnecessary regulations where possible.

Mr. BLUM. Without the executive order?

Mr. OWENS. Yes, without the executive order—

Mr. BLUM. This process was already moving?

Mr. OWENS. Well, the executive order came very early in the administration, so those of us who joined at that time, we didn't have a lot of time to get the institution up and running. But I think it's fair to say that whether or not the executive order had been issued, we at DOT would have been pushing forward with an effort to ensure that we're removing unnecessary regulations.

Mr. BLUM. Based on history and based on the past, most folks would not believe, out there in the real world, would not believe what you just said. Because we don't see it in the private sector. We don't see that at all. So I'm glad that your agency is having the private sector coming and you're listening to them in the GSA, and I would encourage all agencies to listen to the folks that pay our salaries.

I yield back the time I don't have, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman from Iowa.

The chair recognizes the gentlewoman from New York, Ms. Maloney, for 5 minutes.

Mrs. MALONEY. Thank you so much, Mr. Chairman. And I would like to ask Mr. Brizzi, the procurement policies that you've put out saying that the GSA is reviewing its procurement policies for outdated regulations. And as I understand it now, you've put out a product you need, or say what you need, and you have competitive bidding coming in, and then you make a decision of what is the lowest qualified bidder. But you're going to change this, the proposal that was in the 2018 National Defense Authorization, Section 801, would require GSA to establish online marketplaces for the procurement of commercial goods. And I don't quite understand what you mean. What do you mean by that? In other words, you're going to—you tell me. What do you mean by that?

Mr. BRIZZI. I personally cannot speak to that particular legislation or what it's trying to achieve. I certainly can look into it. But I would say, certainly we want to engage industry, and we do want to get competitive bids and make sure that when we procure something from the public, that we take into consideration taxpayer money and get the best value possible for the government.

Mrs. MALONEY. Well, in the online marketplace provision, it says that any procurement of a commercial product through the marketplace, and I'm quoting here, "shall be made under the standard terms and conditions of the marketplace, and the administrator shall not require an online marketplace to modify its standard terms and conditions."

So, for instance, suppliers are required to have a unique identifying number, and to agree to certain conditions regarding payment and timing.

So does the GSA propose to reconcile these existing requirements with the language of the proposal that would prohibit modification of the online marketplace's terms and conditions?

Mr. BRIZZI. Again, I can't speak to that particular provision or the legislation that's being proposed. But once, if enacted, we will certainly update and look at our regulations to make sure those are compliant with any legislation that is passed.

Mrs. MALONEY. Well, I'd like someone from your office to come over and explain this new National Defense Authorization rule, because the procurement for the Defense Department is absolutely huge. And personally, I like the open bidding practice that says what they need and lets the marketplace respond to them. And this appears to mean that they're going to allow them to purchase online, is how I'm reading it, I could be wrong—instead of going through the competitive bid process. And I don't know if I think that's a good idea.

If an online product wants to respond to an RFP, or product request from the government or from the Defense Department, then they can do so. Why in the world do we have to change the online ordering programs and say that they can't modify the terms and conditions? I really would like a clarification on it.

Mr. BRIZZI. Yes, ma'am. We'd be happy to provide that.

Mrs. MALONEY. Okay. And can anyone else comment on the rule? Are you familiar with it, Ms. Chung or Mr. Owens? No?

Ms. CHUNG. I'm not.

Mr. MEADOWS. If the gentlewoman would yield, actually we had a hearing on that, we'll be glad to get your staff a whole lot of information on that particular issue.

Mrs. MALONEY. Well, then maybe you can answer my question.

Mr. MEADOWS. I can, but I don't want to take up your time, but you go ahead. I'll yield back.

Mrs. MALONEY. Okay. And I'm concerned about the President's executive orders, what they may have on transportation safety. And a few years ago, the National Traffic Highway Safety Administration requested input on updates to the New Car Assessment Program. And this program has been an innovative way to spur improvement and upgrades in the auto industry.

Mr. Owens, what is the status of upgrading the NCAP to incorporate new technology to save lives? Every day I read about new ways to save lives.

Mr. OWENS. So we are certainly committed to vehicle safety, and we are very excited by the new technologies that are coming into being in the automotive industry.

We are evaluating the NCAP program, and we want to ensure that when we update it, it will be updated in the best possible way.

Mrs. MALONEY. Well, is the executive order having any type of impact on the upgrading of the NCAP program?

Mr. OWENS. No, it does not. The NCAP program is not a regulation in any event, but it would not have an impact on whether and what kinds of upgrades we would do to this. This is a voluntary program that industry engages in, that industry supports very much, and we want to ensure that consumers have the best possible information available to them.

Mrs. MALONEY. Thank you. All right.

Mr. MEADOWS. I thank the gentlewoman. The chair recognizes himself for a series of questions.

So Ms. Chung, let me come to you. Mr. Blum from Iowa, I guess, was hitting in on some of the, "why are you doing it now because of an executive order."

Would you suggest that the executive order has given more focus to actually reducing some of the regulations, even though it's been part of your ongoing effort? Because of the executive order, do you think there's more of a focus within your agency on reducing regulations?

Ms. CHUNG. Yes, sir, I do. I think it has focused our efforts to formalize and institutionalize the process.

Mr. MEADOWS. All right. And so, Dr. Owens, let me come to you, because obviously at DOT, there was a whole lot made of safety. Is there ever a time where safety is sacrificed as you're reviewing what regulations to get rid of?

Mr. OWENS. Absolutely not. Safety is our number one priority and as we analyze every possible rulemaking. We are looking to maximize safety benefits and other benefits and minimize the costs.

Mr. MEADOWS. Okay. Dr. Owens, can you make the case that when have you some of these regulations and guidances that are out there that seem to just clog up the works, that the more streamlined you make it, the more you can focus on safety?

Mr. OWENS. I think that's a fair assessment. I think we are looking to remove costs that are unrelated to safety so that industry and the government can focus more on the safety issues.

Mr. MEADOWS. Okay. Mr. Brizzi, let me come to you, because as we look at what GSA is doing and actually trying to streamline the whole regulatory side of things, what would you say has been the biggest impediment to actually getting that done?

Mr. BRIZZI. I wouldn't say there's been any impediments, it's just a matter of rallying more troops and—

Mr. MEADOWS. Okay. Well, some on my side would suggest the deep state, or actually staff, but what I'm hearing is actually it's been career staff that has been helping all of you make these kinds of recommendations and changes. Is that correct, Mr. Brizzi?

Mr. BRIZZI. Yes, sir.

Mr. MEADOWS. So what we're saying is that the Federal workforce, who has been here for a long time, is actually participating in this, making constructive recommendations on what we can get rid of from a regulatory point of view. Is that correct?

Mr. BRIZZI. Absolutely, sir, yes.

Mr. MEADOWS. And, Ms. Chung, are you finding the same thing?

Ms. CHUNG. Absolutely, sir.

Mr. MEADOWS. Dr. Owens, are you finding the same thing?

Mr. OWENS. That is correct. In one sense, aside from industry and other stakeholders, our career staff are the closest to many of these regs, and many of them understand what is obsolete, what is outdated, what needs to be changed.

Mr. MEADOWS. Okay. So let me make sure that I send a very clear message to your agencies.

One, thank you for the job that you're doing. And today you're getting the applause, and not only of members of Congress, but certainly, the American people, who say that regulation after regulation, many times all it does is puts one regulation on top of another that makes it so laborious that they can't figure out what they should abide by and what they shouldn't.

But I also want to thank your agencies, those career Federal employees, who many times get beat up by Members of Congress. And I just want to say, would you share with each one of them that we appreciate the fact that they are taking, not only this seriously, but that as they embark on that that they're making a real difference.

Saving millions of dollars, Ms. Chung, one of those, I think you said they had already saved \$10 million. Is that correct? So, eventually, that adds up to real money, right?

Ms. CHUNG. Yes, sir.

Mr. MEADOWS. All right. So will all three of you take that back?

Mr. BRIZZI. Happy to forward that message back, Mr. Chairman.

Mr. MEADOWS. Okay.

Mr. OWENS. Delighted to do so.

Mr. MEADOWS. Okay.

Ms. CHUNG. Yes, sir.

Mr. MEADOWS. All right. So let me also, in just the one minute that I have remaining here, in executive order, Mr. Blum is right, you know, why would an executive order be required?

Sometimes, I have found that there is not an incentive or an encouragement for those who look at things the way that they've al-

ways been done and try to look at them in a different manner. And it is critically important that we let them know that that type of focus is there. I mean, there's a bill out there that we're looking at codifying this executive order in law.

Would any of you say that that would, if we did that, that it would sacrifice safety or readiness?

Mr. OWENS. I would not believe that that would sacrifice safety.

Mr. MEADOWS. Okay. Mr. Brizzi?

Mr. BRIZZI. I don't believe that to be the case.

Mr. MEADOWS. Okay. Ms. Chung?

Ms. CHUNG. I don't believe so.

Mr. MEADOWS. All right. Well, thank you, and I will close with this: Dr. Owens, you were talking earlier about guidance and putting it in the Federal registry, and all of that. I want to give you a chance to clarify your statement, because I don't know that you actually meant that, because there is not a statutory requirement to do so. And in publishing, in fact, I think the rules that we—because when I heard that, it kind of hit very quickly. And I think the rules would suggest that rules of an agency, organization, or procedure, or practice, or interpretive rules, or general statements of policy are not really part of the notice requirement for rule-making.

And so, since we still have you under oath, not to put words in your mouth, but I assume that you want to abide by the statute, but not make a commitment to go beyond what the statute requires. Is that correct?

Mr. OWENS. Absolutely. We will comply with the statute and abide by all rules that apply to guidance documents.

Mr. MEADOWS. All right. Well, thank you. All of you have been very delightful. And at this point, the first panel is excused.

All right. The subcommittee will come to order.

I am pleased to welcome and introduce our second panel.

Obviously, all of you were here to hear the first panel as we went through that. We look forward to having your expertise.

I'll go ahead and introduce, and, as usual, we start out with the most difficult name first. And so, Mr. Jitinder. Jitin-dee or -der?

Mr. KOHLI. It's phonetic. You can just literally read it out.

Mr. MEADOWS. Okay. Mr. Kohli—how about that? Managing Director of Deloitte Consulting, welcome. Thank you; Ms. Diane Katz, Senior Research Fellow in regulatory policy at the Heritage Foundation, welcome; James Goodwin, Senior Policy Analyst at the Center for Progressive Reform, welcome; and Mr. Clyde Wayne Crews, Jr., the Vice President for Policy and Director of Technology Studies at the Competitive Enterprise Institute, welcome.

Pursuant to committee rules, all witnesses will be sworn in before they testify, so if you will please rise and raise your right hand.

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

All right. Thank you. You may be seated.

Let the record reflect that all witnesses answered in the affirmative. And as a reminder, just 5 minutes on your verbal testimony,

but your entire written testimony will be made part of the record. And Mr. Kohli, you are recognized for 5 minutes.

## **PANEL II:**

### **WITNESS STATEMENTS**

#### **STATEMENT OF JITINDER KOHLI**

Mr. KOHLI. Thank you. So you said I work for Deloitte Consulting, and I do, but the reason I'm here is because I served for 4 years as the head of the British Better Regulation Executive. And in that capacity, I led our regulatory reform program for the United Kingdom.

So we started that journey in about 2005, and I have been going ever since in the United Kingdom. And in the remarks today, I really want to talk about some of the lessons from the British experience, which also reflect experience in other countries. So the U.K. model has been emulated, not just by the U.K., but also by other countries in Europe, the Netherlands, Denmark, would be some of those countries, Australia and New Zealand, Canada would be others of those countries. And indeed, the concept of 1-in-2-out now acknowledged by the Trump administration is a concept that was invented in London, indeed, in the organization that I worked for.

So with that, let's talk a little bit about the U.K. experience. So in the period I was responsible for better regulation, serving Prime Minister Tony Blair, and then Prime Minister Gordon Brown, we made a commitment to reduce the administrative burden of regulation by 25 percent. And over that period of time, we took out \$3.5 billion—billion pounds of costs from British business.

Given that the U.K. economy is about seven times smaller than the U.S. economy, and given the U.K. economy, the pound is a stronger currency—less strong now than it was maybe a year ago, or a year-and-a-half ago, but nevertheless, a stronger currency—that gives you a sense of the savings.

So what are the lessons of that experience? We were very much the pioneers of that, of how to do regulatory reform, and how to do it in a sustainable and effective way.

So the first lesson I would say, is that you have to focus on the cost of regulations, not the number. Businesses don't care about the number of pages or the number of regulations that are out there. They care about the actual cost that they face. Indeed, they don't really care about the regulation itself, what they care about is the costs imposed by the regulation. So if they don't understand a regulatory requirement and they end up spending more time understanding it, that's a real cost. If, however, 1000-page regulation only touches one business in the land and doesn't impose much cost, that's a very minimal cost.

So very much the focus in the United Kingdom was to think about real cost and real businesses, and only when we could demonstrate a real cost reduction on real businesses did we count that. So one lesson I would take away is that—and certainly, if you look at the administration's 1-in-2-out policy, there are obviously some risks there, if you look at just the number of regulations.

Secondly, it is, you know, in our experience, it was essential to focus on maintaining protections at the same time as trying to reduce costs.

If you are unable to maintain protections, you couldn't get the kind of consensus that you needed in order to drive regulatory improvement. In the U.K., we called it better regulation. We didn't call it more regulation. We didn't call it deregulation. And that was a very intentional decision.

Our policy was to focus on how we regulated in order to make it better for the business community whilst at the same time maintaining protections that are essential for our society.

As a result, we focused on simple things. Simplifying forms, automating processes; they're the kind of things that yield very significant savings for business, and yet are far away from the political limelight and have a real impact.

The third lesson, I'd say, is avoid exclusions. The regulatory reform policy can only be effective if it's broad in its coverage.

So, for example, if you're bringing in new controls on immigration and they require, and they require—and you're committed to a regulatory reform policy, you have to require offsets for those as well. And indeed, one of the members earlier was talking about the risks of exclusions.

Of course, you might need some flexibility if the Transportation Security Administration requires limiting liquid going through airport security, as we all know they did, it would have been difficult for them immediately to bring in an offset. But actually, they did bring in offsets later of sorts. They brought in TSA Precheck, which we know saves people time and money, but maybe, if you had a more effective—an effective regulatory reform policy might make that happen faster.

The fourth thing we learned is this is almost entirely about small businesses. Small businesses are the entrepreneurial engine of the economy, and unlike large organizations, which have compliance departments, small businesses' compliance department is the entrepreneur, often at 11 p.m. At night.

And so, focusing on protecting that small business and supporting that small business to succeed is what we want to do.

I spent a lot of time with small businesses. And the thing I heard most of all is, We want regulation. We believe in the outcomes that regulation is there for, but we want it to be easier to comply, and so that's where we put our focus.

I'm aware of time. The last thing I would say is fundamentally, this is about culture change. What we were trying to do was change the culture of government. And, indeed, now with new techniques such as advanced analytics, it's easier to change the culture of government. So what we—so regulatory reform for us was about driving sustainable culture change. And, indeed, 12 years later, the U.K. is still on that journey.

[Prepared statement of Mr. Kohli follows:]

**WRITTEN STATEMENT****JITINDER KOHLI****Former chief executive, Britain's Better Regulation Executive****Subcommittee on Health Care, Benefits, and Administrative Rules****Subcommittee on Government Operations****October 24, 2017**

Chairman Meadows and Chairman Jordan, thank you for the opportunity to testify today regarding efforts to reduce the regulatory burden in the United States.

My name is Jitinder Kohli; I am currently a Managing Director in Deloitte Consulting's public sector practice based in Washington DC. Prior to arriving in the US in 2009, I served as the Chief Executive of Britain's Better Regulation Executive – which is the agency responsible for regulatory reform in the United Kingdom. The closest agency in the United States is the Office of Information and Regulatory Affairs in OMB.

I would note my testimony and comments today reflect my experience in the UK, and do not reflect the views of my current employer.

In 2005, the British government adopted targets for reducing regulatory burdens. The initial goal was to reduce administrative burdens associated with regulation by 25% over 5 years. By 2010, agencies had delivered reductions in administrative costs of around £3.5bn. The government's approach then evolved into a "One-in, One-out" requirement. Now, the UK runs a "One-in, Three-out" initiative – where agencies are required to identify £3 of savings for every additional £1 of costs associated with new regulatory proposals.

I think there are five key lessons one can take away from the UK experience.

**1. Focus on the cost of regulations, not the number.**

Business cares about the costs associated with regulation, not the number of pages or the number of regulations. Taken literally, the administration's one-in, two out policy means: Every time a new regulation comes into force, two existing regulations should be removed. But there is a significant risk with this approach. What if a new regulation costs business \$1 billion, while the two eliminated regulations carry a burden of only \$1 million each? That would hardly count as a meaningful offset. The administration has also adopted a requirement for agencies not to increase the overall costs of regulations. This "net-zero" requirement is more akin to a one-in, one-out policy under the UK government's rules.

**2. Reducing regulatory costs doesn't require gutting critical protections.**



In the UK, the clear emphasis of regulatory reform efforts that I led was to reduce costs for business and non-profits **whilst maintaining** protections. We believed that by focusing on *how* we regulated, rather than just *what* we regulated, we could reduce costs while at the same time maintaining essential protections for workers, the environment and other key regulatory areas. We focused on approaches such as simplifying forms and automating processes where possible. For example, allowing publicly traded companies to use electronic versions of their annual reports saved British business more than £180 million.

Our focus was *better* regulation – not *more* or *less* regulation – but improving regulations to maintain protections whilst minimizing burdens. This approach allowed us to win the support of trade unions and consumer groups as well as business groups – who all agreed on the importance of reducing burdens where possible as long as we did not reduce protections.

### 3. Avoid exclusions.

A regulatory reform policy can only be effective if it is broad in its coverage. If new controls on immigration become law, for example, and these involve new regulatory requirements on employers, an effective regulatory reform approach would require offsets.

Some flexibility may be required, since new rules can stem from urgent measures that control new risks. For example, the Transportation Security Administration (TSA) requirement limiting liquids going through airport security called for swift implementation—it would have been difficult to wait for TSA to find offsets *before* changing the rules. But it would have been possible to mandate that TSA find the savings in the near future. Doing so, may have encouraged faster identification of burden-easing initiatives such as TSA Pre-check.

### 4. Focus on small business.

Our efforts in the UK focused most of all on small businesses. They are the entrepreneurial engine of the economy and often find regulatory requirements especially complex. The “compliance department” for a small business is often the entrepreneur themselves. In the UK, we found that approaches that made it easier for small businesses to comply with regulations were extremely powerful. I spent a lot of time visiting small businesses, and often heard that they believed in the objectives of regulation such as protecting the environment, food safety or worker safety.

But businesses also often asked “why can’t you just tell us what to do....we don’t have time to make sense of all the complexity”. A number of agencies in the UK took this message to heart and developed much clearer guidance and tools to help small business comply. The result was lower costs for small businesses whilst maintaining protections.

With today’s advancement in technology – especially online technologies – there are many more ways to ease the regulatory burden on business and citizens by making regulatory forms and processes more intuitive to the end user.

### 5. Culture change is the heart of regulatory reform.

Prior to 2005, the primary emphasis of government officials who worked on regulatory policies was on designing new regulatory ideas. As with any government new issues are always emerging, it is only natural for political leaders to seek new regulations to address these risks. But with so much effort focused on new regulatory ideas, there was little emphasis on identifying ways to reduce the costs of regulations already on the books.

The issue is a common issue across governments. Deloitte released a study of the Code of Federal Regulations yesterday in which we found that 67 percent of all CFR sections currently on the books have never been edited since they were originally created.

Our approach in the UK was designed to encourage agencies to look for ways to reduce the costs of regulatory compliance at the same time as thinking up new regulatory ideas.

To make that shift, agencies worked hard to understand what was driving existing costs and set up teams responsible for regulatory simplification. And because driving culture change often means injecting new ideas, they crowdsourced improvement ideas from businesses and front-line enforcers. They also applied techniques such as design thinking to formulate regulatory processes that were simpler to understand and implement.

I oversaw the British regulatory reform effort for four years, and over that period, we found that a putting an emphasis on better regulation had enormous power. Following the UK's work in this area, Australia and Canada have both adopted similar initiatives. Many European countries have also adopted initiatives to promote less burdensome regulation whilst maintaining protections.

As the United States embarks on a new regulatory reform effort, I would urge the administration and Congress to apply some of the lessons from international experience.

This concludes my written testimony. I would be happy to entertain any questions you may have.

Mr. MEADOWS. Thank you so much.  
 Ms. Katz, you're recognized for 5 minutes.

#### STATEMENT OF DIANE KATZ

Ms. KATZ. Good morning. As we examine the administration's regulatory reform agenda, I'd like to provide some context about the regulatory landscape that the agenda is intended to reform. But before I even do that, it's driving me crazy, I have to correct an apparent misunderstanding on the part of some Members about what these executive orders can and cannot do with respect to—

Mr. MEADOWS. Are you suggesting that Members are sometimes confused, Ms. Katz?

Ms. KATZ. Well, I'm not going to go there.

Mr. MEADOWS. Go ahead.

Ms. KATZ. Under no circumstance can the task forces or agencies summarily get rid of health and safety regulations. If Congress, if there's a statute, statutory requirement, they're still required to fulfill that. And if they want to change it, they have to go through the same process by which the original rule was created, which is a long, protracted and very, you know, transparent process of rule-making. Thank you.

For the past several years, I and my colleague, James Gattuso, have tracked the number and costs of new regulation, and compiled the data in our annual Red Tape Rising reports. This year's report, by the way, is entitled Red Tape Receding.

During its 8 years in power, the Obama administration issued more than 23,000 regulations, and increased cumulative regulatory costs by more than \$122 billion annually, and that's only counting major rules, not dozens of rules issued by independent agencies in the tally.

The \$122 billion figure was nearly double the \$68 billion imposed under the administration of President George W. Bush.

On the day President Trump took office, his administration inherited some 1900 actions in the rulemaking pipeline. And as the number of regulations has grown, so, too, has government spending on administration and enforcement.

The pace of new regulations during the Obama years was unparalleled, but regulatory expansion have been occurring for decades under both Democratic and Republican administrations.

The need for reform has never been greater, and the Heritage Foundation's 2017 index of economic freedom, documents the urgency. For the ninth time in the past 10 years, the U.S. has lost ground compared to other countries.

In the business freedom component of the index, which measures the regulatory burden, the U.S., this year, registered its lowest score ever.

The benefits of reform are numerous and well-documented, particularly for lower income Americans who bear a disproportionate burden from regulation, but progress is hard to come by.

As you know, the Federal regulatory apparatus is immense, convoluted, and lethargic, and it involves decades of legislative, executive, and judicial edicts.

So that means no single reform will be enough to reign it all in. A variety of systemic and strategic reforms are needed and we should welcome any new approaches.

The most important component of any reform proposal is that it focus our attention and agencies' attention on reform.

My written testimony details the administration's reform efforts in its first 6 months, but I'll briefly address EO 13777 and EO 13771. And obviously, everyone here knows what those are.

Although agencies are currently required to document that the benefits of a new regulation exceed the cost through a cost-benefit analysis, there's no constraint on the accumulation of new regulatory costs.

Regulatory budgeting has the potential to inject some badly-needed discipline and rationality into the rulemaking process if its operational challenges can be addressed.

The 2-for-1 requirement puts some long-needed muscle behind the multiple, but nonbinding White House directives, for agencies to conduct retrospective review. But there's some practical challenge that may affect these EO's utility, and I detail responses in my written testimony.

But suffice it to say, that we're at the point in time when we need to do something more than has been done in the past. The administration has taken a very good step in starting. We'll have to see over the long term what it's able to accomplish, but there's also lots that Congress needs to do as well. Thank you.

[Prepared statement of Ms. Katz follows:]

Testimony of Diane Katz  
 Senior Research Fellow in Regulatory Policy  
 The Heritage Foundation  
 Before the  
 Subcommittee on Government Operations  
 Subcommittee on Healthcare, Benefits, and Administrative Rules  
 Committee on Oversight and Government Reform  
 October 24, 2017

Subcommittee Chairman Meadows, Subcommittee Chairman Jordan, and Members of the Subcommittees, thank you for the opportunity to address you today. My name is Diane Katz, and I am a Senior Research Fellow in Regulatory Policy at The Heritage Foundation. The views I express in this testimony are my own, and do not represent any official position of The Heritage Foundation.

At noon on January 20, 2017, federal regulatory policy dramatically shifted from the unparalleled expansion of the Obama Administration to a reform agenda under President Donald Trump. During the Obama years, the nation's regulatory burden increased by more than \$122 billion annually as a result of 284 new "major" rules (roughly defined as those costing the private sector at least \$100 million per year). The Trump Administration, in contrast, has launched a multifaceted reform agenda that has, to date, slowed rulemaking considerably and forced agencies to offset the regulatory costs imposed on the public. The extent to which the Administration ultimately succeeds in reining in decades of excess remains to be seen.

The need for reform has never been greater. Regulation acts as a stealth tax on the American people and the U.S. economy, and exacts an incalculable toll on individual liberty. The Heritage Foundation's 2017 Index of Economic Freedom—an annual global study that compares countries' entrepreneurial environments—highlights the urgent need for the U.S. to change course. For the ninth time in the past 10 years, America lost ground compared to other countries. And in the Business Freedom component of the index, which measures the regulatory burden, the U.S. registered its lowest score ever.<sup>1</sup>

The benefits of deregulation are numerous and well-documented. In a recent literature review on "The Growth Potential of Deregulation," the Council of Economic Advisors cited 2016 research that found excessive regulation cost the U.S. an average of 0.8 percent of GDP growth per year since 1980.<sup>2</sup> According to the Council, "Deregulation can unleash the greater potential of the U.S. economy, spurring the innovation and economic growth necessary to keep the United States prosperous, and to empower its citizens with greater opportunities."

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<sup>1</sup>Terry Miller and Anthony B. Kim, 2017 Index of Economic Freedom, The Heritage Foundation, [http://www.heritage.org/index/pdf/2017/book/index\\_2017.pdf](http://www.heritage.org/index/pdf/2017/book/index_2017.pdf)

<sup>2</sup>The Council of Economic Advisors, The Growth Potential of Deregulation, October 2, 2017, [https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/The%20Growth%20Potential%20of%20Deregulation\\_1.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/The%20Growth%20Potential%20of%20Deregulation_1.pdf)

### **Obama's Red Tape**

During its eight years in power, the Obama Administration imposed more than 23,000 regulations, including 693 major rules, of which 258 imposed a cumulative total of \$122 billion in new annual costs on the private sector.

That was nearly double the \$68 billion in private-sector costs imposed under the Administration of President George W. Bush.<sup>3</sup>

Some 40 percent of all major rules issued by the Obama Administration in its final year (21 out of 54 rules) were finalized after the election on November 8, 2016. These “midnight” regulations included some of the costliest rules of the final year.

This rush of rulemaking at the end of a term has been common among both Democratic and Republican Administrations, and regardless of the incoming president’s party affiliation. In 2008, for example, George W. Bush imposed 36 new major rules, far above his average of about 20 major rules annually. A large spike was also recorded in the final year of the George H. W. Bush Administration.

The practice is problematic because the administration officials who issue midnight regulations have virtually no accountability once the President’s term ends; they face no consequences for the regulatory costs imposed on society.

### **Trump's First Six Months**

On the day President Trump took office, his Administration inherited more than 1,900 regulations in the rulemaking pipeline—900 or so in the proposed stage, and 1,000 in the final stage.

Like his predecessors, President Trump moved quickly to direct his chief of staff to issue a memorandum to department heads directing them to freeze rulemaking until designated senior officials could review and approve the regulations.<sup>4</sup>

The memorandum also directed agency heads to withdraw regulations that had been sent to the Office of the Federal Register but had not yet been published, and to postpone for 60 days the regulations that had been published in the Federal Register but had not yet taken effect.

<sup>3</sup>Cost figures are based on assessments prepared by the rulemaking agency, typically from regulatory impact analyses. In calculating the Bush Administration rules, OMB estimates were used when available. If an agency did not prepare an analysis or did not quantify costs, an amount was not included, although the rule was counted in our tally of major regulations. The agencies’ totals were adjusted to constant 2015 dollars using the gross domestic product deflator at Areppim, “Converter of Current to Real US Dollars,” [http://stats.areppim.com/calc/calc\\_usdldrdeflator.php](http://stats.areppim.com/calc/calc_usdldrdeflator.php) (accessed between March and June in 2017). Where applicable, a 7 percent discount rate was used. When a range of values was given by an agency, costs were based on the most likely scenario if so indicated by the agency; otherwise, the mid-point value was used. The date of a rule was based on its date of publication in the *Federal Register*.

<sup>4</sup>Reince Priebus, Memorandum for the Heads of Executive Departments and Agencies, January 20, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies>

The memorandum seems to have had its desired effect—there has been a dramatic decrease in the number of new rules adopted. From Inauguration Day through June 30, the Trump Administration finalized 659 new rules, of which eight were classified as major. Two of these increased regulatory burdens on the private sector, and two decreased those burdens. This is a startling change from Obama’s first six months, during which 1,103 rules were finalized, of which 23 imposed major costs on the private sector. The George W. Bush Administration adopted 1,464 rules in its first six months, of which 25 imposed major costs on the private sector.

Both of the Trump rules that increased regulatory burdens were initiated by the Obama Administration and promulgated by agencies independent of direct White House control. The Securities and Exchange Commission adopted a rule shortening the settlement cycle for broker-dealer transactions (for which costs were not quantified), while the Federal Reserve Board imposed loss-absorption mandates on large banks (with private-sector costs estimated at \$1.3 billion).

Of the two rules implemented by the Trump Administration that reduce regulation, one from the Food and Drug Administration postponed the effective date for new nutrition label requirements, and the second, from the Department of Labor, postponed the effective date of its rule expanding the scope of fiduciary duties for investment advisors. By extending the effective dates of these 2016 rules, the regulatory costs have been reduced, although the savings are one-time gains. In neither case have the underlying mandates been eased (although efforts to accomplish this are continuing).

In the same six-month period, the Trump Administration’s Office of Information and Regulatory Affairs (OIRA) conducted significantly fewer reviews of new rules—and withdrew a higher proportion of rulemakings—than either the Obama Administration or the Bush Administration—the lowest number, in fact, since recordkeeping began in the 1990s.

In the latest survey of CNBC’s Global CFO Council, 74 percent of the executives cited deregulation as the Trump administration’s achievement that has had the most positive impact on their company.<sup>5</sup>

### **Executive Orders**

The Trump White House issued 39 executive orders (EOs) in his first six months. Two, in particular, are intended to have a direct and substantial impact on the regulatory process.

EO 13771 directs executive departments and agencies to identify for repeal at least two existing regulations for every new regulation they promulgate.<sup>6</sup> The order also calls for a budgeting process to manage regulatory costs, and prohibited any increase in the total incremental cost of all regulations finalized in 2017 (unless required by law or advised by the Director of the Office

<sup>5</sup>The CNBC Global CFO Council represents public and private companies that collectively manage more than \$4 trillion in market capitalization across a variety of sectors. See CNBC Global CFO Council Survey, September 2017, <https://www.cnbc.com/2017/09/18/cfos-say-trump-deserves-credit-for-stock-market-highs.html>

<sup>6</sup>Executive Office of the President, “Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs,” *Federal Register*, Vol. 82 (January 30, 2017), p. 9339, <https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs> (accessed September 22, 2017).

of Management and Budget (OMB). Going forward, the EO directs the OMB director to set the amount of incremental costs an agency will be allowed to impose, if any.

The OMB's guidance for implementing EO 13771 limits its application to regulatory actions (rules and guidance documents) that are "economically significant."<sup>7</sup> However, offsets to regulatory costs may be derived from any deregulatory actions that will result in a net savings.

According to OIRA Administrator Neomi Rao, agencies have "more than met" the two-for-one requirement for FY 2017. OMB officials have said that agencies have issued four final rules that were offset by at least 10 deregulatory actions.

#### **Executive Order 13777 Enforcing the Regulatory Reform Agenda**

This executive order directs the head of each regulatory agency to 1) designate an agency official as the Regulatory Reform Officer responsible for overseeing implementation of regulatory reform initiatives and policies; and 2) form a Regulatory Reform Task Force to recommend regulatory reforms. The task forces were to report on their progress by the end of May. The schedule for future progress reports is to be set by agency administrators.

#### **The Upsides of the EOs**

The regulatory budgeting established in EO 13771 is intended to inject economic discipline and rationality into rulemaking. If agencies are compelled to restrict the costs imposed on the public, they must engage in a type of rolling retrospective review of the vast accumulation of rules that comprise more than 185,000 pages in the Code of Federal Regulation—up from some 138,000 in 2000.<sup>8</sup>

From the Carter Administration forward, agencies have been directed by the White House to conduct some form of regulatory look-back.<sup>9</sup> But absent a fixed numeric or budgetary target (as called for in this order), there has been little accountability and thus these past initiatives have largely failed to appreciably reduce regulatory costs.

The budgeting regime in EO 13771 (and its guidance) are also intended to motivate agencies to streamline existing regulations (to offset the cost of new rules). In so doing, agencies can reduce the compliance burden without sacrificing the regulatory purpose.

If properly set, the budget caps should also compel agencies to prioritize their rulemaking. Otherwise, they risk running short of the budgetary headroom necessary to issue a new rule. And

<sup>7</sup>The term "economically significant" refers to rules that will lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, as sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities; create a serious inconsistency or interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; or raise novel legal or policy issues.

<sup>8</sup>George Washington University Regulatory Studies Center, Reg Stats, Pages in the Federal Register (1936-2016), <https://regulatorystudies.columbian.gwu.edu/reg-stats/>

<sup>9</sup>Joseph E. Aldy, Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy, November 17, 2014, <https://www.acus.gov/sites/default/files/documents/Aldy%20Retro%20Review%20Draft%2011-17-2014.pdf>



because the OMB will determine the annual caps, agencies (presumably) will have to compete for the now limited resource of regulatory costs. Not all rulemakings are equally necessary or warranted, and the OMB—not just the individual agency—will distinguish between them. Although agencies are currently required to document that the benefits of a new regulation exceed the costs (through a benefit-cost analysis), there is no constraint on the amount of accumulated costs of regulation. Indeed, the government does not even track the cost of regulation on consumers and businesses, which reflects Washington's indifference.

The regulatory budget exercise, if properly conducted, will reflect the accuracy (or inaccuracy) of agencies' benefit-cost analyses. One can hope that over time, the retrospective reviews will help to improve regulatory estimates at the front end.

The two-for-one requirement puts some muscle behind retrospective review that was previously missing. If the procedural challenges can be overcome, this approach may prove useful in rationalizing regulatory activity, and incentivizing deregulation as well as regulation.

The advantage of EO 13777 is in fostering regulatory reform from within the agency. Also significant is the directive for agency heads to consider progress on reform in evaluating the performance of personnel.

Creation of the regulatory task force is intended to broaden the search for regulations that 1) eliminate jobs, or inhibit job creation; 2) are outdated, unnecessary, or ineffective; 3) impose costs that exceed benefits; 4) are insufficiently transparent to meet the standard for reproducibility; or 5) implement executive orders and other presidential directives. The EO directs agency heads to prioritize (to the extent permitted by law) regulations identified by the task force as "outdated, unnecessary, or ineffective."

Critics claim to the contrary, neither executive order allows agencies to circumvent their statutory obligations. If a statute prohibits consideration of cost in devising a regulatory action, EO 13771 does not override that stricture. However, the OMB guidance states that agencies will generally be required to offset costs even if costs are not considered in the promulgation of the rule.

#### **EO Issues to Resolve**

Well-intended as it is, EO 13771 presents some practical challenges that may affect its utility. To some extent, these relate to the erosion of regulatory accountability on the part of Congress and to the inordinate deference granted agencies by the courts. These problems require congressional action.

Agency calculations of regulatory costs are notoriously inaccurate and imprecise, which may skew the impact of reform efforts unless addressed. In particular, a range of political and fiscal incentives drive agencies to overstate benefits and understate costs.

The absence of accurate analyses represents both a major dysfunction in the rulemaking process and a potential pitfall for regulatory budgeting. How can an agency (or the public) judge the efficiency of a regulation if the costs of a rule are estimated to range, say, from \$290 million to

\$2.05 billion—as was the case with a rule setting margin requirements for uncleared swaps promulgated by the Commodity Futures Trading Commission?<sup>10</sup>

The vast majority of new rules issued each year do not undergo benefit-cost analysis, including many designated as “major” (defined as imposing costs on the private sector in excess of \$100 million). According to a scorecard on the quality of agency regulatory analyses developed by the Mercatus Center, none of the 130 analyses examined received more than a 2.8 out of a possible 5, meaning each was incomplete in some meaningful way.<sup>11</sup> On what basis will these rules be quantified—either in their contribution to costs or for purposes of offsets?

Contrived analyses also present challenges for balancing regulatory costs. For example, the Obama Administration’s Clean Power Plan was estimated to cost \$6.6 billion annually—a figure widely contested as low by industry. But the benefits calculation used to justify the rule is even more dubious than the cost calculation: The only way the agency could show that the benefits of the rule exceed the costs was to count presumed benefits worldwide rather than just in the United States—an obviously invalid approach. Ascribing benefits to the entire globe is an attempt to shrink the relative costs to a more acceptable figure. But such trickery will wreak havoc in regulatory budgeting.

Also problematic is the exemption of independent agencies from EO 13771 and EO 13777, although they generate a great many onerous regulations—particularly following the 2010 passage of the Dodd-Frank Act. This is a major loophole in the both the rulemaking process and the Administration’s regulatory reform directive. These agencies should be fully subject to the same requirements as executive branch agencies.

Another dilemma is the shifting of regulatory burdens among various sectors of the economy. For example, a new rule may impose hefty costs on, say, power plants, but the offsets in regulatory costs may not necessarily accrue to that sector. EO 13771 advises agencies to “prioritize” deregulatory actions that affect the same sector or geographic area, but there is no assurance that will happen.<sup>12</sup>

Regulatory budgeting emphasizes the cost of regulation, but both executive orders will succeed or fail to the extent the agencies set appropriate priorities and eliminate unwarranted rules. This is easier said than done because regulation is far more than policy. It is also a political spoils system by which various special interests impose their will on the public. Thus, powerful forces favor the status quo, and resist reform.

As it is, deregulation entails a complex and protracted administrative process, often involving the courts. Repealing a regulation requires following the rulemaking procedures under the

<sup>10</sup>Commodity Futures Trading Commission, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants; Final Rule, Federal Register, January 6, 2016, <https://www.gpo.gov/fdsys/pkg/FR-2016-01-06/pdf/2015-32320.pdf>

<sup>11</sup>Jerry Ellig, James Broughel, and Spencer Bell, Regulating Real Problems: The First Principle of Regulatory Impact Analysis, Mercatus Center, March 2016, <http://mercatus.org/sites/default/files/Ellig-Regulating-Real-Problems-MOP-v1.pdf>

<sup>12</sup>EO 13771 regulatory actions for which offsetting costs must be identified are “significant” rules, of entitlements, grants, user fees or loan programs; or raise novel legal or policy issues. Significance determination made by OIRA.

Administrative Procedures Act, including providing justification for the action and subjecting it to public notice and comment. A regulatory repeal can take years to accomplish.

“For agencies, deregulation is hard—something I’ve learned in the past three months,” said Neomi Rao, administrator of the Office of Information and Regulatory Affairs, in remarks on October 4 at the Heritage Foundation.

### **Unified Agenda**

The new Administration in July released its first Unified Agenda of Regulatory and Deregulatory Actions.<sup>13</sup> This document—typically published twice a year—outlines the rulemaking plans for each agency. Under President Obama, the Unified Agenda consistently included between 120 and 130 major rules,<sup>14</sup> reaching a high of 144 pending rules in the spring of 2016. In President Trump’s agenda, the number was cut by about two-thirds, to 48, with agencies having withdrawn 469 rulemakings. The Administration also reconsidered 391 active rulemakings by reclassifying them as long-term (282) or inactive (109).

### **Scaling Back**

As part of a broader effort to scale back the Obama Administration’s vast web of global warming programs, President Trump on June 1 announced the U.S. withdrawal from the Paris climate agreement, which President Obama had signed as an executive agreement on April 22, 2016. The United States, under its Intended Nationally Determined Contributions, was committed to reduce greenhouse gas emissions in 2025 by 26 percent to 28 percent compared to 2005 levels.

The Trump Administration also revoked an Obama directive allowing transgender students in public schools and other government facilities to use the bathrooms and locker rooms as befit their gender identity. A two-page “Dear Colleague” letter announcing the revocation on February 22, 2017, stated that the Obama directive lacked legal justification.

On Oct 6, 2017 the Administration released two companion rules that provide exemptions for employers from the contraceptive mandate. The mandate issued by the Obama Administration required employers to offer health insurance coverage for all FDA-approved contraception, including medications and devices that may act as abortifacients as well sterilization procedures. Under the two companion rules published on October 13, 2017, entities that have sincerely held religious beliefs or moral convictions against providing such services would no longer be required to do so.

The Administration has also initiated a variety of other rule delays and reconsiderations, including:

### Clean Power Plan

EPA Administrator Scott Pruitt on October 10, 2017 issued a Notice of Proposed Rulemaking to repeal the Obama Administration’s Clean Power Plan. The rule dictates state-specific restrictions on GHG emissions, with a target reduction of 30 percent below 2005 levels by 2030. Under the

<sup>13</sup>Reginfo.gov, “Unified Agenda of Regulatory and Deregulatory Actions,” <https://www.reginfo.gov/public/do/eAgendaMain> (accessed September 22, 2017).

<sup>14</sup>Including only major rules at the proposal, or final, stages.

Presidential Executive Order on Promoting Energy Independence and Economic Growth, issued March 28, 2017, the EPA was directed to consider rescinding the rule. Following its review, the EPA has proposed to determine that the regulation exceeds the agency's statutory authority.

#### Waters of the United States

Also facing repeal is the EPA's 2015 rule on the "waters of the United States" (issued jointly with the U.S. Army Corps of Engineers). The rule created a new definition for the waters that the federal government can regulate under the Clean Water Act. The new definition tramples property rights and overrides the important role that states play in water stewardship. Property owners are losing their ability to derive value from their land, restricting investment and diminishing property values, and curtailing property tax revenues. Farmers, too, are deeply concerned that their land-use practices will be restricted, thereby reducing their productivity—and income.

#### Sue and Settle

EPA Administrator Scott Pruitt on October 16, 2017 issued a directive to end agency cooperation with the practice of "sue and settle." Regulators have often worked in concert with advocacy groups to produce settlements to lawsuits that result in more stringent regulation. Such collaboration has become a common way for agencies to impose rules that otherwise would not have made it through the regulatory review process. The sue and settle practice at its core is regulation through litigation.

#### Dodd-Frank

The U.S. Department of the Treasury has released two of the four reports detailing reforms to the regulation of the financial sector. The action follows the Presidential Executive Order on Core Principles for Regulating the United States Financial System, issued February 3, 2017. The report concludes that the hundreds of regulations imposed in the wake of the 2008 financial crisis impeded economic recovery, and states: "In the wake of the financial crisis, the U.S. economy has experienced the slowest economic recovery of the post-war period." One key area of reform will be promoting capital formation for entrepreneurs and businesses.

#### Energy

The Bureau of Land Management (BLM) proposed on October 5, 2017 to suspend or delay requirements of the "flaring and venting rule" until January 17, 2019. According to the agency, the BLM is reviewing the 2016 rule and "wants to avoid imposing temporary or permanent compliance costs on operators for requirements that may be rescinded or significantly revised in the near future."<sup>15</sup>

#### Network Neutrality

The 2015 network neutrality rule, formally titled the Open Internet Order, reclassified "Internet access" as a common carrier service under the Communications Act of 1934. This seemingly technical change subjects Internet service providers to comprehensive regulation by the Federal Communications Commission. It also requires service providers to treat all bits of content

<sup>15</sup>Department of Interior, Bureau of Land Management, Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, Federal Register, October 5, 2017, <https://www.gpo.gov/fdsys/pkg/FR-2017-10-05/pdf/2017-21294.pdf>

travelling over their networks in equal fashion. FCC Chairman Ajit Pai is moving to revoke the order.

#### Overtime Rule

On June 30, 2017, the U.S. Department of Labor told the U.S. Court of Appeals for the Fifth Circuit that it intends to abandon the Obama overtime rule, but pursue a new, more reasonable regulation. As issued, the rule eliminates the “white collar” exemptions from minimum-wage and overtime-pay requirements under the Fair Labor Standards Act.

#### Nutrition Labels

On May 4, 2017, the Food and Drug Administration (FDA) announced that it is pushing back the compliance deadline for its rule on Nutrition Labeling of Standard Menu Items<sup>16</sup> from May 5, 2017, to May 7, 2018 (following two previous delays). Similarly, on June 13, 2017, the FDA announced its intention to extend the compliance date for the Nutrition Facts Label rule.<sup>17</sup> According to the FDA, “The framework for the extension will be guided by the desire to give industry more time and decrease costs, balanced with the importance of minimizing the transition period during which consumers will see both the old and the new versions of the label in the marketplace.”<sup>18</sup>

#### **Congressional Review Act**

A total of 14 rules have been “disapproved” under provisions of the Congressional Review Act (CRA)—a 1996 statute that provides for fast-track review of regulations. If passed by Congress and signed by the President, a resolution of disapproval rescinds a regulation and prohibits a future rule that is “substantially the same.” A 15th resolution—to block a CFPB rule restricting arbitration agreements—is pending. Since it was enacted in 1996, the CRA had been successfully used only once, in March 2001. But this year, it became one of the primary tools available to block last-minute Obama rules from taking effect.

#### **Conclusion**

The burden of federal regulation has grown without constraint for decades—with \$122 billion in new annual costs added in the Obama years alone. President Trump has pledged to “massively” reduce regulation, and he has so far significantly slowed regulatory output. The administration is also reconsidering several of the Obama Administration’s most egregious regulations. Two of his directives, in particular, hold promise for incremental change if procedural challenges can be overcome. But there are a number of necessary systemic reforms that require action by Congress.

<sup>16</sup>Food and Drug Administration, “Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments,” *Federal Register* Vol. 82, No. 85 (May 4, 2017), p. 20825, <https://www.gpo.gov/fdsys/pkg/FR-2017-05-04/pdf/2017-09029.pdf> (accessed September 25, 2017).

<sup>17</sup>Food and Drug Administration, “Changes to the Nutrition Facts Label,” <https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm#dates> (accessed September 22, 2017).

<sup>18</sup>Food and Drug Administration, “Changes to the Nutrition Facts Label: Compliance Date,” <https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm#dates> (accessed September 22, 2017).

### Recommendations for Reform

1. Require congressional approval of new major regulations issued by agencies. Congress, not regulators, should make the laws and be accountable to the American people for the results. No major regulation should be allowed to take effect unless and until Congress explicitly approves it. In addition, legislators should include requirements for congressional approval of rules in every bill that expands or re-authorizes regulation. Such an approach would demonstrate how REINS Act requirements work in practice, paving the way for their broader application.
2. Create a congressional regulatory analysis capability. In order to exercise regulatory oversight, especially if the REINS Act is adopted, Congress needs to be able to analyze various regulatory policies objectively. Congress currently depends on the White House's OIRA, or the regulatory agencies themselves, for analyses, and needs an independent source of expertise. This could be accomplished through an existing congressional institution, such as the Congressional Budget Office or the Government Accountability Office, or through a new unit established by Congress. This new capability need not require a net increase in staff or budget, but could easily be paid for through reductions in existing regulatory agency expenses.
3. Automatically sunset obsolete regulations. While the REINS Act would strengthen review of new regulations, measures for reviewing existing red tape are also necessary. Congress should set sunset dates for all major regulations. Rules should expire automatically if not explicitly reaffirmed by the relevant agency through the formal rulemaking process. As with any such regulatory decision, this reaffirmation would be subject to review by the courts. Such sunset clauses already exist for some regulations. Congress should make them the rule, not the exception.
4. Codify regulatory impact analysis requirements. All executive branch agencies are currently required to conduct regulatory impact analysis (including cost-benefit calculations) when proposing any major new rules. Codifying these requirements would ensure that they cannot be rolled back without congressional action and provide the basis for judicial review of agency compliance.
5. Subject independent agencies to executive branch regulatory review. Rulemaking is increasingly being conducted by independent agencies outside the direct control of the White House. Regulations issued by agencies such as the FCC, the SEC, and the CFPB are not subject to review by OIRA or even required to undergo a cost-benefit analysis. This is a gaping loophole in the rulemaking process. These agencies should be fully subject to the same regulatory review requirements as executive branch agencies.
6. Increase professional staff levels within OIRA. OIRA is one of the only government entities in Washington that is charged with limiting, rather than producing, red tape. More resources should be focused on OIRA's regulatory review function. This should be done at no additional cost to taxpayers: The necessary funding should come from cuts in the budgets of regulatory agencies.

## Appendix A

### Other EOs and Memoranda Related to Regulation

**Presidential Memorandum on Fiduciary Duty Rule.** This directs the Secretary of Labor to examine the Fiduciary Duty Rule<sup>19</sup> to determine, through legal and economic analysis, whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice. If an affirmative determination is made, the EO directs the Secretary of Labor to publish for notice and comment a proposed rule rescinding or revising the Fiduciary Duty Rule.

**Presidential Executive Order on Promoting Energy Independence and Economic Growth.** The order directs agencies responsible for regulating domestic energy production to propose revisions or rescissions of regulatory barriers that impede U.S. energy independence. It also rescinds several Obama EOs and policies related to climate change, and directs reconsideration of the \$7.2 billion Clean Power Plan. And, it directs the Administrator of the EPA and the Secretary of the Interior to review, and, if necessary, revise or rescind several regulations that place unnecessary, costly burdens on coal-fired electric utilities, coal miners, and oil and gas producers.

**Presidential Memorandum Regarding Construction of the Dakota Access Pipeline.** This directs relevant officials to expedite requests for approvals to construct and operate the Dakota Access Pipeline.

**Presidential Memorandum Regarding Construction of the Keystone XL Pipeline.** This invites TransCanada to re-submit its application to the Department of State for a presidential permit for the construction and operation of the Keystone XL Pipeline, and directs the Secretary of State to expedite review.

**Executive Order Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal.** This directs the Secretary of Health and Human Services and the heads of all other relevant departments and agencies to “waive, defer, grant exemptions from, or delay” Obamacare rules “that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.”

**Presidential Executive Order on Core Principles for Regulating the United States Financial System.** This directs the Secretary of the Treasury to identify all Treasury regulations that are an undue financial burden on taxpayers, add undue complexity, or exceed statutory authority. It also establishes Core Principles of financial regulation, including (1) empowering Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth; (2) preventing taxpayer-funded bailouts; (3) fostering economic growth and vibrant financial markets through more rigorous regulatory impact analysis that

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<sup>19</sup>Norbert Michel, “Feds Just Can’t Allow People to Save and Invest,” Heritage Foundation *Commentary*, November 4, 2015, <http://www.heritage.org/government-regulation/commentary/feds-just-cant-allow-people-save-and-invest>.

addresses systemic risk and market failures, such as moral hazard and information asymmetry; (4) enabling American companies to be competitive with foreign firms in domestic and foreign markets; (5) advancing American interests in international financial regulatory negotiations and meetings; (6) making regulation efficient, effective, and appropriately tailored; and (7) restoring public accountability within federal financial regulatory agencies and rationalizing the federal financial regulatory framework.

**Presidential Executive Order on a Comprehensive Plan for Reorganizing the Executive Branch.** This order is intended to improve the efficiency, effectiveness, and accountability of the executive branch by directing the OMB Director to propose a plan to reorganize governmental functions and eliminate unnecessary agencies.

**Presidential Executive Order on Identifying and Reducing Tax Regulatory Burdens.** This directs the Secretary of the Treasury to review all “significant” tax regulations issued by the department on or after January 1, 2016, and, in consultation with the Administrator of OIRA within the OMB, identify regulations that impose an undue financial burden on taxpayers; add undue complexity to the tax laws; or exceed the statutory authority of the Internal Revenue Service. The Secretary is also directed to delay the effective date of such regulations, if possible, and to modify or rescind such regulations through notice and comment rulemaking.



Mr. MEADOWS. Thank you, Ms. Katz.  
Mr. Goodwin, you're recognized for 5 minutes.

#### STATEMENT OF JAMES GOODWIN

Mr. GOODWIN. Chairman Meadows, Chairman Jordan, Ranking Member Connolly, and Ranking Member Krishnamoorthi, and members of the subcommittee. I appreciate the opportunity to testify today on the Trump administration's ill-conceived regulatory reform task forces, the lack of adequate transparency and meaningful public participation, and, indeed, whether their efforts to undermine the regulatory safeguards we all depend on should be taking place at all.

My prepared testimony for the record makes three points: One, regulations are essential for safeguarding the public. Two, the Trump administration's task forces and the regulatory review processes that they were created to carry out are fundamentally flawed, as both a theoretical and practical matter. The work threatens to do much more harm than good and this experiment in regulatory reform should be abandoned. Three, given the Trump administration is unlikely to abandon the pillars of his assault on public safeguards, Congress must be vigilant, and must conduct vigilant and thorough oversight of the task forces in the work they undertake.

I conclude by offering some recommendations on what this oversight might entail.

My oral presentation will focus on these latter two points. Point 1, the Trump Administration's regulatory reform task forces and the work suffer from at least 4 fundamental flaws: One, the public harms they will create; two, their lack of a rational policy basis; three, their continuing disregard of fundamental norms of administrative law; and four, their intractable implementation problems.

Today, I will focus my remarks on the task force's disregard of fundamental norms of administrative law.

As William Funk, a leading scholar on the subject, has noted, transparency and public accountability are two of the essential hallmarks of U.S. administrative law. Fidelity to these principles is essential to ensuring that agencies are dutifully fulfilling the missions that Congress has set out for them in their authorization statutes. Transparency assists Congress in performing its oversight activities more effectively, while public participation serves as a mechanism for connecting the abstract goals that Congress has articulated in statutes to the practical realities of the world in which implementing regulations will give life to those goals.

Therefore, Congress, in particular, has an especially strong interest in ensuring that regulatory actors comport with the principles of transparency and public participation. And Congress, in particular, should be outraged when regulatory actors defy those principles.

To this point, the operation of the Trump administration's regulatory reform task forces has been marked by a distinct lack of transparency and balanced public administration, rendering them susceptible to abuse by narrow interests.

With regard to transparency, Executive Order 13777 imposes no real mandates on agency task forces to operate in an open manner

that will allow for meaningful public accountability or congressional oversight. The order does not mandate that agencies disclose the identity of their task force members, the task forces are not subject to any open meeting requirements, the task forces never need to explain the basis for the recommendations. Indeed, these recommendations never need to be disclosed at all.

With regard to public participation, individual agency task forces have taken wildly divergent approaches to seeking public input, suggesting that this process is, at best, a low priority, and, at worst, window dressing.

When agencies did solicit public input, it was debatable whether these opportunities truly offered members of the public a credible avenue for impacting the task force's recommendations. The deadlines for submitting comments are often too short, and these deadlines often fell right before, or even after agency task forces were required to submit their initial reports of recommendations.

Point 2, going forward, Congress will have an important role to play in supervising the regulatory reform task forces. I outlined some steps that they should take as part of this.

The first step this and other committees should take is to make full use of their oversight and information-gathering authorities. The second step Congress should take is to monitor the deregulatory actions the Trump administration is carrying out to ensure that they are complying with applicable procedural safeguards.

My prepared testimony outlines several criteria that Congress may wish to use to inform these monitoring efforts.

As a third step, this and other relevant committees should commit to taking appropriate and effective responses whenever they identify potential instances of agencies failing to abide by their administrative law responsibilities.

As a fourth and final step, this committee may wish to investigate on an ongoing basis, other matters of critical importance that are relevant to the work of the Trump administration's task forces, such as the degree to which the work comports with basic administrative law principles, such as transparency and balanced public participation.

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

[Prepared statement of Mr. Goodwin follows:]



## TESTIMONY

James Goodwin  
Senior Policy Analyst, Center for Progressive Reform (<http://www.progressivereform.org/>)

before the

**Committee on Oversight and Government Reform  
Subcommittee on Government Operations and Subcommittee on Health Care, Benefits,  
and Administrative Rules  
U.S. House of Representatives**

**Joint Hearing on  
Regulatory Reform Task Forces Check-In**

October 24, 2017

Chairman Meadows, chairman Jordan, ranking member Connolly, ranking member Krishnamoorthi, and members of the subcommittees, I appreciate the opportunity to testify today on the Trump administration's ill-conceived Regulatory Reform Task Forces, their lack of adequate transparency and meaningful public participation, and indeed whether their efforts to undermine the regulatory safeguards we all depend on should be taking place at all.

I am a Senior Policy Analyst at the Center for Progressive Reform (CPR). CPR is a network of more than 50 acclaimed legal scholars from across the United States who work with a professional staff of policy analysts and communications experts to advocate for robust public protections. I have had the privilege of working as a member of this staff since 2008, during which time my portfolio has included regulatory policy and process, scientific integrity in government decision-making, and citizen access to the courts.

In my testimony today, I will make three points related to the hearing topic:

1. Regulations are essential for safeguarding the public.
2. The Trump administration's Regulatory Reform Task Forces and the regulatory review process they were created to carry out are fundamentally flawed, as both a theoretical and practical matter. Their work threatens to do much more harm than good, and this "experiment" in regulatory reform should be abandoned.
3. Given that the Trump administration is unlikely to abandon the pillars of his assault on public safeguards, Congress must conduct vigilant and through oversight of the Task

Forces and the work they undertake. I conclude by offering some recommendations on what this oversight should entail.

### ***Regulations are Essential for Protecting the Public***

Over the past four decades, U.S. regulatory agencies have achieved remarkable success in establishing safeguards that protect people and the environment against unreasonable risks. During the 1960s and 1970s, rivers caught fire, cars exploded on rear impact, workers breathing benzene contracted liver cancer, and chemical haze settled over the industrial zones of the nation's cities and towns. But today, the most visible manifestations of these threats are under control, millions of people have been protected from death and debilitating injury, and environmental degradation has been slowed and even reversed in some cases. In short, the United States is much better off because of the regulations adopted over the past 40 years. But serious hazards remain, and indeed new ones continue to emerge as new technologies develop and the U.S. economy evolves. Americans would be even better protected if the gaps that leave them and their environment vulnerable to unnecessary risks were closed.

To gauge the positive impact of regulation on Americans' lives, consider:

- In its most recent report to Congress, the Office of Management and Budget (OMB) estimates that the total benefits of significant regulations for the past ten years exceeded their costs by a ratio as high as 14 to 1.<sup>1</sup>
- The Environmental Protection Agency (EPA) estimates that the regulatory benefits of the Clean Air Act exceeds its costs by a 25-to-1 ratio.<sup>2</sup> The agency 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.<sup>3</sup>
- An Endangered Species Act recovery program implemented by the U.S. Fish and Wildlife Service helped increase the bald eagle population from just 400 nesting pairs in 1963 to 10,000 nesting pairs in 2007, enabling the Service agency to remove the bird from the Endangered Species List.<sup>4</sup>

<sup>1</sup> OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 1-2, *available at* [https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/2015\\_cb/2015-cost-benefit-report.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf).

<sup>2</sup> 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>.

<sup>3</sup> RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT 12 (2010).

<sup>4</sup> Press Release, Fish & Wildlife Serv., U.S. Dept. of the Interior, Bald Eagle Soars Off Endangered Species List Secretary Kempthorne: The Eagle has Returned (June 28, 2007), *available at* [https://www.doi.gov/sites/doi.gov/files/archive/news/archive/07\\_News\\_Releases/070628.html](https://www.doi.gov/sites/doi.gov/files/archive/news/archive/07_News_Releases/070628.html). The successful conservation of the Bald Eagle is due in part to regulations issued by the Fish and Wildlife Service under the Endangered Species Act and the Bald and Golden Eagle Protection Act, as well as to regulations issued by the EPA to ban DDT, a harmful pesticide that impaired eagle's ability to reproduce.

- 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 are spectacular on a world-wide scale. The BP Oil Spill caused tens of billions of dollars in damages.<sup>5</sup> 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.<sup>6</sup>
- Dozens of retrospective evaluations of regulations by the EPA and 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.<sup>7</sup>

### ***The Flaws of the Trump Administration's Regulatory Reform Task Forces***

#### Background

Among Trump's first acts in office was to issue Executive Order 13771 on "Reducing Regulation and Controlling Regulatory Costs." The so-called "2-out, 1-in" Order, this directive imposes two kinds of regulatory "caps": one on the total number of federal regulations and one on the total amount of regulatory costs. If implemented strictly, Executive Order 13771 would introduce some of the biggest roadblocks to new public safeguards in the last several decades.

First, Executive Order 13771 creates a regulatory "pay-go" system under which an agency must commit to repealing at least two existing regulations for each new "significant" regulation it wishes to issue. Second, it establishes a regulatory "budget" system that caps the total amount of additional regulatory costs an agency can impose in any given fiscal year by issuing new regulations. For fiscal year 2017, the Order set a regulatory budget of \$0 in new incremental regulatory costs. In other words, through September 2017, the costs imposed by any

<sup>5</sup> 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](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/>.

<sup>6</sup> 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](http://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](http://www.urban.org/uploadedpdf/411914_retirement_incomes.pdf).

<sup>7</sup> 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](http://www.progressivereform.org/articles/RegBenefits_1109.pdf).

new significant rules that an agency issued were to be fully offset by the cost savings that were achieved through the elimination of the existing regulations under the order's regulatory pay-go system.

It is unclear, however, what the regulatory "budget" is for fiscal year 2018. In September, the Administrator of the White House Office of Information and Regulatory Affairs (OIRA) Neomi Rao issued a memo to agencies announcing an "expectation" that "each agency will propose a net reduction in total incremental regulatory costs." My reading is that this requires agencies to meet a regulatory budget that is less than \$0 or negative. Others I have talked to are not so sure. One thing we all agree on is that those words in that order are very difficult to decipher.

In addition to Executive Order 13771, Trump has issued a second executive order on the subject of "Enforcing the Regulatory Reform Agenda." The stated purpose of Executive Order 13777 is to ensure that agencies fully implement several previous executive orders related to regulatory policy, including most notably Executive Order 13771. Among other things, this second Order directs each agency to appoint a Regulatory Reform Officer who will coordinate efforts to roll back the protections that American communities and families rely upon. Executive Order 13777 further directs the Regulatory Reform Officer to assemble a Regulatory Reform Task Force and review that agency's existing regulations to find those that should be weakened or eliminated in part to satisfy the two regulatory caps imposed by Executive Order 13771.

Below, I highlight four ways in which the Trump administration's Regulatory Reform Task Forces and their work are fundamentally flawed, including (1) the public harms they will create; (2) their lack of a rational policy basis; (3) their continuing disregard of fundamental norms of administrative law; and (4) their intractable implementation problems.

In light of these flaws, I am left with no other choice than to recommend the Regulatory Reform Task Forces be abandoned and that Executive Orders 13771 and 13777, which direct the activities of those Task Forces, be repealed.

Moreover, these flaws should especially serve to discourage any legislative efforts to codify all or parts of Executive Orders 13771 and 13777. In fact, if these Executive Orders have any saving grace, it is that they do not carry the force of law.

In addition to these general flaws with Executive Orders 13771 and 13777, I have two concerns in particular with efforts to codify their provisions. First, as explained below, one of the consequences of these Orders is that they elevate considerations of regulatory costs to the exclusion of consideration of regulatory benefits in regulatory decision-making. This is a dramatic departure from decades of administrative law, and directly contradicts the clear language and intent of decades' worth of public interest lawmaking. Codification of these Executive Orders would therefore result in a substantive "supermandate" that literally rewrites dozens or possibly more than a hundred laws, subverting or erasing their guarantees of public protections.

Second, also as explained below, implementation of Executive Orders 13771 and 13777 has been and will continue to be plagued with a host of practical problems. In fact, it appears that compliance with the Orders' requirements is proving to be impossible for this administration. Because these Orders' provisions are not judicially enforceable, the failure to strictly comply with their requirements has not been fatal to the task of promulgating new rules. Codification risks changing that, however. At best, making these Orders' impracticable requirements judicially enforceable would lead to resource-intensive and wasteful litigation. At worst, such legislation would hand interested stakeholders – particularly well-resourced ones – a powerful lever for blocking any pending rulemaking they oppose. The prospect of these requirements being used to thwart agency efforts at fulfilling their statutory missions – not just in this administration but in future administrations as well – should be of grave concern to Members of Congress.

#### An Assault on Public Safeguards That Will Cause Real Harms to Real Americans

The most obvious and most directly objectionable problem with the Regulatory Reform Task Forces is that their work is serving to defeat the implementation of public safeguards, leaving people and the environment inadequately protected against unacceptable risks of harm. In the absence of such protections, too many Americans will continue to breathe unhealthy air, drink contaminated water, eat adulterated food, labor under dangerous work conditions, get cheated out of their hard-earned money to fraudulent schemes, become injured or worse by dangerous products, or be deprived of the natural landscapes that they value for themselves and wish to preserve for future generations. By definition, all of these harms are avoidable.

Yet, such harms are the inevitable consequence of the Orders' myopic focus on regulatory costs, which effectively excludes consideration of regulatory benefits from the equation in agency regulatory decision-making. This aspect of the Orders runs directly counter to the entire history of U.S. regulation, stretching all the way back to the Founding era. Indeed, among the first laws to be enacted by Congress in 1789 were several that were essentially regulatory in nature. Critically, the regulatory functions established in those early laws were defined in terms of advancing some conception of the public good – that is, in the achievement of regulatory benefits. In the centuries since, the pursuit of certain defined regulatory benefits has been inextricably intertwined with the notion of rational policymaking via regulation.<sup>8</sup>

Executive Order 13771 in particular will serve as a formidable barrier to agencies in carrying out their statutory missions of promoting the public welfare. Complying with the Order's two regulatory caps will be enormously time-consuming and resource intensive. Their practical effect is to transform every rulemaking into three (one for the new rule, and two more for the existing rules that are to be weakened or eliminated). Administrative law scholars have thoroughly documented the problem of regulatory ossification, which already makes it nearly impossible for agencies to issue complex rulemakings in a timely fashion.<sup>9</sup> Executive Order 13771 will triple that morass. With each rulemaking consuming more and more of the agency's

<sup>8</sup> Joseph P. Tomain, *The Twin Demons of the Trump-Bannon Assault on Democracy* (Ctr. for Progressive Reform, CPR Paper 1704, 2017), available at [http://www.progressivereform.org/articles/Twin\\_Demons\\_0617.pdf](http://www.progressivereform.org/articles/Twin_Demons_0617.pdf).

<sup>9</sup> See, e.g., Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

scarce resources (which are set to be even scarcer under future budgets), the inevitable result will be that fewer rulemakings will be initiated. In particular, agencies may see nearly any discretionary rule (and perhaps some non-discretionary ones) as not worth the trouble and forgo pursuing it altogether.

Executive Order 13777 would only reinforce this dynamic by redirecting already scarce agency resources to the labor-intensive task of reviewing agencies' existing rules. In effect, the goal of looking back would come at the expense of the goal of moving forward, especially considering the Trump administration's plans to significantly cut agency budgets rather than expand them to undertake this additional work.

In addition to preventing the implementation of new regulatory safeguards, the Regulatory Reform Task Forces also risk harm to the public by supporting agency actions that would result in the elimination of vital existing protections. Though regulated corporations may see many existing safeguards as inconvenient to the bottom lines, these measures are nonetheless essential to assuring that our air is healthy to breathe, our food and drinking water is safe to consume, our workplaces are free of unacceptable hazards, and our finances are secured against scams and other fraudulent activities. The lack of adequate controls on the Regulatory Reform Task Forces' activities combined with the apparent indifference toward – or even contempt for – the public welfare displayed by Executive Orders 13771 and 13777 affords little confidence that the Trump administration's efforts to roll back regulatory safeguards will not come at an unacceptable cost to public health, safety, environmental protection, and financial security.

Several early examples already demonstrate the potential public harms that are likely to accrue as a result of the work of the Regulatory Reform Task Forces in implementing the provisions of Executive Orders 13771 and 13777. Here I will highlight three.

One of the more high profile actions that the Trump administration has taken as part of its broader assault on public safeguards has been to block the EPA from implementing an update to its Risk Management Plan (RMP) program. Finalized late in the Obama administration, this rulemaking had been prompted by the catastrophic fertilizer storage facility explosion that occurred in West, Texas, in 2013, which leveled an entire town and left 15 people dead and at least another 160 more people wounded. The catastrophe revealed serious deficiencies in the existing RMP program, such as inadequate sharing of risk information with local first responders and the failure to mandate that facilities take adequate response actions following actual or near-miss incidents that result in large-scale releases of harmful chemicals.<sup>10</sup>

Soon after the Trump administration took office, the EPA began instituting a series of actions aimed at delaying the implementation of the RMP program update, which was set to begin in June 2017. The folly of these actions was soon exposed by the catastrophic explosions at the Arkema chemical plant in Crosby, Texas, following the severe flooding of the plant

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<sup>10</sup> Leif Reigstad, *EPA Delays Chemical Facility Safety Regulations Inspired by West Fertilizer Plant Explosion*, TEXAS MONTHLY, June 15, 2017, <https://www.texasmonthly.com/energy/epa-delays-chemical-facility-safety-regulations-inspired-west-fertilizer-plant-explosion/> (last visited Oct. 22, 2017).



experienced during Hurricane Harvey.<sup>11</sup> To be sure, the RMP program updates would not have prevented that particular incident, but this episode does illustrate why the rulemaking is so important and should be implemented as quickly as possible rather than needlessly delayed. While the EPA's most recent final rule delaying implementation of the RMP program updates until February 2019 does not explicitly attribute the delay to the requirements of Executive Orders 13771 and 13777, the action does clearly advance the objectives of those Orders. It constitutes a deregulatory action that targets an existing regulation for the purposes of Executive Order 13777. Likewise, the EPA could claim it as a deregulatory action and as a source of regulatory cost savings for the purposes of the two regulatory caps established under Executive Order 13771.

A second example of a regulatory rollback that appears to have been inspired by Executive Orders 13771 and 13777 is the decision by the Department of Transportation to abandon a pending rulemaking that would have mandated testing for sleep apnea in truck drivers and train operators. The rule had been proposed in March 2016 by two of the Department's sub-agencies: The Federal Railroad Administration (FRA) and the Federal Motor Carrier Safety Administration (FMCSA). At the time, the agencies had found that sleep apnea was prevalent among truck drivers and train operators. Moreover, many instances of truck crashes and train derailments – including several involving fatalities and multiple injuries – were likely attributable to truck drivers or train operators who had fallen asleep or were otherwise impaired while on duty as a result of suffering from sleep apnea.<sup>12</sup>

Again, the *Federal Register* notice announcing the agencies' decision to abandon the rulemaking does not cite either of the Executive Orders as a basis for that decision. It is clear, however, that Executive Order 13771's requirements created strong incentives for the agencies not to pursue the rulemakings to their conclusion. In particular, they would have had to identify two existing rules to repeal or weaken and to ensure that those resulting cost savings at least offset the costs of their new sleep apnea rules. Given their limited resources, it is easy to see why the FRA and the FMCSA would have followed the path of least resistance by not completing the rulemakings.

A third example of a potentially harmful regulatory rollback is a proposal by the Food and Drug Administration (FDA) to delay by several years certain compliance dates for requirements imposed by its 2015 Produce Safety Rule. The Produce Safety Rule was one of the major rulemakings that the FDA completed as part of implementing the 2011 Food Safety Modernization Act, which drastically overhauled how the agency safeguarded our food supply. The regulations related to produce were especially critical since this category of food is the single largest source of foodborne illness in the United States. By the FDA's own estimate, the delays would result in nearly \$109 million in forgone benefits – that is, in preventable foodborne illnesses that will not be prevented.

<sup>11</sup> Emily Atkin, *As the Arkema Crisis is Unfolding, an EPA Chemical Plant Safety Rule is on Hold*, NEW REPUBLIC, Aug. 31, 2017, <https://newrepublic.com/minutes/144655/arkema-crisis-unfolding-epa-chemical-plant-safety-rule-hold> (last visited Oct. 22, 2017).

<sup>12</sup> Bill Chappell, *Regulators Pull Plan To Test Truckers, Train Operators For Sleep Apnea*, NPR, Aug. 8, 2017 <http://www.npr.org/sections/thetwo-way/2017/08/08/542230369/regulators-pull-plan-to-test-truckers-train-operators-for-apnea> (last visited Oct. 22, 2017).

In this case, the role of Executive Orders 13771 and 13777 was clear. The FDA specifically cites their requirements as a contributing factor in its decision to delay the compliance dates. The agency explains that it expects to treat the action as a deregulatory one for the purposes of Executive Order 13771's requirement that the agency take two deregulatory actions for each affirmative regulatory action it plans to undertake. In addition, the agency notes that the cost savings achieved will contribute to its efforts to meet its \$0 regulatory budget for Fiscal Year 2017, also as mandated by Executive Order 13771.

That the implementation of Executive Orders 13771 and 13777 would result in these kinds of potentially harmful actions should not come as a surprise. This past summer, we all witnessed a dramatic example of the intolerably high costs of arbitrary campaigns to rollback regulatory safeguards when the Grenfell Tower in London, England, burned to the ground, killing at least 79 people and injuring as many as 70 more. A major contributing cause of the fire's destructive power was the flammable layer of cladding that had been installed on the exterior of the building just months before the disaster took place. For well over a decade, the United Kingdom has operated under a series of regulatory reform programs requiring its agencies to eliminate existing protective safeguards before they can institute new ones. Among the safeguards that were repealed under these programs was one establishing uniform fire codes in public buildings. According to experts investigating the disaster, the flammable cladding used in the Grenfell Tower would not have been permitted under these fire codes.<sup>13</sup> In short, it is possible to draw a straight line from the United Kingdom's own experiment with regulatory budgets – similar to the one imposed by Executive Order 13771 – to one of the deadliest fire-related tragedies in U.K. history.

#### A Lack of Plausible Policy Rationales

The three apparent policy rationales for the Regulatory Reform Task Forces are: (1) we face excessive regulation; (2) regulated industry lacks adequate opportunity to influence regulatory policy; and (3) no adequate regulatory review process currently exists. All three are without merit.

First, no reliable evidence exists to support the proposition that we face excessive regulation. One of the most commonly cited statistics offered by opponents of regulatory safeguards is the number of pages in the *Federal Register*. As a metric of regulatory activity these numbers are fundamentally misleading and meaningless. It ignores the fact that a highly costly rule can take up a few pages, while a less costly rule may take up dozens or even hundreds of pages. Indeed, the Trump administration's actions to roll back existing protective safeguards are already filling up several pages of the *Federal Register*. In reality, the growing number of pages in the *Federal Register* has more to do with the rigorous analysis agencies carry out in support of the rules, including assessments of the rule's impacts on the economy, trade, small businesses, energy costs, small businesses, and so on. It is also a reflection of agency efforts to build flexibility into regulatory design to minimize burdens on regulated corporations. After all,

<sup>13</sup> David D. Kirkpatrick, Danny Hakim, & James Glanz, *Why Grenfell Tower Burned: Regulators Put Cost Before Safety*, N.Y. TIMES, June 25, 2017, at A1, available at <https://www.nytimes.com/2017/06/24/world/europe/grenfell-tower-london-fire.html>.

the “one-size-fits-all” rule bogeyman we often hear about would take up relatively little space in the *Federal Register*; but a rule with nuances, flexibilities, and exceptions would. If anything, opponents of regulatory safeguards ought to celebrate the large number of pages in the *Federal Register*, not deride them.

A related statistic that is increasingly cited is the number of so-called “restriction” words – such as “shall” or “must” – that appear in the Code of Federal Regulations. As with pages in the *Federal Register*, though, not all “shalls” and “musts” are created equal. One might impose a low cost paperwork requirement, while another might mandate an expensive piece of pollution control equipment. Because most restrictions are of the former variety rather than the latter, this will lead to a misleading overestimate in regulatory activity. Moreover, many restrictions in a rule might be conditional (Company A shall do X, but only if . . . ) or might be presented as a choice (to comply, Company A shall do X, shall do Y, or shall do Z). Counting all of these restriction words would similarly lead to a massive overestimate of regulatory activity.

The last form of evidence frequently cited by opponents of regulatory safeguards are the myriad studies that purport to measure the total costs or burdens of federal regulations. When these studies are subjected to closer inspections, invariably, their methodologies are revealed to be fundamentally flawed, making it impossible to take seriously the studies’ findings and conclusions. The primary flaw with each of these studies is that they fail to provide an accounting of regulatory benefits against which to measure their findings on regulatory costs. A discussion of regulation is inherently incomplete – and distorted – if it focuses on costs without also considering benefits. Using this methodology, practically any economic transaction – from the purchase of a loaf of bread to the construction of a manufacturing plant – would be counted as a drain on the economy, because they only include the costs not the benefits. Things get even worse when the studies attempt to generate their estimates of total regulatory costs. Often the approach involves deriving some baroque econometric model that purports to describe the relationship between some proxy for regulatory volume and its resulting impact on some macroeconomic indicator, such as GDP. Invariably, the proxies for regulatory volume are farfetched and the assumptions and other inputs used to construct the models seem to be selected for their capacity to generate large estimates of costs rather than their ability to accurately reality.

Second, the regulatory system currently offers numerous opportunities for public participation by regulated corporations. These corporations not only take full advantage of the many existing participatory opportunities; all of the available evidence demonstrates that corporate 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 Environmental Protection Agency, they found that corporate interests had an average of 84 contacts per rule, while public interest groups averaged 0.7 contacts per rule. These contacts included meetings, phone calls, and letters.<sup>14</sup> Similarly, a 2011 study I coauthored on lobbying at the White House Office of Information and Regulatory Affairs (OIRA) found a similar pattern of industry dominance. In the roughly 10 years studied in the white paper, OIRA hosted 1,080 meetings, with 5,759 appearances by outside participants. Sixty-five percent of the participants

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<sup>14</sup> 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).

represented regulated industry interests; 12 percent of participants appeared on behalf of public interest groups.<sup>15</sup>

Third, several effective process for reviewing existing agency regulations already exist, rendering the Trump Administration's Task Forces redundant and wasteful at best. The Regulatory Flexibility Act 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. President Bill Clinton's Executive Order 12866 requires agencies to develop a program "under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated." President Barack Obama's Executive Order 13563 builds upon the Executive Order 12866 periodic review program by adding, among other things, time-consuming and resource-intensive procedures for carrying out the regulatory reviews on an ongoing basis. Some regulatory review programs are baked right into the statutes that authorize the regulations. For example, the Clean Air Act directs the EPA to "complete a thorough review" of the agency's existing National Ambient Air Quality Standards (NAAQSs) and "to make such revisions . . . as may be appropriate" at least once every five years.

In many cases, agencies review their existing regulations even when it is not mandated by a particular program – that is, because they independently recognize that such a review is a good idea under the circumstances. As Michelle Sager, the Director of Strategic Issues at the U.S. Government Accountability Office (GAO), testified before the U.S. Senate Committee on Homeland Security and Governmental Affairs, "Reviews mandated by requirements in statutes or executive orders and related OMB memorandums were sometimes the impetus for reviews, but agencies more often exercised their own discretionary authorities to review regulations." Significantly, according to Ms. Sager's testimony, the GAO found that "[a]gencies noted that discretionary reviews generated additional action more often than mandatory reviews, which most often resulted in no changes."<sup>16</sup> In other words, these discretionary reviews tended to be have meaningful effect than the mandatory ones.

These agency-driven regulatory review programs do not even include the numerous reviews conducted by independent third parties. 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 GAO, an independent agency that works to aid Congress's oversight of the federal government. A key component of the GAO's work is to audit and evaluate specific regulatory programs in response to requests from members of Congress. As part of this effort, the GAO maintains a "High Risk List," which it updates at the start of each new

<sup>15</sup> 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, 2011), available at [http://www.progressivereform.org/articles/OIRA\\_Meetings\\_1111.pdf](http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf).

<sup>16</sup> *A More Efficient and Effective Government: Improving the Regulatory Framework*, Hearing Before the Subcomm. on Efficiency and Effectiveness of Fed. Programs and Fed. Workforce of the S. Comm. on Homeland Security and Gov. Aff., 113th Cong. 3 (2014) (statement of Michelle Sager, Director, Strategic Issues, U.S. Gov. Accountability Off.), available at <http://www.hsgac.senate.gov/subcommittees/fpfw/hearings/a-more-efficient-and-effective-government-improving-the-regulatory-framework> [follow hyperlink text "Download Testimony (217.7 KB)"].

Congress in order to bring “attention to agencies and program areas that are high risk due to their vulnerabilities to fraud, waste, abuse, and mismanagement, or are most in need of transformation.”

No one, of course, objects to the concept of reviewing existing regulations. When done well, it is an essential part of an agency’s work. Two key elements are necessary for a successful regulatory review program, however. First, an agency must be afforded the requisite resources to execute these reviews, which can be deceptively complex and labor intensive to carry out. To the extent that the myriad existing regulatory review programs have fallen short of their promise it is that presidential administrations have never sought and Congress has never provided agencies with adequate resources for carrying them out. Second, the regulatory review process cannot be “one sided” in approach. In other words, the regulatory review must not focus solely on eliminating or weakening existing regulations; it must also identify opportunities in which the agency’s mission would be advanced if an existing regulation was strengthened, expanded, or made even more protective of the public interest. Unlike the Trump administration’s Regulatory Reform Task Forces, all of the existing regulatory review programs described above have been broad enough to permit the identification of existing regulations that could be improved by strengthening their requirements. In this regard, the Trump administration’s Regulatory Reform Task Forces are not merely duplicative of existing regulatory review programs; their design renders them substandard outliers by comparison.

#### A Troubling Track Record on Transparency and Public Participation

As William Funk, a leading scholar on the subject, has noted, transparency and public participation are two of the essential hallmarks of U.S. administrative law.<sup>17</sup> Agency implementation of regulatory safeguards derives much of its legitimacy from the fact that these actions must be undertaken in an open manner and their substantive outcomes must plainly reflect the public input agencies receive.

Fidelity to these principles is also essential to ensuring that agencies are dutifully fulfilling the missions that Congress has set out for them in their authorizing statutes. Transparency assists Congress in performing its oversight activities more effectively, while public participation serves as a mechanism for connecting the abstract goals that Congress has articulated in statutes to the practical realities of the world in which their implementing regulations will give life to those goals. Therefore, Congress in particular has an especially strong interest in ensuring that regulatory actors comport with the principles of transparency and public participation. And Congress in particular should be especially outraged when regulatory actors defy those principles.

Importantly, though, transparency and public participation in the regulatory system are extremely fragile. For instance, it might be useful to think of them as chains that run through the entire rulemaking process. As the old cliché puts it, a chain is only as strong as its weakest link, and that is precisely the case with transparency and public participation in the rulemaking process. The rulemaking process could contain dozens of mechanisms for promoting

<sup>17</sup> William Funk, *Public Participation and Transparency in Administrative Law: Three Examples as an Object Lesson*, 61 AM. L. REV. 171, 171 (2009).

transparency and public participation, but those mechanisms would be rendered meaningless if just one step in the process lacks any effective measures for assuring those principles. After all, interest groups – especially those with significant resources – will face strong incentives to focus their attention on any step that they perceive to have weak controls on transparency and public participation. Such steps would offer these interest groups a critical opportunity for exercising undue influence on the substance of regulatory safeguards that are relevant to their unique and narrow interests.

To this point, the operation of the Trump administration's Regulatory Reform Task Forces has been marked by a distinct lack of transparency and balanced public participation, rendering them susceptible to abuse by narrow interests. In fact, the operations of these Task Forces are perhaps the least transparent and involve the least meaningful public participation of any component of the U.S. regulatory system. They are, in other words, the weakest link. And not surprisingly well resourced corporate interests appear to be taking full advantage of the Regulatory Reform Task Forces to seek the rollback of public safeguards that may be inconvenient to the bottom lines but which are delivering critical health, safety, environmental, or financial security benefits for ordinary Americans, their families, and their communities.

With regard to transparency, Executive Order 13777 imposes no real mandates on agency Regulatory Reform Task Forces to operate in an open manner that would allow for meaningful public accountability or congressional oversight. Notably, the Order does not mandate that agencies disclose the identities of the Task Force members. The Task Forces are not subject to any open meeting requirements, such as those that apply to Federal Advisory Committees. The Task Forces never need to explain the basis for their recommendations for which existing rules should be weakened or eliminated. Indeed, their recommendations never need to be disclosed at all. While the Executive Order directs the Task Forces to submit an initial report containing their recommendations for regulatory rollbacks to their agency head by May 25 of this year and subsequent reports on a periodic basis thereafter, nowhere does it require that these reports ever be publicly disclosed.

Given the lack of transparency requirements, it is not surprising then that the work of these Task Forces has largely taken place behind closed doors. For many agencies, we do not know who the members of the Regulatory Reform Task Forces are. We do not know whether they have met with any outside interest groups, and, if such meetings have taken place, what matters were discussed. We do not know what recommendations the Task Forces have provided or what the policy rationale is for those recommendations. And to the extent agencies are undertaking actions to weaken or eliminate their existing regulations, we do not know if those actions reflect any recommendations that were provided by the relevant Regulatory Reform Task Force.

Over the last several months I have talked to several members of the press and the public interest community who are working diligently to uncover any information they can about various Regulatory Reform Task Forces and the work they are carrying out to implement Executive Orders 13771 and 13777. All have uncovered precious little information. They have submitted numerous Freedom of Information Act (FOIA) requests, many of which have been denied or are being slow-walked. The few responses they have received have been heavily redacted, yielding little useful information.

What little we do know about the Regulatory Reform Task Forces has been uncovered through a few reluctant responses to FOIA requests or through disclosures to the press from courageous whistleblowers within the agencies themselves. The picture that is slowly emerging from these disclosures hardly casts the Regulatory Reform Task Forces in a flattering light. Instead, we are gradually finding that these Task Forces are dominated by individuals with close ties to the industries that their agency is charged with regulating. Many of these individuals formerly worked in these industries as attorneys or lobbyists or otherwise have a personal financial stake in their success, creating the appearance, if not the reality, of a conflict of interest for their work on behalf of the Regulatory Reform Task Forces.

This past July, the *New York Times* and *Pro Publica* jointly published an investigative article on the Trump administration's Regulatory Reform Task Forces that provides some of the most damning accounts yet about the work they are doing on behalf of politically powerful corporate interests. It details the conflicts of interest that exist among the members of Task Forces at such agencies as the EPA, the Department of the Interior, and the Department of Education. It also highlights how several of the existing rules the Task Forces are working to weaken or eliminate have long been targeted by corporate interests with close ties to the Task Force members. As the article puts it, "Some appointees are reviewing rules their previous employers sought to weaken or kill, and at least two may be positioned to profit if certain regulations are undone."<sup>18</sup>

With regard to public participation, Executive Order 13777 directs agency Regulatory Reform Task Forces to "seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations." Yet, individual agency Task Forces have taken wildly divergent approaches to seeking public input, suggesting that this process is at best a low priority and at worse window dressing. Some agencies, such as the EPA, held in-person public listening sessions and solicited public comment through official notice in the *Federal Register*. Other agencies, such as the Small Business Administration's Office of Advocacy, created an electronic form on their website, through which members of the public could submit input. Other agencies, such as the Department of Homeland Security, appear not to have taken any formal steps at all to gather public input.

When agencies did solicit public input, it was at best debatable whether these opportunities truly offered members of the public a viable avenue for impacting the Task Force's recommendations. The deadlines for submitting comments were often too short to allow members of the public to respond effectively. This was the case with the EPA's comment period, which lasted only 30 days. In many cases, the public comment period ended just days before the Regulatory Reform Task Force was required to submit its initial report of recommendations, as mandated by Executive Order 13777. For example, the EPA's comment period ended on May 15, just 10 days before the initial report was due. In some cases, the relevant comment period even ended after the May 25 deadline. These cases raise serious questions about whether and to what extent Regulatory Reform Task Forces would be able to incorporate the public input they

<sup>18</sup> Danielle Ivory & Robert Faturechi, *The Deep Industry Ties of Trump's Deregulation Teams*, N.Y. TIMES, July 12, 2017, at A1, available at [https://www.nytimes.com/2017/07/11/business/the-deep-industry-ties-of-trumps-deregulation-teams.html?\\_r=1](https://www.nytimes.com/2017/07/11/business/the-deep-industry-ties-of-trumps-deregulation-teams.html?_r=1).

received into their initial reports, assuming their intention was to make a good faith effort to do so.

In general, it is impossible to determine whether public input has had any impact whatsoever on the Regulatory Reform Task Forces' recommendations. As noted above, the Task Forces have not disclosed their recommendations to the public, nor do they appear to be required to do so. What's more, it does not appear that the Task Forces ever have to explain the basis for their recommendations, including whether and how they took into account the public input they received. Without such basic transparency requirements, it is not inconceivable that the public input many agencies received remains on a shelf somewhere, unread and gathering dust.

In contrast, the whistleblower accounts noted above suggest that the only real public input the Regulatory Reform Task Forces were interested in gathering was the input they received from powerful corporate interests during closed door meetings. The comments that agency Task Forces received at these meetings appear to be the real drivers of the Task Forces' recommendations. If so, any efforts to gather public comments through in-person meetings or an official notice-and-comment process would have been little more than a "check the box" exercise, meant to create the illusion of meaningful public participation, rather than a legitimate attempt to inform the Task Forces' recommendations.

#### A Litany of Implementation Problems

From the beginning, implementation of Executive Orders 13771 and 13777 have been beset with myriad implementation problems. Some of these implementation problems appear to be so intractable that it may prove to be impossible for the Regulatory Reform Task Forces to achieve literal compliance with many of the Orders' provisions.

The first implementation problem, as noted above, is that the goals that Executive Order 13771 and 13777 seek to advance are categorically incompatible with the statutory mandates under which agencies operate. As such, agencies may not be able to adjust their regulatory decision-making to account for these Orders without running afoul of their authorizing statutes. Or, put differently, accounting for the Orders' may necessarily put in agencies the position of contravening their statutory authority.

For example, Executive Order 13771 essentially makes the question of whether or not an agency has sufficient "space" under its regulatory budget a prominent new criterion in the agency's decision-making for all new rulemakings. I am unaware of any existing laws that requires or permits to consider such a factor when deciding whether and how to regulate. Similarly, under the "two-out, one-in" requirement of Executive Order 13771, the decision of whether to weaken or eliminate an existing rule would primarily be driven by an agency's desire to issue a new regulation. Again, I am unaware of any statute that permits an agency to alter or repeal an otherwise required or authorized rule simply because that agency must meet some arbitrary quota on the number of rules it can implement at any given time.

A second big implementation problem arises from the requirement that any deregulatory actions that agencies take pursuant to Executive Orders 13771 and 13777 must pass a strict



“cost-benefit analysis test.” Thus, when an agency proposes to weaken or eliminate one of its existing rules, it must demonstrate that this action would produce sufficient benefits to justify the costs. Another Executive Order, Executive Order 12866, has long mandated such a test for affirmative regulatory actions to institute new protective safeguards, to assure that these actions will make society better off on balance. Trump administration White House officials charged with overseeing agency compliance with Executive Orders 13771 and 13777 have determined that this logic should similarly apply to deregulatory actions well.

Among the first deregulatory actions undertaken by the Trump administration have been those aimed at repealing recently finalized rules from the Obama administration. In these situations, the cost-benefit analysis for the deregulatory action simply involves flipping the ledger: The benefits of the original regulation become the costs of the deregulatory action (referred to as “forgone benefits”) while the costs of the original regulation become the benefits of the deregulatory action (referred to as “costs avoided”). The problem this poses for the Trump administration’s agencies is that all of the original regulations they are seeking to repeal have passed a cost-benefit analysis test. So, by definition, their deregulatory action to repeal that regulation would not pass such a test, since the ledger has simply been flipped (*i.e.*, the net benefits of the original regulation would become net costs in the deregulatory action to repeal).

So far, Trump administration agencies have responded to this problem by cooking the books on their deregulatory actions to create the appearance that they pass a cost-benefit analysis test. As illustrated by the cost-benefit analyses for actions to repeal the EPA’s Waters of the United States rule or its Clean Power Plan, agencies will resort to questionable logic and deceitful accounting tricks to significantly increase the costs of the original rule, significantly decrease the benefits, or both.<sup>19</sup>

A third problem, which is related to the second, arises from calculating the cost savings achieved when an older regulation is eliminated or weakened. The nature of most regulations is that the vast majority of the compliance costs are incurred at the beginning, such as through the upfront investments in new pollution control equipment. Afterwards, the ongoing compliance costs tend to be very modest, involving relatively inexpensive reporting and monitoring costs, for example. Accordingly, repealing or weakening older rules would not generate much in the way of cost savings, since much of the compliance costs have already become “sunk” and are therefore unrecoverable. This economic reality means that it will likely be exceedingly difficult for agencies to meet the regulatory “budget” requirements imposed by Executive Order 13771. Simply repealing or weakening two existing rules is unlikely to generate enough cost savings to fully offset the costs of one new regulation, which could be relatively large by comparison if the particular regulation involves significant one-time upfront compliance costs.

<sup>19</sup> James Goodwin, *Practitioner Insight: Fuzzy Math to Assault Environmental Rules*, BLOOMBERG BNA: DAILY ENVIRONMENT REPORT, Sept. 28, 2017, available at [http://progressivereform.org/articles/Goodwin\\_BloombergBNA-DailyEnvironment\\_Fuzzy\\_Math\\_092817.pdf](http://progressivereform.org/articles/Goodwin_BloombergBNA-DailyEnvironment_Fuzzy_Math_092817.pdf) (critiquing the cost-benefit analysis for the Waters of the United States rule); Kevin Steinberger & Starla Yeh, *Pruitt Cooks the Books to Inflate Clean Power Plan’s Cost*, NRDC BLOG, Oct. 10, 2017, <https://www.nrdc.org/experts/kevin-steinberger/pruitt-cooks-books-inflate-clean-power-plans-cost> (last visited Oct. 23, 2017) (Clean Power Plan rule); Kevin Steinberger & Starla Yeh, *Pruitt Cooks the Books to Hide Clean Power Plan Benefits*, NRDC BLOG, Oct. 10, 2017, <https://www.nrdc.org/experts/kevin-steinberger/pruitt-cooks-books-hide-clean-power-plan-benefits> (last visited Oct. 23, 2017) (Clean Power Plan rule).

A fourth problem, as noted above, is that compliance with Executive Order 13771's "two-out, one-in" requirement will essentially triple the workload for agencies. An agency will need to carry out the standard rulemaking process for its new rulemaking, and then two more for each of the accompanying two deregulatory actions it must undertake. At a time when agency budgets continue to drop or remain stagnant in real dollar terms, they may simply lack the resources to implement new regulations. The burdens involved may be too great to overcome, and agencies will simply abandon most pending rulemakings. Given the Trump administration's professed antipathy toward regulatory safeguards, this consequence of Executive Order 13771 would appear to be a feature and not a bug.

***Congress Must Subject the Regulatory Reform Task Forces to Vigilant Oversight***

Given the many flaws with the Trump administration's Regulatory Reform Task Forces and the work they are charged with undertaking, the best course of action would be to simply repeal Executive Orders 13771 and 13777 and disband the Task Forces. As President Trump is unlikely to adopt this course of action, the onus will be on Congress to carefully supervise the Regulatory Reform Task Forces to ensure that their activities are not preventing agencies from faithfully executing the statutory obligations as Congress has set out for them.

The first step this and other committees should take is to make full use of their oversight and information gathering authorities to learn more about the individual Regulatory Reform Task Forces and the work they are doing. This hearing presents a critical initial opportunity for advancing these oversight objectives.

The second step Congress should take is to monitor the deregulatory actions the Trump administration is carrying out – whether or not such actions are being undertaken explicitly in accordance with the requirements of Executive Orders 13771 and 13777 – to ensure they are complying with the applicable procedural safeguards that serve to guide administrative action. In particular, this committee may wish to evaluate these actions according to the following criteria, as relevant:

- Did the agency afford the public an adequate opportunity to participate in the development of the action, including through the Administrative Procedure Act's (APA) notice-and-comment procedures?
- Did the agency properly revise its rule to account for the public input it received during the APA notice-and-comment procedures? If not, in what ways did the agency fall short in fulfilling this obligation?
- Did the agency abide by the letter and spirit of various ancillary rulemaking requirements, including those established under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act?
- Does it appear that the deregulatory action was primarily motivated by decision-making factors that the agency is not legally permitted to consider, even if the agency was able to supply a plausible policy rationale for the action that is arguably within its legal authority? If so, what were those improper decision-making factors?

- In general, does it appear that OIRA's centralized regulatory review process is being deployed in a less rigorous manner for deregulatory actions as opposed to affirmative regulatory actions?
- In general, does it appear that agency compliance with all applicable rulemaking requirements is less rigorous for deregulatory actions as opposed to affirmative regulatory actions?

This and other relevant committees should commit to taking appropriate and effective responses whenever, on the basis of the evaluations outlined above, they identify potential instances of agencies failing to abide by their administrative law responsibilities when undertaking deregulatory actions. In particular, this committee may wish to hold the agency accountable for such failings through the use of targeted agency letters, GAO or Inspector General investigations, hearings, or other appropriate oversight tools. To be sure, the courts are available to police agency compliance with many of these requirements. Congress, however, is uniquely positioned and has a constitutional obligation to probe earlier and more deeply into these matters before they ever reach the judicial review stage.

Similarly, this committee may wish to investigate on an ongoing basis other matters of critical importance that are relevant to the work of the Trump administration's Regulatory Reform Task Forces. For example, such matters might include the degree to which this work comports with basic administrative law principles of transparency and meaningful public participation, as described above.

### ***Conclusion***

Thank you for the opportunity to share my views on this topic. I would be pleased to answer any questions you might have.

Mr. MEADOWS. Thank you, Mr. Goodwin.  
Mr. Crews you're recognized for 5 minutes.

#### STATEMENT OF CLYDE WAYNE CREWS

Mr. CREWS. Good morning. I'm Wayne Crews, Vice President for Policy—

Mr. MEADOWS. You can pull the mike a little bit closer, if it's on there.

Mr. CREWS. Vice President for Policy at the Competitive Enterprise Institute. And I thank the chairman and the members for the invitation to address regulatory reform task forces, 2-for-1 rule pacing and cost management.

These steps reaffirm sound regulatory review and agency engagement, but will best function within a framework of improved congressional accountability for what regulators do. Politics obscures it now, but alongside overseas development, like Britain's 1-in-3-out, proposals to monitor regulatory costs have deep bipartisan pedigree. Regulatory budgeting dates back to Jimmy Carter, and to Texas Senator Lloyd Bentsen, who became Clinton's Treasury Secretary.

A modern bipartisan root of Trump's 1-in-2-out is Senator Mark Warner's 2010 PAYGO. After Trump's first 9 months, and after OIRA's agency directives to include cost allowances in the upcoming unified agenda, what makes us know the task forces are solid ideas? What successes and weaknesses stand out? Reagan's Executive Order 12291 that kick-started OIRA, showed that the pen and phone can expand liberty in terms of stabilizing rule counts and Federal Register pages. Trump's reductions appear to be the most significant since then; meanwhile, dozens of guidance documents have been rescinded, such as the Labor Department proclamations on franchising and independence contracting.

But too much of the regulatory apparatus is beyond OIRA's scope. The core reality is the revoking a rule requires another notice and comment rulemaking progression. And long term, task force machinery can't overcome presidents who deprioritize oversight. Meanwhile, the 800-pound gorilla independent agencies get no OMB scrutiny, even under Trump's orders. And until Trump's orders, guidance documents, memoranda, and other regulatory dark matter rarely got scrutiny either.

Also, task forces must address unmeasured categories of intervention that propel cost, not just discrete rules. When government steers while the market merely rose, that creates compounding costs, even if no budgetable rules get issued, such as the re-embrace of a public utility model in the tech and telecom sectors.

Rules with cost analysis amount to a small percentage of the rulemaking enterprise. That, along with the administrative state's broader weakening of democratic accountability, only strengthens the case for Congress' restoration of Article I checks and balances. In the meantime, as Neomi Rao advises, Congress doesn't have to wait, it can revoke rules if Trump can't.

Other steps include boosting OIRA resources and implementing a bipartisan regulatory improvement commission with goals and

targets. As for 2-for-1, it may make sense to emphasize equivalent burdens, perhaps dollar-for-dollar, rather than rule-for-rule.

I highlight also the former U.S. regulatory program, a sister document to the Federal budget and a model by which OIRA could compile annual transparency statistics to better compare apples to apples, to underscore when cost and benefits are not quantified, and to better distinguish between additive and subtractive rules and guidance.

At bottom, the benefit sought via regulation are also forms of wealth, and they require market disciplines, not just political ones, to flourish.

Markets and competitive enterprise make the world, not just richer, but fairer, safer and cleaner. Regulation doesn't get all the credit.

Disagreements over regulatory benefits are the core concern that separate left and right today. These are irreconcilable. But that's actually constructive because it underscores that elected legislators must resolve controversial issues involving regulations with massive impact.

But for lesser anxieties, my optimism rests in knowing that some among us agree that sometimes, so-called market failures might be rooted in long-standing political failures, and that coercive top-down regulation isn't always the answer. On good days, both the left and right understand regulatory capture and rent-seeking.

Until Article I comes to the rescue, here's hoping that today's invigorating savings and streamlining, remain permanent changes to the regulatory and guidance landscape. When it comes to economic expansion, you don't have to tell the grass to grow, but you do need to move the rocks off it. Why not use the new task forces as a lever.

Thank you very much.

[Prepared statement of Mr. Crews follows:]



**Testimony of**

**Clyde Wayne Crews Jr.**  
**Vice President for Policy/Director of Technology Studies**  
**Competitive Enterprise Institute**

**Before the:**

**House of Representatives, Committee on Oversight and Government Reform,**  
**Subcommittee on Health Care, Benefits, and Administrative Rules, and**  
**Subcommittee on Government Operations**  
**2154 Rayburn House Office Building,**  
**Washington, D.C. 20510-0250**

**Hearing on: Regulatory Reform Task Force Check-In**

Tuesday, October 14, 2017, 10:00 a.m.

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The Competitive Enterprise Institute (CEI) is a non-profit public policy research organization dedicated to advancing individual liberty and free enterprise with an emphasis on regulatory policy. I appreciate the opportunity to discuss issues surrounding regulatory oversight and the new Regulatory Reform Task forces, and I thank the Chairs, Ranking Members and Members of the Subcommittees.<sup>1</sup>

### **Introduction: The OIRA and Regulatory Reform Task Force Roles in Overseeing the Federal Regulatory Enterprise**

When policymakers neglect federal regulation, they ignore arguably the greatest element of governmental influence in the United States' economy and perhaps in society itself. As a policy concern, regulation merits attention like the \$20 trillion national debt receives, since both spending and regulation profoundly redirect societal resources.

When the era of executive regulation began in the 1920s, few likely imagined the dense tangle of rules it would produce nor how they would envelop the economy and society. But over decades, the federal regulatory state has continued expanding, with rules accumulating year after year. Members of both major political parties have long recognized that federal regulatory burdens can operate as a hidden tax.<sup>2</sup> President Donald Trump has echoed that view.<sup>3</sup> In response, his administration issued a memorandum titled "Regulatory Freeze Pending Review" to executive branch agencies.<sup>4</sup> (That is a typical step taken by new presidents wishing to review their predecessor's pending actions and to prioritize their own.<sup>5</sup>) The president also issued during his first 100 days a series of executive actions related to reforming the regulatory process, in particular **Executive Order 13771** "Reducing Regulation and Controlling Regulatory Costs,"<sup>6</sup>

<sup>1</sup> This testimony in part updates and expands upon "One Nation, Ungovernable? Confronting the Modern Regulatory State," in *What America's Decline in Economic Freedom Means for Entrepreneurship and Prosperity*, Fraser Institute: Montreal, 2015, pp. 117-181; and 2016 House Judiciary Testimony.

<sup>2</sup> For example, consider President Jimmy Carter's *Economic Report of the President* in 1980: "[A]s more goals are pursued through rules and regulations mandating private outlays rather than through direct government expenditures, the Federal budget is an increasingly inadequate measure of the resources directed by government toward social ends." Council of Economic Advisers, *Economic Report of the President*, Executive Office of the President, January 1980, p. 125, [http://www.presidency.ucsb.edu/economic\\_reports/1980.pdf](http://www.presidency.ucsb.edu/economic_reports/1980.pdf).

<sup>3</sup> Jacob Pramuk, "Trump Tells Business Leaders He Wants to Cut Regulations by 75% or 'Maybe More,'" CNBC, January 23, 2017, <http://www.cnbc.com/2017/01/23/trump-tells-business-leaders-he-wants-to-cut-regulations-by-75-percent-or-maybe-more.html>.

<sup>4</sup> This memorandum took the additional step of incorporating agency guidance documents. White House, Office of the Press Secretary, "Memorandum for the Heads of Executive Departments and Agencies from Reince Priebus, Assistant to the President and Chief of Staff, Regulatory Freeze Pending Review," January 20, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies>.

<sup>5</sup> For example, the first action of the incoming Obama administration in 2009 was likewise a Memorandum for the Heads of Executive Departments and Agencies, from then-Chief of Staff Rahm Emanuel, on "Regulatory Review," [https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/information\\_and\\_regulatory\\_affairs/regulatory\\_review\\_012009.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/information_and_regulatory_affairs/regulatory_review_012009.pdf).

<sup>6</sup> White House, Office of the Press Secretary, "Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs," news release, January 30, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>. Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," *Federal Register*, Vol. 82, No. 22, February 3, 2017, <https://www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02451.pdf>.

and **Executive Order 13777**, “Enforcing the Regulatory Reform Agenda.”<sup>7</sup> The first established the one-in, two-out expectation for certain economically significant rules where not in violation of law. It also directed that “total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero” for executive departments and agencies. The second executive order launched Regulatory Reform Officers and Regulatory Reform Task Forces at agencies to oversee provisions of E.O. 13771 and prior consistent orders.

Other significant and related executive actions have included a presidential memorandum on “Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing,”<sup>8</sup> and Executive Order 13755, “Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects,”<sup>9</sup> and Executive Order 13772, “Core Principles for Regulating the United States Financial System.”<sup>10</sup> Importantly also, a September 7, 2017 memorandum<sup>11</sup> from new Office of Information and Regulatory Affairs (OIRA) administrator Neomi Rao directed agencies for the first time to propose an overall incremental regulatory cost allowance in the Fall 2017 edition of their “Unified Agenda” on regulations. Prior Agenda editions, since the 1980s, would label rules as “economically significant,” but never has there been such a “regulatory budget” incorporated within. Rao says, “OMB expects that each agency will propose a net reduction in incremental regulatory costs for FY 2018.”

In that context, this testimony looks at OIRA’s and Trump’s Regulatory Reform Task Forces’ recent improvements in regulatory oversight, and urges reinforcement by Congress and the administration. Concern over regulatory growth lies not solely with the prior administration’s “pen and phone” stance. Congressional Republicans have acknowledged neglecting their own role in regulatory oversight, as the June 2016 House Task Forces addressing Article I and delegation issues made abundantly clear.<sup>12</sup>

<sup>7</sup> White House, Office of the Press Secretary, “Presidential Executive Order on Enforcing the Regulatory Reform Agenda,” news release, February 24, 2017, <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>. Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” *Federal Register*, Vol. 82, No. 39, March 1, 2017, <https://www.gpo.gov/fdsys/pkg/FR-2017-03-01/pdf/2017-04107.pdf>.

<sup>8</sup> White House, Office of the Press Secretary, “Presidential Memorandum Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing,” news release, January 24, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-streamlining-permitting-and-reducing-regulatory>.

<sup>9</sup> White House, Office of the Press Secretary, “Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects,” news release, January 24, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/24/executive-order-expediting-environmental-reviews-and-approvals-high>. Executive Order 13766, “Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects,” *Federal Register*, Vol. 82, No. 18, <https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02029.pdf>.

<sup>10</sup> White House, Office of the Press Secretary, “Presidential Executive Order on Core Principles for Regulating the United States Financial System,” news release, February 3, 2017, <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states>. Executive Order 13772, “Core Principles for Regulating the United States Financial System,” *Federal Register*, Vol. 82, No. 25, February 8, 2017, <https://www.gpo.gov/fdsys/pkg/FR-2017-02-08/pdf/2017-02762.pdf>.

<sup>11</sup> <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/FY%202018%20Regulatory%20Cost%20Allowances.pdf>.

<sup>12</sup> The “BetterGOP” Task Force reports are archived at <http://abetterway.speaker.gov/>.



On the regulatory front, the first nine months of the Trump administration have brought the issuance of the above executive actions, as well as the enactment of Congressional Review Act resolutions eliminating 14 of former President' Barack Obama's rules (among hundreds eligible). Capping weeks of the Obama White House's touting of a "pen and phone" (Rucker 2014) strategy to further expand federal economic, environmental and social regulation and intervention (White House, 25 February 2014), Obama at that time vowed that, "[I]f Congress won't act soon..., I will. I will direct my cabinet to come up with executive actions we can take, now and in the future (Marks 2013)."

While the 114<sup>th</sup> Congress objected to such aspirations, it faced "the year of the veto (Sink and Wong 2015)." The president promised vetoes on regulatory reforms like the REINS Act and Regulatory Accountability Act (which now await Senate action in the 115<sup>th</sup> Congress), and followed through on a veto of the Keystone XL pipeline (White House, 2 February 2015) in contrast to America's onetime ethos of rapid, roiling infrastructure growth (Gordon 2004).

While the Constitution has not come to the rescue, we are not without options. In light of Congress' over-delegation of power to federal agencies, this testimony surveys Trump's actions thus far in light of the formal oversight procedures that ostensibly exist for the thousands of regulations issuing annually. Next we note that central oversight of regulation sports theoretical inconsistencies and gaps, and present data demonstrating that federal regulatory review is far from comprehensive. While central review's shortcomings (it is weak compared to the administrative state as such) hasn't worked to halt the advance of the vast administrative state, in recent months it has played a far greater role, and can go further still. Given that reality that code or administrative agency law is here to stay for the time being, this testimony offers proposals for the Task Forces and OIRA, while remaining cognizant of central review's limitations. The aim of these proposals is to (1) help legitimize Congress' case for regulatory liberalization and enable a revival of some semblance of constitutional order; and to (2) facilitate the executive branch's deployment of the "pen and phone" in *defense* of liberty. An alternate take on "Energy in the Executive" (*Federalist Papers* No. 70, 1788) is a welcome contrast to its usage in undermining institutions of limited government and destabilizing core values of classical liberal society.

#### **Early Results in the Trump White House; And Overseas Rule-in, Rule-Out Experiences**

The Trump mode has been to regulate bureaucrats rather than the public. New, large-scale regulation has slowed dramatically in 2017, and where it hasn't, new costs are required to be offset. The president capped the end of the fiscal year and began the new one with high-profile events on tax reform<sup>13</sup> and cutting red tape, respectively. He highlighted these issues in a speech to the National Association of Manufacturers on September 29, the last working day of the federal government's 2017 fiscal year. Then on Monday, October 2, the 2018 fiscal year began and the White House hosted a "Cut the Red Tape" event<sup>14</sup> to discuss the administration's regulatory reform plans.

<sup>13</sup> <https://www.c-span.org/video/?434888-1/president-defends-puerto-rico-hurricane-response-touts-tax-cuts-plan&live=>.

<sup>14</sup> <https://www.bna.com/trump-preview-regulatory-n73014464392/>.

Under Reagan, both final rules and Federal Register pages dropped more than one-third.<sup>15</sup> Thus far, Trump, OIRA and the agency Task Forces have reduced the flow of new regulation by large magnitude as well. Trump's agencies have eliminated some of the higher-profile guidance documents of Obama's administration as well.

Notably, the Federal Register stood at 45,678 pages<sup>16</sup> at the end of the 2017 fiscal year. Last year at fiscal year-end, Barack Obama's Federal Register stood at 67,900 pages.<sup>17</sup> (Indeed, Obama's 2016 Federal Register set an all-time-record: 97,110 pages.<sup>18</sup>) Compared to Obama at this time last year, Trump's page count is down 32 percent.

It took a few years for Ronald Reagan to achieve his ultimate one-third reduction in Federal Register pages following Jimmy Carter's then-record Federal Register. So by this metric, Trump is moving faster.

Trump's regulatory flows in terms of executive branch and independent agency rules and significant issued compared to the same period (Jan. 20-Sept. 30) under President Obama in 2016 are also lower.

**Nine Months of Trump Regulations vs. Obama (Jan 20-September 30)**

	<b>Rules</b>	<b>"Significant" Rules</b>
<b>Trump 2017</b>	2,183	116
<b>Obama 2016</b>	2,686	274

In nine months, the Trump administration had issued 2,183 rules. Obama issued 2,686 rules in the corresponding time period in 2016. Trump's tally represents an 18 percent decrease. Keep in mind, even getting rid of a rule requires issuing a "rule" in order to comply with the Administrative Procedure Act's notice-and-comment requirements. So these tallies obscure that some of Trump's rules have been eliminations or delays of earlier rules that hadn't reached their effective date. For example, here are several delayed Environmental Protection Agency rules.<sup>19</sup> Moreover, new costs agencies impose must net out at zero. (This witness has urged that Congress, or Trump via executive order, needs to change the nomenclature to consolidate overly abundant rule types so we can compare apples and apples.<sup>20</sup>)

Significant rules issued, generally those with an impact of \$100 million or more, were down an astonishing 58 percent compared to Obama for this partial fiscal-year window. Trump's agencies issued 116 significant final rules during his first nine months, while Obama's issued 274 over the corresponding nine-month period in 2016. This also ignores any portion of Trump's rules that are deferrals or freezes.

<sup>15</sup> <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Channeling%20Reagan%20by%20Executive%20Order.pdf>.

<sup>16</sup> <https://www.gpo.gov/fdsys/pkg/FR-2017-09-29/pdf/FR-2017-09-29.pdf>.

<sup>17</sup> <https://www.gpo.gov/fdsys/pkg/FR-2016-09-30/pdf/FR-2016-09-30.pdf>.

<sup>18</sup> <https://www.gpo.gov/fdsys/pkg/FR-2016-12-30/pdf/FR-2016-12-30.pdf>.

<sup>19</sup> <https://www.federalregister.gov/documents/2017/03/20/2017-05462/further-delay-of-effective-dates-for-five-final-regulations-published-by-the-environmental>.

<sup>20</sup> <https://cei.org/sites/default/files/Wayne%20Crews%20-%20What%20is%20the%20Difference%20Between%20Major%20and%20Significant%20Rules.pdf>.

The tally above is for rules finalized, but rules entering the pipeline in the first place are way down too. Proposed rules are those in the process of being created, written, and commented upon. Their bulk implies either a higher or lower level of final rules (what we just covered) that one would expect to see later. The flows are less than seen with predecessors.

**Trump's First Fiscal Year: Proposed Rules Compared to Predecessors**  
(January 20 - September 30)

		Proposed Rules	"Significant" Proposed
<b>Trump</b>	<b>(2017)</b>	1241	65
<b>Obama</b>	<b>(2016)</b>	1737	290
<b>Obama</b>	<b>(2009)</b>	1413	216
<b>Bush</b>	<b>(2008)</b>	1707	276
<b>Bush</b>	<b>(2001)</b>	1757	129
<b>Clinton</b>	<b>(2000)</b>	1976	198
<b>Clinton</b>	<b>(1997)</b>	2134	169

Trump's overall proposed rules in the pipeline are down 28 percent compared to the corresponding time frame from Obama's final year (Trump: 1241, Obama: 1737). Note that Trump's "significant" proposed rules are drastically below any predecessor. They are down 77 percent compared to Obama (Trump: 65, Obama: 290).

Other nations have long operated rule-in, rule-out campaigns efforts. Canada's rule-in, rule out effort was praised by NPR in 2015.<sup>21</sup> British Columbia is a realm where the size of TV's in restaurants and the size of nails in small bridges are no longer regulated. Britain's rule-in, rule out process addressing broad "Care," "Energy" and "Waste" categories has recently morphed into one-in, three-out, and is credited with cutting \$10 billion pounds in permitting burdens and reducing overlap in agencies.<sup>22</sup> Future goals and targets matter: British Columbia's program sought and achieved a 1/3 reduction in "requirements," and cut hundreds of thousands of paperwork hours. Britain's version seeks to cut another \$10 billion by 2020. In garnering savings overseas and under Trump's initiative, it may ultimately make more sense to locate and reduce equivalent *burdens*, not necessarily rule counts, elsewhere; perhaps dollar for dollar rather than rule for rule reductions.<sup>23</sup>

Of course reducing future regulatory flows is not the same as a review and rollback of the existing body accumulated over decades, which also matters in budgeting. Accordingly, Britain's in-out "budget" is paired with a Cutting Red Tape review program. A similar proposal in the U.S. was President Obama's executive order on retrospective review, but is most embodied now in Sen. Angus King's bipartisan Regulatory Improvement Commission, an idea endorsed by the Progressive Policy Institute, which makes the commonsense observation that regulations that make sense alone might not when layered atop one another (Mandel and Carew 2013). Regulatory cost budgeting experiments are already complicated, so reducing the universe of

<sup>21</sup> <http://www.npr.org/2015/05/26/409671996/canada-cuts-down-on-red-tape-could-it-work-in-the-u-s>.

<sup>22</sup> <https://www.rstreet.org/wp-content/uploads/2016/03/RSTREET54.pdf> and <https://www.gov.uk/government/news/government-going-further-to-cut-red-tape-by-10-billion>.

<sup>23</sup> <https://www.cato.org/blog/president-trumps-one-two-out-rule-lessons-uk>.

subject matter can help. If it's so difficult to remove rules administratively now, with a president so actively engaged in doing it, that fact underscores the reality of unrelieved rule accumulation over decades under more detached executives, highlighting the role that Congress must play in reform. OIRA Director Neomi Rao points out that "Congress can simply deregulate through legislation and override an agency's determination."<sup>24</sup>

#### A Legacy of Regulatory Overreach, A Future of Competitive Discipline

*I think that is really where the thrill comes from. And it is a thrill; it's a high... I was born to regulate. I don't know why, but that's very true. So long as I am regulating, I'm happy (Quoted in Olson 2001).*

—OSHA safety standards program director Marthe Kent in 2001

Seemingly no corner of life escapes the modern state's purview, and much emanates not from an elected Congress but from the president and from unelected bureau personnel. Concern over executive branch ambition ranges across the policy spectrum—from a House Republican lawsuit against President Obama's unilateral actions (Walsh and Bash 2014), to Georgetown law professor Jonathan Turley's 2014 House Judiciary Committee testimony that, "We are in the midst of a constitutional crisis with sweeping implications for our system of government (Turley 2014)."

Until the Trump reforms, those doing the regulating saw no problem whatsoever and have engaged in "resistance" since then<sup>25</sup>; meanwhile and groups like Public Citizen<sup>26</sup> and the Center for Progressive Reform<sup>27</sup> disavow a negative impact of regulation on the economy and jobs, and other pundits likewise deny any linkage.<sup>28</sup> Others continue seeing things differently. Unemployment is "down" in part because statistics omit those who've given up the job hunt. A remarkable 94 million Americans 16 and older not in the labor force.<sup>29</sup> New banks aren't opening.<sup>30</sup> Data point to high debt per capita, and to the highest part-time and temporary-job creation rates in contrast to full time career positions.<sup>31</sup> A popular blog lamented the "slow death of American entrepreneurship" (Casselmann 2014) Headlines occasionally told painful tales, like *Investor's Business Daily* in 2015 reporting on businesses dying faster than they're being created. Likewise a Brookings study on small business formation noted declining rates, as did a *Wall Street Journal* report on reduced business ownership rates among the young (Simon and Barr 2015). One recruiter detailed to the *Wall Street Journal* how regulations undermine employment (Moore 2013), while others point to an inverse correlation between regulation and innovation (Kritikos 2014). Industry anecdotes paralleled the general statistics; In food service, regulations were driving restaurants out of business and even sending them abroad (Little 2013). In this age of tax reform, regulations constitute a "hidden tax."

<sup>24</sup> <https://www.bna.com/new-regulatory-task-n73014470829/>.

<sup>25</sup> [https://www.washingtonpost.com/news/book-party/wp/2017/02/02/the-crucial-fight-that-the-anti-trump-resistance-is-forgetting/?utm\\_term=.55bbdc22f5fd](https://www.washingtonpost.com/news/book-party/wp/2017/02/02/the-crucial-fight-that-the-anti-trump-resistance-is-forgetting/?utm_term=.55bbdc22f5fd).

<sup>26</sup> <http://www.judiciary.senate.gov/imo/media/doc/10-06-15%20Narang%20Testimony.pdf>.

<sup>27</sup> <http://www.progressivereform.org/CPRBlog.cfm?idBlog=DA6A88BC-AFC3-D090-2C768107F7CD3367>.

<sup>28</sup> [http://www.huffingtonpost.com/2011/11/17/deregulation-job-growth\\_n\\_1099579.html](http://www.huffingtonpost.com/2011/11/17/deregulation-job-growth_n_1099579.html).

<sup>29</sup> <https://data.bls.gov/timeseries/LNS15000000>.

<sup>30</sup> <https://cei.org/blog/administrations-regulatory-uncertainty>.

<sup>31</sup> [http://www.huffingtonpost.com/2011/11/17/deregulation-job-growth\\_n\\_1099579.html](http://www.huffingtonpost.com/2011/11/17/deregulation-job-growth_n_1099579.html).

Congress blamed overreach and its consequences on president Obama and agencies, but as noted the recent House Task Forces on regulatory and Article I issues, Congress has acknowledged it delegated that power inappropriately. The over-delegation phenomenon of unelected and unaccountable agency personnel doing the lawmaking was detailed in David Schoenbrod's *Power Without Responsibility* (1993). In *Is Administrative Law Unlawful?* Philip Hamburger sees the modern administration state as a reemergence of the absolute power practiced by pre-modern kings (2014). In *Imprimis*, Hamburger describes the return of monarchical prerogative—the very condition our Constitution was drafted to eliminate (November 2014):

*[T]he United States Constitution expressly bars the delegation of legislative power. This may sound odd, given that the opposite is so commonly asserted by scholars and so routinely accepted by the courts. ...The Constitution's very first substantive words are, "All legislative Powers herein granted shall be vested in a Congress of the United States." The word "all" was not placed there by accident.*

It is in *this* environment in which OIRA and Trump's new Task Forces operates; one in which courts also tend to defer to agencies' "expertise" (R. J. May 2010), and Ivy League scholars in the *Washington Post* from the "Constitutional disobedience" school of thought (described in Gasaway and Parrish 2017) ponder dispensing with Congress altogether in favor of a president that both makes and executes laws,<sup>32</sup> and giving up on the Constitution.<sup>33</sup> Supreme Court Justice Clarence Thomas probed the roots of today's deference to the Administrative State. (*Perez v. Mortgage Bankers Association*, 2015. 19):

*Many decisions of this Court invoke agency expertise as a justification for deference. This argument has its root in the support for administrative agencies that developed during the Progressive Era in this country. The Era was marked by a move from the individualism that had long characterized American society to the concept of a society organized for collective action.*

The combination of that progressive victory, delegation, inertia, and a ratchet effect that expands and never unwinds government power (Higgs 1987) dictates that the Constitution is not coming to the rescue in the short term. For all intents and purposes, code law has won, and is here to stay, until Article I reinstatement of congressional accountability to voters replaces bureaucratic unaccountability. Congress enabled bureaucratic and presidential hubris, and only it can reverse "regulation without representation" (Schoenbrod and Taylor 2003). As William A. Niskanen made clear in *Market Liberalism* (1992, 114):

*More promising than any identifiable change in the regulatory process would be a revival of the constitutional doctrines limiting restraints on interstate commerce,*

<sup>32</sup>[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=ria&uact=8&ved=0ahU/KEwiv3MjGoolXAhXnwVQKHRSrDc0QFggoMAA&url=https%3A%2F%2Fwww.washingtonpost.com%2Fnews%2Fin-theory%2Fwp%2F2016%2F01%2F11%2FImagine-theres-no-congress%2F&usq=AQvVaw0LP1fthb4\\_Cw\\_XcJCi5WiSu](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=ria&uact=8&ved=0ahU/KEwiv3MjGoolXAhXnwVQKHRSrDc0QFggoMAA&url=https%3A%2F%2Fwww.washingtonpost.com%2Fnews%2Fin-theory%2Fwp%2F2016%2F01%2F11%2FImagine-theres-no-congress%2F&usq=AQvVaw0LP1fthb4_Cw_XcJCi5WiSu) and [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2920778](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920778).

<sup>33</sup> <http://www.nytimes.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html>.

*restrictions on private contracts, the uncompensated taking of property rights, and the undue delegation of policy decisions to regulatory agencies.*

However with the right leadership and backing, OIRA's administrative oversight and the new Task Forces can lay a foundation for future liberalization and re-establishment of democratic accountability. This begins with what is underway now: Assuring that the regulatory state ultimate endures the disclosure, transparency and accountability demanded of taxing and spending.

We next confront the regulated nation we live in and address constraints that prevent America's traditional tools from doing much about it. But this is not a pessimistic survey; we will highlighting incremental reforms addressing regulatory overreach that today's energized OIRA and Task Force structure can implement, now that a president is engaged.

#### **What Restrains the Administrative/Regulatory State?**

Legislatures rarely control spending, (the fiscal 2017 deficit was \$666 billion<sup>34</sup>), let alone the tentacles of a regulatory enterprise enabled through design and apathy. As lawmaking disengaged from the legislature and relocated to unelected and unaccountable bureaucracies, economic, environmental and social intervention escalated. To compare, there were 214 public laws passed by Congress and signed by the president in calendar year 2016 (U.S. GPO); meanwhile agencies, implementing laws passed earlier and by earlier Congresses, issued 3,853 rules and regulations—a multiple (I like to call it the “Unconstitutionality Index”) of 18 rules for every law.

On those occasions when Congress gets traction on regulatory liberalization and is able to mobilize for reform, small business burdens and job concerns are often the inspiration. Since 1980, the Regulatory Flexibility Act has directed federal agencies to assess their rules' effects on small businesses and describe regulatory actions under development “that may have a significant economic impact on a substantial number of small entities (*Federal Register*, Vol. 74, No. 233, December 7, 2009, pp. 64131–32).” The RFA has (imperfectly) recognized the importance of vitality in small business and the need to scale federal actions to the size of those expected to comply, and occasional attempts to update it occur but have not been implemented. Another development was the Unfunded Mandates Reform Act of 1995 (P.L. 104-4.), driven largely by governors mobilized against Washington's rules for which compliance was disrupting states' own budgetary priorities (Dilger and Beth 2014). So popular was the Senate version it was dubbed “S. 1.”

The 1996 Congressional Review Act (CRA) requires agencies to submit reports to Congress on their major—roughly \$100 million—rules. Maintained in a Government Accountability Office database, these reports allow one to more readily observe which of thousands of final rules issued each year are major and which agencies are producing the rules (U.S. GAO).

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<sup>34</sup> <https://www.treasury.gov/press-center/press-releases/Pages/sm0184.aspx>

The CRA gives Congress a window of 60 legislative days in which to review a major rule and, if desired, pass a “resolution of disapproval” rejecting the rule. The CRA, in spirit, is one of the more important recent affirmations of the separation of powers. But despite the issuance of thousands of rules since passage, including many dozens of major ones, only one rule was rejected until this year’s elimination of 14 by the Trump administration: a Labor Department rule on workplace repetitive-motion injuries in early 2001.

Such concerns were recognized early, and upgrading CRA to require an affirmation of major agency regulations before they are effective is required. In the 115<sup>th</sup> Congress, the House but not the Senate has passed such legislation (the REINS Act). Meanwhile the CRA itself is undermined by final rules not being properly submitted to the Government Accountability Office and to Congress as required under the law (Copeland 2014), an arguably indispensable step since Congress needs the reports to introduce a formal disapproval resolution. The Pacific Legal Foundation’s RedTapeRollback project has begun compiling examples.<sup>35</sup>

So the Constitution has not come to the rescue, and alas, nor has Congress. We have settled for what the executive branch review of regulations embodied at OIRA could achieve—something now greatly amplified by the Trump Administration. The basis of the prevailing regulatory process is the post-New Deal Administrative Procedure Act (APA) of 1946 (P.L. 79-404) which set up the process of public advance notice of rulemakings and provided the opportunity for the public to provide input and comment before a final rule is published in the *Federal Register* subject to a 30-day period before it becomes effective. The *Federal Register* is the daily depository of all these proposed and final federal rules and regulations (such as the 3,853 rules of 2016). While the APA established formal rulemaking processes with quasi-judicial proceedings for significant regulations, these are rarely used. Instead, APA’s “informal rulemaking” procedure of notice and comment (“Section 553” rulemaking) is most common (Carey 2014). But there is wiggle room even for that. As noted in a 2014 survey by the Congressional Research Service, “The APA specifically authorizes any federal agency to dispense with its requirements for notice and comment if the agency for good cause finds that the use of traditional procedures would be ‘impracticable, unnecessary, or contrary to the public interest’ (Carey 2014).”

During the late 1970s and early 1980s, concern over regulations’ economic effects bred inquiries and reforms meant to reinvigorate the economy while stemming that era’s inflationary pressures (Hopkins 1976). Alongside cost concerns, agency tendencies to overstate or selectively express benefits was recognized. Prominent regulatory liberalizations began in the 1970s, and included certain trucking, rail, and airline deregulatory moves, partial financial services reforms, relaxed antitrust enforcement and paperwork reduction (Firey 2011). The regulatory review regime began with President Nixon, was expanded by President Ford, and embraced more fully by President Carter. A significant advance was the Reagan Administration’s formalization of more activist central regulatory review at the OIRA within the Office of Management and Budget.

Created by the Paperwork Reduction Act of 1980, OIRA first concentrated on reducing the private sector’s federal paperwork burdens. Later, OIRA’s authority was expanded by President Reagan’s February 17, 1981 Executive Order 12291 to encompass (theoretically) a larger portion of the regulatory process by requiring that any new major executive agency regulation’s benefits outweigh costs where not prohibited by statute (independent agencies were exempt), and to

<sup>35</sup> <https://www.redtaperollback.com/>.

review agencies rules and analyses. Earlier administrations' regulatory review efforts such as ones conducted by the Council on Wage and Price Stability, the Council of Economic Advisers and the interagency Regulatory Analysis Review Group, lacked extensive enforcement powers (DeMuth 1980). These earlier bodies could seek regulatory cost analysis if not statutorily prohibited, but could not enforce net-benefit requirements; agencies could reject reviewers' counsel and appeals to the president were possible, but rare (DeMuth 1980). Net benefit analysis sports insurmountable problems of its own ("The Costs of Benefits" in Crews 2013; and Crews, *Forbes* 7 July 2013), but the intent was significant in the new context of consciously addressing regulation. The early and mid-1980s saw declining costs and flows, particularly in economic regulation in contrast to social and environmental (Hopkins 1992).

Over the years, OIRA review—and that at the first President George Bush's Council on Competitiveness tasked to screen regulations (Bloomberg Business 1991)—faced political opposition, narrow scope of authority (Bolton, Potter and Thrower 2014) and limited resources (Dudley 2011). On September 30, 1993, President Bill Clinton's replacement of Reagan's E.O. 12291 with E.O. 12866 "Regulatory Planning and Review" reduced OIRA's authority. The Clinton approach retained the central regulatory review structure, but "reaffirm[ed] the primacy of Federal agencies in the regulatory decision-making process" (*Federal Register*, Vol. 58, No. 190, October 4, 1993), weakening the "central" in review. The new order also changed the Reagan criterion that benefits "outweigh" costs to a weaker stipulation that benefits "justify" costs. But the order retained requirements that agencies assess costs and benefits of "significant" proposed and final actions, conduct cost benefit analysis of "economically significant" (\$100 million-plus), and to assess "reasonably feasible alternatives" for OIRA to review. As with E.O. 12291, independent agencies, while they are subject to APA notice-and-comment, remained exempt from enforceable review, as they still remain under Trump's E.O. 13771.

President Obama's January 18, 2011 E.O. 13565 on review and reform ("Improving Regulation and Regulatory Review") carried on the Clinton order and articulated a pledge to address unwarranted regulation (*Federal Register*, Vol. 76, No. 14, January 21, 2011). Obama achieved a few billion dollars in savings, even wisecracking in the 2013 State of the Union Address about a rule that had categorized spilled milk as an "oil" (White House 2012), but roadblock to rolling back regulations became and remain apparent under Trump's initiative. Too often, the few billions of dollar cut via executive actions have been swamped by rules otherwise issued.

A president cannot change congressional directives with respect to independent agencies, but can use the pen and phone bully pulpit to, if not to restrain agencies, to not encourage their excesses. President Obama's July 11, 2011 E.O. 13579 ("Regulation and Independent Regulatory Agencies") called upon them to fall into line on disclosure (*Federal Register*, Vol. 76, No. 135, July 14, 2011).<sup>36</sup>

But formal executive branch regulatory review processes cannot work when a president's philosophy is that government, not private individuals and interactions, should dominate finance, health care, energy policy, manufacturing and other spheres of human action. While Obama embodied this belief system with repeated pledges to go around Congress attest to this while

<sup>36</sup> In all, four of President Obama's executive orders addressed the role of central reviewers at OIRA (All available on OMB's "Regulatory Matters" site, [https://www.whitehouse.gov/omb/inforeg\\_regmatters#eo13610](https://www.whitehouse.gov/omb/inforeg_regmatters#eo13610)).



every instance from net neutrality to breath-mint serving size rules to school lunch mandates underscores a federal government disinclined to leave the public alone. Like the original E.O. 12291, the *potential* for executive orders to boost oversight and review is high when the motivation exists.

### **The Limits of OIRA's Central Regulatory Review**

Executive branch central review has been improved markedly by Trump's orders, but congressional action will be needed for permanence.

#### **Rent-seeking and agency self-interest**

For one thing, it is not entirely accurate, as OMB has been known to proclaim, that "businesses generally are not in favor of regulation" (U.S. OMB 1997)." Business not only generally favors regulation, but often pursued regulation in the first place (Stigler 1971). Taxes obviously transfer wealth and affect profits, but regulations do likewise; pollution controls, accounting requirements, privacy mandates and the like do not impact every firm equally. They create artificial entry barriers and hobble competition, they benefit some producers while punishing others. This aggravates cronyism and attempts at regulatory capture. Consumers enjoying falling prices and growing output were not demanding the Interstate Commerce Commission, or the state regulation of utilities (Geddes 1992), or the antitrust laws, or regulation of Uber: such are sought by political elites and producers protecting profits by eliminating competition. Small businesses, when they get big, may look more favorably upon rent-seeking and score-settling (Tollison 1982).

Social welfare rationales that dominate policy rhetoric, but regulation benefits regulatory advocates, pressure groups and, obviously, the regulator, and creates a constituency favoring command-and-control rules over market processes. This generates legislation and derivative rules requiring OMB "review" that perhaps shouldn't exist in the first place. Just as *economic* regulatory agencies are captured by special interests, much of what is considered *social* or *health/safety* or environmental regulation may undermine consumers as well (Crandall 1992). Even when regulation "works," the overall or societal benefits of can be outweighed by costs, or may ignore wealth transfers, regulatory takings and due process.

Executive review, when it works, is an institution recognizing that agencies and departments do not benefit from *curtailing* operations, from *not* regulating. Rather they gain immensely—in budget allocation, staffing, and political and career status—the more extensive the regulatory empires they oversee. Output for bureaus is not directly measurable, but must be inferred from the level of activity, creating a slippage in the ability to closely monitor agency effectiveness (Niskanen 1971). Unlike profit-making firms, unaccountable bureaus can disregard minimizing the costs of their "product" (regulations) since others (private sector entities and their customers) bear the impact of their actions. Turf-building assures agencies will sometimes not care all that much about anything more than cosmetic benefit-cost concerns, enough to create the appearance regulatory justification. Unlike private actors, bureaus are unlikely to face stiff repercussions when their interventions prove scientifically, socially or economically wasteful and harmful.

#### **"Regulatory Dark Matter" that OIRA misses**

Even if APA notice and comment worked optimally, and OIRA review (and that of the new agency Task Forces) exceeds expectations, it only a partially adequate safeguard since the already incomplete discipline of rulemaking—which provides OIRA the subject matter to review in the first place—downplays agency guidance documents (“non-legislative” rules), memoranda, notices, Administrator Interpretations and bulletins. Such “regulatory dark matter”<sup>37</sup> can influence policy yet avoid not just the constitutional lawmaking process, but skirt the public notice-and-comment requirements of the Administrative Procedure Act and OIRA review (Mercatus Institute symposium, 2014) and potentially that of the agency Task Forces.

Until Trump’s E.O. 13771 incorporated them, guidance documents largely skirted central review, since the APA’s requirement of publishing a notice of proposed rulemaking doesn’t apply to “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” That, along with the “good cause” exemption for legislative rules (P.L. 79-404, Section 553) provides a workable loophole. This witness’s partial inventory finds 617 pieces of acknowledged “significant guidance” in play (as of March 2017), but there are many tens of thousands of guidances in existence<sup>38</sup>

President Obama’s waivers of Patient Protection and Affordable Care Act elements were among the most prominent, but alongside was other conspicuous and sometimes headline-grabbing executive and independent agency guidance documents, as seen below.

#### **Recent Prominent and Headline-Grabbing Guidance Documents Call for Greater OIRA, Task Force and Congressional Oversight**

##### **Social Policy**

- **Housing and Urban Development** guidance decreeing landlord and home seller denial of those with criminal records a potential violation of the Fair Housing Act.<sup>39</sup>
- A series of **Department of Education** guidance documents, issued at a rate of one per business day, imposing mandates on colleges and schools.<sup>40</sup> According to the bipartisan Senate-appointed Task Force on Federal Regulation of Higher Education, “In 2012 alone, the Department [of Education] released approximately 270 “Dear

<sup>37</sup> Clyde Wayne Crews Jr., “Mapping Washington’s Lawlessness: A Preliminary Inventory of ‘Regulatory Dark Matter,’” *Issue Analysis 2017 No. 4*, Competitive Enterprise Institute, March 2017. <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness%202017.pdf>; also available on SSRN Social Science Research Network. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2733378](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378).

<sup>38</sup> Crews, Regulatory Dark Matter, 2017. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2733378](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378).

<sup>39</sup> U.S. Department of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, April 4, 2016.

[http://portal.hud.gov/hudportal/documents/huddoc?id=HUD\\_OGCGuidAppFHASandCR.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf). Camila Domonoske, “Denying Housing Over Criminal Record May Be Discrimination, Feds Say,” National Public Radio, April 3, 2016, [http://wamu.org/news/16/04/03/denying\\_housing\\_over\\_criminal\\_record\\_may\\_be\\_discrimination\\_feds\\_say](http://wamu.org/news/16/04/03/denying_housing_over_criminal_record_may_be_discrimination_feds_say).

<sup>40</sup> Hans Bader, “Education Department Floods Schools with New Uncodified Bureaucratic Mandates,” Competitive Enterprise Institute Blog, February 25, 2015, <https://cei.org/blog/education-department-floods-schools-new-uncodified-bureaucratic-mandates>.

Colleague” letters and other electronic announcements”<sup>41</sup> recalibrating regulation of colleges and universities. Those that do not comply stand to lose funding.<sup>42</sup> High-profile, controversial recent Education Department guidance has included:

- Guidance (a 2011 “Dear Colleague”) to colleges and universities on sexual assault and harassment.<sup>43</sup> The campus environment has generated strong responses from and organization among mothers of accused students.<sup>44</sup>
- Guidance letter (a 2010 “Dear Colleague”) on bullying and harassment.<sup>45</sup>
- Guidance (a 2016 “Dear Colleague”), co-produced with the **Department of Justice’s Civil Rights Division**, requiring inclusion of “gender identity” in the definition of “sex” and requiring schools to allow transgender students to choose which bathroom or locker room to use.<sup>46</sup> The transgender bathroom dispute has been a driver of headlines as well as of state reaction, notably that of Texas and other state attorneys general suing the Education and Justice Departments over “their efforts to unilaterally re-write the law in flagrant disregard for the checks and balances provided by the other branches of government” and “systematically abus[ing] the exceptions to the rulemaking process.”<sup>47</sup>
- 2016 Policy Statement from the Education Department and the **Department of Health and Human Services** “preventing and severely limiting expulsion

<sup>41</sup> *Recalibrating Regulation of Colleges and Universities*, Report of the Task Force on Federal Regulation of Higher Education, p. 10, [http://www.help.senate.gov/imo/media/Regulations\\_Task\\_Force\\_Report\\_2015\\_FINAL.pdf](http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf).

<sup>42</sup> John O. McGinnis, “Deregulate to Undermine Political Correctness,” Library of Law and Liberty Blog, November 23, 2016, <http://www.libertylawsite.org/2016/11/23/deregulate-to-undermine-political-correctness/>.

<sup>43</sup> U.S. Department of Education, Office for Civil Rights, Dear Colleague letter on Sexual Violence: Background, Summary, and Fast Facts, April 4, 2011, <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf>.

<sup>44</sup> Fred Barbash, “Toxic Environment” for Sons Accused of Campus Sex Offenses Turns Mothers into Militants,” *Washington Post*, August 29, 2016, [https://www.washingtonpost.com/news/morning-mix/wp/2016/08/29/toxic-environment-for-sons-accused-of-campus-sex-offenses-turns-mothers-to-militants/?utm\\_campaign=buffer&utm\\_content=bufferaa012&utm\\_medium=social&utm\\_source=facebook.com&utm\\_term=.1e143b1c9ae6&wpisrc=nl\\_evening&wpmm=1](https://www.washingtonpost.com/news/morning-mix/wp/2016/08/29/toxic-environment-for-sons-accused-of-campus-sex-offenses-turns-mothers-to-militants/?utm_campaign=buffer&utm_content=bufferaa012&utm_medium=social&utm_source=facebook.com&utm_term=.1e143b1c9ae6&wpisrc=nl_evening&wpmm=1).

<sup>45</sup> United States Department of Education, Office for Civil Rights, Dear Colleague letter, October 26, 2010, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>46</sup> U.S. Department of Justice Civil Rights Division and U.S. Department of Education Office for Civil Rights, Dear Colleague letter, May 13, 2016, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. Devlin Barrett, “Obama Administration Issues Guidance on Transgender Bathroom Use in Schools,” *Wall Street Journal*, May 13, 2013, <http://www.wsj.com/articles/obama-administration-directs-public-schools-on-transgender-bathroom-rights-1463112023>.

<sup>47</sup> United States District Court, Northern District of Texas, Wichita Falls Division, Civil Action No. 7:16-cv-00054-O, August 3, 2016, [https://www.texasattorneygeneral.gov/files/epress/Harold\\_Reply\\_Brief080416.pdf](https://www.texasattorneygeneral.gov/files/epress/Harold_Reply_Brief080416.pdf). This brief adopted the term “regulatory dark matter,” citing the December 2015 edition of this report. Christopher Collins, “States’ Attorneys Say Feds Using ‘Regulatory Dark Matter’ in transgender case,” *Times Record News*, August 4, 2016, <http://www.timesrecordnews.com/news/politics/states-attorneys-say-feds-using-regulatory-dark-matter-in-transgender-case-3942497b-9172-7c0e-e053-0-389224521.html>.

and suspension practices in early childhood settings”<sup>48</sup> without basis in law or notice and comment.<sup>49</sup>

- The **General Services Administration** reiterated the Obama Justice and Education Departments’ definition of ‘sex’ interpretation with an August 2016 “clarification” Bulletin on transgender access, declaring that ‘the nondiscrimination requirement includes gender identity as a prohibited basis of discrimination under the existing prohibition of sex discrimination for any facility under the jurisdiction, custody, or control of GSA.’<sup>50</sup>

### **Labor Policy**

- The **Department of Labor Wage and Hour Division’s** blog post and “Administrative Interpretation No. 2015-1” informing the public that many independent contractors may now be classified as employees.<sup>51</sup>
- The **Department of Labor Wage and Hour Division’s** “Administrative Interpretation No. 2016-1” asserting a possible redefinition of “joint employment” under the Fair Labor Standards Act on case-by-case basis in contracting situations “to ensure that all responsible employers are aware of their obligations.”<sup>52</sup> With this interpretation, the DOL “will hold more employers liable for wage violations against employees they do not directly employ. The enforcement effort will focus on the construction, hospitality, janitorial, staffing agencies, and warehousing and logistics”<sup>53</sup> and potentially “penalize any industry that utilizes contractors and labor suppliers.”<sup>54</sup>

<sup>48</sup> U.S. Department of Health and Human Services and U.S. Department of Education, Policy Statement on Expulsion and Suspension Policies in Early Childhood Settings, [http://www.acf.hhs.gov/sites/default/files/ecd/expulsion\\_suspension\\_final.pdf](http://www.acf.hhs.gov/sites/default/files/ecd/expulsion_suspension_final.pdf).

<sup>49</sup> Hans Bader, “Obama’s Central Planning for Preschools Is Overreaching,” Competitive Enterprise Institute blog, June 16, 2016, <https://cei.org/blog/obamas-central-planning-preschools-overreaching>.

<sup>50</sup> General Services Administration, Bulletin, “Federal Management Regulation; Nondiscrimination Clarification in the Federal Workplace,” August 18, 2016, <https://www.federalregister.gov/articles/2016/08/18/2016-19450/federal-management-regulation-nondiscrimination-clarification-in-the-federal-workplace>. Dominic Holden, “Bathroom Access a ‘Must’ for Transgender People in Federal Facilities,” BuzzFeed News, August 15, 2016, [https://www.buzzfeed.com/dominicholden/bathroom-access-a-must-for-transgender-people-in-federal?utm\\_term=.mb8dlnlBq#.mpRIQDQnc](https://www.buzzfeed.com/dominicholden/bathroom-access-a-must-for-transgender-people-in-federal?utm_term=.mb8dlnlBq#.mpRIQDQnc).

<sup>51</sup> David Weil, “Employee or Independent Contractor?” U.S. Department of Labor Blog, July 15, 2015, <https://blog.dol.gov/2015/07/15/employee-or-independent-contractor/>. Weil, “The Application of the Fair Labor Standards Act’s ‘Suffer or Permit’ Standard in the Identification of Employees Who Are Misclassified as Independent Contractors,” Administrator’s Interpretation No. 2015-1, DOL, Wage and Hour Division, July 15, 2015, [http://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.pdf](http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf).

<sup>52</sup> DOL, Wage and Hour Division, Administrator’s Interpretation No. 2016-1, Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act, January 20, 2016, [https://www.dol.gov/whd/flsa/Joint\\_Employment\\_AI.pdf](https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf). For overview and concerns, see Rochelle Spandorf, “Twelve Tips for Licensors to Reduce Joint Employer Risks under Today’s Legal Standards—Revisited,” *Business Law Today*, American Bar Association, February 2016, [http://www.americanbar.org/publications/blt/2016/02/06\\_spandorf.html](http://www.americanbar.org/publications/blt/2016/02/06_spandorf.html).

<sup>53</sup> Trey Kovacs, “Labor Policy Developments to Watch in the New Year,” Competitive Enterprise Institute Blog, January 22, 2016, <https://cei.org/blog/labor-policy-developments-watch-new-year>.

<sup>54</sup> *Ibid.*

- The **Department of Labor's** guidance for Executive Order 13673, "Fair Pay and Safe Workplaces" guidance (and accompanying rule<sup>55</sup>) on prior labor law violation disclosure catalogs "explicit new instructions for Federal contracting officers to consider a contractor's compliance with certain Federal and State labor laws as a part of the determination of contractor 'responsibility' that contracting officers presently must undertake before awarding a Federal contract."<sup>56</sup> This effort has been criticized by critics as blacklisting and part of a series of "anti-employer policies."<sup>57</sup>
- An **Occupational Safety and Health Administration** interpretation letter proclaiming that during a workplace inspection, employees of a non-union firm may authorize and be represented by a union representative accompanying OSHA compliance officers. The letter maintained that "there may be times when the presence of an employee representative who is not employed by that employer will allow a more effective inspection."<sup>58</sup>
- Greater use by the **National Labor Relations Board** of memoranda that affect non-union employers.<sup>59</sup>
- A series of **Equal Employment Opportunity Commission** guidance documents on pregnancy discrimination and accommodation in the workplace, credit checks on potential employees, and criminal background checks.<sup>60</sup>
- A September 2016 **U.S. Commission on Civil Rights** 306-page report, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*, which features this Chairman's statement:

The phrases "religious liberty" and "religious freedom" will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance. ... Religious liberty was never intended to give one

<sup>55</sup> Federal Acquisition Regulation, Fair Pay and Safe Workplaces, RIN 9000-AM81. October 25, 2016, <http://hr.ech.com/ELD/2016-19676.pdf>.

<sup>56</sup> DOL, Final Guidance, Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces," August 25, 2016, [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=FEDERAL\\_REGISTER&p\\_id=27458](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=27458).

<sup>57</sup> Mark Pulliam, "A Lawless Labor Agenda," Library of Law and Liberty, November 2, 2016, <http://www.libertylawsite.org/2016/11/02/a-lawless-labor-agenda/#more-21492>.

<sup>58</sup> DOL, Occupational Safety and Health Administration, February 21, 2013, [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=28604](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604). Roy Maurer, "OSHA: Unions May Represent Nonunion Workplaces during Inspections," Society for Human Resource Management, April 24, 2013, <https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/osha-unions-represent-nonunion-inspections.aspx>. Ben Huggett, "Workplace Policy Institute—OSHA Changes Course: Will Allow outside Representatives, including Union Agents, to Enter Non-Union Worksites During OSHA Inspections," Littler Insight Blog, April 23, 2013, <https://www.littler.com/workplace-policy-institute-%E2%80%94-osha-changes-course-will-allow-outside-representatives-including-union>.

<sup>59</sup> Sean Higgins, "Comrades in Arms," *Washington Examiner*, May 18, 2015, <http://www.washingtonexaminer.com/comrades-in-arms/article/2564545>.

<sup>60</sup> National Federation of Independent Business, *The Fourth Branch & Underground Regulations*, September 2015, <http://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf>.

religion dominion over other religions, or a veto power over the civil rights and civil liberties of others. However, today, as in the past, religion is being used as both a weapon and a shield by those seeking to deny others equality.<sup>61</sup>

### Health Policy

- **Centers for Disease Control and Prevention** Guidelines to physicians<sup>62</sup> that have become controversial on the part of groups and individuals concerned with pain management and substitution of riskier alternatives.<sup>63</sup>
- A Notice of Intent from the **Drug Enforcement Administration** (DEA) that places the plant kratom on schedule I of the Controlled Substances Act 'to avoid an imminent hazard to the public safety,'<sup>64</sup> to considerable controversy.<sup>65</sup> The DEA has not accepted comments, but a public petition in opposition to the ban has over 100,000 signatures.<sup>66</sup>

### Environmental Policy

- The **Environmental Protection Agency's** (EPA's) Clean Water Act interpretive guidance on "Waters of the United States."<sup>67</sup> This directive took the step of soliciting notice and comment per the APA, though with significant controversy over manufactured endorsement.<sup>68</sup> This rule represents an instance in which the House and Senate supported a resolution of disapproval, but the president naturally objected to overturning his own administration's rule.
- The **Securities and Exchange Commission's** interpretive Commission Guidance Regarding Disclosure Related to Climate Change, on disclosing potential disruption

<sup>61</sup> U.S. Commission on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*, September 2016, <http://www.newamericancivilrightsproject.org/wp-content/uploads/2016/09/Peaceful-Coexistence-09-07-16-6.pdf>.

<sup>62</sup> Deborah Dowell, Tamara M. Haegerich, and Roger Chou, "CDC Guideline for Prescribing Opioids for Chronic Pain—United States," March 18, 2016, Vol. 65, No. RR-1, pp. 1–49, <http://dx.doi.org/10.15585/mmwr.rr6501e1>.

<sup>63</sup> Josh Bloom, "Have Opioid Restrictions Made Things Better or Worse?" American Council on Science and Health, November 3, 2016, <http://acsh.org/news/2016/11/03/have-opioid-restrictions-made-things-better-or-worse-10400>.

<sup>64</sup> Drug Enforcement Administration, "Schedules of Controlled Substances: Temporary Placement of Mitragynine and 7-Hydroxymitragynine Into Schedule I," August 31, 2016, <https://www.federalregister.gov/documents/2016/08/31/2016-20803/schedules-of-controlled-substances-temporary-placement-of-mitragynine-and-7-hydroxymitragynine-into>.

<sup>65</sup> Jacob Sullum, "The DEA's Contrived Kratom Crisis," Reason.com, October 5, 2016, <http://reason.com/archives/2016/10/05/the-deas-contrived-kratom-crisis>.

<sup>66</sup> Center for Regulatory Effectiveness, "An Open Letter to the Obama White House Staff," September 15, 2016, <http://www.thecre.com/forum11/?p=109>.

<sup>67</sup> Environmental Protection Agency, "Documents Related to the Clean Water Rule," <http://www2.epa.gov/cleanwaterrule/documents-related-clean-water-rule>. Daren Bakst, "What You Need to Know about the EPA/Crops Water Rule: It's a Power Grab and an Attack on Property Rights," *Backgrounders* No. 3012, Heritage Foundation, April 29, 2015, "<http://www.heritage.org/research/reports/2015/04/what-you-need-to-know-about-the-epacrops-water-rule-its-a-power-grab-and-an-attack-on-property-rights>."

<sup>68</sup> William Yeatman, "Understanding the EPA's Power Grab through the 'Waters of the U.S. Rule,'" Competitive Enterprise Institute Blog, June 1, 2015, <https://cei.org/blog/understanding-epa%E2%80%99s-power-grab-through-%E2%80%99waters-us-rule%E2%80%99D>.

from “significant physical effects of climate change” on “a registrant’s operations and results,” and disclosing international community actions that “can have a material impact on companies that report with the Commission.”<sup>69</sup> The guidance observes: “Many companies are providing information to their peers and to the public about their carbon footprints and their efforts to reduce them.”

- The **U.S. Department of Agriculture’s Forest Service’s** Notice of Final Directive permanent Ecosystem Restoration policy to replace Interim Directive, Ecological Restoration and Resilience Policy, in Forest Service Manual 2020, providing broad guidance for restoring ecosystems.<sup>70</sup>
- Three **Department of Labor** guidance documents regarding the Process Safety Management standards for hazardous chemicals, which have been highlighted by Sen. James Lankford as bringing a range of manufacturers and retailers within the scope of regulation without the opportunity for public comment. A letter from Sen. Lankford to the Labor Department noted:

These three guidance documents are expected to dramatically expand the universe of regulated parties, create extreme logistical and financial burdens on regulated parties, and convert flexible recommended practices into mandatory requirements—all without the opportunity for public comment. We therefore ask that OSHA immediately withdraw these memoranda.<sup>71</sup>

Subject matter of the three guidance documents concerned engineering practices, retail exemptions, and chemical concentrations subject to Process Safety Management standards.

- The **Environmental Protection Agency** consent decree, in response to automaker Volkswagen’s deploying “defeat device” software to circumvent EPA emissions standards for nitrogen oxides,<sup>72</sup> will now review commitments by the company to build electric vehicle charging stations in the United States.<sup>73</sup> Such decrees, penalties aside, have the potential effect of improperly influencing the market trajectory of an entire sector. Noting the penalties, however, CEI’s William Yeatman has stressed the capability of this specific consent decree (and those of the future, if allowed to stand)

<sup>69</sup> Securities and Exchange Commission, “Commission Guidance Regarding Disclosure Related to Climate Change,” February 8, 2010, <https://www.sec.gov/rules/interp/2010/33-9106.pdf>. John Berlau, “Energy Bill Greens Financial Agencies,” Daily Caller, February 5, 2016, <http://dailycaller.com/2016/02/05/energy-bill-greens-financial-agencies/>.

<sup>70</sup> U.S. Department of Agriculture, Forest Service, Ecosystem Restoration Policy (RIN 0596-AC82), *Federal Register*, Vol. 81, No. 81, April 27, 2016, pp. 24785-24793, <https://www.gpo.gov/fdsys/pkg/FR-2016-04-27/pdf/2016-09750.pdf>.

<sup>71</sup> Office of Sen. James Lankford, “Lankford, Senators Challenge Department of Labor Regulatory Actions,” news release, September 29, 2015, <https://www.lankford.senate.gov/newsroom/press-releases/lankford-senators-challenge-department-of-labor-regulatory-actions>.

<sup>72</sup> EPA, “Volkswagen Light Duty Diesel Vehicle Violations for Model Years 2009-2016,” accessed February 9, 2017, <https://www.epa.gov/vw>.

<sup>73</sup> “EPA asks Volkswagen to make electric cars in U.S.: Welt am Sonntag,” Reuters, February 21, 2016, <http://www.reuters.com/article/us-volkswagen-emissions-usa-idUSKCN0VU01A>.

being abused by presidents or the executive branch to circumvent Congress' power of the purse and achieve extra-legislative regulatory ends by extractive fines of even greater magnitude than a president dared ask of Congress. With regard to the Volkswagen settlement specifically, and noting that President Obama had previously sought similar zero-emission vehicle infrastructure investments, Yeatman notes:

The proposed consent decree would give the government authority over \$1.2 billion in zero-emissions vehicle investments, which is four times what the administration unsuccessfully sought from Congress for effectively the same purpose in 2011.

If allowed to stand, the \$1.2 billion electric-car money grab would provide a powerful model for future presidents to cut Congress out of the appropriations process. All future presidents would have to do is allocate resources into regulatory enforcement and then pursue settlements whereby the regulated entity "voluntarily" agrees to fund the president's preferred policies.<sup>74</sup>

- **The Council on Environmental Quality's Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts**, which in effect turns the National Environmental Policy Act into a vehicle for implementing climate policy, particularly through federal land management decisions.<sup>75</sup> The guidance document, which is under seemingly perpetual review, holds that "agencies should consider both the potential effects of a proposed action on climate change, as indicated by its estimated greenhouse gas emissions, and the implications of climate change for the environmental effects of a proposed action," and expanding upon 2010 draft guidance, "applies to all proposed Federal agency actions, including land and resource management actions." Elizabeth Lake on the site Law360 asserts that the new draft "appears to push federal agencies to use NEPA to take a more activist stance in reducing GHG emissions":

[W]hile courts have held that NEPA is a procedural statute, requiring only a "hard look" at environmental impacts (*NRDC v. Morton*, 458 F.2d 827, 838 (D.C.Cir., 1972)), this CEQ proposed guidance goes well-beyond this doctrine by instructing agencies to use the NEPA process to force the substantive reduction of GHG emissions.<sup>76</sup>

Meanwhile, a multi-agency body called the U.S. Global Change Research Program recently hosted a 2016 Advisory Committee for the Sustained National Climate Assessment that includes ideological environmental advocacy groups.<sup>77</sup>

<sup>74</sup> Yeatman, "Obama's Electric Car Money Grab," *Wall Street Journal*, November 2, 2016, <http://www.wsj.com/articles/obamas-electric-car-money-grab-1478041904>.

<sup>75</sup> White House Council on Environmental Quality, Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts, August 2016, <https://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance>.

<sup>76</sup> Elizabeth A. Lake, "No Consensus On CEQ Draft Guidance For NEPA Reviews," Law360, May 22, 2015, <http://www.law360.com/articles/658194/no-consensus-on-ceq-draft-guidance-for-nepa-reviews>.

<sup>77</sup> U.S. Global Change Research Program, "NOAA Appoints Members to Advisory Committee for the Sustained



### **Financial Policy**

- Guidance from the **Consumer Financial Protection Bureau** in the form of a bulletin on “Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act” that limits the ability of automobile dealers to offer discounts to customers allegedly in the name of credit fairness and eliminating racial bias (“When such disparities exist within an indirect auto lender’s portfolio, lenders may be liable under the legal doctrines of both disparate treatment and disparate impact”).<sup>78</sup> Given the size of the auto lending marketplace, this is clearly an economically significant measure that at the very least required a rulemaking. Even the CFPB recognized internally that it was overestimating bias.<sup>79</sup> That led to bipartisan passage in the House of Representatives of the Reforming CFPB Indirect Auto Financing Guidance Act (H.R. 1737) to revoke the guidance.<sup>80</sup> The bill would force CFPB “to withdraw the flawed guidance that attempts to eliminate a dealer’s ability to discount auto financing for consumers. The bill also requires the minimal safeguards the agency failed to follow, such as public participation and transparency.”<sup>81</sup>
- A **Commodity Futures Trading Commission** staff advisory guidance document on international financial transactions between overseas parties “arranged, negotiated or executed” by a U.S.-based individual.<sup>82</sup> The guidance was delayed several times (indicating it perhaps should be a commented-upon rule, instead) and said by Republican commissioners to jeopardize thousands of jobs by potentially sending them offshore.<sup>83</sup>

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National Climate Assessment,” June 29, 2016, <http://www.globalchange.gov/news/noaa-appoints-members-advisory-committee-sustained-national-climate-assessment>.

<sup>78</sup> Consumer Financial Protection Bureau, Bulletin 2013-02, March 21, 2013, “Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act,”

[http://files.consumerfinance.gov/f/201303\\_cfpb\\_march\\_-\\_Auto-Finance-Bulletin.pdf](http://files.consumerfinance.gov/f/201303_cfpb_march_-_Auto-Finance-Bulletin.pdf).

<sup>79</sup> Rachel Witkowski, “CFPB Overestimates Potential Discrimination, Documents Show,” *American Banker*, September 17, 2015, <http://www.americanbanker.com/news/law-regulation/cfpb-overestimates-potential-discrimination-documents-show-1076742-1.html>.

<sup>80</sup> John Irwin, “U.S. House passes bill revoking CFPB auto lending guidance,” *Automotive News*, November 18, 2015, [http://www.autonews.com/article/20151118/FINANCE\\_AND\\_INSURANCE/151119809/u.s.-house-passes-bill-revoking-cfpb-auto-lending-guidance](http://www.autonews.com/article/20151118/FINANCE_AND_INSURANCE/151119809/u.s.-house-passes-bill-revoking-cfpb-auto-lending-guidance).

<sup>81</sup> National Automobile Dealers Association, “Bipartisan CFPB Transparency Bill Passes House Overwhelmingly,” news release, November 18, 2015,

<https://www.nada.org/CustomTemplates/DetailPressRelease.aspx?id=21474842886>.

<sup>82</sup> U.S. Commodity Futures Trading Commission, Division of Swap Dealer and Intermediary Oversight, CFTC Staff Advisory No. 13-69, “Applicability of Transaction-Level Requirements to Activity in the United States,” November 13, 2015, <http://www.cftc.gov/ide/groups/public/@lrllettergeneral/documents/letter/13-69.pdf>.

<sup>83</sup> J. Christopher Giancarlo, “Now Federal Job-Killers Are Coming After Derivatives,” *Wall Street Journal*, November 19, 2014, <http://www.wsj.com/articles/j-christopher-giancarlo-now-federal-job-killers-are-coming-after-derivatives-1416442215>.

- A **Federal Reserve** Secure Payments Task Force, which was set up without statutory authority,<sup>84</sup> and sets the stage for a government-run real-time electronic payment network.<sup>85</sup>

#### ***Economic/Technology Policy***

- The **Department of Transportation's Federal Aviation Administration** restrictive June 2016 final rule on drones, "Operation and Certification of Small Unmanned Aircraft Systems," which requires line-of-sight and no night-time operations among much else, ignoring the ability of technological and contractual solutions to address risk, and refusing to stand down to local law enforcement solutions.<sup>86</sup> It also contains declarations from the agency regarding case-by-case waivers, as well as a large quantity of forthcoming guidance, much of which would seem to be economically significant, on issues, including:
  - Industry best practices;
  - Risk assessment;
  - Potential guidance on external load operations;
  - Guidance associated with not dropping objects in ways that damage persons or property;
  - Advisories on training and direction to air traffic control facilities;
  - Preflight checks for safe operation;
  - Vehicle conditions for safe operations; and
  - Guidance "on topics such as aeromedical factors and visual scanning techniques."
- A **Federal Aviation Administration** rule interpretation on drones via a Notice of Policy<sup>87</sup> that temporarily outlawed commercial activity (in violation of the Administrative Procedure Act), before a reversal by the National Transportation Safety Board.<sup>88</sup>
- The **National Highway Traffic Safety Administration's** Federal Automated Vehicles Policy guidelines "to speed the delivery of an initial regulatory framework

<sup>84</sup> Jain Murray, "Federal Reserve Week: The Fed Takes Over," National Review Online, December 14, 2015, <http://www.nationalreview.com/corner/428487/federal-reserve-week-fed-takes-over-payments>.

<sup>85</sup> U.S. Federal Reserve, In Pursuit of a Better Payment System website, "Federal Reserve's Secure Payments Task Force Survey Extended," November 8, 2016, <https://fedpaymentsimprovement.org/federal-reserves-secure-payments-task-force-identifies-key-priorities-seeks-industry-feedback/>.

<sup>86</sup> Department of Transportation, Federal Aviation Administration, Office of the Secretary of Transportation (RIN 2120-AJ60), Operation and Certification of Small Unmanned Aircraft Systems, June 2016, [http://www.faa.gov/uas/media/RIN\\_2120-AJ60\\_Clean\\_Signed.pdf](http://www.faa.gov/uas/media/RIN_2120-AJ60_Clean_Signed.pdf). Marc Scribner, "FAA's Long-Delayed Drone Certification and Operations Rule Disappoints," Competitive Enterprise Institute Blog, June 21, 2016, <https://cei.org/blog/faas-long-delayed-drone-certification-and-operations-rule-disappoints>.

<sup>87</sup> Department of Transportation, Federal Aviation Administration, "Unmanned Aircraft Operations in the National Airspace System," *Federal Register*, Vol. 72, No. 29 (February 13, 2007), <http://www.gpo.gov/fdsys/pkg/FR-2007-02-13/html/E7-2402.htm>.

<sup>88</sup> Marc Scribner, "Commercial Drones Face Sky-High Regulatory Barriers," Competitive Enterprise Institute Blog, July 11, 2014, <https://cei.org/content/commercial-drones-face-sky-high-regulatory-barriers>.

and best practices to guide manufacturers and other entities in the safe design, development, testing, and deployment of highly automated vehicles.”<sup>89</sup>

- The **National Highway Traffic Safety Administration's** federal “commonsense guidelines” on altering smartphones to create a “Driver Mode” to purportedly “help designers of mobile devices build products that cut down on distraction on the road.”<sup>90</sup> Consumer Technology Association president Gary Shapiro responded:

NHTSA’s approach to distracted driving is disturbing. Rather than focus on devices which could reduce drunk driving, they have chosen to exceed their actual authority and regulate almost every portable device. ... This regulatory overreach could thwart the innovative solutions and technologies that help drivers make safer decisions from ever coming to market.<sup>91</sup>

Shapiro added: “NHTSA doesn’t have the authority to dictate the design of smartphone apps and other devices used in cars—its legal jurisdiction begins and ends with motor vehicle equipment.”<sup>92</sup>

- The **Federal Trade Commission's** staff report on the “sharing economy,” which incorporates public comment and acknowledges technology’s role in reducing rationales for regulation, yet nonetheless aims at an FTC role in “ensuring that consumers using these online and app-enabled platforms are adequately protected.”<sup>93</sup>
- The United States **Department of Agriculture's Agricultural Marketing Service's** Notice revising the United States Standards for Grades of Canned Baked Beans. Text in the “Product Description” was changed by removing the text: “[T]he product is prepared by washing, soaking, and baking by the application of dry heat in open or loosely covered containers in a closed oven at atmospheric pressure for sufficient prolonged time to produce a typical texture and flavor,” and replacing it with: “[T]he product is prepared by heating beans and sauce in a closed or open container for a period of time sufficient to provide texture, flavor, color, and consistency attributes that are typical for this product.”<sup>94</sup>

<sup>89</sup> National Highway Traffic Safety Administration, Request for Comment on “Federal Automated Vehicles Policy” Docket No. NHTSA–2016–0090, Federal Register, September 23, 2016, pp. 65703–65705, <https://www.gpo.gov/fdsys/pkg/FR-2016-09-23/pdf/2016-22993.pdf>. Policy guidelines at <http://www.nhtsa.gov/AA>.

<sup>90</sup> National Highway Traffic Safety Administration, Statement, and Notice of Proposed Visual-Manual NHTSA Driver Distraction Guidelines for Portable and Aftermarket Devices, November 21, 2016, [http://www.nhtsa.gov/About-NHTSA/Press-Releases/ci.nhtsa\\_distraction\\_guidelines\\_phase2\\_11232016.print](http://www.nhtsa.gov/About-NHTSA/Press-Releases/ci.nhtsa_distraction_guidelines_phase2_11232016.print).

<sup>91</sup> Melanie Zanona, “Feds Want ‘Driver Mode’ for Smart Phones,” *The Hill*, November 23, 2016, <http://thehill.com/policy/transportation/307357-feds-want-driver-mode-for-smart-phones>.

<sup>92</sup> Todd Shields and Alan Levin, “Phonemakers Asked to Alter Devices to Cut Driver Distraction,” *Washington Post*, November 27, 2016, <http://washpost.bloomberg.com/Story?docId=1376-OH3T4M61JIV201-0IS1SCG3L3MKIOH4N1SF1TLJTD>.

<sup>93</sup> Federal Trade Commission, Press Release, “FTC ‘sharing Economy’ Report Explores Evolving Internet And App-Based Services,” November 17, 2016, <https://www.ftc.gov/news-events/press-releases/2016/11/ftc-sharing-economy-report-explores-evolving-internet-app-based>.

<sup>94</sup> Agricultural Marketing Service, United States Department of Agriculture, Final Notice, “United States Standards for Grades of Canned Baked Beans,” May 9, 2016, <https://www.federalregister.gov/documents/2016/05/09/2016->

The Trump administration has already rolled back some of these guidances, such as the transgender restroom “guidelines”<sup>95</sup> and the Department of Labor’s controversial “Administrator’s Interpretations” on franchising and on independent have also been revoked.<sup>96</sup> Dozens of Education Department guidances have now been rescinded.<sup>97</sup> OIRA and the Task Forces should assume more affirmative oversight, particularly since OIRA already does review some indeterminate number of “Notices,” albeit via indeterminate standards.<sup>98</sup> Systematic studies of the total quantity of agency guidance have not been performed, but guidance document volume dwarfs that of rulemaking, which is not surprising when no one can even say with authority how many agencies exist.<sup>99</sup> Even back in 1992 *Duke Law Journal* article noted that “Federal Aviation Administration rules are two inches thick while corresponding guidance totals forty feet; similarly, IRS rules consume a foot of space while supporting guidance documents total over twenty feet” (Strauss 1992).

Indeed, “sub rosa” regulation has been an issue for decades. In *Regulation and the Reagan Era*, Robert A Rogowski (1989) was clear:

*Regulatory bureaucracies are able to accomplish their goals outside the realm of formal rulemaking....An impressive underground regulatory infrastructure thrives on investigations, inquiries, threatened legal actions, and negotiated settlements. ... Many of the most questionable regulatory actions are imposed in this way, most of which escape the scrutiny of the public, Congress, and even the regulatory watchdogs in the executive branch.*

One must appreciate that attempts to force more of this informal regulatory dark matter into the notice and comment stream might induce agencies to become even more creative in skirting review, such as with informal provision of information regarding agency expectations (Shapiro 2014), doubtless of the “Nice business you got there, shame if something were to happen to it” variety at times. New constraints could spur other measures by agencies to escape oversight, effectiveness of which could depend “significantly on how easy it is for OIRA to detect avoidance, and for OIRA, the courts, and others to respond” (Mendelson, Nina A. and Wiener 2014). Agencies can also raise the costs of presidential review of what they do, “self-insulating” their decisions with “variations in policymaking form, cost-benefit analysis quality, timing strategies, and institutional coalition-building (Nou 2013).” This seems to be affirmed by agency “resistance”<sup>100</sup>

**But on the other hand, how review levels the playing field**

[10743/united-states-standards-for-grades-of-canned-baked-beans.](https://www.reuters.com/article/us-usa-trump-lgbt/trump-revokes-obama-guidelines-on-transgender-bathrooms-idUSKBN161243)

<sup>95</sup> [https://www.reuters.com/article/us-usa-trump-lgbt/trump-revokes-obama-guidelines-on-transgender-bathrooms-idUSKBN161243.](https://www.reuters.com/article/us-usa-trump-lgbt/trump-revokes-obama-guidelines-on-transgender-bathrooms-idUSKBN161243)

<sup>96</sup> [http://thehill.com/regulation/business/336733-labor-department-rescinds-obama-era-guidance-on-joint-employers.](http://thehill.com/regulation/business/336733-labor-department-rescinds-obama-era-guidance-on-joint-employers)

<sup>97</sup> [https://cymcdn.com/sites/copaa.site-ym.com/resource/resmgr/docs/accessible\\_2017/OSERS\\_list\\_of\\_rescinded\\_guid.pdf.](https://cymcdn.com/sites/copaa.site-ym.com/resource/resmgr/docs/accessible_2017/OSERS_list_of_rescinded_guid.pdf)

<sup>98</sup> Crews, Regulatory Dark Matter, 2015. p. 29. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2733378](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378)

<sup>99</sup> [https://cei.org/blog/nobody-knows-how-many-federal-agencies-exist.](https://cei.org/blog/nobody-knows-how-many-federal-agencies-exist)

<sup>100</sup> [http://robertreich.org/post/155456448785.](http://robertreich.org/post/155456448785)

Tough centralized review of regulations has been argued to help empower consumers and citizens, relative to the rent-seeking and capture that typically prevails. Without central regulatory review, costs of influencing laws are high since policy formation is dispersed among numerous agencies and lawmakers. Producer groups whose members are often more concentrated (crony types, not infrequently), hold a relative advantage in securing favorable policy since lower organization costs enable them to prevail at the expense of those less favorably positioned. For scattered consumers, political organization costs are higher and tendencies to free-ride on the efforts of others can dominate even when ire is raised, derailing the ability to push back on over-regulation or to even recognize it (The seminal discussion on free-riding and group behavior is Olson 1965). Regulation therefore grows over time because it costs consumers more to organize and prevent having a dollar taken away than it costs for them to simply accept the loss. Consumers become the put-upon “suppliers” in the equation of “demanders and suppliers of wealth transfers” (McCormick and Tollson 1982).

Centralized regulatory review may come to the “rescue” by helping level the playing field for the usual losers in the rent-seeking game. Theoretically again, centralization of review in one spot can increase the “rate of return” to lobbying for dispersed groups (like consumers) relative to that of concentrated interests because they need influence only one entity rather than many (Miller, Shughart and Tollison 1984). Meanwhile, expected benefits for concentrated groups are likely to be little influenced or even reduced (since they would have taken most of the pie anyway without central review). If that holds, “commissions (i.e., the reviewing entities) that are responsible for regulating several industries are less likely to be captured by a single industry, and thus are more likely to be responsive to the diverse interests of consumers and consumer advocates” (Mueller 1989).

But central review mechanisms can block neither legislators nor presidents who act to circumvent such oversight. To the extent Congress passes onerous laws, requires unnecessarily rapid statutory deadlines for new regulations, prohibits cost analysis of rules, creates loopholes that prevent or enable avoidance of review, or frontally acts to benefit special interests, aggressive regulatory review remains improbable. In short, the Trump advances are vulnerable to a successor.

Policymakers must get better at measuring regulation, too. So let’s look where OIRA central review stands now.

#### **Baseline: What the Numbers Say about OIRA’s Pre-Trump Central Review of Regulation**

The central review process is incomplete. In December 2016, Obama’s OMB finally released the *2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations*.<sup>101</sup> The final 2016 report is overdue, and there is as yet no 2017 draft. These annual reports show the results of OMB’s reviews of a subset of the thousands of proposed and final rules issued annually by executive agencies (not independent agencies, some of which are highly influential). Notices, guidance documents, memoranda and bulletins get no scrutiny here and, as described, rarely

<sup>101</sup> OMB, Office of Information and Regulatory Affairs, *2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, December 23, 2016, [https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative\\_reports/draft\\_2016\\_cost\\_benefit\\_report\\_12\\_14\\_2016\\_2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf).

anywhere else. When they draw attention to these reports at all, administrations stress net-benefits of the regulatory enterprise as a whole (Sunstein 2012). A problem with the regulatory mindset is that the benefits we seek to elevate via *regulation*—public health, financial stability, food safety, auto safety, airspace allocation, privacy and cybersecurity—are also *forms of wealth*, and require market disciplines, not just political ones, to flourish. So we contend markets and competitive enterprise make the world not just richer, but fairer, safer and cleaner.<sup>102</sup> Regulation doesn't get all the credit nor even the bulk of it.

In any event, the latest report pegs the annual costs of 129 selected “major” regulations from 2005 to 2015 at between \$74 billion and \$110 billion (in 2014 dollars).<sup>103</sup> The estimated range for benefits in the new report spanned \$269 billion to \$872 billion (in 2014 dollars). According to OMB, 21 rules subjected to both benefit and cost analyses during the fiscal year ending September 2015 show added annual costs of \$5.5 to \$6.9 billion (2014 dollars).<sup>104</sup> The OMB cost-benefit breakdown incorporates only those rules for which agencies have expressed both benefits and costs in quantitative and monetary terms. Several billion dollars more in annual rule costs generally appear in these reports for rules with only cost estimates, however they are not tallied and highlighted by OMB.

Today's narrative maintains that this OMB-reviewed subset of major or “economically significant” executive branch rules (those anticipated to have a \$100 million economic impact) account for the bulk of regulatory costs. The OMB (2014, 22) holds that:

*[T]he benefits and costs of major rules, which have the largest economic effects, account for the majority of the total benefits and costs of all rules subject to OMB review.*

But OMB's breakdowns incorporate benefits and costs of only the few “major” executive agency rules that agencies or OMB have expressed in quantitative, monetary terms.

Only 21 rules in the 2016 Draft had both cost *and* benefit analysis performed, out of 59 executive agency major rules that OMB reviewed. OMB listed another six rules with dollar costs assigned, without accompanying benefit estimates. There were a few hundred non-quantified “significant” rules OMB looked at, and hundreds more it did not review (as noted over 3,000 rules and regulations are finalized each calendar year).

The “subject to OMB review” clause in the italicized quote above is a critical qualifier. Plenty gets left out, like non-major rule impacts, as well as the aforementioned guidance documents, memoranda and other notices. Ominously, independent agencies' thousands of rules get no OMB review, not even the many rules stemming from high-impact laws like the Dodd–Frank Wall Street Reform and Consumer Protection Act. In instances like the independent Consumer

<sup>102</sup> <https://cei.org/content/morality-and-virtues-capitalism-and-firm>.

<sup>103</sup> OMB, *2016 Draft Report*, Table 1-1, “Estimates of the Total Annual Benefits and Costs of Major Federal Rules (For Which Both Benefits and Costs Have Been Estimates) by Agency, October 1, 2005–September 30, 2015 (billions of 2001 or 2014 dollars),” p. 9,

[https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative\\_reports/draft\\_2016\\_cost\\_benefit\\_report\\_12\\_14\\_2016\\_2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf).

<sup>104</sup> OMB, *2016 Draft Report*, Table 1-5, “Estimates, by Agency, of the Total Annual Benefits and Costs of Major Rules: October 1, 2014–September 30, 2015 (billions of 2001 or 2014 dollars),” p. 22.

Financial Protection Bureau created by Dodd-Frank, the concern goes well beyond lack of regulatory review (Murray 2014): There exists a fundamental lack of accountability as such, either executive or legislative or judicial, since the President cannot remove the director, and since Congress does not fund the self-financing agency. Congress lacks even the necessary “power of the purse” to ensure even an appearance of accountability to voters (Murray 2014).

Twenty-nine other major rules in the 2016 draft report implemented transfer programs; such “budget rules” are officially considered transfers rather than regulations. Paying little regard to these may be appropriate in a limited government context, but not when the federal government dominates ever more economic and social activity like retirement and medical insurance.

Over the years, some 10 percent of all rules have been reviewed whether or not costs and benefits enter into the picture. The 2016 draft *Benefits and Costs* report tells us that:

*From FY 2006 through FY 2015, Federal agencies published 36,289 final rules in the Federal Register. OMB reviewed 2,753 of these final rules under Executive Orders 12866 and 13563. Of these OMB-reviewed rules, 555 are considered major rules, primarily as a result of their anticipated impact on the economy.*

As noted, for FY 2016, OMB reviewed 59 major rules and a few hundred significant ones, 27 of which had a cost estimate. However, again, 3,853 rules were finalized by 60 federal departments, agencies and commissions during the 2016 calendar year.

OMB’s once-common recognition that costs “could easily be a factor of ten or more larger than the sum of the costs...reported,” (U.S. OMB 2002, 37) was a more helpful stance, since, of several thousand agency rules issued, and the several hundred reviewed annually by OMB, only a handful of executive agency rules (and no independent agency rules) feature cost analysis alone, let alone the cost-benefit analysis that could justify claims of net-benefits for the entire regulatory enterprise.

As a percentage of the annual flow of final rules in the *Federal Register*, the proportion of costed rules averages around 35 percent of the few hundred designated “major”; but the proportion of *all* rules with any cost analysis at all has averaged less than a percent. Benefits, which the federal government declares justifies the modern regulatory state, fare even worse.

These gaps in knowledge of rule costs and the burdens of sub-regulatory guidance show there is much work for Trump’s agency Task Forces to do.

#### **How OIRA and the Regulatory Reform Task Forces Can Improve Processes**

To the extent ill-founded, overlapping and unclear regulations (and tax policy) dominate, businesses cannot plan, hiring becomes an insupportable risk (businesses will not hire if they know they cannot fire thanks to labor law) and citizens suffer. This is what Trump’s executive orders attempt to change. Moreover, policymakers and regulators often fail to recognize that, while businesses want to “create jobs” as a matter of good citizenship, that goodwill does not change the reality that jobs are a cost, a *liability*. If businesses feel punished for hiring, or cannot

predict regulations coming their way, it is little wonder that they don't expand, or that business startups recently hit record lows (Reuters 2012). The threat of regulation can induce companies to behave in reactive ways, distorting markets and creating economic inefficiency, compounding stagnation.

President Obama promised to veto (Executive Office of the President 2015) key reform legislation like the Regulatory Accountability Act, the 114<sup>th</sup> Congress' signature regulatory reform bill that had passed House the second week of the new session in January 2015. The RAA would have codified some provisions contained in the executive orders discussed so far, making them enforceable, as well as allow formal semi-judicial proceedings for major rules and address guidance documents. A veto was also promised on the House-passed REINS Act (Regulations from the Executive In Need of Scrutiny), which had also passed in both the 112<sup>th</sup> and 113<sup>th</sup> Congresses. REINS would require an expedited congressional vote on all major or significant rules before they are effective (Adler 2013 for background). REINS would convert the Congressional Accountability Act "resolution of disapproval" into a positive affirmation. Both RAA and REINS have passed the House in the 115<sup>th</sup> Congress, and President Trump would presumably sign them. Each awaits Senate action.

There are other important congressional reforms in the "wish list" category. Changing statutory language that induces some agencies to disregard economic concerns in evaluating their regulations (Manheim 2009) is one. Congress needs to broaden REINS to any controversial rule, whether or not tied to a cost estimate that deems it a major rule; and in the era of regulatory dark matter, the requirement for congressional approval should extend to guidance documents and other agency decrees. Trump appears to be maximizing the potential of executive driven regulatory budgeting on the part of individual agencies; but only Congress can compare questionable rules across the board to the benefits that could be gained if the compliance costs went elsewhere, so should explore allocating regulatory cost authority among agencies in a regulatory cost budget that distinguishes between categories like economic, health/safety, environmental regulations, and paperwork (Crews 1998). The incentives the approach creates could advance typical supervisory mechanisms like central review and sunsets, and inspire agencies to "compete" with one another in terms of lives they save or some other regulatory benefit rather than think within their own box. The budgeting concept is neither new nor traditionally partisan. Former Democratic Texas Sen. Lloyd Bentsen, who served as Treasury Secretary in the Clinton Administration, proposed in 1979 an "an annual cap on the compliance costs each agency could impose on the private sector" to "make it possible to coordinate the regulatory and fiscal budgets." Regulatory budgeting was also referenced back in President Jimmy Carter's 1980 *Economic Report of the President*. Today, one can find a survey of recent offerings in the House Budget Committee's September 2016 "Introduction to Regulatory Budgeting" report. Presumably, a comprehensive regulatory budget paralleling the fiscal one to better account for gov'ts presence in economy would require Congress to divide a total budget among agencies roughly in proportion to potential lives saved or other metrics. While agencies could regulate unwisely, stupidly or even with malice, the squandered budgetary allocation could shift to a rival agency that saves more lives, to equalize margins. Yet another potential option for bipartisan, cross-branch, and bicameral cooperation is the aforementioned "regulatory improvement commission" contained in the Regulatory Improvement Act of 2013 (Stemberg 2013). This body would initiate review, similar to the military base closure and realignment



commission, of the entire existing regulatory apparatus as distinct from the one-by-one appraisal that characterizes OMB review. The commission would select a bundle of rules for rollback with expedited congressional vote. If it's so difficult to remove rules administratively now, with a president so actively engaged, that only underscores the reality of their unrelieved accumulation for decades under more detached executives. This highlights the role Congress must play in reform.

While making a case for regulatory budgeting, this witness's starting assumption is that, apart from certain payroll-rooted paperwork/compliance burdens, objective costs of each year's thousands of regulations cannot be calculated.<sup>105</sup> If, as Ludwig von Mises proclaimed, "Economic Calculation in the Socialist Commonwealth" is impossible, then impossible too is *regulatory* cost calculation in an *elemental* sense. Cost experienced subjectively or indirectly by someone who's not you, cannot be measured by you. We must instead transact in magnitudes and thresholds and "idiosyncratic guesstimates."<sup>106</sup> Moreover, prospective regulatory budgeters will have to pay increased attention to unmeasured *categories* of intervention and interference, not just discrete rules, propel costs as well. When government steers in some area of practical endeavor while the market merely rows, that creates compounding costs *even if* no "budgetable" future rules are issued, such as antitrust, the freezing up of western lands, the reluctance to move spectrum into the wealth creating disciplines to bridge digital divides, and the delivery of the Internet, drones, and likely soon driverless cars, into century old public-utility models.

The legislative reforms just covered are unlikely to become law with today's slim Republican Senate majority, and even if the Senate had such a majority this witness suspects it may balk at REINS. Certainly, today's policy climate is quite different from the 1990s, when Republicans proposed outright elimination of agencies like the Department of Energy (Competitive Enterprise Institute 1994).

So we find ourselves watching Trump, observing what the executive pen and phone might do to boost OIRA and reduce rather than increase government influence in the economy. We knew from our Constitution's framers and we know now from the modern pen and phone era that, for better or worse, an energetic executive's hands are far from tied. Alexander Hamilton sought a king (Papers of Alexander Hamilton 1962), but settled for vigorously defending "Energy in the Executive." And to be sure, an "energetic" liberalization attitude prevailed in the executive branch during past presidencies and resulted in the creation of the executive branch review and oversight process itself.

We know from reforms in the 1990's that not everyone wants to go to the mat maintaining a regulatory state that harms their constituents. Steps underway by Trump, OIRA, and presumably the agency Task Forces and tweaks from Congress can enable more fundamental legislative reform in a future favorable climate.

### **Enforce, strengthen and codify existing executive orders on regulation**

<sup>105</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2502883](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2502883).

<sup>106</sup> <https://www.newsbusters.org/blogs/nb/clyde-wayne-crews/2016/07/23/washington-post-fact-checker-column-still-denial-over>.

Culminating in Trump's E.O.s 13771 and 13777, we now have a decades-long series of executive orders meant to address the flow of regulation. Congress should insist that existing executive orders on cost analysis and review be strictly applied, strengthened, and ultimately codified, and further, extended to independent agency rules, guidance documents and other agency proclamations. The new agency Task Forces can lay groundwork for this, and for superior data-gathering about the regulatory enterprise and its effects.

**Continue regulatory moratoria and arrange revocation of existing rules**

Immediately upon entering office, President Obama's chief of staff announced a regulatory freeze as part of a first 100 days initiative (Associated Press 2009). The march of rulemaking wasn't appreciably reduced, but no permanent reduction followed a 90-day moratorium implemented by President George H. W. Bush in the early 1990s either, who had directed agencies to look for rules to waive.<sup>107</sup> Each generated just a few billions in savings (Sunstein 2011). Moreover, many rules implement statutory requirements and are exempt from executive waiver (although with respect to the Patient Protection and Affordable Care Act, waivers applied via bulletin, memo and press release by the Internal Revenue Service (Graham and Broughel 2014)). Trump implemented a moratorium, and went further than predecessors by also incorporating guidance for the first time.<sup>108</sup>

Obama's unilateral waivers notwithstanding, in the normal course of events, getting regulations off the books requires the same laborious public notice and comment procedures of a new rule. "Going back and reviewing stuff is as hard as drafting regulations," said one Environmental Protection Agency representative way back during the Bush effort (Quoted in Davis 1992). This eternally pro-government state of affairs needs to be changed legislatively. It is clearly making it difficult for Trump's administration to roll back Obama-era (or earlier) regulation.<sup>109</sup>

While awaiting congressional reform of the APA that addresses the need for new designations and processes for eliminating old rule, a new effort should build upon the lessons of past moratoria, and lawfully freeze regulation—and guidance—for a lengthier, more thorough audit, publish reports on the data generated, seek public comment on which rules should go and so forth (much as Great Britain sought public comment on its in-out program). Creativity will produce information to support other reforms such as ensuring that for every new rule, one within or outside the agency should be eliminated, the by now familiar status quo "regulatory budget."

**Boost Office of Information and Regulatory Affairs resources and free market law and economics staff at agencies**

<sup>107</sup> With the Bush moratorium, agencies were being asked to describe what they did badly—a task at odds with self-interest and bureaucratic turf building. Furthermore, Bush's three-month campaign was considerably less time than needed to examine the fruits generated by an intense, thorough audit.

<sup>108</sup> Cass Sunstein, <https://www.bloomberg.com/view/articles/2017-01-25/the-fine-print-in-trump-s-regulation-memo>.

<sup>109</sup> Susan Dudley, "Trump Wants to Deconstruct the Administrative State. Can He?" *NBC News*, October 16, 2017. <https://www.nbcnews.com/think/opinion/trump-wants-deconstruct-administrative-state-can-he-ncna810576>.

Along with the Regulatory Reform Officer and agency Task Forces, more money and staff could enhance OIRA's review function, or that of some subsequent body (See Dudley 2011 on expanding OIRA resources). Where political circumstances prevent that, the administration and Congress might shift personnel and funds to concentrate on key agencies (or some subset). Additional analytical help can and does come from employees borrowed from federal agencies and departments. The aforementioned moratoria could help the process of regrouping.

Alternatively, economists and/or divisions at agencies whose job is benefit and cost assessment and Regulatory Impact Analysis preparation could be moved out of less active agencies. The president or OIRA chief or Congress could give these economists "Bureau of No" marching orders in the spirit of the Task Forces, to look for reasons not to regulate, to challenge conventional RIAs that somehow always find net benefits rather than net costs, and to underscore the role of competitive discipline and other factors that "regulate" economic efficiency and health and safety apart from Washington bureaus. Agency economists, deployed where objectively more useful in blocking the ceaseless regulatory flow, could provide greater assurance that more complete analyses were being carried out even without changes at OIRA.

It must be emphasized that *it is not enough for economists reviewing agency output to focus on Regulatory Impact Analyses*. Only a few get prepared and reviewed. The flow, the rising costs and the limited scrutiny that even major rules get indicates that the ignored costs of "minor" rules and of regulatory dark matter may actually be very large. Recall that non-major rules and independent agency rules make up the regulatory bulk. Economists can get better at concentrating efforts if there is presidential encouragement (and there now is), and bipartisan support, of their role and acknowledgement of their importance.

#### **Continue to systematize review, sunseting, revision and repeal of regulations**

In keeping with the spirit of Trump's executive orders and retrospective reviews that agencies purportedly conduct already,<sup>110</sup> more aggressive periodic rule review by OMB and agencies would be valuable. Congress occasionally considers regulatory sunseting; the president too could, in pen and phone fashion, require agency-generated regulatory requirements to expire or sunset within a given period of time unless they are re-proposed with public notice and comment.

Without an engaged executive sunsets or rule phase-outs will be disregarded without legislative backup, formal reporting on deadlines, extensions and non-extensions and disclosing ratios of what gets retained and what gets discarded helps quantify whether streamlining or supervision really happens. If the answer turns out to be no, we have automatically generated the record capable of prompting Congress to do so. Criteria by which agencies could routinely evaluate outstanding rules include:

- Which rules can be eliminated or relaxed without becoming bogged down in scientific disputes over risk assessment? Which rules are just silly? Which are paternalistic?
- Are the data that regulated entities are required to report being used at all?

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<sup>110</sup> Detailed at <https://www.federalregister.gov/blog/learn/regulatory-improvement/retrospective-review-documents>.

- Does the rule create unfavorable health costs (such as health costs of advertising restrictions on some needed drug)?

Such questions can help isolate burdensome or counterproductive rules. President Obama had encouraged retrospective review with E. O. 13563's call for agencies to develop and execute plans to:

*[P]eriodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome.*

We noted above, however, the barriers to actually eliminating a rule affected Obama and Trump alike (new Task Forces, same old obstacle<sup>111</sup>). Little about aggressively reducing existing regulation appears in OIRA status reports. Agency RIAs and the entire executive branch review process should reflect a higher burden of proof regarding rules' value. Where agency analyses under the various executive orders appear not to justify a rule, OIRA should be more forthright about saying so, and it should challenge non-major rules as well. OIRA could recommend modifications to entire regulatory programs based on plain common sense, regardless of executive orders. OIRA might note costs of presumably beneficial regulations, and compare those benefits to superior advantages available elsewhere. In other words, OIRA has the experience and know-how to create a benefit "yardstick" to objectively critique high cost, low benefit rule, which can help inform the "Transparency Report Card" we will note shortly). President Trump and the agency Task Forces can continue pressing agencies about rule reductions, and demand that they rank regulations and show that their least effective rules are superior to another agency's rules. Findings should be published, and government rolled back from the places it should not be.

#### **Reduce dollar thresholds that trigger Regulatory Impact Analyses and/or OIRA review**

Non-major rule costs are typically disregarded since analysis is often not required. Review is accordingly non-existent and burdens ignored. The Federal Communications Commission's open Internet (net neutrality) order was not regarded as significant, but mere "prophylactic," for example (Federal Communications Commission 2011), despite huge economically significant, industry-altering effects.

During the Carter-era regulatory review programs, when the \$100 million major-rule threshold originated, there were a "suspiciously large number of regulations...projected to cost \$90-95 million" (DeMuth 1980, 21). Costs may have exceeded the threshold but been ignored or understated just enough by agencies to evade scrutiny. Along with reinstating moratoria, devising criteria for a periodic review and stressing executive order-driven review, President Trump (or of course Congress) may also reduce the flow of rules that escape analysis simply by lowering the threshold at which written Regulatory Impact Analyses are asked to be prepared.

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<sup>111</sup> <https://www.bna.com/new-regulatory-task-n73014470829/>  
<https://www.disabilitycoop.com/2017/10/20/trump-rescinds-special-ed-guidance/24323/>.

The current \$100 million threshold translates into written, quantified and reviewed analysis for a handful of rules, as described earlier. More rules would be subject to review simply by lowering the bar to \$50 million or \$25 million. Doing so will not automatically improve how RIA cost and (especially) benefit tallies are performed, of course. Note also that some agencies may strategically adapt behavior to the likelihood of review, and present major rules larger than truly intended in order to “negotiate” and create an appearance of compromise (DeMuth 1980, 21), but in reality expand their scope and influence. Such behaviors can be confronted; President Reagan’s E.O. 12291 permitted the Director of OMB to order rules to be treated as major even when at first blush they do not appear to be, thereby activating the RIA requirement.

**Scrutinize all agency decrees and dark matter that affects the public, not just rules**

With tens of thousands of agency proclamations annually, it does not suffice for executive agency “significant” or “major” rules to receive OMB review. Nor is it enough any longer to include independent agencies. “Regulatory dark matter” is gaining ground on the readily observable, and such guidance documents get no objective review.

Today, non-legislative rules and proclamations like presidential and agency memos, guidance documents, bulletins and press releases may enact policy directly or indirectly—and even by implied threat (Brito 2014). Interpretations may be articulated by agencies, and regulated parties pressured to comply with no actual formal regulation nor understanding of costs. To address this loophole, former OIRA director John Graham and James Broughel propose options such as reinstating a George W. Bush requirement to prepare analysis for significant guidance documents, explicitly labeling guidance documents as nonbinding, and requiring notice and comment for significant guidance documents (Graham and Broughel 2014). Numerous other reforms should be applied as well.<sup>112</sup>

As a July 2012 U.S. House of Representatives Committee on Oversight and Government Reform report expressed it (2011, 7):

*Guidance documents, while not legally binding or technically enforceable, are supposed to be issued only to clarify regulations already on the books. However... they are increasingly used to effect policy changes, and they often are as effective as regulations in changing behavior due to the weight agencies and the courts give them. Accordingly, job creators feel forced to comply.*

Governance ought never to have descended to this level. Clearly all potentially significant decrees by agencies need scrutiny and democratic accountability, not just “rules.” OIRA does conduct some indeterminate amount of review of “notices.” Trump’s executive actions apply to “significant guidance,” but sub-significant guidance, which swamps significant guidance and rules, gives too much slack to agencies. It is surely the case that agencies will attempt to strategically adapt to new scrutiny (Shapiro 2014). But a highly engaged executive, and ultimately Congress, can definitively address quasi- or semi-regulatory activity.

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<sup>112</sup> <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Why%20Congress%20Must%20End%20Regulation%20by%20Guidance%20Document.pdf>.

**Require rule publication in the Unified Agenda of Federal Regulations**

There are rules, and then there are rules. Agencies are supposed to alert the public to their priorities in the semi-annual "Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions" (the Agenda). It normally appears in the *Federal Register* each fall and, minus the Regulatory Plan, each spring. The Agenda is intended to give researchers a sense of the flow in the regulatory pipeline as it details rules recently completed, plus those anticipated within the upcoming 12 months by federal departments, agencies, and commissions. But there is a whopper of a disclaimer, as the *Federal Register* has noted (7 December 2009, 64133):

*The Regulatory Plan and the Unified Agenda do not create a legal obligation on agencies to adhere to schedules in this publication or to confine their regulatory activities to those regulations that appear within it.*

For the first time, Trump altered this by his E.O. 13771, proclaiming that "Unless otherwise required by law, no regulation shall be issued by an agency if it was not included on the most recent version or update of the published Unified Regulatory Agenda...." Future legislation likewise should direct that agencies *do* confine their regulatory activities to those appearing in the Agenda. OIRA and Task Forces could indicate for rules whether or not the agency had prioritized them before.

**Tally federal regulations that accumulate as business sectors grow**

The observation that there's no free lunch applies especially to the small businessperson. The "Small Business Anthem," heard on the *Small Business Advocate* radio program, goes in part (SmallBusinessAdvocate.com):

*Even though you make payroll every Friday,  
You don't have a guaranteed paycheck.  
You're a small business owner, and you eat what you kill.*

President Trump has issued proclamations with respect to reducing permitting burdens on construction and infrastructure projects. For perspective on the small-business regulatory climate, the nearby list of "Federal Workplace Regulation Affecting Growing Businesses" shows basic, non-sector-specific laws and regulations that affect small businesses as they grow that can provide guidance on Task Force focus. This list, however, assumes nonunion, nongovernment contractor firms with interstate operations and a basic employee benefits package. Only general workforce-related regulation is included: omitted are categories such as environmental and consumer product safety regulations and regulations applying to specific types of businesses, such as mining, farming, trucking, or financial firms. For those enterprises, numerous other laws and regulations would apply (For one industry-specific roundup, see National Association of Automobile Dealers 2014).

**Federal Workplace Regulation Affecting Growing Businesses**

**1 EMPLOYEE**

- Fair Labor Standards Act (overtime and minimum wage [27 percent minimum wage increase since

1990])

- Social Security matching and deposits
- Medicare, Federal Insurance Contributions Act (FICA)
- Military Selective Service Act (allowing 90 days leave for reservists, rehiring of discharged veterans)
- Equal Pay Act (no sex discrimination in wages)
- Immigration Reform Act (eligibility that must be documented)
- Federal Unemployment Tax Act (unemployment compensation)
- Employee Retirement Income Security Act (standards for pension and benefit plans)
- Occupational Safety and Health Act
- Polygraph Protection Act

**4 EMPLOYEES: ALL THE ABOVE, PLUS**

- Immigration Reform Act (no discrimination with regard to national origin, citizenship, or intention to obtain citizenship)

**15 EMPLOYEES: ALL THE ABOVE, PLUS**

- Civil Rights Act Title VII (no discrimination with regard to race, color, national origin, religion, or sex; pregnancy-related protections; record keeping)
- Americans with Disabilities Act (no discrimination, reasonable accommodations)

**20 EMPLOYEES: ALL THE ABOVE, PLUS**

- Age Discrimination Act (no discrimination on the basis of age against those 40 and older)
- Older Worker Benefit Protection Act (benefits for older workers to be commensurate with younger workers)
- Consolidation Omnibus Budget Reconciliation Act (COBRA) (continuation of medical benefits for up to 18 months upon termination)

**25 EMPLOYEES: ALL THE ABOVE, PLUS**

- Health Maintenance Organization Act (HMO option required)
- Veterans' Reemployment Act (reemployment for persons returning from active, reserve, or National Guard duty)

**50 EMPLOYEES: ALL THE ABOVE, PLUS**

- Family and Medical Leave Act (12 weeks unpaid leave or care for newborn or ill family member)

**100 EMPLOYEES: ALL THE ABOVE, PLUS**

- Worker Adjustment and Retraining Notification (WARN) Act (60-day written notice of plant closing)—Civil Rights Act (annual EEO-1 form)

By statute, executive order or OIRA and agency Task Force initiative, the federal government should build upon this by revealing how federal regulations (along with laws) and guidance now accumulate in specific sectors. This will give some sense of impacts in particular industries and economic subdivisions, which can help guide reforms and liberalization.

**Compile better annual Regulatory Transparency Reporting**

*Measure what is measurable, and make measurable what is not so.*

—Quote frequently attributed to Galileo that, alas, probably was not his.

Improving annual public disclosure for regulatory and guidance output and trends is one realm in which the president (and OIRA and Task Forces) can undertake unilateral initiatives without statutory regulatory reform or congressionally stipulated transparency reporting.

An annual Regulatory Transparency Report Card detailing agency regulatory output in digest form, incorporating the current year's data plus historical tables could be encapsulated and published as a chapter in the Federal Budget, the *Economic Report of the President*, the OMB *Benefits and Costs* report, the Unified Agenda or some other format. Before 1994, information such as numbers of proposed and final rules, and major and minor rules was collected and published in the annual *Regulatory Program of the United States Government*, in an appendix called "Annual Report on Executive Order 12291." This report identified what actions OMB took on proposed and final rules it reviewed per that order, and the preceding 10 years' data, with information on specific regulations that were sent back to agencies for reconsideration. The *Regulatory Program* ceased when the Clinton administration's E.O. 12866 replaced E.O. 12291 with the aforementioned reaffirmation of agency primacy.

Significant but valuable *non-cost* information should also be published. Agencies and OMB could assemble quantitative and non-quantitative data into charts and historical tables, enabling cross-agency comparisons. Presenting ratios of rules and guidance with, *and without*, benefit calculations helps reveal whether or not the regulatory enterprise can be deemed as doing the good it claims. The following is a sample of what could be officially summarized and published annually by program, agency and grand total, and with historical tables (Crews, "The Other National Debt Crisis," 2011).

**Annual Regulatory Transparency Report Card:  
Recommended Official Summary Data by Program, Agency & Grand Total  
(with Five-Year Historical Tables)**

- Tallies of economically significant, major, and non-major rules and guidance by department, agency, and commission.
- Numbers and percentages of rules and guidance impacting small business.
- Depictions of sectoral regulatory accumulation.
- Numbers and percentages of regulations that contain numerical cost estimates.
- Tallies of existing cost estimates, including subtotals by agency and grand total.
- Numbers and percentages *lacking* cost estimates, with explanations for absence of cost estimates.
- *Federal Register* analysis, including numbers of pages and proposed and final rule breakdowns by agency.
- Number of major rules reported on by the GAO in its database of reports on regulations.
- Rankings of most active executive and independent rule-making agencies.
- There needs to be far greater distinction between *additive* and *subtractive* rules and dark matter; Rules that are deregulatory rather than regulatory need to be better identified.
- Allegedly "non-regulatory" rules that affect internal agency procedures alone (important as federal government expansion into new realms of activity displaces the private sector).
- Number of rules new to the Unified Agenda; number that are carry-overs from previous years.
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch options to address them.
- Rules for which weighing costs and benefits is statutorily prohibited.



- Percentages of rules reviewed by the OMB and action taken.

Some elements shown here were incorporated H.R. 2804, the ALERRT Act (Achieving Less Excess in Regulation and Requiring Transparency), which passed the House in 2014 (but not the Senate), and before that into S. 3572, the “Restoring Tax and Regulatory Certainty to Small Businesses Act” introduced by Sen. Olympia Snowe (R-Maine) in the 112<sup>th</sup> Congress, but never passed.

Regular highlights would reaffirm the importance of disclosure and in the process, expose to what extent Congress itself causes regulatory excess via over-delegation and the imposition of statutory deadlines that can undermine regulatory analysis. OIRA and Task Force disclosure will help shift the narrative back to congressional accountability for what agencies do.

**Designate multiple classes of major rules and guidance in transparency reporting**

Above, we recommended lowering cost thresholds for regulatory review. For decades, regulations have been loosely divided into those that are major or economically significant (over \$100 million in annual effects) and those that are not, but this gives only the roughest idea of minimum costs. For example, given the definition an economically significant rule, we can infer that the 200 major rules in the 2014 year-end *Unified Agenda*, when fully implemented, will have economic impacts of around \$20 billion annually, minus any rules among them that reduce costs.

A Regulatory Transparency Report like that described above should obviously include the number of economically significant (or major) rules, but this designation could be expanded to disclose more than a minimum level of costs. OMB could develop guidelines separating economically significant rules into categories representing increasing costs and present them in the Regulatory Transparency Report. Here is one suggested breakdown:

One Proposed Breakdown of “Economically Significant” Rules	
Category 1	> \$100 million, <\$500 million
Category 2	> \$500 million, < \$1 billion
Category 3	> \$1 billion
Category 4	> \$5 billion
Category 5	>\$10 billion

This particular itemization had been incorporated in the “Restoring Tax and Regulatory Certainty to Small Businesses Act” (S. 3572) and the ALERRT Act (H.R. 2804), but Trump, OIRA and agency Task Forces could facilitate such reporting. For example, some cost estimates of the EPA New Source Performance Standards rule figure about \$738 million annually (U.S. EPA 2001). Appreciating when EPA is imposing “Category 2” rules and the like would be more helpful shorthand than knowing about economically significance. This could be especially useful as

Congress explores formal hearing requirements for mega rules, such as the high-impact (\$1 billion-plus) rules in the 115<sup>th</sup> Congress's Regulatory Accountability Act.

**Report separately on economic, health/safety, environmental regulations and paperwork**

While economic regulation had lost favor in the 1980s relative to environmental or health and safety rules, it has resurged in banking, energy, telecommunications and other realms. These sectors often are the domain of independent agencies exempt from OIRA review.

This is peculiar since the origins of executive branch regulatory review were driven partly by recognition that economic regulation worked against the public interest. Such views may have peaked at OMB's onetime willingness to adopt the premise that some economic regulation "produces negligible benefits (U.S. OMB 1997)." Economic regulations cannot automatically be presumed rooted in the public interest. Whether the proposition is "fine-tuning" of the macro economy, direct government management of an specific industry's output and prices (such as agricultural quotas or electricity generation prices) or entry into an industry (such as trucking), coercive economic interference lacks legitimacy. The reality of governmental failure and acknowledgement of cronyism in economic concerns is more evolved now, as is recognition of the impossibility of central economic planning and calculation (von Mises 1920).

However today, an engaged executive's and even Congress' ability to address economic regulation as opposed to health and safety rules is undermined by the lack of oversight of independent agency rules that increasingly govern. Since the role of health and safety regulation differ so from economic regulation, separate presentation everywhere—in the *Report to Congress*, in any Regulatory Transparency Report or elsewhere—is important from the standpoint of comparing relative merits of regulations. Conceptual differences render meaningless any comparison of, for example, purported economic benefits from an energy regulation with lives saved by a safety regulation, so such categories of costs should be presented and analyzed separately in 2-for-1 processes and in cost budgeting. With executive buy-in, to the extent that analyses such as the OIRA *Report to Congress* and other investigations help in delegitimizing economic regulation, such realms can be freed from government purview altogether (a utopian thought, as aggressions as recent as net neutrality attest). But with that new rationality we would leave Congress, OIRA and Task Forces with the "lesser" task of documenting and controlling costs of environmental, health, and safety regulations. Then where health and safety rules reveal that they too reflect private interests or are publicly detrimental, a motivated executive can urge their rollback as well.

**Improve "transfer" and "fiscal budget" regulatory cost assessments**

Paralleling the distinction between "economic" and "social" regulation, process rulings like leasing requirements for federal lands and revenue collection standards and service-oriented administrative paperwork—such as that for business loans, passports and obtaining government benefits already appear separately in OIRA reports, and in some cases the federal *Information Collection Budget*.

Certain of these administrative costs represent not regulation as such, but “services” secured from government by the public, and do not concern us here. But that does not make it appropriate for OIRA and Task Forces not to actively disclose and question them, or to fail to anticipate their entailing future costs or having displacement or deadweight effects. Similarly, it is important not to lump service-related paperwork in the same category with the tax compliance burden and other involuntary, non-service-related process costs such as workplace reporting requirements. All these are hardly minimal and should be tallied and reduced where possible.

OIRA has begun recognizing that these transfers “may impose real costs on society,” may “cause people to change behavior” and result in “deadweight losses”; OIRA expressed that it “will consider incorporating any such (cost-benefit) estimates into future Reports” (U.S. OMB 2013, 22). More needs to be done by the agency Task Forces to analyze the costs of these transfers and their impacts on individual rights and economic growth.

As more of the economy—such as health care—succumbs to federal supervision, there is less inclination for subsequent generations of Americans to recognize what government does as regulation or interference; it just “is.” This becomes more of a concern as dark matter expands; addressing it all is an increasingly important task of the executive branch and Congress.

#### *Acknowledge and minimize indirect costs of regulations*

In its *Report to Congress*, OIRA allows that “many regulations affect economic growth indirectly through their effects on intermediate factors” (U.S. OMB 2013, 48), but is non-committal on whether the net effects are positive or negative. If indirect costs of regulation are too difficult or policymakers themselves to compute, then government cannot credibly argue that compliance is feasible or fair or affordable. But objectively assessing regulatory cost is, of course, impossible.

Compliance-focused regulatory cost estimates may inadvertently or purposely omit indirect costs. That uncertainty requires that indirect costs be guarded against and minimized, since some regulations’ indirect costs could even exceed their direct costs, and since OIRA itself occasionally has acknowledged that regulatory costs could be many times the amount it presents annually attaching to major rules (U.S. OMB 2002, 37).

Fairness and accountability in government require acknowledging indirect costs. Without addressing indirect effects, officials will systematically underestimate and downplay regulatory impacts and thus overregulate. Taxing and spending are substitutes for regulation, and if regulation is perceived as an artificially cheap alternative means of achieving governmental ends, policymakers will exploit it and it will increase. Allowing regulators to disregard entire categories of indirect costs (such as bans or disapprovals of pipelines or antitrust regulation or product bans) could inspire more regulations of that very type. Imagine acknowledging only direct costs of regulations—such as the engineering costs of controlling an emission, while ignoring outright input or product bans as indirect costs. Under such scenarios, many regulations could be expected to feature bans or disapprovals so that regulators could appear to avoid imposing high regulatory costs.

Recognizing and levelheadedly incorporating indirect cost presents serious challenges, but if the executive branch and Congress emphasize cost over net-benefit assessments, manpower and resources are freed to better assess indirect regulatory costs.

Dealing with indirect costs, and all costs for that matter, will ultimately require congressional approval of final agency rules, because complete cost assessments and quantification are impossible for third parties who are mere mortals (Buchanan 1969, 42-43), no matter which government agency they work for. This points to an important principle; the aim of annual regulatory accounting cannot be not solely accuracy, but to make Congress more accountable to voters for regulatory impacts, and to induce agencies to minimize indirect costs by ensuring that they “compete” before Congress for the “right” to regulate. Even imperfect recognition of indirect cost magnitudes by OIRA can provide a basis for allocating scarce resources in loose correspondence with where a (perhaps one day) more accountable Congress believes benefits to lie.

#### **Continue to Formalize “Do Not Regulate” reporting and offices**

The agency Regulatory Reform Task Forces represent the most explicit recognition that the tendency of bureaucracy is to expand, and that a counterweight is needed. Beyond internal agency operations, some have called for an independent congressional office of regulatory analysis resembling the Congressional Budget Office (U.S. House of Representatives Report 105-441, 1998). This would go beyond more resources for OIRA, the Task Forces or agency economists. There are scenarios in which the independent office could be a good idea, such as if the entity were formally chartered with an anti-regulatory “bias” (as the agency Task Forces are) to offset the pro-regulatory bias prevailing in the remainder of the federal government. Some formal entity could highlight the desirability of market-oriented alternatives over command options for every regulation, and continually present the case for eliminating existing rules and create plans for elimination of regulatory agencies themselves as years pass. A much stronger version of OIRA or a body that replaces it in conjunction with agency law and economics personnel of laissez-faire persuasion, can bolster this “Bureau of No” role that the Task Forces have kickstarted.

#### **Conclusion: OIRA, Regulatory Reform Task Forces and regulatory liberalization**

The modern conceit is that untethered regulation and rulemaking always work. They do not; bureaucracy and administrative state overreach may not only impede economic efficiency but also undermine health, safety and environmental progress. Healthy government requires recognizing downsides to coercive intervention; it requires vigilant legislative and executive institutions and mindsets that seek reasons *not* to add yet another rule or decree to the existing tens of thousands. Meanwhile the public has a right to know the ways federal agencies have harmed and harm that which they oversee, and how those negatives may propagate beyond the agency throughout the economy and society.

It is no longer enough just to cut federal spending and balance the budget. The Trump executive orders and the agency Task Forces reflect the need to offset the march of bureaucracy and regulation. This testimony has proposed ideas for reinforcing them, particularly since the current reality assures that the Constitution isn’t coming to the rescue in the immediate term. However,

bipartisan momentum for economic and regulatory reform can emerge unexpectedly. If it does not, with conventional options to restore liberties and elevate the rule of law exhausted or ignored, the states themselves may address federal government expansion by taking rightful powers back from Congress and the executive branch. The Constitution's Article V provides for the states to call a convention to amend the Constitution and restore balance of power, and several states are pursuing that option (For example Brown 2014). One proposal with respect to over-regulation specifically is the "Regulation Freedom Amendment" that would stipulate that a quarter of the members of either the House or the Senate could require Congress to vote on a significant federal regulation, very much like the REINS Act legislation would do (Buhler 2013).

The regulatory process has been in need of regulation, and for the first time in a long while the executive and legislative branches are in agreement on congressional reassertion of authority over the making of law and regulation.<sup>113</sup> While it would be preferable for Congress engage by implementing measures such as the Regulatory Accountability Act, Regulatory Improvement Act, or the REINS Act that limit agency authority, those await political alignment. Many recommendations presented here reinforce appropriate executive action by the same pens and phones once used to expand the state. The goal is assurance that, if an expensive or burdensome regulation is enacted, elected representatives are on record for or against it, accountable to voters.

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<sup>113</sup> <http://thefederalist.com/2017/10/17/trumps-executive-moves-have-strengthened-checks-and-balances/>.

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## Endnotes

Mr. MEADOWS. Thank you. Thank you all for your insightful testimony this morning.

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

Mr. HICE. Thank you very much, Mr. Chairman.

Mr. Katz, let me start with you. You've made—you implied that Members are confused on some issues. So let me pick up on that.

I am one of them that you confused in some of your statements, but particularly when you described—in your words, not mine—but that the manner in which regulations come forth is a hard process, a transparent process. From my perspective, it's neither of those. I have run into businesses that are totally unaware that regulations are being formulated. They just wake up one morning and find out there's more regs in their various industry, whatever it is, and they bypass Congress. And all of a sudden, here is—I mean, we have one legislative body, and that's not agency.

So what is the regulatory process by which they're created?

Ms. KATZ. The Administrative Procedures Act covers most of the rulemaking process. And what I meant by transparency was—and this is the, you know, disadvantage to small businesses, is that, you know, there are a lot of points along the way in which businesses can, you know, offer their comment.

Unfortunately, small businesses can't afford the legions of lawyers and lobbyists that big businesses do to keep track of all that's going on in the regulatory space. But the Administrative Procedures Act and the, you know, a variety of other acts and executive orders, you know, do govern a very systematic process of rule-making. And in some respects, it's too rigid, but it does exist.

Mr. HICE. I would like to have more information on that, because I see these regulations, in essence, become law. People, businesses have to abide by them. It's law. And there's penalties if they don't. And these are laws that are not created by Congress. And yet, they are happening without the jurisdiction and oversight of Congress. And to me, that's very problematic. That's not the way our system is designed to operate. But let's move on from here.

Let me, Mr. Crews, let me hit you. In previous attempts from other administrations, retrospectively, review regulations, oftentimes, that actually resulted in more regulations. What makes this effort different?

Mr. CREWS. You have to have an engaged President, an engaged executive to do it. There were cuts under the Obama's administration retrospective review program, and I think that's important in this debate too, because I heard you mentioned James Gattuso at the Heritage Foundation. I heard him say if the Obama's administration retrospective review program was a legal thing to do, and an appropriate thing to do, this kind of approach is, too. But when President Reagan came in, and set up the initial central review process at OIRA, it already preexisted because of the Paperwork Reduction Act, but that was when there was a focus put on—doing cost benefit analysis of regulations.

But the problem is, still, so many of them are missed, and that's one of the reasons the cost can still go up like you talked about, because if you're talking about a flow of over 3500 rules that are going through every year, and then you've got a few hundred that

OIRA reviews that are considered significant, then of that, there are some that are major or economically significant. And of those, you end up with just a sliver, a dozen or so, that have a cost benefit analysis at all, and there's a few extras that have cost analysis. So there's a lot that can slip through.

And other forms of costs may come in the form of regulatory guidance and things of that sort, because you mentioned small business and business, you've certainly heard from them on regulatory guidance in recent years, too. But I think that's one of the reasons—

It takes effort and it takes setting goals. I think if you try to do regulatory reduction commissions, or if you try to—if you try to put this kind of regulatory review model in statute, something like that, you still got to put goals in place, so that the regulators know that it's time to trim things. And this is not a partisan issue, too. I mean, when the Regulatory Improvement Commission was debated, I remember a report from the Progressive Policy Institute where they said, these rules are stacking up. It's like pebbles in a stream. You put, you know, you drop a little pebble in the stream, and that's fine, but over time, it accumulates.

And one of the things that we don't ever do is go through and try to say, well, how much of this makes sense anymore?

As I said in my testimony, it's not just regulation that gets you health and safety benefits, too, you've got to get those from other—you've got to have a lot of forces that are ready to expand health and safety, as well as economic efficiency. So it's just, it's too easy for rules to slip through, is the essence of it.

Mr. HICE. Okay. Just a yes or no really for me, Mr. Kohli, thank you for being involved in the U.K. and here, what you did. The differences in our government, will it impact the success of this effort here, the differences between the U.K. and the U.S.?

Mr. KOHLI. The U.K., not having a separation of powers, the primary difference is around Congress. And the primary difference between the U.K. and the U.S., is the U.K. requires regulatory impact analysis for acts by Parliament. The U.S. does not require regulatory impact analysis for acts of Congress.

Mr. HICE. So can this still work here, is my question?

Mr. KOHLI. It could. That's definitely a limitation in the U.S. model, but it's a difference.

Mr. HICE. Okay. Thank you, Mr. Chairman. I yield.

Mr. MEADOWS. I thank the gentleman. The chair recognizes the gentleman from Illinois, Mr. Krishnamoorthi, again, for 5 minutes.

Mr. KRISHNAMOORTHY. Thank you, Mr. Chairman. If there's one thing my constituents care about, it's effective and efficient government. That is why it's concerning to me to see what the Trump administration is doing, for instance, in the area of healthcare. It appears that they are actively undermining programs to help my constituents afford quality health insurance.

I would like to ask whether there are legitimate reasons for some of the things that the Trump administration is doing, or whether they're just playing politics.

Mr. Goodwin, the Trump administration has indicated it will stop necessary cost-sharing subsidies that help Americans afford health insurance. This has required Congress and some of the law-

makers, especially in the Senate, to come up with an agreement to help save health insurance for millions of Americans, and even that plan is at risk of not being able to be passed by the House.

Mr. Goodwin, is there a reason, other than politics, that would explain why the Trump administration is putting the health insurance of millions at risk?

Mr. GOODWIN. Healthcare is a little outside my wheelhouse policy-wise, expertise-wise, but I guess I can answer as an interested member of the public, somebody who reads the newspapers. And from my, sort of outsider perspective, it does look like playing politics.

And, I mean, that still should be of grave concern, because it really undermines public esteem for our governing institutions when something like healthcare policy, people's healthcare is being used as a political, or is being targeted through political games.

Mr. KRISHNAMOORTHY. Mr. Goodwin, the Trump administration has also issued an emergency rule, which would allow any employer to claim an exemption from providing woman with birth control under the Affordable Care Act. Mr. Goodwin, is there a reason, other than politics, that would explain why the Trump administration is putting the healthcare of millions of women at risk?

Mr. GOODWIN. Similar answer as before, I can't think of a legitimate policy reason, but, again, I'm outside of my substantive policy wheelhouse. To me, it looks like playing politics, and that's just as the damaging to the institution of the presidency, I think.

Mr. KRISHNAMOORTHY. And finally, Mr. Goodwin, the Trump administration has announced it will be taking down the healthcare.gov website for, quote unquote, "maintenance" every Sunday morning through the end of the open enrollment period.

These morning hours, as you know, are the ideal time for Americans, especially families, to shop for health insurance. And this plan will make it difficult for many Americans to shop for the right health insurance plan for them at times that are convenient for them. Mr. Goodwin, is there any reason, other than politics, that would explain why the Trump administration is actively sabotaging the efforts of American families to plan for their healthcare futures?

Mr. GOODWIN. It doesn't look good. And it really would be great if the Trump administration explained the policy basis for that. Because otherwise, we're just left with the impression that this is just an ideological driven action on their part.

Mr. KRISHNAMOORTHY. Thank you, Mr. Goodwin. I'm disappointed to hear that it appears that the Trump administration is playing politics with the healthcare of millions of American families. I hope the administration considers doing better by them.

Thank you very much.

Mr. MEADOWS. The chair recognizes himself for a series of questions. Mr. Kohli, let me come to you.

Where did you see most of the cost reductions in your implementation in the U.K.?

Mr. KOHLI. Across the board. So I would say the largest areas were around occupational health and safety, around employment. We had a big area around—yeah, so those would be the two largest areas, I would say, off memory, it's a little bit dated. And but,

again, I just want to emphasize the way in which we did it. So you would have an agency like our food standardization agency responsible for supporting, making sure that restaurants followed good food hygiene.

Mr. MEADOWS. Right.

Mr. KOHLI. And they would regularly visit a restaurant establishment and find that the establishment didn't know what to do in order to comply with the law. And so was endangering, was endangering the visits of people who went to the premises.

And so the approach was to give them much clearer guidance, which said, Here are the ten things you need to do. And often small businesses, particularly, found that extremely helpful in helping them work out what to do, and therefore, it was possible for them to reduce costs whilst maintaining protections.

That similar approach was used by a number of our agencies. Another thing that was a very important approach was looking at eEnablement, so we were in the relatively early days of the internet as we were starting this, and by taking processes away from complex paper forms and putting them on easy intuitive electronic processes, where we use design-thinking to design the technique in a way that is intuitive for the user, can get rid of all of that time when you're trying to work out what you're meant to do and replace it with time when you're having a seamless transaction.

So, you know, those kinds of things were very, very powerful, and were the bulk of the changes that the U.K. made.

Mr. MEADOWS. And since many Members of Congress love to watch C-SPAN and watch the debating back and forth in a different style than what we're used to here, you know, perhaps you can help me understand. When you actually implemented that in the U.K., the cost savings, how did that get redirected? Was it redirected somewhere else? Was it actually—I mean, how was it realized?

Mr. KOHLI. These are savings for business.

Mr. MEADOWS. Right.

Mr. KOHLI. And we had a very high-quality accounting system for a pound of savings. We had to demonstrate it with a genuine saving for business. We then had the numbers validated. We now have an independent committee which validates all those numbers, called a Regular Free Policy Committee, and, you know, businesses would use that time, you know, for things that are different to complying with regulations.

So let's take that small business restaurateur, the moment when they're not trying to work out what the rules are, they are using that to think about what should be on the menu next week, you know, so it releases time back into the economy. But the one thing I would say is, you know, we were able to get the support of both the trade union community and consumer groups, because our emphasis was absolutely about maintaining protections.

And our emphasis was not about, you know, reducing air quality or reducing worker safety, or anything like that. It was all about maintaining protections and looking for places where you could streamline the process. And indeed one of your colleagues talked about how businesses sometimes find it hard to learn about new regulations. You know, we had a review around small businesses



and guidance, and somebody said to me, you know, we had a small business person lead that review. And she said, Have you ever bought an electronic device, like a television? I said, Yes. And she said, you know, When you buy one, you get a quick start guide, which tells you what you need to do when you—you know, when you start up the TV. Yes, you get the 100-page manual, but you also get the quick-start guide. And she said, Where is your quick-start guide for regulation? And that was an incredibly powerful insight, and one that, you know, allowed us to think about new ways to do that. So within, you know, within a relatively short period, we were setting up quick start guides for every new regulation.

Another thing we did in the U.K. is, almost all regulations come into force on 2 days of the year. And so they're either coming into force in April or in October, and so, while there may be a number coming into force, because they're all coming into force on the same day, it's easier for businesses to get used to; whereas, if you have one coming in every month.

These are very easy things to do that do not impact on protections but have real impact. But they're a long, long way from the sort of political dialogue. And the last thing I would say is, our approach was highly technocratic. It was about technically boring things that made a difference in the real world.

Mr. MEADOWS. Well, thank you. So I'm running low on time. We'll have a second round where we'll be able to follow up with some of the rest of you.

So let me finish very quickly, Mr. Kohli.

Mr. MEADOWS. Would you say that this type of regulatory process where we're actually reviewing and removing regulations should be a long term process or more of a spring cleaning kind of once-a-year event that we go in and review it?

Mr. KOHLI. Certainly the experience of other countries, the United Kingdom, you know, Australia, the Netherlands, et cetera, has been that introducing long term disciplines is very, very important in the same way that long term disciplines around high quality cost benefit analysis, which a number of my colleagues talked about on the panel, is important. You know, always thinking about ways to maintain protections while streamlining is a good thing as well.

Mr. MEADOWS. So long term.

Mr. KOHLI. Yes.

Mr. MEADOWS. All right. The chair recognizes the gentlewoman from the District of Columbia, Ms. Eleanor Holmes Norton.

Ms. NORTON. Thank you very much, Mr. Chairman. Long before I came to Congress, I chaired the Equal Employment Opportunity Commission and had the experience of dealing with regulations and guidelines. And so I'll preface my question by indicating to you, in light of the high profile of sexual harassment in today's headlines, that the Commission studied what were then a few court decisions, District Court decisions, indicating that sexual harassment was a violation of an antidiscrimination act. And it had not been so declared.

When we—we did so, of course, we put the guidelines out for comment, but I did something that may be fairly unusual, and I wish we had done more often today. Obviously, business did not

want any kind of regulations of any kind, and I've never heard of a business testifying in favor of regulations, but I called in the leaders of the business roundtable and other such business groups, and indicated what we had seen happen. That essentially it looked like courts were opening them to liability, and that the Government agency had given them no indication of what in the world sexual harassment was.

There's a broad statute, it didn't put sexual harassment in it. So employers didn't even know what to tell their managers about how to handle this very delicate problem, so we have to call them in. And I said, I know you don't want to see any regulation, but if you do not even know what sexual harassment is, how can you be protected against sexual harassment.

So you can talk about regulations all you want to, but I had a good conversation at that time with the business community, and got their input personally about how they had handled sexual harassment. And I must tell you, some of what had hit the newspapers would make anyone bow their head. And I give you that experience because I had to cope with what regulations—guidelines that had never been defined. And, by the way, the Supreme Court went on to find that the guidelines were constitutional, and I believe the guidance has been helpful to business, as opposed to being left out there with nothing said.

Therefore, it seems to me, you know, when I went beyond notice and comments, but actually had the business leaders to come in and see me, I have valued transparency because we did accept many changes that could only come from them. That experience, with chairing an administrative agency, has led me to understand how important transparency is, instead of just being a word that everyone will always buy into. So I'm interested in these task forces. The public will be interested in these task forces.

Do any of you know whether or not these task forces consist of career civil servants or, for example, appointees, does anybody know that? Yes, Mr. Crews.

Mr. CREWS. In the panel this morning the indication seemed to be that the majority where a lot of the members were career employees, but other than that, I don't know. That's what I had heard in prior reports as well, and I think that's probably true. But I thank you for the comments on guidelines, it's very, very interesting the distinctions between regulations and guidances and what role the regulators take and what role Congress takes.

Ms. NORTON. Well, the guidelines were no different in the long run to regulations because the Supreme Court in defining what was sexual harassment used the guidelines, and said that what the agency had found was, in, fact the definition from here on in. And so you go to the Supreme Court today you will find those guidelines used.

But the importance of the guidelines, as far as I was concerned, was it told business what was a violation in the first place. So the transparency is very important, it seems to me, to all of us.

And, Mr. Goodwin, you've heard Mr. Crews say that he thought that these were primarily career civil servants, and we understand career civil servants operate under the guidance of appointees. But it was reassuring to hear that he believes there were career civil

servants who then, of course, would have to convince the appointee. But what is your view of who should be on these task forces?

Mr. GOODWIN. Well, I was encouraged, too, by the fact that there is so many career employees on these task forces. I mean, the first question that sprung to mind for me today was why am I just hearing about this for the first time today. I didn't know anything about these task forces, for the most part, the identity of the membership, until today. So congratulations to this committee for extracting that information.

But this is something I have been tracking for a long time, and I know a lot of people have. So it's a little disappointing that we're just now learning basic stuff about these task forces, which are evidently so important and having such a crucial—or making such a crucial contribution to the Trump administration's domestic policy agenda. So I would note that.

And the other thing I would note is I hear so much about how the—the deep state at these agencies and how they are sabotaging everything that the Trump administration is doing. And then one by one by one all of these agency representatives said that, no, that's not the case at all, these people are professionals. They are given a task and they do it well. And, you know, I share the chairman in applauding them for that, I think that's great. And it reflects really well on the public servants in our agencies, and I hope we all learn something from them.

Ms. NORTON. Do you think, for example, we ought to at least know the agenda of the task forces so as to know which kinds of regulations they are focusing on so that we know, for example, whether they are focusing on outdated regulations? Of course regulations have to be updated, or lifesaving ones. Is there any agenda published so that the public would know which they're focusing on. Ms. Katz?

Ms. KATZ. I can't say whether the agendas themselves are published. I can say though that if the task forces recommend to the agency that there be changes to particular rules, that the agency does have to open, you know, a docket, if you will, and take public comment on changing that regulation.

In other words, you have to create a regulation to get—to end a regulation. And that's the process I was referring to earlier in terms of there being a formal process.

Ms. NORTON. Well there is already in place something to—from OMB for a cost benefit analysis. Let's go and do—are there difficulties in doing a cost benefit analysis that everybody could agree upon is objective?

Mr. GOODWIN. Well, I think what we're learning from the cost benefit analyses on these rules that are being rolled back under the Trump administration is that they're anything—well, any sort of claim to credibility or objectivity that cost benefit analysis may have had has been thrown out the window with these cost benefit analyses.

Ms. NORTON. Is there an objective way to do cost benefit analysis?

Mr. GOODWIN. I mean, there is, unless you're trying to support a decision made by other means, and I think that's what we're seeing with these cost benefit analyses. If they were to do an honest

cost benefit analyses for these regulatory roll-backs, frankly, the roll-backs would look terrible as an economic matter. And that's why, for example, at the EPA, the Trump administration, and Administrator Pruitt, put out these really fuzzy cost benefit analyses where, you know, problematic data, assumptions, accounting tricks, kind of iffy accounting tricks were used to justify these decisions that under any reasonable applicable of cost benefit analysis would not pass a cost benefit analysis test.

Ms. NORTON. Mr. Chairman, if I may ask a final question here. I'm really only looking for—Ms. Katz testified that, you know, at such point as I suppose you were saying, Ms. Katz, that the task forces had a change that they wanted the agency to make, at that point there would be some transparency? Was that your testimony?

Ms. KATZ. The task forces only make recommendations to the agency, they don't carry out—

Ms. NORTON. Well see, that's important. So how do they make recommendations without having—without being identified so that they could receive some input from the public?

Ms. KATZ. I do believe they get some input from the public.

Ms. NORTON. Well, we don't even know who they are, how do they—at the regulatory stage, you have to have input from the public, but then you're making a recommendation to, let's say, the head of the agency, but you've had no input from the public at that point, but you are making a recommendation for changes in the regulations.

Ms. KATZ. Yes. And these are experts who are making the recommendations. But I suppose it's up to every agency how much input they want to get on their internal recommendations. But as soon as there's any action involved, then public input is immediate.

Ms. NORTON. Mr. Crews, did you want to say something on that?

Mr. CREWS. Just a quick thing. I think it's important to point out that—I think the agencies of their own accord could have undertaken these kinds of task forces on their own. It didn't have to come from a presidential executive order—

Ms. NORTON. I think that's an important point.

Mr. CREWS. Right. So we have to agree that a President—because remember, these are executive agencies, not the independent agencies. We have to agree that the President has some authority in setting his own regulatory agenda.

Ms. NORTON. He certainly does, and he wants as much information as he can get.

Mr. CREWS. But Diane is right. Once—but it could have been done without an executive order, so that's one thing, so you would know it's going to be internal people—

Ms. NORTON. We're not questioning the legality of the task forces.

Mr. CREWS. Some are—a lot of the questions seem to be, I think.

Ms. NORTON. I think you can rely on, you know, whoever you want to on your staff. I'm just—it's a transparency question for me.

Mr. CREWS. It comes out in the notice and comment, that's I think—

Ms. NORTON. But these people have already made a recommendation. Look, when I chaired the EEOC, I was dependent upon staff.

Mr. CREWS. Right.

Ms. NORTON. The earlier I had some notion of whether business would think this is the worst thing in the world, the better off I was. And I'm asking whether or not early consultation with the public would be facilitated if the task forces asked for some information from the public or from experts, and if we knew who they were, instead of making them look like they're part of some deep state that nobody knows anything about ever, because we don't know anything—we don't even know what they do until the agency head——

Mr. CREWS. I hear what you're saying. I think that's where things are headed. I think that's the trajectory. You might remember a couple weeks ago now, there was a day—it was October 2, Vice-President Pence gave a speech at the White House, and after that there were break-out sessions across the various agencies. I went to one of them, and what the key point is that they are looking for comment from the public, and——

Ms. NORTON. The task forces?

Mr. CREWS. It wasn't the task forces. This was the break-out sessions from the agencies, which you would imagine have to include and be part of the task forces because a lot of the theme of all of this was the executive orders and taking another look at regulations.

So part of that ethos was getting input from the public. So I think that's where it's all headed. And ultimately whatever is put together in the docket would have to go through public notice and comment anyway, because you can't get rid of a regulation, you can only replace it.

Ms. NORTON. Finally, I understand that, but——

Mr. MEADOWS. The chair is going to give a generous 8 minutes here. So go ahead, your final question.

Ms. NORTON. Thank you, Mr. Chairman. You're a good friend, but you do understand I'm holding up the fort by myself on this side of the table?

Mr. MEADOWS. And using everyone's time that's not here, but go ahead. Last question.

Ms. NORTON. And they have ceded to me, if that helps. And I appreciate your generosity. What I'm really saying is that—and I'm going from my own experience. I didn't have a sense of what—I knew business was on the spot, because they could—there could be liability if, in, fact they were sued.

I knew they didn't like regulations, so I had my own staff, even before I called them, to consult with business so that I would not, in fact, in the first instance, be issuing guidelines that would send them up the wall. What I value so much, Mr. Chairman, is that you have opened up for us the notion of these task forces that we knew nothing about.

And, Mr. Crews, I appreciate what you said because—I hope the chairman heard what Mr. Crews said, that he felt we were headed toward more input for the task forces themselves from the public so that by the time they got to the agency level, their own recommendations would have more credibility because somehow or the other the public had been—business to be sure, and the public had been asked their advice, maybe not on any final regulations, but

at least on what the task force was undertaking. So I appreciate, Mr. Crews, your notion that you think they were headed in that direction.

And I thank you, Mr. Chairman.

Mr. MEADOWS. I thank the gentlewoman. The chair recognizes himself for a series of questions.

Ms. KATZ, I want to come back to you because you've made it very clear that this is an open and transparent process when it comes to actually—I think you said you need to set up a regulation to do away with a regulation. I think what you meant is you need to set up a rule to do away with a regulation, which requires the same comment period as we do that. And you're in my wheelhouse now. This is what I live for.

And so, at this point, if we're actually going to do away with a rules and regulations and guidance, is there not a noticing period that's required under Federal statute any time that we're going to have to adjust that, is there something that's required.

Ms. KATZ. For most rules, there would be. You know——

Mr. MEADOWS. What about guidance?

Ms. KATZ. I'm sorry.

Mr. MEADOWS. What about guidance?

Ms. KATZ. Well guidance—I may need your help on this. I don't know if guidance has to go through a rulemaking procedure.

Mr. CREWS. No.

Mr. MEADOWS. So now you're really hitting in my area because the gentlewoman made a good point. Many times guidance is viewed just as strongly as rules and regulations, in fact, we found that a lot of times administrations get around the rulemaking process by offering guidance that carries, essentially, the enforcement of law, but maybe not the enforcement of law, depending on how it gets litigated. So do you see a problem there?

Ms. NORTON. Mr. Chairman, if I could just yield a second of your time to say——

Mr. MEADOWS. Well, you've used a second of everybody's time, so why not. Go ahead.

Ms. NORTON. The guidelines I speak of did not have to go through the rulemaking process, and I deliberately put them through the rulemaking process.

Mr. MEADOWS. Kudos to you. Ms. Katz.

Ms. KATZ. Some things are reviewed by the Office of Information and Regulatory Affairs.

Mr. MEADOWS. OIRA.

Ms. KATZ. There are some that don't. And I think the exchange with Mr. Hice and I—what I had meant when I referred to transparency and openness was proper rulemaking. So I just want to correct that. But that being said, the other real loophole here is on independent agencies. And this is particularly problematic because since 2010 and Dodd-Frank, hundreds, if not thousands, of very costly and burdensome regulations have come through these independent agencies. They're the ones who are getting a free pass here, and that's another problem.

Mr. MEADOWS. And so your premise is that they should not get a free pass.

Ms. KATZ. They should not get a free pass.

Mr. MEADOWS. Mr. Crews, do you agree with that?

Mr. CREWS. I would agree they should not get a free pass. The independent agencies are heavy, heavy regulators. And it had been the case that economic regulation in the U.S. was declining and environmental regulation was rising. But in recent years, after Dodd-Frank and then the healthcare legislation, and now net neutrality legislation—and regulation, and things of that sort. Economic regulations trickling up, but the agencies can issue guidance rather than issue rules.

Another piece of guidance that was a huge guidance was the Waters of the United States Rule. That actually started out at guidance. And, like you, they went through and did notice and comment on that.

But there are many, many economically significant pieces of guidance, but there are thousands of secondary guidances out there that slipped through the cracks. There are guidance, memoranda, notices, circulars, bulletins, administrative interpretations, it is a whole word salad of these, and they're not taken into account in the notice and comment process. And they really can—the agencies can really slip aside and use guidances and said—so it's something you have to watch as you do a two for one or any kind of regular campaign.

Mr. MEADOWS. So, Mr. Goodwin, would you agree with Ms. Katz and Mr. Crews that they should be included in the review process?

Mr. GOODWIN. No, absolutely not.

Mr. MEADOWS. Why is that? Because you're all about transparency, and all of sudden now you're disagreeing with your two colleagues on the left and right.

Mr. GOODWIN. I reject the premise that OIRA is transparent to begin with.

Mr. MEADOWS. So you think that OIRA should be done away with?

Mr. GOODWIN. Yeah. Absolutely.

Mr. MEADOWS. Why is that?

Mr. GOODWIN. Because it adds nothing of value to the rule-making process.

Mr. MEADOWS. In what quantitative analysis would you suggest that? It adds nothing?

Mr. GOODWIN. I mean—

Mr. MEADOWS. What studies? What quantitative analysis—you know, you've been here, and I get a little frustrated, Mr. Goodwin, because you act like you don't know what's going on. You're an expert witness. You act like all of this is new information, and actually there's been online portals with the task force and so forth, and you're opining on what is and what is not accurate. So what quantitative analysis do you have to support that OIRA should be done away with?

Mr. GOODWIN. I don't know if quantitative analysis is necessary—

Mr. MEADOWS. So you just have your opinion?

Mr. GOODWIN. No. I have several examples of rules that were weakened as a result of the rulemaking process.

Mr. MEADOWS. And which ones would those be?

Mr. GOODWIN. Oh, EPA's coal ash rule.

Mr. MEADOWS. So would you agree with WOTUS's rulemaking guidance to rulemaking analysis with regards to how OIRA was involved in that? Do you agree with that? You're an EPA lawyer, right, so you probably are well-informed on that.

Mr. GOODWIN. I'm not sure what you're asking me about. There was a WOTUS guidance, which Mr. Crews was talking about, which did undergo OIRA review. There was the original WOTUS rule which underwent two OIRA reviews,.

Mr. MEADOWS. Right.

Mr. GOODWIN. And now there's—

Mr. MEADOWS. And where did they go wrong on that?

Mr. GOODWIN. On the WOTUS rule itself?

Mr. MEADOWS. Yeah.

Mr. GOODWIN. It could have been stronger, I think.

Mr. MEADOWS. Okay. So let me go back to something. You've been talking about how the budgetary analysis that the Trump administration has done is bogus. You know, you didn't use the word bogus, but you questioned its validity under the Trump administration on some of this rulemaking roll-back. Is that correct?

Mr. GOODWIN. You mean the cost benefit analysis.

Mr. MEADOWS. Yes.

Mr. GOODWIN. Yes.

Mr. MEADOWS. All right. And so which—specifically which cost benefit analysis are you referring to?

Mr. GOODWIN. The two that I have in mind is the Waters of the U.S. repeal and the Clean Power—

Mr. MEADOWS. What quantitative analysis—now you're in my wheelhouse again. I know you're a moot courtier, so if you want to debate it back and forth, I'll be glad to debate this. So in what quantitative analysis would you suggest that that was wrong? Are you an economist?

Mr. GOODWIN. No.

Mr. MEADOWS. Do you have a degree in statistics?

Mr. GOODWIN. No, I have a masters in public policy.

Mr. MEADOWS. What about comparative analysis?

Mr. GOODWIN. To the extent that that's incorporated—

Mr. MEADOWS. So, Mr. Goodwin, you're an expert witness here and making statements, sworn testimony, I guess. Based on what analysis are you suggesting that those were quantitatively incorrect?

Mr. GOODWIN. Well, I mean, my own assessment of them as well as the assessment of other experts on them, including folks at NRDC, the Resources for the Future, all kinds of folks who have looked at these things, and we all agree that these—oh, and a researcher at—a Ph.D economist at Harvard.

Mr. MEADOWS. You're giving credentials, you're not giving quantitative analysis. What quantitative analysis would you suggest to support your testimony here?

Mr. GOODWIN. Okay. So for example, with the Waters of the United States Rule, the repeal by the Trump administration. They took the one large category of benefits that they could find, the protection of wetlands and they just zeroed it out, based on some pretty flimsy—

Mr. MEADOWS. Pretty flimsy, according to you?



Mr. GOODWIN. No, according to everybody that has looked at it.

Mr. MEADOWS. Everybody? Well, not according to me. I'm not in the everybody. Ms. Katz, were you part of that? Did you think it was bogus.

Ms. KATZ. I wish I had.

Mr. MEADOWS. Okay. Mr. Goodwin, my point is, when you make statements you need to back them up with proof. And so let's go under the previous administration. Were there any of their analysis, cost benefit analysis, that was incorrect?

Mr. GOODWIN. Yes.

Mr. MEADOWS. On which ones?

Mr. GOODWIN. Off the top of my head, the coal ash rule that I just mentioned before.

Mr. MEADOWS. So you're saying that they made the wrong analysis on implementing coal ash. That may make headlines.

Mr. GOODWIN. The cost benefit analysis, yeah.

Mr. MEADOWS. So you said it would actually benefit us a lot more. Is that what you're saying? I'm trying to figure out where you're coming from on this.

Mr. GOODWIN. It's been awhile since I looked at it, but the rule itself was stronger then—during the OIRA process it was weakened, and part of the process for weakening it—or part of the justification for weakening it was a cost benefit analysis that was flawed. Yeah.

Mr. MEADOWS. Okay. So can you get to this committee your analysis on where the Trump administration has gone wrong on the cost benefit analysis? Your personal—

Mr. GOODWIN. Oh, yeah, sure. It's cited in my testimony as well.

Mr. MEADOWS. So you're saying today is the first day that you really understood anything about the make-up or the input from these task forces? Today is the first day? That is your testimony?

Mr. GOODWIN. I know very little about what was in these things beyond—I think in the New York Times report was all I ever really saw of—

Mr. MEADOWS. But I thought you were the expert witness here today?

Mr. GOODWIN. How can I be an expert on something that's not transparent?

Mr. MEADOWS. Well but it is. I would say that—I had my staff look up, I said, certainly this has to be transparent. And there's actually online portals at DOD, Commerce, Interior, and other agencies already, and you're the expert, and yet you don't know about those online portals, and actually the requests for information?

Mr. GOODWIN. Oh, I saw the Department of Interior one. All it did was—

Mr. MEADOWS. But I thought today was the first day you found about it?

Mr. GOODWIN. No, no, no. I said the membership—

Mr. MEADOWS. That was your sworn testimony.

Mr. GOODWIN. No, I said today was the first day I knew about the membership of the task forces and who those individuals were.

Mr. MEADOWS. So are the task forces a good thing or a bad thing?

Mr. GOODWIN. No, they are a bad thing.

Mr. MEADOWS. And you base that on?

Mr. GOODWIN. I identified four flaws in my testimony.

Mr. MEADOWS. In terms of—so it's a bad thing based on—well, I thought, according to you, I got a quote from you that basically said that you didn't think that this deregulation executive order was really amounted to anything.

Because, according to you, it was like a bumper sticker or a stump speech, something that is hard to be translated into regulatory policy. But we're hearing today that it's actually been translated into regulatory policy. And it's actually saved millions of dollars. So would you revise that statement?

Mr. GOODWIN. Well, \$22 million, which according to my calculations is \$0.07 per American.

Mr. MEADOWS. So what is you're saying is because it's only \$22 million, that's not a big deal?

Mr. GOODWIN. No, I'm just saying it's not as—there's,—you know, to the extent that—so what we heard today from the—

Mr. MEADOWS. Is \$22 million a big deal?

Mr. GOODWIN. It's not as big a deal as people are making it out to be. Here is the important things—

Mr. MEADOWS. No, that's not an important thing. I think at this particular point is, what I'm seeing is, is we've asked a host of people to come here from an expert witness standpoint. What I got from you was disappointing, Mr. Goodwin, because what it came in was with more rhetoric on what you thought, with perhaps an agenda.

Actually, since you mentioned The Times article, they just passed me a note. The Times article that you referred to actually included many of the names of the task force members. So maybe you didn't read it.

Mr. GOODWIN. No, I did. That is what I said, to the extent that I knew anything about the membership, it was from that article.

Mr. MEADOWS. Here's what I want the message to go away with. I want to thank each one of you for your testimony. Mr. Kohli, thank you for giving us a good model of which, actually we saw it implemented in the U.K. and how it's making a difference.

Mr. Goodwin, I come back to you and say that perhaps we can look at this in a more open way from a cost benefit analysis. And I'll be glad to work with you in the future, looking at it from a different perspective.

Ms. Katz and Mr. Crews, thank you so much for your expert testimony, in terms of what it's doing.

Mr. Goodwin, I would disagree with you from a standpoint of the value of OIRA. Under the previous administration and under this administration, I think they perform a critical role. And to suggest otherwise really makes me question really your testimony from an administrative procedures point of view.

I mean, again, you're in my wheelhouse, and I'll be glad to follow-up. If you want to come by my office, my door is always open. I'd be glad to do that. But here is the concern I have. This is saving real dollars for the American people. And you may not think \$22 million is a lot, but I think it's a whole lot. And every dollar, whether it's \$0.07 or not, is money that can be directed towards other things and it's critically important.

And I think what we ought to do is applaud these task force and the efforts that are there. It shouldn't be a spring cleaning kind of event, Mr. Kohli, it should be an ongoing event. And as we look at that, to try to implement this across the board.

If there is no further business before the subcommittees, the subcommittees stand adjourned.

[Whereupon, at 12:35 p.m., the subcommittees were adjourned.]

