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Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary

"THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS: FEDERAL REGULATIONS AND REGULATORY REFORM"

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Statement of Amb. C. Boyden Gray

I am honored to have been invited to testify before the Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law on the subject of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

The focus of my remarks today will be the regulatory reforms that can be accomplished by subjecting proposed regulations to the oversight of OIRA—perhaps the most powerful office in the administrative apparatus of our Government, but one of its best-kept secrets.

I. REGULATORY ACCOUNTABILITY ACT

In the last Congress, I twice testified before the full Judiciary Committee in support of the Regulatory Accountability Act of 2011.[1] As I said in 2011, "[b]y incorporating the provisions of the Regulatory Accountability Act . . . into the

[1] My statements remain available on the Committee's web site, at http://judiciary.house.gov/hearings/pdf/Gray%2010252011.pdf and http://judiciary.house.gov/hearings/Hearings 2012/Gray 09202012.pdf.

overarching structure of the Administrative Procedure Act— which does *not* exempt independent agencies—Congress will commit the independent agencies to OIRA guidance and oversight, including the discipline of cost-benefit analysis and alternatives analysis." This remains, to my mind, one of our administrative law system's most critical needs.

A. OIRA OVERSIGHT OF INDEPENDENT AGENCIES

Before examining the cost-benefit analysis in particular, I will spend a moment on the virtues of OIRA oversight in general. As federal agencies proliferate and the regulatory burden on American public and American industry grows, it becomes increasingly important that the myriad cooks stirring the regulatory soup be subject to meaningful oversight. As Sally Katzen observed after her time as OIRA Administrator under President Clinton, "the problems that plague our nation do not fit neatly into one agency"; "nor are they likely to be solved by one regulatory *action*."[2] Subjecting independent agencies to OIRA oversight would therefore result in "better coordinated and coherent regulatory actions, and ultimately better decisionmaking."[3] The need to bring independent agencies into the fold grows more urgent as Congress delegates more and more power to them. The Securities and Exchange Commission, National Labor

[2] Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 108, 111 (2011).

[3] *Id.* at 110.

Relations Board, and other longstanding agencies wield immensely more power than they once did. And the Dodd-Frank Act granted vast new powers to existing independent agencies such as the Commodity Futures Trading Commission, and created another new independent agency, the Bureau of Consumer Financial Protection ("CFPB"), with unprecedented power and unprecedented independence from all three branches of government. Exempting independent agencies from OIRA oversight is sometimes justified by the argument that, whereas executive agencies are the President's, independent agencies are Congress's. The premise is no longer true if it ever was: Congress is increasingly unwilling to oversee those agencies, as demonstrated by the Dodd- Frank provisions preventing Congress even from reviewing the budget of the self-funded CFPB.

As a general matter, Congress and the courts can only react to administrative rules after they have already been promulgated; meaningful oversight of the administrative state must start in the executive branch. Indeed, beginning with my experience as counsel to Vice President Bush, I have observed that centralized review of administrative agencies is most effective when the Office of the Vice President takes an active role in its supervision. I have seen ambitious regulatory reform succeed with vice presidential leadership, and I have seen inter-agency efforts fail for want of centralized leadership. Whether or not the Vice President takes an active role in regulatory matters, however, it is now

more important than ever that OIRA be granted the authority it needs to direct and supervise a coherent administrative policy across all federal agencies—not just those whose heads serve at the pleasure of the President.

It is well accepted that the President's constitutional duty to faithfully execute the laws gives him authority to subject independent agencies to OIRA review.[4] But this is an area in which congressional cooperation, rather than unilateral executive action, is preferable for purposes of inter-branch comity. While the Obama Administration has made much of the fact that it nominally asked independent agencies to review the costs and benefits of their regulations, the executive branch has not taken serious steps to actually align the costs and benefits of independent agencies' regulations. And OIRA does not discuss proposed independent agency rules with the public as it does with respect to executive agencies.

B. COST-BENEFIT ANALYSIS

One of the greatest virtues of the Regulatory Accountability Act is that it would subject independent agencies to the requirement that they establish that the costs imposed by their rules are justified by the benefits they accrue.

Cost-benefit analysis is sometimes unfairly disparaged as tool of

[4] *See* VIVIAN S. CHU & DANIEL T. SHEDD, PRESIDENTIAL REVIEW OF INDEPENDENT REGULATORY COMMISSION RULEMAKING: LEGAL ISSUES (Sept. 10, 2012), at 12-15, *available at* http://www.fas.org/sgp/crs/misc/R42720.pdf.

conservatives, and as designed to "promote a deregulatory agenda under the cover of scientific objectivity."[5] Both claims are false.

1. IDEOLOGICALLY NEUTRAL

The detractors of cost-benefit analysis tend to oppose it for its results, not its method. For example, there are those who criticize economic analysis because it "has never been the environmentalist's friend."[6] Economic analysis viewed in the abstract is ideologically neutral. When it is used correctly, cost-benefit analysis promotes regulations that are good for society by deterring regulations (from any political quarter) that would elevate the interests of a few above the good of the whole.[7]

But conservatives are by no means the only advocates of cost-benefit analysis.

Sally Katzen opposed codification of cost-benefit analysis while in office,[8]

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[5] FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 9 (2004); *see also Daniel A. Farber, Rethinking the Role of Cost-benefit Analysis*, 76 U. CHI. L. REV. 1355, 1366 (2009) (arguing that cost-benefit analysis is motivated by "political bias against regulation") (reviewing ACKERMAN & HEINZERLING, *supra*); Jonathan D. Guynn, *The Political Economy of Financial Rulemaking After* Business Roundtable, 99 VA. L. REV. 641, 644 (2013) (citing arguments that cost-benefit analysis is "designed to further a deregulatory agenda by creating regulatory gridlock, imposing an impossible burden of proof on the regulators or making it prohibitively expensive for agencies to issue regulations.").

[6] Lisa Heinzerling, *Lisa Heinzerling Responds to Richard Revesz on Cost-Benefit Analysis*, GRIST (May 15, 2008), http://grist.org/article/cost-benefit-environmentalism-an-oxymoron/

[7] Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 225-26 (1999) ("[W]e argue that CBA, properly understood, is consistent with every political theory that holds that the government should care about the overall well-being of its citizens.").

[8] Katzen, *supra* note 2, at 108.

but she had a change of heart after she left OIRA. In 2011 she wrote that "requirements for economic analysis and centralized review should be extended to the Independent Regulatory Commissions (IRCs—those multi-headed agencies, such as the Securities and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, etc., whose members do not serve at the pleasure of the President and can be removed only for cause."[9] Citing reports by OMB and Resources for the Future, Katzen observed that "IRCs do not typically engage in the rigorous economic analysis that has come to be expected (and generally accepted) for executive branch agencies. In light of the wave of financial regulations triggered by the Dodd-Frank Act, Katzen called extending cost-benefit analysis to independent agencies "a no-brainer."[10] I agree.

And Cass Sunstein, who headed OIRA during President Obama's first term and authored *The Cost Benefit State*, published by the American Bar Association, wrote that "us[ing] cost-benefit analysis in a highly disciplined way" to "ensur[e] that high costs are justified by high benefits—is especially important in a period of economic difficulty."[11]

This is not a new idea. Judge Patricia Wald, former Chief Judge of the D.C. Circuit, appointed by President Carter, wrote in 1983 that "[e]ven when the

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[9] *Id.* at 109.

[10] *Id.* at 110.

[11] Cass R. Sunstein, *Humanizing Cost-Benefit Analysis*, Euro. 2 J. OF RISK REG. 3 (2011).

governing statute says nothing specific about economic principles, the agency may rely heavily on economic analysis to meet more general statutory criteria, such as determining that rates are 'just and reasonable.' "[12]

Given the bipartisanship support its practitioner's have voiced for cost-benefit analysis, it should come as no surprise that it "has become a mainstream tool used by Presidents of both parties and members of Congress on both sides of the aisle."[13]

2. FACILITATION OF JUDICAL REVIEW

Requiring agencies to subject their regulations to cost-benefit analysis also allows for meaningful judicial review of agency action. Without substituting its policy judgment for that of the agency, a court can ensure that the agency employed its expertise to craft a regulation that will do more good than harm.

Perhaps the best example of judicial review of administrative cost-benefit analysis is *Business Roundtable v. S.E.C.*, the very case that sparked some of the loudest complaints that cost-benefit analysis is a partisan device. That case involved an appeal of the S.E.C.'s "proxy access rule." A federal statute required the S.E.C. to consider the costs and benefits of that rule. When the proxy access rule was appealed in the D.C. Circuit, the court did not try to undertake its own

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[12] Patricia M. Wald, *Judicial Review of Economic Analysis*, 1 YALE J. ON REG. 43, 43 (1983).

[13] Guynn, *supra* note 5, at 644–45.

economic analysis, or even micromanage the agency's own substantive review; rather, the court reviewed only whether the S.E.C. had sufficiently considered the evidence in the record before the agency, and whether the agency had meaningfully considered and replied to affected parties' arguments about the costs of the rule. The agency clearly had failed to satisfy those minimal requirements. As the court held, the agency had "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."[14] But rather than dictating an outcome, the court vacated the rule and remanded the matter to the agency—it gave the agency another bite at the apple. The court did not prohibit the S.E.C. from reaching the same substantive outcome; it simply required the agency to satisfy the applicable procedural requirements.

This is precisely what the reviewing court is supposed to do when confronted with an agency's statutorily required cost-benefit analysis. In the words of Judge Wald,

> Where a governing statute requires the agency to conduct an economic analysis as a basis for action, . . . the court must insist that it be done and that it include whatever components Congress specified. Little or no deference is due the agency in such threshold

[14] *Business Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011).

> scrutiny. . . . The court must assure itself that the statutorily mandated decision . . . has been made and that the agency's reasoning was rational and supported by evidence. An agency cannot immunize arbitrary or capricious substantive decisions by dressing them up in the Emperor's clothes of economic jargon.[15]

Business Roundtable demonstrates that judicial review of cost-benefit analysis promotes a rulemaking process driven by expertise and not mere politics. There is no good reason why independent agencies, which are responsible for some of the costliest rules in the Federal Register, should be exempt from this process.

3. PROBLEMATIC IMPLEMENTATION OF COST-BENEFIT ANALYSIS

None of this is to suggest that simply requiring agencies to perform cost-benefit analysis of their rules is a fail-proof solution for the problems of regulatory mismanagement. Like any form of analysis, cost-benefit analysis inevitably reflects the value judgments of the regulator. Congress, and this body in particular, must therefore be vigilant in regulating the regulators.

This vigilance is especially needful in the current Administration, which, by its own estimate, has imposed up to $51.5 million in regulatory costs between 2009 and 2012, considering only the 58 so-called "major rules" issued during that

[15] Wald, *supra* note 12, at 50.

time period.[16] And that self-serving estimate should be viewed skeptically: As former OIRA Administrator Susan Dudley has observed,

> Agencies have strong incentives to demonstrate through analysis that their desired regulations will result in benefits that exceed costs. . . . [A]s the regulatory game is now structured, OIRA is the umpire—the sole judge of the balls and strikes pitched by the agencies. When the umpire boasts with such enthusiasm about his team's score, one has to wonder who will ensure that the game is played fairly.[17]

In sharp contrast to the Administration's own estimate, the American Action Forum (led by Douglas Holtz-Eakin, former chief economist of the President's Council of Economic Advisers and director of the Congressional Budget Office) estimates that this Administration's regulatory burden on the economy exceeds $518 billion.

The Administration's estimate of the benefits of its regulations is just as problematic as its estimate of costs. Take, for example, the Administration's estimate of the "social cost of carbon"—a figure that is critical to the cost-benefit analyses for an increasing number of greenhouse gas emissions-related regulations.[18] According to former OIRA Administrator Cass Sunstein, the social

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[16] *See* OIRA, 2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act," at 19, at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf.

[17] Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, BUS. ECON. 47:3, at 175 (2012).

[18] Cass R. Sunstein, Working Paper: *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, HARV. L. SCHOOL PUB. L. & LEGAL THEORY WORKING PAPER SERIES, Paper No. 13-11 (May 15, 2013) (Social cost of carbon "values are used to establish the benefits of regulatory efforts to reduce greenhouse gas emissions, and they have played a significant role in many rulemakings."), *available at*

cost of carbon (now $36 per ton), which was the product of an interagency working group, is "binding until [it is] changed" by "some kind of formal process." Until that time, says Sunstein, "[a]gencies and departments (including OIRA and others within the Executive Office of the President) may not reject such documents, in whole or in part, in the context of particular rules."[19] But those estimates have never been the subject of a stand-alone notice and comment procedure. And the estimated cost declared by the committee is particularly problematic because the risk it attributes to carbon emissions (and therefore the benefit of their reduction) is global in scope, whereas the cost of regulation is necessarily borne only by entities within the United States. Thus, EPA justifies regulations that impose enormous costs on U.S. industry by reference to benefits that are shared the world over. This is in tension with an OMB Circular stating the commonsense proposition that "Analyses should focus on benefits and costs accruing to the citizens of the United States in determining net present value. Where programs or projects have effects outside the United States, these effects should be reported separately."[20] My point here is not to propose a solution but to guard against complacent acceptance of cost-benefit analysis by administrative agencies.

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199112 (citing Light-Duty Vehicle Greenhouse Gas Emission Standards, 75 Fed. Reg. 25,324, 25,520–524 (May 7, 2010) (to be codified at 49 C.F.R. pts. 531, 533, 536, 537, 538); Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers, 76 Fed. Reg. 57,516, 57,559–57,561 (Sept. 15, 2011) (to be codified at 10 C.F.R. pt. 430)).

[19] *Id.* at 4.

[20] OMB Circular A-94 (revised), *available at* http://www.whitehouse.gov/omb/circulars_a094.

II. REGULATORY FLEXIBILITY ACT

Under the current Regulatory Flexibility Act, each of three "covered agencies"[21] must convene a review panel to assess the impact on small businesses of ill-defined economically "significant" proposed rules.[22] The Regulatory Flexibility Improvements Act (H.R. 2542) would give primary responsibility for this assessment to the Chief Counsel for Advocacy of the Small Business Administration,[23] and would require the interagency panel that receives the Chief Counsel's report to include an OIRA employee.[24] The Act would also allow OIRA, not just the originating agency—to decide what rules are covered.[25] Finally, the Act would require executive agencies to submit to OIRA (and to Congress) their periodic reviews of small business impacts of their existing rules.[26] Including OIRA in the process in these ways would promote consistency and reduce bias in the assessment of regulatory impacts on small businesses—a matter of vital importance to the economy.

III. SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT

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[21] The "covered agencies" are EPA, CFPB, and OSHA. 5 U.S.C. § 609(d).

[22] *Id.* § 509(a).

[23] H.R. 2542, sec. 6, amending 5 U.S.C. § 609(b).

[24] *Id.*, amending 5 U.S.C. § 609(d).

[25] *Id.*, amending 5 U.S.C. § 609(e).

[26] *Id.*, sec. 7, amending 5 U.S.C. § 610.

Although the primary subject of my remarks has been OIRA, I would be remiss if I did not address the Sunshine for Regulatory Decrees and Settlements Act (H.R. 4078, Title III). This legislation would help to solve the longstanding collusion between activist groups and sympathetic regulators, which use sham ("sue and settle") litigation to achieve through "consent decrees" administrative rule that cannot be obtained through the ordinary regulatory process. Relegating administrative rulemaking to backroom deals between administrators and particular interested parties undermines the transparency, public participation, and agency expertise that are the hallmarks of our administrative law system. By requiring greater public notice, tougher judicial scrutiny, a more open judicial process, and (in the Attorney General's office) direct accountability at the highest levels of the Executive Branch, this Act would ensure that "public interest" litigation truly promotes, not impairs, the public interest.