Testimony

Transparency Reform at the Office of Information and Regulatory Affairs

SAM BATKINS | MARCH 15, 2016

Chairman Meadows, Ranking Member Connolly, and Members of the Committee thank you for the opportunity to appear today. In this testimony, I wish to highlight the following points:

- The Office of Information and Regulatory Affairs (OIRA) remains a critical agency for regulatory oversight, but full transparency remains elusive. Unified Agendas and Reports to Congress are often late, if published at all, and there is strong evidence that the administration hides data on unfunded mandates and fails to comply with the Congressional Review Act.
- Under Executive Orders 13,563 and 13,610, the administration endeavors to "modify, streamline, expand, or repeal" burdensome regulations. These reports are rarely on time and were a month late this year. Furthermore, a review of the administration's reports finds that there is more expansion than repeal. Agencies often list new regulations that add hundreds of millions of dollars in economic burdens in these allegedly "retrospective" reports.
- There is more the nation can do on regulatory modernization to reduce unnecessary burdens while ensuring essential public health protections. Balanced regulatory reform that retrospectively examines past rules and prospectively evaluates the costs, benefits, and regulatory alternatives is an international standard practice, not a partisan exercise.

Let me provide additional detail on each in turn.

TRANSPARENCY AT OIRA

Despite several laws and executive orders laying the groundwork for heightened transparency at OIRA, recent troubling events cloud what many view as a secretive government entity. From the Unified Agenda to missing reports to Congress, there is plenty of room for improvement, especially considering that OIRA sometimes fails to follow the law when it violates many of these transparency measures.

It should be stressed, however, that OIRA serves a vital function in the federal regulatory process. By ensuring agencies work together on rulemakings, scrutinizing benefit-cost analyses, and providing an essential review of major regulation, OIRA has withstood attacks during the past six presidential administrations. OIRA might have transparency and reporting issues, like many agencies in the federal government, but its task is vital to ensuring a well-functioning regulatory system. That its model has been replicated in other countries, is a testament to the foundational design of executive review.

Yet, in recent years, it appears OIRA has played in the political realm almost as much as the policy world. In 2012, the administration decided that they weren't going to publish a spring edition of the Unified Agenda of Regulatory and Deregulatory Actions. This, despite the clear language of governing executive orders and the Regulatory Flexibility Act: "During the months of October and April of each year, each agency shall publish in

the Federal Register a regulatory flexibility agenda."[1]

Instead, the administration opted to publish a single agenda on December 21, 2012 (the Friday before Christmas), the latest an agenda has ever been published. To our knowledge, 2012 was the only year when an administration failed to publish two regulatory agendas.[2] Each subsequent agenda has been released not with an eye toward transparency, but to avoid scrutiny. The next "spring" agenda was published on July 3, with the fall agenda released before Thanksgiving. The spring 2014 agenda was released the Friday night before Memorial Day and the fall agenda on the Friday before Thanksgiving.

How can an agenda on federal regulations that regulators have compiled since 1996 possibly be a controversial or political exercise? Releasing a calendar of pending rulemakings should be viewed as ministerial standard practice, not some game designed to hide the ball on federal regulation. OIRA and the administration should return to traditional "spring" and "fall" publication dates for the Unified Agenda and ensure that all pending rulemakings are included. The administration issued its data call for 2016's spring agenda on February 19, 2016, so it appears the agenda is somewhat on time for the spring.

OIRA and the Office of Management and Budget (OMB) also have a responsibility to release the annual "Information Collection Budget" (ICB) of the U.S., which outlines the amount of federal paperwork imposed on Americans and agency violations of the Paperwork Reduction Act. Like the Unified Agenda, it appears the administration has also played "hide-and-go-seek" with this report. The administration released the 2011 report in September of 2011 and then waited until January of 2013 to post the 2012 report. Then, no other data was reported until September 2014, when the 2013 and 2014 reports were released. It is now nearly 500 days since the last update of this "annual" report.

This report is critical because it supposedly represents an accurate account of the nation's paperwork burden. Unofficial figures place the time that businesses and individuals spend complying with reporting and recordkeeping requirements at 11.4 billion hours.[3] To put this in context, it would take more than 5.7 million Americans, working full-time (2,000 hours a year), to complete this annual paperwork. To monetize 11.4 billion hours: assuming the average wage rate of a compliance officer, costs would exceed $372 billion to meet only part of the nation's regulatory burden. The ICB is an obscure, but important piece of the nation's regulatory picture and there are no sound excuses for delaying or avoiding publication.

Beyond the Unified Agenda, there are compliance concerns with the Unfunded Mandates Reform Act (UMRA) and the Congressional Review Act (CRA). For both the Unified Agenda and OIRA's website, agencies and OIRA are supposed to certify whether the rule would result in unfunded private sector or intergovernmental mandates. Despite the myriad of exemptions in the law, it appears that OIRA routinely omits whether a rule contains unfunded mandates.

Take a 2014 rule that requires new vehicles to install rear-view cameras. The aim of this measure was to prevent death and injury to pedestrians, typically young children, while the car is in reverse. The rule may very well generate benefits exceeding its costs, but its burdens could total more than $900 million annually, enough to trigger UMRA. However, the Unified Agenda and OIRA's website report that the rule contains no unfunded mandates. See below:

Image not found or type unknown

Yet, the rulemaking itself acknowledges UMRA status, "[T]oday's final rule would result in expenditures by the private sector of over $100 million annually."[4] Even GAO acknowledged that the measure contained unfunded mandates: "NHTSA determined that this final rule will result in expenditures by the private sector of over $100 million annually."[5] This was not an isolated incident. AAF found several other instances where the administration omitted critical data on unfunded mandates, either in the Unified Agenda or on OIRA's website.[6]

There are also thousands of instances where agencies and OIRA are failing to comply with the CRA. In a recent report from the Administrative Conference of the United States, Curtis Copeland found 43 major and significant rules that were never submitted to Congress or GAO, as required by the CRA.[7] This raises serious legal issues because under 5 U.S.C § 804, the OIRA Administrator makes the finding of major rule status. Furthermore, 5 U.S.C § 801 clearly states, "Before a rule can take effect," federal agencies must submit reports to each House of Congress. The Copeland report outlines 1,200 rules published between 2012 and 2013 that could be in legal limbo because of improper procedure. Furthermore, recent work from AAF found more than 2,000 rules that weren't submitted to GAO between 2014 and 2015. Despite assurances from OIRA Administrator Howard Shelanski, it's clear this problem has not been solved.

Transparency issues don't end with the CRA or UMRA, however. Under the Regulatory Right to Know Act, the administration "shall prepare and submit to Congress, with the budget" a report outlining "total annual costs and benefits" of federal regulation.[8] Nothing in the law limits reporting to cabinet agencies and the language is clear: the report on costs and benefits is to be submitted with, in a temporal sense, the federal fiscal budget.

Despite these legal implications, the current administration rarely complies with this requirement, and as of this writing, it has still not submitted a draft 2016 report to Congress. In 2010 and 2011, the administration published the preliminary report with the budget, and after taking public comment, published the final report later in the year. Then in 2012, the administration waited more than a year to publish the final report. It replicated this practice in 2013, 2014 and 2015. Legislative history reveals that there was good reason the "with the budget" language was included in the Regulatory Right to Know Act. Congress and the nation were to be given a view of the administration's fiscal and regulatory record. OIRA has now decoupled these two aspects and has attempted to hide its regulatory record, just as it does with the Unified Agenda.

The reports to Congress are hardly contentious policy documents. They do not receive widespread media attention. For example, the 2014 report received just 11 substantive comments.[9] There are no good reasons why OIRA and the administration should refuse to follow the law and delay publication.

Finally, there are only a few months left in President Obama's term and with this reality brings the possibility of a rush of "midnight regulation." This is generally defined as the period after Election Day, but before the next president takes office. Historically, it has been defined as time of increased regulatory activity, especially during the transitions in 2000 and 2008. OIRA Administrator Howard Shelanski has already pledged to limit a surfeit of regulation during the midnight period. In a memo to agencies, "Regulatory Review at the End of the Administration," he urged: "agencies should strive to complete their highest priority rulemakings by the summer of 2016 to avoid an end-of-year scramble that has the potential to lower the quality of regulations that OIRA receives for review and to tax the resources available for interagency review."[10] Yet, previous pledges were made in 2008 and that didn't curb OIRA's review of 213 rulemakings during the midnight period from November 2008 to January 2009. For comparison, OIRA concluded review of just 109 rulemakings between November 2015 and January 2016.

There is another possible deadline looming for the administration that could force an early uptick in rulemaking activity. Under the Congressional Review Act (CRA), rules issued within 60 legislative days of the end of a

Congressional session "carryover" to the next Congress. Last year, AAF calculated the date at which President Obama's regulations could be reviewed under the CRA by the next Congress (based on current House and Senate calendars). AAF estimated any regulation issued on May 17, 2016 or later could be reviewed and rescinded by the next Congress.[11] A report from the Congressional Research Service confirmed this date in a paper released earlier this year.[12]

Is this deadline giving the administration a reason to hurry rules before the CRA takes effect? Based on some evidence from OIRA reviews in February, yes. OIRA concluded review of 15 "economically significant" regulations last month, far more than any comparable presidential election year since 1996.[13] One month hardly indicates a trend, but if March and April are equally active, it could portent a mini-rush of regulation before the CRA carryover period takes effect.

IMPLEMENTATION OF EXECUTIVE ORDER 13,563

Despite reform attempts, every year Democrats and Republicans bemoan the current state of regulation. President Obama continued the reform tradition when he issued Executive Order 13,563, demanding that the "regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It also called on regulators to look back at existing regulations to "modify, streamline, expand, or repeal" those that were redundant or ineffective.

After more than five years of regulatory reform, it's clear that regulators have sought to expand regulations more than modify. Retrospective review reports are filled with more new proposals designed to address current issues, than regulatory reviews designed to examine whether past rules succeeded or failed. For example, energy efficiency standards are included in retrospective reports, even though they are implementing new standards. The Department of Education continues to insist the new "Gainful Employment" regulation that adds billions of dollars in costs and millions of burden hours was somehow designed to scrutinize "existing significant regulations." It clearly was not. Likewise, how is the controversial "Waters of the United States" joint rule from the Department of Defense and EPA a retrospective rulemaking?[14]

Regulators either engage in an honest attempt to examine the regulatory state by looking back at past rules and measuring their costs and benefits, or they add new burdens that address current problems. Too often, it is the latter. In the 2015 retrospective reports, the administration managed to add $2.9 billion in regulatory costs, even though the reports are ostensibly deregulatory in nature. The most recent report once again doubles-down on additional regulatory burdens: $16 billion in net costs and 6.5 million additional paperwork burden hours. For example, with all the problems that the Department of Veterans Affairs has had in the past, they managed to list just one specific rulemaking. By comparison, the Department of Transportation listed 43 rulemakings, planning to cut $800 million in costs and remove 21.5 million hours of paperwork.

The cabinet-wide success of retrospective review is incredibly uneven. Typically, agencies just implement new regulation under the guise of retrospective review. Take the Department of Energy's inclusion of efficiency standards for external power supplies. The rulemaking imposes $3.3 billion in long-term costs;[15] it isn't retrospective. If it is, then all new rulemakings are retrospective. New greenhouse gas standards are retrospective because they "look back" at previous regulations addressing emissions at power plants and then add new standards. Thankfully, EPA has not included these measures in its retrospective reports, but it did include its "Tier 3" rulemaking, which imposes $1.5 billion in annual burdens; EPA also added its 2017 to 2025 vehicle efficiency standards, at an annual cost of $10.8 billion. Incredibly, the administration has even included new Affordable Care Act regulations in its retrospective reports. How can implementing a new heath care law qualify as retrospective review designed to "eliminate red tape?"[16]

On its website touting the success of retrospective review, OIRA proclaims, "The regulatory lookback effort to date has achieved an estimated $28 billion in net 5-year savings."[17] We have never seen an itemized list of these savings, but we suspect the final annual cost savings reach $7.1 billion, with another $484 million in proposed annual savings. The agency's five-year savings figure is likely accurate, but regulatory costs and benefits are typically reported as annual figures. By contrast, measures that increase burdens in these reports will add $17.2 billion in annual costs. Thus, on net, the regulatory burden will increase by more than $10 billion annually because of rulemakings contained in these supposedly "retrospective" reviews. Just three of the largest rulemakings contained in these retrospective reports could impose $13.2 billion in annual burdens.

ESSENTIAL PRINCIPLES OF REGULATORY REFORM

It is because regulatory reform has failed so often in the past that we continue to talk about its place in the future. Broadly, regulatory reform should contain three principles:

- Codify the current informal executive orders on benefit-cost analysis and apply those principles to all federal agencies, with the prospect of judicial review if agencies fail to conduct the legally required analyses.
- Insert intelligible principles in future legislation that limit new regulation, enhance benefit-cost guidelines, and place a timeline for reviewing the efficacy of new rules.
- Create a formal system to retrospectively analyze the past regulations of all agencies. A formal bipartisan commission with diverse expertise could examine existing regulations and submit recommendations to Congress.

Currently, there is nothing stopping the next administration from ending the process of centralized review and abolishing generations-old principles of benefit-cost analysis. Despite the success of benefit-cost analysis, it is not applied equally across the federal government, and even within the executive branch, agencies sometimes omit crucial information or fail to consider regulatory alternatives. Codifying the current executive orders on reform, and extending their scope to powerful independent agencies, would enshrine sound analysis into law across all regulatory agencies. By inserting language on judicial review, another branch of government would be able to exercise important oversight.

Too often, agencies take the broad authority that Congress grants and abuse that power. For instance, in the last few years alone, federal courts have struck down more than a dozen regulations that exceeded the scope that Congress contemplated.[18] I first broached the idea of an "upstream" approach to regulation in 2011:

"This approach would insert specific guidelines into all major legislation imposing federal mandates, including: 1) requiring agencies to conduct reviews of regulations once implemented, 2) demanding agencies rescind

duplicative rules, 3) placing a limit on the number of regulations an agency could promulgate during implementation of a particular law, 4) establishing regulatory 'pay as you go' that would require the elimination of a rule whenever a new rule is adopted, and 5) prohibiting new regulations where costs exceed benefits."[19]

Congress does not have to adopt all five reforms, but including more specific guidelines for agencies could reform the regulatory process and give agencies a greater margin for error when challenged in court. This upstream approach would abolish the current "whack-a-mole" tactics that target controversial rules and instead focus on crafting sound rules before they become contentious.

There must also be a formal structure to evaluate past regulations to determine whether these measures are still generating significant benefits at an acceptable cost. This is not a partisan exercise. The OECD recommends that nations "adopt a dynamic approach to improve regulatory systems over time to improve the stock of existing and the quality of new regulations."[20]

Currently, there are more than 9,300 federal paperwork requirements, totaling 11.4 billion hours of compliance time for Americans. This is not solely the fault of the current administration, but generations of regulatory accumulation that policymakers have often overlooked. Whether addressing these burdens is conducted by an independent commission or an independent agency, there must be an outside arbiter that forces regulators to examine past rules. The current agency led process will produce piecemeal reforms at best and completely ignore past rules at worst. Without an effort to rescind or amend duplicative rules, any regulatory reform effort will garner only partial success.

The House of Representatives has already considered a piece of legislation that would address past cumulative burdens and future rulemakings. The Searching for and Cutting Regulations that are Unnecessarily Burdensome Act, or SCRUB, would establish an independent commission to identify duplicative regulations and allow Congress to vote on repeal or amendment. It would also establish a "cut-go" pool for regulators, where they would remove an older duplicative rule if they want to implement a new rule. As AAF found, a 15 percent reduction in regulatory costs, which SCRUB sets, could generate approximately 1.5 billion fewer paperwork hours and anywhere from $48 billion to $90 billion in annual cost savings.[21]

Embedded in the SCRUB Act is a form of a regulatory budget, an idea meriting increased attention on Capitol Hill. Whatever the form of a regulatory budget, cumulative or "one-in, one-out," recent evidence reveals that it can generate tremendous savings without adverse health and safety impacts. For example, the United Kingdom adopted a regulatory budget five years ago and it has saved roughly $1 billion in costs.[22] Meanwhile, particulate matter pollution and greenhouse gas emissions continue to decrease in the U.K. It is legally doubtful that OIRA could adopt a regulatory budget unilaterally, but AAF proposed the idea of a flexible paperwork budget, which might be more palatable, legally and practically.[23] Regardless of the scope, a flexible regulatory budget could allow Congress to gain greater oversight of the regulatory system while still allowing agencies to meet their legal obligations.

CONCLUSION

OIRA has played a critical role in managing the nation's regulatory apparatus for more than a generation. Although critiques of the agency are justified, mainly on transparency grounds, its status as a gatekeeper for federal regulation is vital. However, OIRA cannot serve the American people and the regulatory system if it continues to miss deadlines and misrepresent data. Better analysis in the future will serve regulations and our economy well, but broader reform would deliver even greater benefits.

Thank you. I look forward to answering your questions.

---

[1] Regulatory Flexibility Act, 5 U.S.C. § 602, available at https://www.law.cornell.edu/uscode/text/5/602.