S. Hrg. 104–825

OVERSIGHT OF REGULATORY REVIEW ACTIVITIES OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS

HEARING

BEFORE THE

SUBCOMMITTEE ON
FINANCIAL MANAGEMENT AND ACCOUNTABILITY

OF THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

SEPTEMBER 25, 1996

Printed for the use of the Committee on Governmental Affairs

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OVERSIGHT OF REGULATORY REVIEW ACTIVITIES OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS

WEDNESDAY, SEPTEMBER 25, 1996

U.S. SENATE,
SUBCOMMITTEE ON FINANCIAL MANAGEMENT AND ACCOUNTABILITY, COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:02 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Fred Thompson, Chairman of the Subcommittee, presiding.

Present: Senators Thompson, Stevens, McCain, and Glenn.

OPENING STATEMENT OF CHAIRMAN THOMPSON

Chairman THOMPSON. The hearing will come to order, this hearing of the Committee on Governmental Affairs, Subcommittee on Financial Management and Accountability.

We are meeting today to see how we are going to meet the challenge of having an effective regulatory scheme without overburdening the American people. Specifically, we are going to review the regulatory activities of the Administration's Office of Information and Regulatory Affairs in implementing Executive Order 12866. The Subcommittee also will look at some of the promises made in the National Performance Review to reduce the number of pages of regulations found in the Code of Federal Regulations.

We will ask a number of witnesses with different perspectives, both in the government and the private sector, whether they believe that the Administration has lightened the heavy load of regulations that Americans pay for every day.

Obviously, in this country we are well aware of some of the benefits that we have derived in terms of improving our environment and improving the safety of our workplace as well as other areas. But it is becoming increasingly apparent that without adequate review wasteful and unfair and burdensome rules result. The current regulatory burden is now enormous.

We are talking about $650 billion per year or thereabouts, over $6,500 per household. More and more people are becoming concerned that in the global marketplace that we have now, the competitiveness that we have now, that our economy is generally slowing down, resulting in a slower growth rate. Some of this has to do definitely with the overburdening of American business, especially American small business, in terms of regulatory burden.

Congress continues, however, to pass laws that exempt certain areas from, essentially, regulatory oversight. Congress keeps passing laws that result in requiring more and more regulation. So we are somewhat inconsistent in that regard.

But last year Congress considered regulatory reform legislation because of the enormous burden that more and more people became concerned about. The Administration took the position that reform legislation was not necessary, at least in the form that was presented, and that the Executive Order would produce smarter regulation.

In fact, statements were made that we would see a cutting of red tape, that we would see a cutting back of thousands of pages of the Code of Federal Regulations, that we would see a savings of billions, that the agencies would start operating more and more in the open, that we would be able to have more accountability, that we would have a cost-benefit analysis deriving from this Executive Order, and we would see a lessening of the onerous burden, than we had seen in the past.

So part of what this hearing is about is to see to what extent those wishes and predictions have been met. I believe the witnesses today will show that in many cases the Executive Order actually undercuts the OMB's authority to effectively review regulations, and in many cases the agencies are simply not complying with the President's Order. So I hope this hearing today will help remedy some of those problems.

[The prepared statement of Senator Thompson follows:]

PREPARED STATEMENT OF SENATOR THOMPSON

The Subcommittee is meeting today to take stock of the regulatory burden that the Federal Government imposes on the American people. Specifically, we are going to review the regulatory activities of the Administration's Office of Information and Regulatory Affairs in implementing Executive Order 12866. The Subcommittee also will look at some of the promises made in the National Performance Review to reduce the number of pages of regulations found in the Code of Federal Regulations. We will ask a number of witnesses with different perspectives—both in government and the private sector—whether they believe that the Administration has lightened the heavy load of regulations that Americans pay for every day.

In 1993, President Clinton issued Executive Order 12866 to create a regulatory system that, in the words of the order "works for the American people" by protecting their health and well-being by improving "the performance of the economy, without imposing unacceptable or unreasonable costs on society."

These are goals that we all can agree on. But have these goals been reached? Our hearing today will attempt to answer that question.

The statistics tell us that the Federal regulatory system is still a heavy drag on the American economy. The most current numbers are staggering. The total annual cost of regulation has skyrocketed to $677 billion, which translates into $6,000 per household per year. These numbers would lead me to believe that more reform of our regulatory system is needed.

Last year, I joined a number of my colleagues in supporting legislation to bring greater reform to our regulatory system. As I stated during Senate floor debate on that legislation, Federal agencies need to develop regulations that not only provide protection of health and safety, but also are founded in good, common sense.

To accomplish this goal, the reform legislation we considered would have required agencies to make accurate determinations about the good a potential regulation can bring about. In other words, how much disease or premature death can be avoided? Or, how much less dangerous can a situation be made? In answer to these questions, a Federal agency must be as precise as possible, using the most carefully prepared and up-to-date scientific information available.

Then, the agency needs to look at the negative impact that very same regulation may have on Americans. For example, how much more will the average American have to pay for a product? Will some Americans lose their jobs? Will some products

no longer be available at all? Will citizens have to spend a greater amount of their leisure time complying with government mandates? Will preventing one disease cause an increase in some other equally dangerous one?

Once all of these important questions have been asked and answered, the legislation would have required the Federal agency to put all of this information together and ask the central question: Do the benefits outweigh the costs? Or, in more simple terms: Does this rule produce enough good things for our citizens to make the negative impacts tolerable?

During last year's debate on regulatory reform legislation, many Americans told us they believed this approach to regulation made good, common sense. Americans make calculations about the costs and benefits of their behavior all the time. And they are asking regulators to approach problems in this way too.

Despite the public support for regulatory reform legislation, the friends of the Administration here in Congress would not let the reforms go forward. They held up Executive Order 12866 as a shield. They said that the Executive Order would be sufficient to lift the regulatory burden from the American people.

So, we are here today to examine the results of the Executive Order. Has it produced the promised results? The statistics I cited earlier would appear to make the answer to that question a resounding no. But, I believe that this Subcommittee should give the Administration's efforts a serious review today to determine the proper course for reform legislation in the next Congress.

We have a fine line-up of witnesses from government and the private sector to give us an assessment of today's regulatory burden. I look forward to hearing their testimony and to working with them on this issue in the future.

Chairman THOMPSON. I will call upon our distinguished ranking member of the Committee, Mr. Glenn.

OPENING STATEMENT OF SENATOR GLENN

Senator GLENN. Thank you, Mr. Chairman. Regulatory reform has been a major concern of ours this Congress, we worked an awful lot on it as our first witness today knows, over the last couple of years. We were unable to reach an agreement on a comprehensive bill, but I think we did make some progress in some other areas.

We still have yet to get together on a complete regulatory reform bill. There were just some differences that we got at loggerheads over and we just could not get the complete bill through, although we spent literally hundreds of hours working on it. That is something we still have to do and I think we have to get on with that in the next Congress.

We did, however, pass unfunded mandates reform and we enacted a Small Business Regulatory Fairness bill that provided for congressional review of agency rules. We also passed program specific reforms on safe drinking water and pesticides. So we have had some important accomplishments.

I think the Executive Branch, too, has had accomplishments. The Administration's reinventing government project has produced reforms. The report issued this past Friday discussed many of these achievements. The Administration also has continued the OMB regulatory review started by President Reagan. President Clinton's Executive Order No. 12866 modified the Reagan-Bush OMB process and was supported by a wide variety of groups from business to environmental groups.

The Executive Order is 3 years old now, so it was a good idea to have GAO look at OMB's implementation of the order and I am glad to be a co-requester of that study. I think the results are encouraging. While there clearly is room for improvement, GAO has found that OMB and the agencies are generally complying with the

order. Agency rules are being changed during OMB review, though the sunshine procedures need to be improved. Agencies are eliminating and revising regulations even though Congress keeps requiring that they issue new rules; for example, under the Clean Air Act.

I am sure we will hear some disagreeing views today, but in general it sounds like OMB is doing a reasonable job on regulatory review. We would all like to see it proceed faster, but I look forward to hearing from today's witnesses and look forward to their testimony.

Thank you, Mr. Chairman.

Chairman THOMPSON. Senator Stevens.

OPENING STATEMENT OF SENATOR STEVENS

Senator STEVENS. Mr. Chairman, I wish I could be that rosy about the process. I am concerned that the Unfunded Mandates Reform Act required each agency to develop an effective process to permit elected officers of State, local, and tribal governments to provide meaningful and timely input on proposed rules that have mandates. Now OMB did issue guidelines for implementing this requirement. But the search that my staff has conducted of the Federal Register reveals that only two agencies have issued a proposed statement of policy on intergovernmental consultation.

It has been a year-and-a-half since we touted the Unfunded Mandates Act, and yet there is not a constant policy in the Administration to carry it out. We need a policy that will require intergovernmental consultation consistent with the act. We thought the act would be almost self-implementing. But instead, the guidelines apparently leave it to the executive agencies to make the decision of whether to comply with the act.

Now I really must go on to another hearing but I hope, Mr. Chairman, that you will try to inquire of the representatives of the Administration why, after a year-and-a-half since we passed the Unfunded Mandates Act, is not every agency of the Executive Branch living up to that commitment? It was a bill signed by the President. They should have a program in place to give States and localities a real role in reviewing rules that deeply affect the sovereignty and resources of State and local governments.

I am sorry I cannot stay with you, but I am very pleased that you are continuing this hearing pertaining to these laws that we passed. Senator Glenn mentioned several of them. They are not self-implementing. They require really the action of OMB and other agencies of the Administration to assure that the individual offices of the Federal Government fulfill the requirements of the laws that the Executive Branch and the government have agreed to.

So I think this is a very timely hearing and I hope that the outcome will be we will get some answers. Thank you very much.

Chairman THOMPSON. Thank you very much, Senator Stevens.

Our first witness will be Sally Katzen, Administrator, Office of Information and Regulatory Affairs. Pleased to have you with us, Ms. Katzen. Do you have a statement to make?

TESTIMONY OF HON. SALLY KATZEN, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Ms. KATZEN. Thank you very much, Mr. Chairman, and Members of the Subcommittee. I have prepared written testimony which I hope will be incorporated in the record and would like to try to simply summarize the more salient points now.

I do want to start by commending the Chairman for calling this hearing. I very much appreciate the opportunity to come and speak to you today about the activities of our office in implementing Executive Order 12866. It is indeed appropriate and very timely.

President Clinton signed this Executive Order on September 30, 1993. We had very high expectations at the time and 3 years later I am very proud of what we are accomplishing. In developing this Executive Order we had the benefit of the work done in the Reagan-Bush years. In particular, President Reagan's Executive Order 12291 set forth important basic principles of regulation. Among other things, it stressed the importance of cost-benefit analysis and the consideration of alternative approaches to reduce regulatory burden.

But we were acutely aware that the experiences under Executive Order 12291 were decidedly mixed. Critics complained about the lack of transparency and accountability. Even its proponents were concerned that the order was not meeting its objectives of reducing regulatory burden.

We had to do more than simply command the agencies, "Do more analysis." We had to modify the way they thought about regulating and how they were developing their regulations. And we had to change the process under which we were carrying out our executive regulatory review.

Among other things, Executive Order 12866 created a more open and accountable process. I have heard no complaints about accountability and transparency, and I take that as a success. I also have heard no serious challenge to the legitimacy of centralized review—an issue very much in debate when we took office. Again, another success.

In another change, we provided for greater selectivity in reviewing regulations, creating a triage system to determine what we would review. Initially, agencies decide what rules that they are developing are significant and OIRA reviews only those regs that the agency or OIRA believes warrant review. Thus, rather than review all proposed and final rules as they did under Executive Order 12291, we freed up our limited resources—and incidentally, we have approximately 25 professionals working full-time on regulatory reform and paperwork. We are able to use those limited resources to focus on those regulations where we could add the most value.

Now we expected at the outset that the number of regulations we reviewed would fall, and the number of changes that were produced during the review period would rise. We met our expectations. The number of regulations that OIRA reviewed has gone down—the numbers are in my written testimony. At the same time, the number of rules that were modified during the review period have gone up, and this is documented in the GAO testimony.

Now apparently GAO found it difficult to track the source of specific changes to an agency's rule, and this may be one of the references that Senator Glenn had about the sunshine laws. To me, it is not surprising that we cannot track in all instances the source of the change. That is because we have a paradigm shift here. We have consciously changed the way we relate to the agencies. We have sought to adopt a more collegial, constructive relationship with the agencies instead of engaging in a "gotcha" game.

We work early and often with the agencies to assure that they are processing regulations and developing regulations consistent with the Executive Order. We want regulations that are better supported by relative and relevant data and analysis, more carefully reasoned, more reflective of a fair balancing of the competing concerns involved. This informal exchange and interplay of ideas and suggestions in which we and the agencies engage does not lend itself to formal presentations of competing OIRA and agency, or should I say, OIRA versus agency positions.

Moreover, with our focus on reviewing only the most important regulations in this less adversarial environment, we become involved earlier and more deeply in an agency's rulemaking, before the agency has completed all of its own evaluation and its own internal or interagency coordination. We are involved before the agency becomes invested in its decision, which would make it all the more difficult to bring about change.

Now we, OIRA, OMB, the Administration, and I think the regulatory system enjoy very significant payoffs from this approach. We do not have the staff to do detailed cost-benefit analysis on all significant Executive Branch regulations. The agencies have to learn how to do it, and more importantly, to decide that it is worth doing. They need to become invested in a better process.

Through this consensual approach, we are leveraging our limited resources and really beginning to make a lasting difference. I am personally gratified by the number of times the program officers or senior regulatory officials with agencies have thanked me for my staff's work, invariably ending with the comment, "this rule is so much better as a result of this process."

Now as we approach the third anniversary of the Executive Order, we are compiling examples of such regulatory successes and expect to have a report available in the October-November time frame. Having served as the Administrator of OIRA for the past 3 years I see numerous signs that we are delivering on our promises. I describe a number of the examples of success in my written statement.

The examples that I cite, examples of not regulating, examples of tailoring a regulation to address a specific problem rather than a one-size-fits-all. This is the FDA and USDA HACCP rules, for example, or the EPA lead abatement rule. The use of cost-benefit analysis to achieve the same or higher level of benefit for the same level of cost. This would be the DOT rule that I use as an example.

The use of market incentives. Again, EPA is a good example here with its use of an emissions trading rule rather than a command and control approach. Streamlining and simplifying our regulations. This would be the Department of Commerce's BXA Export Administration rewrite. Consensual rulemaking—the example I use

is the Department of Interior and HHS's Indian self-determination rules.

These are just a few of the many that we have seen, and they focus on just one part of the regulatory system, and that is the development of new regulations.

There is another part that is important, and that is what we are doing to improve the face of regulations that have been in place for years or even decades. As promised, we are cutting back on the volume of existing rules and reinventing still other rules to reduce burden and red tape. The President announced that we would eliminate 16,000 pages of the Code of Federal Regulations and that we would reinvent, streamline, simplify, or otherwise improve, 31,000 pages.

As GAO confirms, we are well on our way to that end. The figures that they use were over 70 percent of the pages to be eliminated have been eliminated, and over 50 percent of the regulations to be reinvented have been improved. And more is in the pipeline.

I also discuss in my written testimony that the effect of regulations is not just how they are written but how they are enforced. For this reason we have devoted a lot of our efforts to changing the culture of regulatory enforcement from an adversarial approach that bases sanctions on how people or firms comply to a partnership approach that rewards well-intentioned efforts to reach outcome-based goals such as cleaner air or safer workplaces that you mentioned in your opening statement. Again I give examples of these in my written statement.

Finally, we cannot and are not trying to reform the regulatory system alone. Senator Glenn mentioned a number of legislative projects in which the Administration worked hard, supported and signed with praise, bringing about a change in the regulatory environment.

If I may, I would like to just comment on the unfunded mandates issue that Senator Stevens raised in his comments. There is in fact in place as a government-wide guidance, not only the one that I issued, but more importantly an Executive Order by President Clinton, Executive Order 12875. And 1 year after the Unfunded Mandates Act passed—this would have been March 22, 1996, I submitted a report as required by the act on Executive Branch compliance.

In that report we gave each of the projects, each of the plans, each of the consultation proposals of each of the major regulatory agencies and evaluated them in this report. We showed that some of the agencies, such as EPA or DOL or DOT that have extensive regulatory programs had extensive consultation processes, and those that issued very few regulations that affect American citizens, States, or localities, such as the State Department, have fairly straightforward, simple, almost simplistic proposals. In other words, proposals that are appropriate to their own mandates and their own missions.

We also showed that during the first year there were only two regulations that were issued that affected State, local, or tribal governments with unfunded mandates in excess of $100 million, which is the trigger under the act. And in both of those we documented what the proposal was, what the concerns of the State and local-

ities were, how EPA—both of these were EPA rules—how they responded on the merits, on the substance to these concerns, and then how the State and local governments accepted the final regulation.

So I think we are doing our best; would obviously continue to work in this area. But there is information that shows a comprehensive enforcement by the Executive Branch of this act.

Let me just say in closing that I believe the public is beginning to experience the results of our efforts to improve the Federal regulatory system, particularly those outside the Beltway who live with this system rather than simply comment on it. We have received fan mail from those being regulated who congratulate us on our efforts and applaud our efforts in this regard.

But to be sure, we must do more. The regulatory system that we inherited was not created overnight. It cannot be changed overnight. But I think in the 3 years that we have been working under Executive Order 12866 we have made a difference, and as I said at the outset, I am very proud of what we are accomplishing.

Again, I thank you for the opportunity to appear here today and I would be happy to answer any questions you may have.

[The prepared statement of Ms. Katzen follows:]

PREPARED STATEMENT OF SALLY KATZEN

Mr. Chairman, Members of this Subcommittee, I appreciate the opportunity to appear before you today. In particular, I welcome the opportunity to discuss the activities of the Office of Information and Regulatory Affairs (OIRA) implementing Executive Order No. 12866, "Regulatory Planning and Review."

President Clinton signed this Executive Order on September 30, 1993. We had high expectations at the time, and 3 years later I am very proud of what we are accomplishing.

As I will point out today, we have begun to change the very essence of Federal regulation—to the benefit of the American public, businesses, State, local and tribal government, and others affected by the regulations.

Specifically, we have—

- created a more open and accountable process, with more public involvement and more outreach to State, local, and tribal governments;
- concentrated OIRA's limited resources to review "significant" regulations, focusing on rules on which we could add the most value and leaving administrative matters to the agencies; and
- developed more collegial working relationships between OIRA, agencies, and affected parties, replacing confrontation with consensus.

As a result of these better processes, we have produced better regulations—regulations better supported by relevant data and analysis, more carefully reasoned, more cost-effective, and more reflective of a fair balancing of the competing concerns involved. In other words, we promised smarter regulations and as I will now discuss, we are delivering on that promise.

The Challenge We Faced

During my confirmation hearings, I testified about the need to improve the Federal regulatory system—to make it better. E.O. 12866 was one of the first Executive Orders that President Clinton signed. As he emphasized at its signing:

> This order will lighten the load for regulated entities and make government regulations that are needed more efficient. Most of all, it will put behind us the politics of adversarialism that has divided government and industry for too long.

Then OMB Director Leon Panetta elaborated on this theme at the press conference following the signing:

> The President's objective has been a regulatory system that works for the American people by both promoting and protecting their health, safety and environment, and at the same time, encouraging economic growth and job

creation. The process he directed us to implement is intended to regulate only when necessary, to do so cost effectively, to relieve business of unnecessary regulatory burdens, to make the process more efficient and responsive, and to try to end special access for special interests.

In developing E.O. 12866, we had the benefit of the work done in the Reagan-Bush years. In particular, President Reagan's Executive Order No. 12291[1] set forth important, basic principles of regulation. Among other things, it stressed the need for cost-benefit analysis and the consideration of alternative approaches to reduce regulatory burden.

But we were acutely aware that the experience under E.O. 12291 was decidedly mixed. Critics complained about the lack of transparency and accountability. And even its proponents were concerned that the order was not meeting its objective of reducing regulatory burden.

Thus, as then Gov. Clinton stated during his campaign for President, and as we all recognized at the beginning of his Administration, there were still too many regulations, many were excessively burdensome, many did not provide the intended benefits, and, consequently, many members of the public were justifiably frustrated and angry with the Federal regulatory system.

The Administration's Approach

We had to do more than just command agencies to engage in more analysis. We had to modify the way they thought about regulating and developed their regulations. And we had to change the procedures under which we carried out our Executive regulatory review.

E.O. 12866 created a more open and accountable review process. The order called for more public involvement, and it set specifically delineated who is responsible for what and when, so that interested parties would know the status and results of the Executive review. I have since heard no complaints about accountability and transparency—and I take that as a success. I have also heard no serious challenge to the legitimacy of central review—another success.

In another change, we provided for greater selectivity in reviewing regulations, creating a triage system to determine what we would review. Initially, agencies decide which rules they are developing are "significant" (based on their economic, social, or legal importance), and OIRA reviews only those rules that the agency or OIRA believes warrant review. Thus, rather than review all proposed and final rules (as under E.O. 12291), we freed up our limited resources (about 25 OIRA professionals work full time on regulatory and paperwork reviews) to focus on those regulations where we could add the most value. This triage system also permits agencies to issue more routine or administrative regulations—the vast bulk of what they do—more expeditiously.

We expected the number of regulations that we reviewed to fall, and the number of changes that agencies made to rise. By focussing on the most important rules, we expected to make real improvements in the content of Federal regulation. And we met our expectations.

On the one hand, the number of regulations that OIRA reviewed has gone down. During the first 12 months under E.O. 12866 (October 1, 1993 to September 30, 1994), OIRA reviewed 1,145 rules—compared with an annual average over the previous 10 years of over 2,200 reviews. During the second year (October 1, 1994 to September 30, 1995) we reviewed 663 rules, and during the third, we reviewed 460. With greater experience with E.O. 12866, OIRA and the agencies developed a better understanding about what is, and isn't, "significant."

At the same time, the number of rules modified during the review period has gone up, as documented in the Government Accounting Office (GAO) testimony. The percentage of rules that agencies modified during the course of OIRA review rose from 32.5 percent in fiscal year 1994, to 37.4 percent in fiscal year 1995, to 49.7 percent in the first 11 months of fiscal year 1996. For long-term comparison, the average for changes during the previous decade was just over 20 percent.

Apparently, GAO found it is hard to track the source of specific changes to an agency rule. That's not surprising. We have consciously tried to adopt a more collegial, constructive relationship with the agencies, and are not in the business of playing "gotcha" with them. My staff works with agency staff to help them do what's right—to develop higher-quality regulations, better supported by relevant data and analysis, more carefully reasoned, and more reflective of a fair balancing of the competing concerns involved. The informal exchange and interplay of ideas and suggestions in which we and agencies engage does not lend itself to a formal presentation

[1] Executive Order No. 12291, "Federal Regulation," 46 F.R. 13193 (February 19, 1981).

of arguments, counter-arguments, rebuttal, and sur-rebuttal—with each position locked up and labeled as to source and authority.

Moreover, with our focus on reviewing only the most important regulations in this less adversarial environment, we can become involved earlier and more deeply in an agency rulemaking—before the agency has completed all of its own evaluation and its internal and/or inter-agency coordination, and has become invested in its decision. William Niskanen, Chairman of the Cato Institute, described this approach quite well in a recent article:

> More important perhaps, OIRA tried to change the "culture" of regulatory review from a confrontational process (between OIRA, the agencies, and the affected parties) to a consensual process. The agencies were encouraged to solicit early input from the affected parties, to consider the alternative measures to achieve statutory goals, and to achieve a balance of interests among the affected parties. In that sense, OIRA functioned more as a counselor during the review process than as an enforcer of the executive order.[2]

OIRA enjoys very significant pay-offs from this approach. We do not have the staff to develop detailed cost-benefit analyses for, or to undertake extensive edits of, all significant regulations from the Executive branch. Instead, agencies have to learn how to improve the quality of the regulations they prepare[3] and—even more importantly—decide that it's worth doing. Through this consensual approach, we are leveraging our limited resources and really beginning to make a lasting difference. I am gratified by the number of times that program officers or senior regulatory officials within agencies have thanked me for my staff's work, invariably saying "the rule is so much better as a result."

We reported previously on actions taken during the first 6 months of E.O. 12866[4] and again after the first year.[5] in the 1-year report, we stated that we were "pleased with the progress that has been made in achieving the objectives of the Executive Order." Important accomplishments from the first year included legitimizing the principle of centralized review of agency regulations, improved interagency coordination, more timely review of significant rules, more openness and participation by the public, extensive outreach to State, local, and tribal governments, and a stronger focus on the importance of analysis and sound data to support rulemaking.

We also stated that "we are acutely conscious of the work that remains to be done to realize the full benefits that we hope to achieve." For the full benefits would be not just better process, but also better regulations—regulations in tune with the principles of the Executive Order.

As we approach the third anniversary, we are compiling examples of such regulatory "successes" and expect to have a report available in October or November. Having served as OIRA's Administrator for the past 3 years, however, I see numerous signs that we are delivering on our promises.

Examples From the Front

We speak about regulating only when necessary. Consider the Department of Education (ED), which found that providing information to States through simple voluntary guidance and allowing maximum State flexibility could achieve the goals without imposing unnecessary burdens for two of its most important initiatives: implementation of the Goals 2000 Educate America Act and the School-to-Work Opportunities Act. ED issued no new regulations for either of these laws. Nor will ED issue regulations to implement new State formula grant programs under the Improving America's Schools Act of 1994.

We also talk about the importance of carefully tailoring a regulation to address the specific problem. That is the essence of HACCP (Hazard Analysis Critical Control Point). In the face of reported incidences of illnesses from eating seafood, the Food and Drug Administration (FDA) developed HACCP regulations whereby seafood processors are to focus on, and continually monitor, areas where health hazards will most likely develop. The regulations bring sound science and a sense of responsibility to the problem. In developing them, FDA worked closely with industry to adopt an approach that the private sector had found effective in improving seafood

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[2] "Clinton's Regulatory Record: Policies, Process, and Outcomes," *Regulation*, (No. 3, 1996), pp. 27–8.

[3] To help give agencies more formal guidance my staff worked with a subgroup of the Regulatory Working Group (the interagency forum established in the E.O. 12866 to discuss regulatory issues) to develop a best practices manual to improve the quality of "Economic Analysis of Federal Regulations Under Executive Order No. 12866," which was released on January 11, 1996.

[4] 59 F.R. 24276, May 10, 1994.

[5] OIRA Report released December 20, 1994

safety. The rule will lead to differing treatment of the food production process, whereby parts of that process with greater risk for food contamination will receive strict scrutiny while costs will be lowered through less emphasis on lower-risk components. Based on the same approach, the Department of Agriculture recently issued HACCP regulations for the meat and poultry industry.

Another example of tailoring a regulation to fit the problem rather than imposing a one-size-fits-all approach is the Environmental Protection Agency's (EPA's) proceeding on lead abatement. Initially, an EPA proposal on lead abatement was heavily prescriptive (e.g., detailed diagrams for soil sampling), included extensive paperwork requirements (e.g., detailed documentation of each, identical sampling effort), and did not distinguish between potentially high-risk and low-risk lead hazards. EPA and OIRA staff, working together, substantially revised the draft proposal to reduce the prescriptive character of the rule, adopt more of a performance standard approach, and refocus the requirements on the more important sources of health risk (e.g., focussing on lead in child care centers, not airplane hangers).

We also talk about the importance of using cost-benefit analysis to help assess less burdensome alternatives that achieve the same or higher level of benefit. A Department of Transportation (DOT) regulation offers a good example. People are often injured or die in car and truck accidents. Using sound data and cost-benefit analysis, DOT reassessed one of its proposals to increase protection for side impacts in light trucks, and chose instead to increase the protection for head impacts in passenger cars and trucks. DOT's analysis showed that more lives could be saved for less cost with this approach.

We talk about the importance of market incentives, such as user fees or marketable permits, as an approach that generally provides greater public benefits at less cost than command and control regulation. One example is EPA's August 1995 proposal of a model rule for "emissions trading" of smog-creating pollutants. This program allows a facility that exceeds pollution reductions the opportunity to sell its "surplus" reductions (or "credits") to facilities that find credits a more cost-effective way to comply with these requirements. Once such a program is incorporated into a State plan, companies may freely engage in trades without prior approval from EPA so long as they meet reporting and public health standards. This program gives States and industries another innovative compliance option to cost-effectively and efficiently meet their air pollution requirements.

We talk about streamlining and simplifying regulations. The best example of such re-engineering of a regulatory system was done by the Department of Commerce's Bureau of Export Administration in rewriting the Export Administration Regulations. This comprehensive review simplified and clarified the lengthy and complex body of regulations that establishes licensing regimes for dual-use products—i.e., those that may have both commercial and military applications—and made the regulations more user-friendly. The bureau fundamentally redirected the regulations from the negative presumption that all exports subject to the Act are prohibited unless authorized, to a positive approach that all exports are permitted unless a license is specifically required.

We also talk about using consensual processes in developing potentially controversial regulations. This practice, encouraged by the Administration through both the Executive Order and the Vice President's National Performance Review (NPR), has generated several regulatory successes. For example, the 1975 Indian Self-Determination and Assistance Act gave tribes the authority to contract with the government to run governmental programs serving their communities. The rulemaking associated with this Act had been plagued by distrust, acrimony, misunderstanding, and false starts over many years. Over the past 2 years, the Departments of Interior and Health and Human Services, together, have conducted a negotiated rulemaking with 63 different tribal representatives. These Federal and tribal representatives managed, despite the difficult history, to reach a common understanding of how the government should hand over program responsibilities to the tribes. The final negotiated rule addresses such issues as contract proposals, declination procedures, program management, financial management, procurement, property management, reporting, and construction. Another success from the view of the affected public is that the rule is written in "plain English."

Eliminating Existing Regulations

These examples of implementing E.O. 12866—and they are just a few of many—focus on the development of new regulations. But that is only one part of what the Administration has done to improve the Federal regulatory system. It also has begun to change the face of regulations that have been in place for years, or even decades. As promised, we are cutting back on the volume of existing rules and re-

inventing still other rules to reduce burden and red tape. As the recently released report of the National Performance Review states:

> "On June 11, 1995, President Clinton announced that agencies had identified 16,000 pages of the [Code of Federal Regulations] that had outlived their usefulness and another 31,000 pages that needed reinventing. Eliminating rules—just like making them—requires sufficient time for public input. But agencies are well on their way toward reform. As of June 30, 1996, 70 percent of the rules to be eliminated were gone, and almost half of the rules to be reinvented had been fixed. The rest of the work to be done is well under way."[6]

Other Regulatory Reinvention

The effect of regulations is not only determined by how they are written, but how they are enforced. For this reason, we have focussed much of our effort on changing the culture of regulatory enforcement—from an adversarial approach that bases sanctions on how people or firms comply with Federal regulations, to a partnership approach that rewards well-intended efforts to reach outcome-based goals such as cleaner air or safer workplaces. As Vice President Gore has said:

> "Regulatory agencies are on orders to make partnership with businesses their standard way of operating. We have tested it long enough to know it increases compliance with the laws of the land. After all, compliance is what we're after—not meaningless hassles. New we can move beyond pilot programs for partnership into the mainstream."[7]

One of the best examples is the Department of Labor's Occupational Safety and Health Administration, which has worked extensively to reinvent itself from within, including: (1) nationalizing its "Maine 200" program, which has successfully induced high-injury workplaces to abate hazards on their own; (2) strengthening partnerships with, and allowing more flexibility in, State health and safety programs; (3) reducing penalties for violations corrected during inspection; and (4) measuring OSHA's performance based on safety and health results, not on regulatory compliance.

Other regulatory agencies have undertaken significant regulatory reforms. EPA committed to 25 environmental reforms that will lower burdens and costs for entities it regulates, while maintaining EPA's ability to protect the public health and environment responsibly and effectively. Among other things, EPA is: (1) cutting its 1995 paperwork burden by 25 percent—the equivalent of returning 625,000 workweeks to the private sector to boost productivity and profits; (2) working with States to develop one-stop emissions reporting for firms; (3) giving small businesses who act in good faith a grace period to correct violations; and (4) allowing State, local, and tribal recipients of EPA grants to combine over $600 million in air, water, and waste grants to find cheaper, cleaner means of achieving their local environmental goals.

Other examples include 36 reforms that FDA announced to significantly cut drug approval times and streamline the pre-market clearance process for certain devices by, among other things: (1) eliminating prior approval of certain manufacturing changes for drug manufacturers; (2) eliminating most environmental assessments that must now accompany drug applications; and (3) increasing the number of medical devices that do not need pre-market clearance In addition, FDA is eliminating its lot release requirements for well-characterized drugs, which will generate significant cost savings and speed the development of drugs created through biotechnology without sacrificing safety.

The Small Business Administration (SBA) has also streamlined its rules, rewriting all of its small business regulations in plain English and cutting the number of pages by over half. In addition, SBA has expanded the number of small businesses eligible for small business loans and made it easier to get these loans by turning its complex, one-inch thick application into a one-page, easy to use (and quicker to process) form. SBA also has instituted a number of initiatives to give small businesses assistance in complying properly and efficiently with relevant reg-

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[6] *The Best Kept Secrets in government,* National Performance Review, September 1996, p. 173.
[7] *The Best Kept Secrets in Government,* National Performance Review, September 1996, p. 65. See, generally, Appendix D, "Status of Regulatory Reform Initiatives," pp. 173–185. That Appendix discusses, and provides agency examples, of cutting obsolete regulations, rewarding results—not red tape, creating grassroots partnerships, negotiating—rather than dictating, putting fines to good use, and making reporting easier.

ulations—including the U.S. Small Business Advisor, a one-stop electronic link to all of the business information and services that the government provides.

Finally, we can not, and are not, trying to reform the regulatory system alone. We have worked with Congress to pass constructive legislation that improves and simplifies Federal regulation. Examples include Interstate Banking Deregulation, Intrastate Trucking Deregulation, the Food Quality Protection Act, the Safe Drinking Water Act, and Procurement Reform (the Federal Acquisition and Streamlining Act of 1994). In addition, the Administration has supported, and the President has signed, general regulatory reform legislation that passed with broad, bipartisan support, such as the Unfunded Mandates Reform Act, the Paperwork Reduction Act of 1995, and the Small Business Regulatory Enforcement Fairness Act (SBREFA).

Conclusion

I believe that the public is feeling the results of our effort to improve the Federal regulatory system. We have even received fan mail from those being regulated. To be sure, we must do more; the regulatory system we inherited was not created over night, and we cannot change it over night. But we have made a difference, and I am very proud of what we are accomplishing.

Again, thank you for the opportunity to appear here today. I will be happy to answer any questions that you may have.

Chairman THOMPSON. Thank you very much.

Senator McCain, do you have any opening comments you would like to make?

OPENING STATEMENT OF SENATOR McCAIN

Senator MCCAIN. Mr. Chairman, I want to thank you for holding this hearing today regarding oversight of the Administration's regulatory review activities. I appreciate you doing so.

The Vice President recently sent my office this new book touting the Administration's reinvention highlights. These highlights include the line item veto, which the Vice President voted against five times when he served in the Senate and which his Democrat colleagues continually stonewalled. I really enjoyed, Mr. Chairman, the touting by the Vice President and the President of the line item veto. For 10 years we tried to get a vote on the line item veto. Each time it was blocked by the then-Democrat majority.

In 1993 and 1994 when the other party was still in the majority in the Senate, Senator Coats and I sent a letter to the President and the Vice President asking them to support the line item veto, which they refused to do. In fact, I got a letter back saying that the only way that the President of the United States would support the line item veto would be if it were a freestanding bill, knowing full well that the Democrat majority would not allow a freestanding bill to come up.

So I would appreciate it, a lot of us would appreciate it, if the line item was not touted as a success on the part of the President and the Vice President of the United States.

Another highlight is that Health Care Financing Administration eliminated the Physician Attestation Form. I wonder if the Administration forgot the First Lady's health care bureaucracy that they attempted to force upon the American people.

The book noted that the Administration approved welfare demonstration projects in more than 40 States in the 3 years before President Clinton signed the welfare bill. Again, they have neglected to note the waivers of compliance from the provisions of the welfare bill they granted to cities and States prior to signing the bill. Recently, due to congressional pressure, the White House was

forced to withdraw the waiver it granted of 10 years to the District of Columbia.

This report, Mr. Chairman, is not totally accurate, to say the least. It notes that many of the field offices of the Bureau of Mines have been closed. While that is true, examination of the appropriations bill that fund these operations show that the money used to fund most of the offices that were closed has been earmarked to fund similar activities in the same location. It may no longer be called the Bureau of Mines, but the offices and the people are still there.

The report notes that the government workers are seeing fewer and fewer illogical and bizarre rules and regulations. However, just weeks ago I called for an investigation of the Bureau Prisons regarding the bizarre policy of unavoidable overtime; a policy that has cost the taxpayers millions of dollars.

What about a recent Inspector General's report that noted that FEMA had spent millions of dollars repairing golf courses and luxury yacht harbors, including construction of a $5 million scoreboard at Anaheim Stadium?

The facts are that very little of the government has actually been reinvented. Names have been changed and personnel have been shuffled, and the public has been amused by the smashing of ashtrays on late night TV. But real reform has not occurred, regulatory burdens have not been lessened, and the people are not substantially better off.

Mr. Chairman, I would suggest that members of the Administration who operate inside of the Beltway here go out and talk to a small business person in my home State of Arizona or any place in America and ask them how the regulatory burden is on them. I think they will get a near unanimous view that the regulatory burden that they suffer under as they try to get into the free enterprise system is more severe than it was 4 years ago, and more difficult for them to start and maintain a business. That is why we have this worker anxiety out there.

Finally, Mr. Chairman, I would like to say that as the Administration takes credit for this cut in the numbers of Federal employees it is well to note that almost all of those, or a significant percentage of those, come from the Department of Defense. The downsizing we all know began at the end of the Cold War. Some hundreds of thousands have been reduced, as they should have been, as a result of the end of the Cold War.

So, Mr. Chairman, I want to thank you for holding this hearing. I am sorry that I leaned so hard on the line item veto, but after 10 years of frustration with a Democrat-controlled Congress of being unable to get an up or down vote—we would always bring it up as an amendment because we were not allowed to bring it up as a freestanding bill—and then have the Administration claim credit for it is the height of sophistry.

I thank you, Mr. Chairman.

[The statement of Senator McCain follows:]

PREPARED STATEMENT OF SENATOR McCAIN

Mr. Chairman, I want to thank you for holding this hearing today regarding oversight of the Administration's regulatory review activities. I appreciate your doing so.

This hearing is extremely timely. Yesterday's *Wall Street Journal* in its editorial on the Congressional appropriations process stated:

> "Meanwhile, the White House plays Oliver Twist asking the Republicans for "more"—even as the President, out on the campaign trail, keeps bragging about how much he's shrunk the government."

Mr. Chairman, that is what I hope will be the point of this hearing: to discern the truth from the campaign rhetoric. The President and the Vice President can't have it both ways.

The Vice President recently sent my office this new book touting the Administration's "reinvention highlights." These highlights include the line item veto—which Mr. Gore voted against 5 times when he served in the Senate and which his Democratic colleagues continually stonewalled.

Another highlight is that "the Health Care Finance Administration eliminated the Physician Attestation Form." Did the Administration forget the First Lady's health care bureaucracy that they attempted to force upon the American public?

The Vice President's book noted that the Administration "Approved welfare demonstration projects in more than 40 states in the 3 years before President Clinton signed the welfare reform bill."

Mr. Chairman, again, they have neglected to note the waivers of compliance from the provisions of the Welfare bill they granted to cities and states prior to signing the bill. Recently, due to Congressional pressure, the White House was forced to withdraw the waiver it granted to the District of Columbia.

This report is rife with half truths. It notes that many of the field offices of the Bureau of Mines have been closed. While that is true, examination of the appropriations bills that fund these operations shows that the money used to fund most of the offices that were closed has been earmarked to fund similar activities in the same location. It may no longer be called the Bureau of Mines, but the offices and the people are still there.

The Vice President notes that government workers are seeing fewer and fewer illogical and bizarre rules and regulations. However, just weeks ago I called for an investigation of the Bureau of Prisons regarding the bizarre policy of unavoidable overtime—a policy that has cost the taxpayers millions of dollars. And what about a recent IG's report that noted that FEMA had spent millions of dollars repairing golf courses and luxury yacht harbors?

The facts are that very little of the government has actually been reinvented. Names have been changed and personnel have been shuffled around and the public has been amused by the smashing of ashtrays on late night TV. But real reform has not occurred. Regulatory burdens have not been lessened. And the people are not substantially better off.

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

Chairman THOMPSON. Thank you, Senator.

Ms. Katzen, would you agree that under the President's Executive Order that your office and OMB have less authority and power in the regulatory process to review the actions of the agencies than your office did under the Reagan Executive Order?

Ms. KATZEN. No, I would not agree to that. It is a different kind of influence that we have, and I think it is yielding good results. Under the earlier administrations, they reviewed all the regs and made changes in very few. We are reviewing fewer regs. I know that some have said, then all this stuff is getting through. We are looking at the significant regs. We are looking at the ones where there really is an economic effect to be felt, or precedential effect to be established, where there is value-added.

Chairman THOMPSON. I am talking about more of what effect you have on whatever number of regulations that you look at.

Ms. KATZEN. I think even on those that we look at we have more effect because we are working with the agency and are able to bring about more change. That is the ultimate bottom line.

Chairman THOMPSON. No, I am talking about your legal authority to act, to approve or disapprove or make some kind of final deci-

sion. Is your agency's authority more or less than under previous Executive Orders?

Ms. KATZEN. It is the same, in fact. Because under Executive Order 12291, if OIRA did not approve a regulation then it was not published. Under Executive Order 12286, if we do not approve a regulation, if we return it, it will not be published unless and until the agency has responded on the merits and that has been resolved by the President, or on delegated authority to the Vice President. So that in fact the appellate process, if you will, of a rejection from our office is the same both before and after. Ours is simply more transparent.

Chairman THOMPSON. But you just described a minute ago a process where apparently you do not really consider it in terms of approval or rejection. It is just kind of a collegial getting together where you all come to an agreed-upon solution.

Ms. KATZEN. I must have misstated it then, because we can and we have, in rare instances, returned a regulation to an agency for further consideration. That is when we cannot resolve——

Chairman THOMPSON. Have you disapproved one?

Ms. KATZEN. Yes, to return for further consideration is to disapprove. This is probably a semantic issue at this point. But what we try to do is resolve the issues. If we can, then it will be approved with changes. If it is not able to be resolved, in those rare instances, we will return it and say that you need to consider further. And we send a written letter which explains why the public is aware of the basis for it.

Chairman THOMPSON. We will get to this in a minute, but the GAO apparently had a little difficulty in determining those instances in which you formally gave your reasons for any disapproval on any such matter.

What I am getting at is what I thought was a pretty open secret. The criticism of the situation before President Clinton's Executive Order was that the OMB had too much authority in a lot of people's minds and that they were disapproving too many regulations. President Clinton's Executive Order was supposed to address those problems and reaffirm the primacy of the agencies. Was it not to reaffirm the primary of the agencies?

Ms. KATZEN. The criticism of the earlier administration was that they had too much authority in secret, and that no one knew who was making decisions on what basis and for what reasons.

What we did in establishing the primacy of the agencies was to remind them that they are ultimately responsible and that we would be reviewing. We still have the power and the authority and the obligation, if a rule does not warrant approval by us, to return it to the agency for further consideration.

And GAO's concern was not that they could not find the basis for returns, but that on those that were approved with changes they did not know whether the change came about because we insisted on it, or whether the change came about because the agency chose to make that decision.

Chairman THOMPSON. Well, you're talking about full disclosure. You're talking about accountability, and I want to get to that in a minute. I think I'm talking about something else.

What does it mean? You've got a prior situation there under a prior Executive Order. You have now a new Executive Order, which I presume reaffirms the primacy of the agencies. That's not just saying that the agencies should be more open. That's reaffirming the primacy of the agencies.

Now, are you saying that that does not give them more authority. Do the agencies have more authority in this process than they previously had?

Ms. KATZEN. I think it clarifies that under statutes they are often delegated that authority, and it is their responsibility, and that we can achieve our objectives by having them buy into better analysis, better drafting, better outreach, better approaches to regulation.

Chairman THOMPSON. So the primacy of the agencies to you means that the agencies should be better drafters.

Ms. KATZEN. No, I think it goes beyond drafting, sir.

Chairman THOMPSON. I think so, too.

Ms. KATZEN. It truly encompasses their fulfilling their statutory mandates. These agencies are not independent creatures. They are creatures of Congress, having delegated to the agencies certain decision-making authority.

Chairman THOMPSON. Well, Executive Orders, though, cannot supplant statutes. I mean, statutes are statutes.

Ms. KATZEN. That is correct.

Chairman THOMPSON. The law is the law. The Executive Orders cannot change that one way or the other.

Let me ask you this: Who is in charge of the National Performance Review cutting red tape effort?

Ms. KATZEN. The cutting red tape effort is handled through the Vice President's National Performance Review office. The chief advisor there is Elaine Camark, and on all matters involving regulations, such as the red tape that goes with regulations, we work closely with her, and, in fact, I guess would say, work together.

Chairman THOMPSON. Section 5 of the Executive Order seems to give your office supervision of these matters, does it not?

Ms. KATZEN. It does, and it was at the end of the first year that I wrote a report to the President that basically said, we're not getting what we want from this. The agencies have been looking through their existing regulations, and have been proposing regs to be reviewed. But I think—and this is my opinion—I think more needs to be done.

I think we need to have even higher level support for this project, and it's for that reason that the Vice President in the reinvention project looked to the reviewing of regulations to see which could be eliminated and which could be reinvented.

That's the piece that I work very closely with Elaine Camark on, and the Vice President.

Chairman THOMPSON. So, the GAO found that while the Administration claims to be reducing 16,000 pages from the Code of Federal Regulation, they're rapidly adding pages at the same time.

For example, GAO found that while EPA claimed to have reduced 1,292 pages from the CFR by July, EPA regulations have grown to 14,690 pages, a net increase of 300 or more pages.

Isn't it problematic for the Administration to claim the removal of 16,000 pages of regulations at the same time that more are being added to offset those removals? And do you believe that this kind of situation substantially reduces regulatory burden?

Ms. KATZEN. Well, I think that is an important observation. During the year 1995, we were hard at work to try to eliminate and reinvent regulations. At the same time, many of the statutory deadlines from the Clean Air Act amendments of 1990 kicked in—if we're talking about EPA.

The vast bulk of the regulations that were issued during 1995 were because Congress said do it. And where Congress had said do it, and it hadn't been done up to that point, people had gone to court, and judges were saying, do it.

We had, and I think GAO testimony substantiates this, a significant increase in statutory and judicial deadlines facing agencies. And EPA was the prime target of that. And they were under an obligation, if they were going to faithfully execute the law as they are supposed to, to get those regulations out.

That's what you're seeing in 1995. The Act wasn't passed in 1995. It was passed in 1990. It was one of President Bush's major achievements in terms of the Clean Air Act amendments.

It was a bipartisan decision of Congress and signed by a Republican president. It's kicking in now, and that's why the President supported the Congressional review procedures of SBREFA, of the Small Business Act, because for a long time Congress has passed laws, asked the Executive Branch to develop regulations.

And as soon as the Executive Branch develops those regulations, whether it be under a Republican president or a Democratic president, said, oh my, we never anticipated this. So the Congressional review helps, I think, brings some balance back into the equation.

I mentioned Republican and Democrat because I truly see this as a bipartisan issue. I don't think this is an occasion to try to score points. Both parties have acknowledged that there is too much regulation. Both parties have acknowledged that things need to be done.

Chairman THOMPSON. I was going to ask you another——

Ms. KATZEN. And if we work together, we can achieve that.

Chairman THOMPSON [continuing]. Question along those lines. The recent National Performance Review Report claimed that the cutting red tape initiative will save $28 billion. But the GAO review found that half of the rule eliminations were just getting rid of obsolete rules—no burden reduction.

GAO also found that 28 percent of the rule eliminations were just getting rid of other rules in the CFR. Again, no real burden reduction.

GAO also found that of the 1,561 cutting red tape actions, only one economically significant rule was eliminated. As we know, these are the rules with the major burden, $100 million or more.

How is editing the CFR going to produce a $28 billion savings?

Ms. KATZEN. Well, I think you're looking only at one half of this. We talked about eliminating regulations and reinventing regulations. There are two pieces of this.

I personally did not believe we would get very much out of the eliminating regulations because President Bush had had a cam-

paign for a year of agencies should go back and eliminate their regulations. I thought we would find little if anything.

I was actually surprised that there were 16,000 pages still to be pruned from the Federal Register, from the Code of Federal Regulations.

Now, a lot of those are obsolete. A lot of those, the elimination, does not reduce burden. But it is an important, very important exercise for the agencies to look through their regulations and realize that things do change, circumstances do change, and you may want to take yesterday's very bright idea and discard it.

And in terms of the pay off of reducing regulatory burden, I would look to the 31,000 pages that are being reinvented. Some of those are simply being made in plain English, although that is very important to the regulated community, which uses up a lot of unproductive time just trying to figure out what the rules are. That's a clear complaint we've heard.

Some of those go to the heart of the regulatory burden. How do we rethink what we're doing. The best example there, as I said in my written testimony, is the Department of Commerce's Bureau of Export Administration.

You had a tome that was impossible to get through, even if you had spent 30 years in the practice of law. And if you were an exporter, a small business exporter, you couldn't get through this.

They completely rewrote it, simplified and streamlined, and in the process flipped the presumption. It used to be that you could not export without a license unless you were specifically exempted out.

Now, you don't need a license unless you're specifically included in. This is a major change in the approach that we use for regulation. And this was a 2½-year effort that was undertaken by this Administration to try to simplify, streamline and really reduce regulatory burden.

So there are projects. They are not for the most part in the 16,000 eliminations. They are in the 31,000 reinvention effort, I believe.

Chairman THOMPSON. Do you know how that $28 billion figure was calculated?

Ms. KATZEN. I believe that they talked—the NPR staff spoke with the agencies and asked them to put a price tag, if you will, on the various reinvention efforts, and that two or three of the agencies were willing to do so. None of the others wanted to put a specific dollar value.

They used only the information they received, so that's obviously a gross understatement of what we'll be realizing. It was based, I believe, on EPA, Treasury and Transportation. But I can get that information for you, and supply it, if you would like.

Chairman THOMPSON. All right. The GAO tried to document that, but couldn't. So if you could help us with regard to that.

Ms. KATZEN. Certainly.

Chairman THOMPSON. I'll ask one more question, and then I'll turn it over to Senator Glenn. One of the express objectives—and this has to do with the openness question and the accountability question that you referred to.

One of the express objectives of the Executive Order is to, "make the regulatory process more accessible and open to the public."

Therefore, the order requires agencies to "identify for the public those changes in the regulatory action that were made at the suggestion or the recommendation of your office, OIRA."

Yet, GAO has found that none of the EPA or DOT files they reviewed clearly documented changes made to the rule at the recommendation or suggestion of OIRA. GAO concludes, "as a result, the public would frequently find it difficult to determine what changes were made to the regulatory actions because of OIRA."

I heard you describe the new more collegial process where you get along better and you come to conclusions. But it seems to me like the Executive Order does not order you to become more collegial. It orders you to become more open, and make for accountability, so people can look at the record and tell who made what decision, when, and why.

Do you believe that the agencies have sufficiently documented the changes made as a result of OIRA's review?

Ms. KATZEN. I don't think that the agencies have been scrupulously attentive to that provision for a good reason. As the GAO report notes, at the end of either the first 6 months or the first year, in my report to the President, I specifically said this provision doesn't make a whole lot of sense.

In practice, and one of the most important things of running a program is figuring out what works and exploit it, and what doesn't work, and stop it. And it doesn't make sense because we can achieve more by the collegial effort than we can by playing gotcha, by saying, ha, ha, we made you make this change. We want credit for it.

That doesn't sit well with the agency, and it doesn't serve any useful purpose if our ultimate performance standard here is to get better regs.

The other thing I would like to note is that among the other, more open, more accountable requirements were the logging of information about when we get the regulations. Who meets with whom? That is now all on the public record, and GAO didn't speak to that, but if you're talking about accessibility, I've had meetings with industry, with consumer groups, with combinations of industry and consumer groups. And they're all documented in the log.

Also, unlike the past administrations, when a regulation is sent to OIRA, it's logged into our system. That's on line. Anyone can find out when we get it, when we're finished with it, and what disposition we make.

That's part of the openness and accountability process that we are working towards.

Chairman THOMPSON. Well, I'd just make this final observation. The order requires you to identify for the public the changes in the regulatory action that were made at your suggestion. And that's clearly not being done.

You are saying that there's a reason for that, but this Executive Order now has been around since 1993. I would suggest that you recommend a change in the Executive Order if that's what you want to do, and not tout some kind of new openness.

I mean, in your original statement you were saying that one of the things this Executive Order did was to make for more openness and more accountability. Now you're giving an eloquent reason why this really doesn't make any sense, and it doesn't work.

So I would just suggest we go one way or the other with regard to openness and accountability. And that's all I have.

Senator Glenn?

Senator GLENN. Thank you, Mr. Chairman. I want to comment first on my good friend from Arizona's comments about the line item veto. I, too, have the book here, and the only place I find a reference to it is on page six, where it says with new tools like the line item veto and the ability to pursue people who are seriously delinquent in their debts to the Federal Government we'll be able to do a better job of safeguarding taxpayer dollars.

That's listed under Reinvention Highlights, and I grant you maybe that shouldn't have been carried under that particular section. But I believe that's a fair statement, that it is a new tool, and I think that's the only reference in the whole book to line item veto.

So I just wanted to set the record straight on that one.

Since we're talking about things like unfunded mandates, let me say that I know this issue very well, because I was very much involved. I was the author or co-author of the Unfunded Mandates Act and Congressional Accountability Act.

Those are still the two most prominent bills passed under the Contract with America, which I get a kick out of, because I authored them here, got them through Committee, and was out on the Floor in the fall of 1994, trying to get them through.

We had them out of Committee, had support, and they were held up on the Floor, even though it had been developed in a Democratically controlled Congress, and they were blocked by filibusters on the Floor.

So then when the new majority came in and took over, they picked up on those bills and I again worked with Dirk Kempthorne, and we passed the Unfunded Mandates Act, which was basically the same, with a couple of changes, and the Congressional Accountability Act.

As far as the subject of our current hearing today, that is on where we stand with reg reform, and what OIRA is doing, we still have some problems. There's no doubt about that, and everything hasn't been straightened out yet. And Ms. Katzen would be the first to admit that and say that that's the case and she's working on them.

But, I tell you, when I think of where we came from, with the Council on Competitiveness in the last administration, which acted with no agenda, no attendance list, and basically gave OIRA their operating orders on what to do, secretly, undemocratically—and I know that, because we had hearing after hearing after hearing.

I personally chaired a number of hearings on that subject, and we even had the acting head of OIRA at that time, Mr. MacRae, who sat at that same table there, and he talked about the hundreds of contacts that OIRA had back and forth with the Council staff on almost a daily basis.

And I asked him to tell me one time then when the Council told OIRA what to do, that OIRA did not go ahead and do. In other

words, was there anything that the Council had ever told them they didn't carry out. And he couldn't think of one single thing.

And I said, well, maybe that's unfair to spring that on you here at the witness table. If you go back to your office, would you get a list and send it back to me. And he said yes, he would do that. And we have yet to receive that list to this day, and that's been 4 or 5 years ago, I guess.

So I think we've come a long way from those days, because the process is open now, the process is working. The Executive Order lays it out. It's not perfect yet. We're all still working on it. But I think the purposes of the order requiring cost-benefit analysis and so on, it is working. We should agree to that, and go forward to try to perfect it.

But certainly we don't want to go back to that Council on Competitiveness that operated in secret and was about as undemocratic and unfair a process as I've seen since I've been here. And I've been here almost 22 years now.

Ms. Katzen, does it make sense to have a blanket requirement that every rule, or even every economically significant rule have a cost-benefit analysis?

Ms. KATZEN. I don't think so. One of the principles that was, I think, agreed to by all participants in the regulatory reform debate last year that was referred to was that the amount of analysis should be commensurate with the significance of the decision, and the amount of discretion.

I notice that GAO found that 28 out of 29 of our economically significant rules had cost-benefit analysis. One did not. The report reflects that the reason it didn't was it was a price support, which was set by the Congress.

You could do all kinds of analysis, but the terms and conditions had been established by Congress. To spend time and money, and it does take time and money to do a cost-benefit analysis—it's not cost free—would not have made sense in that circumstances.

So you want to think about whether it's cost beneficial to do a cost benefit analysis. It's not a stupid question, and I think it suggests that you look at what you're looking at before you make that decision.

Senator GLENN. How do you decide? Is it sort of a judgment call in each case?

Ms. KATZEN. It's a judgment call informed by objective analysis. Are you tracking the statute, or do you have some discretion? Is it big bucks or small bucks? Is it highly controversial? Are there other alternatives you could pursue? And the more latitude, the more discretion, the more analysis should be involved.

Senator GLENN. Do you find many cases where a cost-benefit analysis has been done just to go through the motions of satisfying the Executive Order as opposed to really doing a serious analysis?

Ms. KATZEN. Not really. I think it is fair to say that the state of the science in the various departments and agencies is very varied. Some agencies are much better at it than others.

And if you look at the quality of the analysis, you'll find, even within a single department, that some agencies are stronger than others. What we're looking for is thinking. Have they looked at the cost? Have they thought about them accurately? Have they thought

about the benefits? Have they been comprehensive and wide-ranging in their review?

And we issued guidance about a year ago—a subgroup of the regulatory working group produced sort of guidelines on how to do economic analysis. And this was hammered out—and I used that term advisedly—by a lot of agency people who brought to the table their own personal experiences with what works and what doesn't in their agency.

Senator GLENN. GAO found that both OMB and agency files often do not explain changes made to a proposed rule during regulatory review. As you know, providing sunshine to the process has been important to me, as I indicated just a moment ago in talking about the Council on Competitiveness.

Is there anything else you would do to improve public participation in rulemaking so it is more open?

Ms. KATZEN. Well, we have put enormous emphasis on consensual based rulemaking, whether it be negotiated rulemaking or other types of involvement of the public. And I use the public here very broadly. It's those who will benefit by the regulation, and those who would be burdened by it.

You can bring them all to the table. You have the opportunity for a win/win situation, where you meet the regulatory objective in the most sensible, least burdensome way. And we're exploring different methods of involving the public. Some agencies are trying electronically, having filings done electronically, using information technology to serve our purposes here.

Other agencies are trying more public meetings, public hearings. This is an area where I think the agencies have a lot of different ideas, and if we can give them some time to experiment, we may all reap the benefits of it.

Senator GLENN. You have indicated that OIRA is now working more collaboratively with agencies than it did in the past. Some, however, would argue that OMB has to be tough, or else it will be captured by the agencies, that OMB will become too cooperative with the agencies and we won't get the benefit of its oversight role.

What's your experience in this?

Ms. KATZEN. Well, I think you can be tough without being a bully. And I think you can be firm and insistent with a smile. And you often accomplish more with honey than with a stick.

And I have found for the 3 years that I have been there that working with the agencies—I've said it before, and I will keep saying it—you can achieve better results.

I've had any number of instances. FDA is a perfect example. There used to be an absolute, knocking heads between FDA and OIRA. And any suggestion from OIRA was greeted immediately as something which was absolutely unacceptable by FDA.

We worked together, and I think the HACCP regulations for sea food, the MDGD prescriptions, where they've moved off of a prescriptive, command and control approach, to a tailored, focused approach has produced a feeling within FDA, within the staff, the rule writers, this works. This makes sense.

And they now come to the table—what do you think about this? Is there an alternative way we can handle this? When they're asking those questions, when they are receptive to our suggestions, we

can go a lot further than when they sit there with their arms crossed and say, over our dead bodies.

And this is a very important shift, and we've seen the product in better regs.

Senator GLENN. Just one more question. I got the impression from the GAO report that when you started on the project of rule elimination and revision, you were focusing, maybe, on reinvention, and did not expect to find a lot of dead wood. But it looks like you found a lot of rules in there that were dead wood.

In our reg reform bills, we had broad requirements to review all current rules. We didn't think that could be done overnight, but we wanted agencies to go back and try to correct the over-regulation of the past, and that required reviewing all the old stuff—that's tough to do—and make some changes.

You pointed out earlier a lot of these things are mandated by Congress, and so it wasn't quite as simple as just looking at rules and applying a single common sense rule to them. We have to go back and legislatively undo some things that we have required in the past.

But how easy or difficult has it been to go back and really pick out some of those things in older rules that should be done away with?

Ms. KATZEN. Well, again, the response has been varied. Some agencies had done a very effective job of pruning their regs earlier, and they had very little to produce. Others were able to produce more.

Some were under the constraints—we had a government shutdown, we had other kinds of problems with budgeting—that put enormous constraints on the agencies, just when they were getting to this.

In order to eliminate a rule, you have to have a rulemaking. This is what the APA provides. So the people who look at the Federal Register and say, oh, my, look at all these pages, a lot of those are the reinvention, are the rule elimination. That takes time. It takes resources, which some of the agencies have been under enormous constraints not to do.

Now, you mentioned the legislation, and again, in a bipartisan approach, I'd like to say the corrections day idea, which came from the House, has worked very well in this regard.

Originally it was presented as, we'll stop these stupid regs with correction day. Well, there are at least eight or nine that specifically deal with regulatory problems. Each one of them changed the law.

It wasn't the regulation that was the problem; it was the underlying law. And we saw any number of the correction day proposals which sailed through the House and the Senate approved as well where we were able to take rifle shots, literally rifle shots, in some of the statutes, and eliminate the need for regulations that didn't make sense.

So I think this is one area where the Administration, working with the Congress, should be able to do very good work, if we have, again, the same objective, which, I have been impressed, we have.

Senator GLENN. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you, Senator Glenn. Senator McCain?

Senator MCCAIN. First of all, to respond to my friend from Ohio, and I have always appreciated his efforts in this area, and he is widely respected and highly regarded. The title of the chapter is "We Are Radically Changing Government," by Vice President Al Gore. Then we get to, with new tools like the line item veto.

It would be fair to mention that Vice President Al Gore five times voted against it when he was a Senator. And also, the fact is that I appreciate Senator Glenn's efforts on behalf of changing rules and regulations.

I would point out that his party was in the majority from 1987 to 1994, and I would be curious if there was companion regulation in the House to the reforms that he wanted to make, which the Republicans, "filibustered."

Ms. Katzen, I just happened to be reading through your statement here, and you say, for example, in 1975, Indian Self-Determination and Assistance Act gave tribes the authority to contract with government to run governmental programs serving their communities.

The rulemaking associated with this act had been plagued by distrust, acrimony, misunderstanding and false starts. Over the past 2 years, the Departments of Interior, Health and Human Services, together, have conducted a negotiated rulemaking with 63 different tribal members.

Do you stand by that statement, Ms. Katzen?

Ms. KATZEN. I believe it is accurate.

Senator MCCAIN. Do you know when the real self-governance law that allowed this to happen was passed? It was 1988. It was a bill by Senator Dan Evans which set up a pilot program for self governance.

And then did you know that about 30 of those compacts were negotiated and agreed to before 1993?

Ms. KATZEN. That was the—the original backdrop was 1975. There was a subsequent statute and work was done. But nothing was moving is the point that I was trying to make.

Senator MCCAIN. The reason why nothing was moving was because nothing could move until the 1988 Self-Governance Act. And then there was a number of these compacts—I believe around 30 of them—that were negotiated before this Administration came to office.

So, you know, I'm the chairman of the Indian Affairs Committee, Ms. Katzen, for your information. And for you to take credit for 63 tribes because of simply negotiations is simply not an accurate depiction of what took place.

But, you might clarify for the record your statement here, Ms. Katzen.

Ms. KATZEN. I'd be happy to do that.

Senator MCCAIN. Thank you. The GAO says the third major issue you were asked to address is whether agencies were eliminating any regulations that the Administration claimed were being eliminated, and whether the eliminations and revisions of rules were reducing the regulatory burden.

We found that EPA and DOT reports on a number of pages of regulations they had eliminated were generally accurate. However, because new regulations are being added at the same time, that regulations are being eliminated and revised, the total number of pages of regulations may actually increase in some agencies.

Then they go on to point out that the total CFR increased from 105,935 pages in 1985 to 138,000 pages in 1995. Data on the number of pages in the entire CFR for 1996 will not be available until the Spring of 1997.

Ms. Katzen, is that improvement, when we go from 105,000 pages to 138,000 pages?

Ms. KATZEN. I think this continues—I don't have the page reference——

Senator MCCAIN. Excuse me. Page 16 of the GAO report.

Ms. KATZEN. My understanding is that the 1996 figures on CFR show it beginning to decline, both in the first quarter and second quarters that are out, as we begin to actually make a change.

The increase from—is it from 1985? Or from 1981?

Senator MCCAIN. I'm just quoting the GAO says the numbers between 1985 and 1995, we've seen increase from 105,000 pages to 135,000 pages.

Ms. KATZEN. Right. And that, I do not think, is a sign of progress. I think the trend that we're going to be seeing over the next several years is the work that we've been doing. You do not see a change in the CFR until after it's been codified, in effect, the next year.

The point that I was trying to make earlier is that to a large extent there is an absence of discretion in the agency. EPA, one of the agencies that's identified here, has had a number of statutory requirements for Clean Air Act amendments which have produced some of the biggest, longest, and in some respects very complicated rules, where the statutory deadlines have fallen on our watch.

In a number of instances, the 1990 amendments gave 2 or 3 years for EPA to do it's work. They missed the statutory deadlines. They were sued in court, and court ordered deadlines were established.

And what you see in the increase here is largely from those kinds of legislative decisions, which is why we were very happy, for example, about the changes in the Safe Drinking Water Act.

The previous act had said we had to set 25 limits every year, whether they were risk-based or not. That's been changed in the new act that the President signed, that the Congress passed, so that there are fewer regs that have to be produced.

And they'll be risk-based. Those kinds of changes we will begin to see changed, but it won't happen over night, and I would join you in saying I would love to reverse this. And that is what our objective is.

Senator MCCAIN. Thank you. The GAO goes on to say on page 20 of their statement, nevertheless in more than 60 percent of the page elimination entries, it did not appear that the CFR pages being eliminated would reduce substantive regulatory burden.

As noted previously, most of these actions were being taken because the regulations being eliminated were obsolete, and many of these did not appear to have been enforced for some time.

Therefore, for these entries, there did not appear to be any reduction in substantive regulatory burden. In some cases, the agencies themselves indicated that the page eliminations would not alter existing regulatory requirements, as shown in the following examples. And they point out a number of examples.

Would you disagree with that characterization of 60 percent of the page elimination entries?

Ms. KATZEN. I haven't done the measurement, but I'm not at all surprised by that. I agree completely with what GAO is saying here. As I testified earlier, I did not expect to get any reduction of burden from the elimination category. I was looking to the reinvention category.

To the extent that there is any in the elimination group, I am very happy. But I find this to be completely accurate.

Senator MCCAIN. Let me understand. You did not anticipate any reduction in the regulatory burden by elimination of pages in the CFR? Is that what you just said?

Ms. KATZEN. Yes, that is what I said. When we initially undertook this, we were looking to go back and review those regulations that could be streamlined, simplified or improved.

The eliminations were originally characterized as those which were obsolete. If they're in fact obsolete, they weren't imposing very much of a burden.

This is what I was saying, speaking in the first person singular—I, personally, did not think we'd come up with very many to be eliminated at all, because President Bush had ordered a 6-month moratorium, or a 9-month moratorium in which he told the agencies, get rid of all the obsolete rules. Get rid of what you don't need.

I didn't think we'd find anything. To find 16,000 was a huge surprise to me. I was focusing on the 31,000. Now, the elimination of the 19,000 in and of itself, I think, is highly desirable, because I think it does help cut some of the stuff that does not need to be there, and simplify and streamline the process.

But the real savings, the reduction of burden, will come from those that are being reinvented.

Senator MCCAIN. Thank you. I just would like to go back again to make the record clear. Again, in the GAO report, on page 16, effective pages being added to the CFR at the same time they were being eliminated can be seen at one of the agencies included in their review.

EPA officials said the agency had 14,384 pages of regulations in the CFR as of July 1, 1995. As of July 1, 1996, EPA said it eliminated 1,292 pages in the CFR, but an EPA official told us in August of 1996 that the number of pages of EPA regulations has expanded to 14,690 pages, a growth of more than 300 pages.

The official said this growth was primarily driven by statutory requirements to develop new Clean Air Act regulations.

You know, bureaucracies are not required to add regulations, Ms. Katzen. Let me finish, please, before you dispute that. They are obviously required to implement laws.

But one of the problems that we have seen, and one of the reasons why there is such enormous mistrust of government out there is the interpretation by regulatory agencies of laws.

In fact, I would suggest that it's one of our largest problems. And if you have an agency that continues to expand its regulations, even if some of it is required by law, it is certainly not in keeping with what the American people want, and that is a reduction of the regulatory burden.

I thank you and I have no more questions, but I'd be glad to hear your response if you would like.

Ms. KATZEN. I understand the point that you're making, and I think that it's an important perspective. When we do receive a regulation, a proposed regulation from an agency, and I would use EPA here as an example, one of the first things we look at is whether it's mandated by the statute, or whether it's permissive.

One of the examples that we had from corrections day was in the RCRA program. EPA came in with a proposal that was going to cost more than a billion dollars for zero benefit. I said why are we doing this? This does not make any sense.

And they said here is the statute, and here is a court order that is making us do this. So what we did was produce the regulation with a preamble that said, in essence, this is a total waste of our resources and American resources, but we are required to do this because of the statute.

And we sent up to Congress a fix to change that. It was passed by the House, it was passed by the Senate, it was signed by the President, and that regulation has been withdrawn, so that it does not impose that kind of burden.

With respect to the Clean Air Act, regrettably, from your perspective, it is quite clear that the agency is required to set max standards in a variety of areas. That's maximum achievable control technology standards in a variety of areas.

It has some other obligations which it has to do, and it has been sued because it has already missed the deadline for those kinds of regulations.

Our effort, when they're doing what they are required to do, is to do it in the most sensible way, the most cost effective way, the least burdensome way.

And you will hear from others today that we haven't done the best job, or that we haven't always achieved our objectives.

But in terms of the adding of pages, in terms of the additional regulations, I don't think there's a whole lot of latitude, because that's the first thing we look at. And we have been assured in these instances, and satisfied, that the law does, in fact, require it, or is otherwise appropriate presidential priority.

Senator MCCAIN. I thank you. I'd just cite a recent example where perhaps that's not totally the view of some agencies. We passed the Telecommunications Reform Act. Three pages of it, not all, three pages of it have triggered 800 pages of regulation out of the FCC in just the last few days.

I find that excessive.

Ms. KATZEN. Our office does not review the regs of independent agencies, sir.

Senator MCCAIN. I understand that. But sometimes I'm skeptical of whether other agencies share your zeal. When I see three pages of statutory language translated into 800 pages of regulations, I worry.

And I thank you, Ms. Katzen. Thank you, Mr. Chairman.

Chairman THOMPSON. Ms. Katzen, another question or two. I was reminded of this when you were talking about the reinvention savings, and you gave some examples, and I have another one here that I asked the staff to dig out for me, because I had remembered reading it.

It gives an OSHA example of what we're dealing with here in this reinvention savings process. In the past, the construction industry struggled with two sets of OSHA standards in two different places in the CFR.

Construction firms and their employees had a hard time trying to understand what was required of them. So the construction industry and the unions asked OSHA to combine both general and specific industry standards into one CFR volume.

In other words, there was one volume with standards for all industry, and there was one that particularly applied to the construction industry, and they were overlapping.

OSHA agreed to combine the standards in one place, and they were easier to understand. Now, under pressure from the White House to cut over a thousand pages of CFR, OSHA reversed itself, and cut the general industry standards from the construction CFR.

Now it's harder for construction firms, especially small companies, to understand and comply with the health and safety requirements, and this certainly can't be good news for construction workers either.

We understand that the Administration is claiming a 500 page reduction as a result, about half the total OSHA goal of 1,049 pages. This definitely has no burden reduction.

Ironically, Joe Dear, the head of OSHA, said the page reduction is part of the larger reinvention effort, to rid our rules of confusing provisions and difficult to understand standards.

We understand that this action has forced the reprinting of the CFR. Understand, now, they put it together and in order to get credit for paper reduction they took it back apart again, back the way it was originally, and took credit for those pages.

And now OSHA, because of the outcry that's come about from industry, OSHA wants to publish a third document that would be some sort of instruction manual that wouldn't go against the page requirement. A third document that contains all the construction requirements, even though this document would not carry the authority of the CFR.

So you could follow that document to the tee, but it doesn't have the authority of the law. You could still get in trouble by following this third document.

This whole fiasco, of course, is a waste of taxpayers dollars, to say the least. In the end, we have more confusion for the industry, less protection for the workers, wasted taxpayers' dollars from the reprinting. In fact, the only benefit from this alleged page elimination is that it allows the Administration to claim that they're cutting red tape.

So that's my example.

Ms. KATZEN. Mr. Chairman, I think the chronology there is just slightly off. Because when we originally asked for agencies to themselves specify those areas that could be cut, and those areas that

could be reinvented, and OSHA mentioned these, and they were put in the original book, it was then that the construction industry, before they did anything, said, we need a single handy guide. That's what we're looking for.

And it took over a year for those pages to be eliminated because OSHA wanted to make sure that those legitimate concerns, that they were being able to respond to those legitimate concerns.

And those regulations, the one statement that you made that I have some trouble with was to say that you get in trouble if you follow this because it doesn't have the force of law—I don't believe, sir, that that is correct, because the portion that was part of the original single volume remains as part of the general statements.

And if you follow the guide, which is in a variety of different formats, both electronic and paper, so it's more accessible to construction workers, and if you follow that, you will not get in trouble.

It is not without force and effect of law.

Chairman THOMPSON. So is it all in one volume now?

Ms. KATZEN. Yes. It's been done in a CD-ROM. It's being done in a variety of different things. So the agency did not take——

Chairman THOMPSON. There are no construction rules that are a part of another volume?

Ms. KATZEN. There are general rules that are applicable to all employers, whether it be construction, fire fighters, dry cleaners, that are applicable to all employers.

Those have been combined with the construction rules in a separate document that you were referring to for the ease of the construction workers. And that does have the force and effect of law.

That's the only modification that I would make.

Chairman THOMPSON. And that was not undone—nothing was undone then, are you saying?

Ms. KATZEN. That's correct. There was a duplication in the Federal Register, and it was eliminated, but a vehicle was provided for the industry that puts it all in a single document.

Chairman THOMPSON. Is it in the CFR?

Ms. KATZEN. It is in the CFR, but most people don't have CFRs in their offices. I have yet to walk into any business where they had the entire Code of Federal Regulations.

What they need is—and this was the whole purpose of the Small Business Regulatory Enforcement Act, was compliance guides.

Chairman THOMPSON. They would get acquainted with them if they got hauled into court, though, wouldn't they?

Ms. KATZEN. The provisions themselves are being made available to them. But not in a formal legal book which they don't have, but rather in a book which they can have.

Chairman THOMPSON. Well, we've got different information on this. We'll check into it and we'll work together on it to find out——

Ms. KATZEN. I'd be happy to do that.

Chairman THOMPSON [continuing]. What the facts are on it.

Despite the statements concerning reducing paperwork burdens, it's our understanding that the overall paperwork burden will stay essentially unchanged at about seven billion hours a year.

For example, when President Clinton signed the Paperwork Reduction Act, he pledged, "EPA will reduce its level of paperwork re-

quirements on the private sector by 25 percent, or 20 million hours."

EPA Administrator Browner said this goal would be met before June 30, 1996, and you highlighted EPA's 25 percent reduction in your written statement. But GAO testified before the Senate Small Business Committee that EPA will not achieve any significant paperwork reduction through the end of the year—maybe one percent.

What are we to make of this?

Ms. KATZEN. I believe the GAO one percent is the government-wide reduction, based on our analysis in the information collection burden report that we submitted to Congress.

The EPA reduction—I think they have actually realized somewhere between 18 and 23 percent already, and have identified the other areas for the end of the year. This was a major commitment by EPA, and they have been held to their commitment, and are proceeding with dispatch in this area.

Chairman THOMPSON. My information is that the EPA is cutting and adding at the same time, as we've previously discussed, resulting in the estimate of one percent.

Senator Glenn?

Senator GLENN. Thank you, Mr. Chairman, just a short comment. Just an observation.

I would hope in future administrations, whether Democrat or Republican, that we stop using pages as the basis for things. You can have one page that changes the course of history for whole industries. You can have 15,000 pages that aren't that significant—just to make extremes here.

I would prefer that this issue be presented in terms of rules and regulations, either improved or done away with, or expanded to perform a certain purpose, and we get away from this counting pages.

I always have thought this was a lousy way to assess regulatory reform accomplishments, and I'm just as critical of Democrats as I am of Republicans for taking that approach. So I would hope that in the future we could present what is actually being done, rather than what I see as a fictitious figure out there that doesn't mean much, and that is the number of pages.

If we wanted to contrast this, I suppose, with the total pages of Federal regulations, and I don't know, they'd be up in the zillions someplace, I guess, maybe 15,000, or 16,000 would probably be a tiny percentage of the pages. But I would much rather have it presented in terms of how we change rules and regs, which is what people out there in the business world and people all over the country really want to see happen.

I don't think they're that interested in the total number of pages. That's just a comment, more than a question.

Ms. KATZEN. Well stated.

Chairman THOMPSON. Thank you, Senator Glenn. Thank you, Ms. Katzen. I appreciate your being with us here today.

We'll ask our next panel, Robert King, Jim Miller and C. Boyden Gray to come forward.

Mr. King, we'll go with you first. Robert King, Director, New York State Office of Regulatory Reform. I appreciate your being with us today.

TESTIMONY OF ROBERT KING, DIRECTOR, NEW YORK STATE OFFICE OF REGULATORY REFORM

Mr. KING. Well, Senator Thompson, thank you. I and Governor Pataki thank you all for inviting me here today. I would be remiss if I didn't also say it's nice to meet you as an alumni of the Vanderbilt University Law School.

Chairman THOMPSON. Pleased to know that. Thank you.

Mr. KING. Well, I was delighted to see that on your resume.

I thought what I would do is rather than simply read my written testimony, which you have, is spend the time that I've got highlighting what I think are—I've numbered them—seven significant points about the process of regulatory reform, and how we are doing it in New York, and then leave time at the end for whatever questions you have.

Probably first and foremost, central to our effort is the incredibly strong and consistent support of our efforts by our chief executive. Governor Pataki has identified this issue as among the important strategies for revitalizing the economy of our State, and he has demonstrated that not only through the issuance of an Executive Order, which is similar in certain respects to that which you have been talking about here at the Federal level.

But he has backed it up not just with the order itself, but with a significant budgetary commitment which allows us to staff our office with 25 full time people dedicated to regulatory reform.

The Governor, in addition, makes constant reference to the importance of this issue in his public remarks, including in two consecutive State-of-the-State messages, as a way of demonstrating not just to the people of our State, but to the bureaucracy in our State government how critical this is.

And, finally, in those instances where our recommendations have differed with those coming out of the various agencies, the Governor has uniformly supported our point of view.

Second, the structure of our office is independent of all of the several agencies of our State government. We report directly to the Governor and his chief of staff, and that, too, has an important feature, which I continue to observe daily.

And that is that bureaucracies have a life unto themselves, and regardless of who the elected officials are, and whether the chief executive, or the majority in any house of the legislature is held by one party of the other, there's like a third party in town. It's always called the bureaucracy, and it is very self-protective.

It is enormously difficult, even under the best of circumstances, to get that institution to change. And so having our office as this totally independent operation, while it creates a certain amount of tension, we think the tension is healthy, and what it does is it provides to the governor and the legislature and the people of our State a truly independent view of the process of regulatory reform and the exercise of regulatory power.

Third, we try very hard to be consistent in our application of the principles contained in the Governor's Executive Order, which in-

clude cost-benefit analysis and risk assessment, the utilization where it's appropriate of independent peer review.

And I guess I would, as a quick aside, take some issue with the former speaker here at the table in terms of limiting review to only those proposed rules which they consider significant.

I guess the question is significant to whom? To the bureaucrats or to the people who are being regulated? And while it is clear you can't do a full blown cost-benefit analysis in every instance, and many simply don't require that, at the same time I share with you one of the examples I give in my written testimony.

It has to do with building code regulations to make buildings more resistant to earthquakes. One of the statements that we got from that particular agency was that this really wasn't a big deal. It would only add three and a half or four percent to the cost of new construction.

And I had made the comment a number of times in public references to that that the bureaucrats can stay only because it's not their money. But that 3½ or 4 percent, by the way, in our State translated into a potential expenditure of $220 million, when you multiplied that times the amount of construction that would have been affected on an annual basis.

Fourth, I think it is too often articulated that the beneficiaries of regulatory reform are only the business community. And while it clearly a central part of our mission to reignite our State's economy, and regulatory reform is a critical part of that, I think it also has to be understood that what we are also doing in our work is having a powerful impact on the cost of local government, which is very heavily subject to mandates, and mandated expenditures. This is having an impact of reducing property taxes in our State.

And also, an enormous array of rules and regulations that govern the operation of not-for-profit agencies, serving people who are poor, who are handicapped, who are mentally ill.

There, too, you see an enormous array of rules that are driving costs in those agencies in directions that don't apply any service to the people that they're trying to address, but rather just cause them to grow their own internal bureaucracies.

Fifth, what we really have attempted to do is to take the principle of total quality management, which is to design quality into the product, rather than inspect it in after the fact, and apply it to the rulemaking process. And that's why in our structure, demanding that before a proposal is made public in the State register, that the agencies have to demonstrate that they've done their cost-benefit assessments, the risk assessments, etc.

It's a way of ensuring that we ultimately are going to get better quality rules.

Sixth, we have undertaken an aggressive effort to train our regulators. We've had a number of large panel discussions. Boyden Gray and Bob Hahn were two of our presenters.

In addition, we've presented, or prepared a fairly extensive handbook for our regulators, in terms of how to go about doing the kinds of analysis that are now expected.

And, seventh, and I guess in conclusion, we have numbers, too, in New York. I can tell you that we have actually, in this second

year of the Governor's administration, reduced the number of new rules being promulgated by 44 percent.

But more important, the quality of the rules is improving. They are more rational. They're supported now by sound science and sound economics, and I believe that we can demonstrate that we're getting better results for our public, and at the same time improving the private economy.

And I thought, in response to Senator Glenn's comments a few minutes ago, I would absolutely agree that trying to measure the impact of these kinds of efforts in pages, or even, Senator, with all due respect, number of rules, is not really the right question to ask.

What we've been attempting to do, and are just starting to develop some numbers, is we're looking at the ability of our efforts to reduce the government-mandated operating costs of businesses, of local governments, of not-for-profit agencies as one way of measuring success.

You can do away with hundreds of rules, but if nobody's bothered to enforce them for the last five decades, who cares. You can do away with thousands of pages of rules. Same thing.

So I think that the real measure is what kind of economic impact are you having, at the same time without sacrificing public health, safety, environment, etc.

So we're making those measurements, and have some pretty significant results thus far.

And finally I would just close with a reference to my written testimony. The one concern that we continue to have is the absence of permanent legislation codifying this process. We, too, operate by virtue of an Executive Order.

And comment at the end, that while the Governor's Executive Orders serving New York well today, codifying its principles and procedures will serve us all long into the future.

Obviously I would recommend the same for the Federal Government. Having an Executive Order without true executive support is not sufficient. Having an Executive Order with solid executive support, as we have, is wonderful for the time being, but having a statute that is properly constructed and supported by Congress and the chief executive would be ideal.

I am honored to be here, and will stop there.

[The statement of Mr. King follows:]

PREPARED STATEMENT OF ROBERT L. KING

During his very first week as Governor of New York, George Pataki issued an executive order that placed a temporary moratorium on all new rule adoptions and directed every state agency to evaluate all existing rules and submit plans to either eliminate obsolete or unreasonable regulations, or to substantially amend those in need of a strong dose of common sense.

The order sent a strong signal that regulatory relief would play a critical role in his efforts to restore the economic vitality to the state. This strategy recognizes that business people are vital assets, not the enemy, and the unalterable truth that regulations always impose costs on the regulated party, consumers, and taxpayers. The Governor insisted that these costs be carefully balanced against any actual or potential benefit. Regulations that impose costs in excess of real or perceived benefits to the public too often harm our ability to compete, to provide quality services, and to grow jobs for our citizens.

Following the moratorium, the Governor created the Office of Regulatory Reform, forcefully demonstrating the importance of executive oversight of the rulemaking activities of bureaucratic agencies. While the President's Executive Order (12866) on

regulatory planning and review indicates it hopes to "reaffirm the primacy of Federal agencies in the regulatory decision-making process," the Pataki Administration believes the primary direction on regulatory policy should come from elected representatives, not from bureaucrats. We rejected the idea of putting a "regulatory reform" officer in each agency because of the very high risk the officer would become a captive of that agency. It would be difficult for that officer to remain truly independent under those circumstances. The President's Executive Order actually calls for the agency head to appoint the officer, with the officer reporting directly to the agency head. It is easy to see how difficult it might become for the regulatory officer to effectively challenge the regulatory decisions of an agency when the officer reports to that agency head. In New York, as Director of Regulatory Reform, I report directly to the Governor and his Chief of Staff.

The Governor has been very supportive of our objectives in several ways:

- The office has a staff of 38, a $2.2 million annual budget, and has been appropriately named the Governor's Office of Regulatory Reform, reflecting its central role in the administration of the state government.
- He signed Executive Order No. 20 in November of 1995. This powerful tool establishes the structural framework for how we manage the exercise of regulatory power in New York. This executive order subjects all newly proposed and existing rules in New York State to the restraint and discipline of cost-benefit analysis, risk assessment, and peer review. The objective is to assure the regulated community and the state's citizens that the exercise of government power is predicated on sound science and sound economics, and that it is focused on results.
- The Governor's support for the recommendations of our office on regulatory reform has been strong and consistent.

For newly proposed rules, the involvement of the Governor's Office of Regulatory Reform precedes the publication of any proposal in the *State Register*. The idea is to apply a key principle of Total Quality Management to the rulemaking process: design quality into a product (a proposed rule), rather than adding it in through the inspection process after it is already built. As a result, agencies are compelled to undertake cost-benefit analysis, etc. before the proposed rules are made public. As we have all observed, once a proposal becomes public, egos and politics make changing it very difficult, even if it is a poorly-crafted rule. This pre-proposal review alleviates the problem. It forces the regulators to produce rules that are supported by data and practical analysis before they go "public."

Regulatory reform together with Governor Pataki's multi-billion dollar tax cuts are producing positive results. About 110,000 new private sector jobs have been added in New York since the Governor took office. Last year, New York ranked tenth in the country, and first in the Northeast, in new factory start-ups. Neither statistic was even within New York's grasp during the Cuomo years. Through August, 1996, we have eliminated or substantially amended nearly 650 rules. Another 700 are now being reviewed. In addition, regulatory, statutory, and permitting reforms emanating from GORR initiatives have been able to reduce government mandated operating costs of businesses, governments, and not-for-profit social service agencies by over $ 1.8 billion. That reduction in government imposed operating costs is the equivalent of a tax cut.

What follows are a few examples of the nature of some of the problems we have uncovered and corrected with the help and support of the Governor and his new Commissioners.

- *Building Codes.* Proposed regulations to make buildings "earthquake proof" by the state's Building Codes Council were twice rejected by our office for failing to appropriately apply cost-benefit and risk assessment analysis. The only information offered in support of the new rules was a 4-year-old newspaper article. When asked to provide cost-benefit and risk assessment studies, the bureaucrats gave up, thereby sparing building owners and taxpayers approximately $220 million annually to finance design changes that were not supported by any scientific or economic data.
- *Prescription Drug Access.* Five years ago, the Department of Health made a decision to reduce Medicaid costs by limiting access to a powerful drug called Clozapine used to treat people suffering from schizophrenia. The agency made it so difficult for doctors to prescribe this drug that essentially just a handful of people were able to secure the medication. The bureaucrats patted themselves on the back for saving money because it cost nearly $20,000 a year, per patient, to purchase and administer this medication.

The department, however, forgot to consider the fact that, with the most severe cases, those people who could not get the medication were spending as much as 270 days a year in psychiatric hospitals costing taxpayers $170,000 per patient, per year. As a result of a recently completed cost-benefit analysis, the bureaucratic barriers to prescribing this medication to Medicaid patients have been eliminated. Taxpayers will save an estimated $17 million per year. More importantly, the people who can benefit from this drug will be home with their families instead of being confined in psychiatric hospitals.

- *ADA Compliance.* The owner of a combination office building/fitness club in Rochester, the Harro East building, volunteered to install a new style lift to better accommodate disabled people who had to rely on a freight elevator to gain access to the building. Unfortunately, the State Building Code prohibited the use of the modern lift unless the owner secured a special variance following formal hearings before a panel in Albany, 200 miles away. GORR staff was able to persuade the panel to grant an administrative variance without need of a hearing, and to change the building code to eliminate the need for any variance in the future. The results saved the building owners $45,000 in construction costs, thousands more in legal fees, six months of time, and improved access for disabled people using the building.
- *Dry Cleaning Rules.* It is common in New York City that dry cleaning businesses are located on the ground floor of apartment buildings. In 1991, several high-profile incidents of exposure to the vapors of the dry cleaning fluid, perchloroethylene (perc), in nearby apartments caused the Department of Health (DOH) to undertake a study of perc exposure in residences and commercial businesses adjacent to dry cleaning facilities. The results of this study prompted the DOH to establish a very conservative, residential, indoor air standard for perc emissions. This standard became the driving force behind New York's Department of Environmental Conservation (DEC) intention to place stricter controls than required by the Federal Clean Air Act on dry clearing emissions. The DEC developed a rule which required the phase-out of older equipment and the installation of emission control equipment for dry cleaners co-located in residential buildings. The estimated cost of this new equipment ranged between $50,000 and $150,000 per facility. Since most of the dry clearing industry is classified as small business with limited resources for large capital investment, the implementation of this rule is expected to put about 20% of New York State's 3,000 dry cleaners out of business and about another 36% on the brink of insolvency.

  From the very start, the scientific basis for a stricter air standard was questionable. For example, there was no significant human health and exposure data from residents living near dry cleaners. Rather than get the data, the Department of Health engaged in some statistical hypothesizing, developing "compound, multiple hypothetical, conservative" assumptions about residential exposure to perc. Not surprisingly, their proposed exposure standards were 1/3000 of that already permitted by OSHA for dry cleaning workers in close proximity to perc for 40 hours per week. Their proposed standard is to be used for building residents who live away from the vicinity of the machinery in separate apartments, and who tend to be home when the dry cleaners are not washing clothes. In response to our concerns and recognizing the data gaps, the DOH agreed to have the air standard subjected to independent peer review prior to adoption of the rule.

The DOH standard had a far-reaching impact on the rulemakers, in that it led them to propose a rule which required enormously expensive and redundant control technologies. After reviewing the control requirements prescribed in the rule, we have required that an incremental cost-benefit analysis of the various control requirements be conducted by the DEC. Although the costs of implementing the rule were well documented, there was no analysis of the benefits, in terms of perc reductions, resulting from the incremental addition of technologies. For example, if buying a new dry cleaning machine costing $20,000 will reduce perc emissions by 90%, is it sensible to require an additional $130,000 to remove the last 10% of vapors? The cost-benefit analysis being conducted will help answer that question. Ultimately, we anticipate a less costly solution can be found, while providing a significantly higher level of protection to the public. This will enhance public health without having to drive hundreds of small dry cleaning companies out of business.

While this may be more detail than is necessary, I wanted to give you a sense of how Governor Pataki's executive order and general approach to regulatory reform is actually working. The impact has been measurable, and positive on the state's economy. At the same time, despite criticism from some sectors, there is no evidence

that these reforms have been at the expense of public health or safety, or environmental quality. In fact, the process has begun to achieve higher quality results and lower costs simply by demanding data-driven decision making.

The only lingering concern we all have is the absence of permanent legislation codifying the process of quality rulemaking. Because we have the tremendous, active support of our Chief Executive, we can continue to achieve the success I have outlined above. However, in the absence of permanent legislation we face the risk that New York's succeeding Governors will not have the level of commitment to this process demonstrated by George Pataki. The people and business community of our state deserve the assurance that quality rulemaking becomes ingrained in the way the bureaucracy wields its regulatory power. While the Governor's Executive Order is serving New York well today, codifying its principles and procedures will serve us all long into the future.

Obviously, I would strongly recommend the Federal Government do the same. Having an executive order without true executive support is not sufficient. Having an executive order with solid executive support is wonderful for the time being. Having a statute, properly constructed and supported by Congress and the Chief Executive, would be ideal.

Thank you for allowing me the privilege of addressing your Subcommittee.

Chairman THOMPSON. Thank you very much, Mr. King.

Jim Miller, former Director of OMB, and Citizens for a Sound Economy.

TESTIMONY OF JAMES C. MILLER, III, CITIZENS FOR A SOUND ECONOMY

Mr. MILLER. Thank you, Mr. Chairman. I have submitted a statement to the Committee, and I would appreciate your printing that.

Chairman THOMPSON. All statements will be made a part of the record.

Mr. MILLER. I'd like to make three points, and then I'd like to make three recommendations. First, let me say, I do represent Citizens for a Sound Economy, which is a 250,000 member and supporter organization, a research and advocacy group that champions market-based solutions to economic and policy problems.

The first point I want to make is it seems to me that President Clinton's revocation of the charter for the Reagan program of regulatory relief, Executive Order 12291, which was coauthored by Mr. Gray and myself, sent a very bad signal throughout the agencies and the regulatory community, that sort of business as usual, the old style regulation, with rather unfettered regulation, was acceptable.

And it seemed to me that was an open invitation to regulatory excess. So it made a very difficult problem even more difficult.

The second point I want to make is that it seems to me OIRA is doing a pretty good job with the resources it has and the authority that it has. I have no complaints or criticism of Ms. Katzen.

I think she's a worthy successor to Chris DeMuth and to Judge Ginsberg and to Dr. Wendy Gramm and Judge Plager and Jim MacRae who was acting director for a while.

She's done a good job, and OIRA has done a good job.

But under the new Executive Order, the authority, the responsibility is much more with the agencies, and it's an unfettered way.

Third point, finding out how the administration is doing with this new program of regulatory review is difficult. But there are some disturbing signs. You mentioned some of them this morning.

One, OIRA no longer has the power to say no. And as Boyden will confirm, that was an extraordinarily important part of the regulatory relief program, was for OIRA to step up and say this regulation makes no sense. You can't do it. Doesn't have that authority quite the same way it once had.

Evaluations of agency performance suggest that they ignore key provisions of the current programs' requirements, that rules be cost effective. President Clinton exempted the IRS from key provisions of the Paperwork Reduction Act, and IRS constitutes three quarters of the paperwork burden in America.

The number of pages published annually in the Federal Register is much higher than it was during the Reagan program, as is the number of rules and the budgets of the regulatory agencies.

The estimated costs of Federal regulation continue to rise. The well known estimates of Tom Hopkins, the time series, show that this number rises, has been rising.

Now, let me make three recommendations. First, that Congress thoroughly review, perhaps with the participation of the Administration, how the agencies are carrying out the mandates to eliminate regulatory excess, and particularly, the extent to which agencies are initiating performance based standards, and market based or oriented mechanisms as alternatives to command and control programs.

Second, I really urge you to institute a regulatory budget. If there is one thing that I'd like to leave with you this morning, it is this: In terms of the way anybody would analyze it, I think, if they think it through, the Federal Government gains command over resources in two ways. One is by spending the money, taxes or borrowing. The second way is by conscripting resources through regulation.

Now, if Hopkins is right and in 1996 total cost of Federal regulation is $677 billion. Contrast that with total Federal spending, estimated in the mid-session review to be $1,570 billion, or $1.57 trillion.

In other words, regulation, the cost of regulation, the resources that Congress and the President conscript through regulation is about 30 percent of the total. Yet you have no budget for it.

And it's worse than the pre-1922 days when agencies submitted budgets directly to Congress. Before then there was no coordination. Afterwards there was a budget office that pulled them together.

It's almost as though you give agencies general guidelines and then give them blank checks. And I would urge you for reasons that we can talk about to consider a regulatory budget. Would it work perfectly? No, neither does the regular budget.

But it would improve things, I think, in a very meaningful way.

Third, and this is not as important, but I would suggest that the Administration try to accomplish what we tried to accomplish in the Reagan Administration without great success, I must say, and that is the President of the United States eliminate his own regulatory excesses in the form of his Executive Orders.

Remember, Boyden, we tried to eliminate superfluous and harmful Executive Orders. And there were screams from the agencies

about this. But I think that's an area where you could streamline government and do a very good job with that.

And, Mr. Chairman, I would be happy to respond to any questions.

[The statement of Mr. Miller follows:]

PREPARED STATEMENT OF JAMES C. MILLER, III

Good morning. Mr. Chairman and Members of the Committee. My name is Jim Miller, and I am Counselor to Citizens for a Sound Economy, a 250,000 member-and-supporter consumer education and advocacy group which promotes market-based solutions to public policy problems.[1]

Thank you for inviting me here today to discuss the importance of regulatory reform and to assess the Clinton Administration's regulatory oversight program pursuant to Executive Order 12866. It is clear now that by casting aside the Reagan-Bush regulatory charter, Executive Order 12291, the Clinton Administration has altered the regulatory environment, changing the dynamic between the agencies and the Executive Office. Although the new relationship may yield some productive changes in regulatory oversight, it also raises concerns about potential increases in regulatory excess.

As you know, the stakes are high. The Federal Government's got 130,000 regulators working on nearly 5,000 regulations at some 60 agencies, producing 67,000 pages each year in the *Federal Register*—and, according to former OIRA Assistant Administrator Tom Hopkins, costing the economy over $600 billion annually, or well over $6,000 for each family. For a different perspective, consider Hopkins' estimate that Federal regulation cost businesses several thousand dollars per employee each year, with the highest costs being borne by the smallest firms.[2]

To cope with the flood of regulation and paperwork, in 1980 Congress passed and President Carter signed The Paperwork Reduction Act, and in 1981 President Reagan issued an executive order which required regulators to get OMB approval of all major new rules. OMB, in turn, not only controlled the paperwork burden Federal agencies imposed on the private sector, but checked to see if the agencies, in proposing Federal rules, had met, as permitted by law, three straightforward, common-sense standards. First, make sure you have requisite knowledge about the proposed regulation's likely effects. Second, when more than one regulatory approach is feasible, pick the one that minimizes cost. And third, don't regulate at all if it appears the costs imposed exceed the benefits generated.

That system worked reasonably well during both the Reagan and Bush years, though not without controversy. Critics claimed that OMB was a bottleneck and had a hair trigger in challenging the agencies' regulatory efforts. Opponents also objected to secrecy surrounding the process and charged that during the Bush Administration the Competitiveness Council (led by Vice President Dan Quayle) provided a "back door" for lobbyists to get objectionable rules "fixed". Congress, of course, resisted the imposition of greater executive control and, by implication, a lessening of its own control over the regulatory agencies.

In late 1993, President Clinton replaced Reagan's executive order with a version of his own. This new order curtailed the power of OMB to veto new rules and gave more leeway to the agencies to approve rules having little analytical justification. That is the "new regulatory era" that you have called this hearing to assess.

The place to start is with Executive Order 12866. Signed by President Clinton in 1993, the order outlined new guidelines for the agencies and OIRA when promulgating and reviewing regulations. Although in many ways the executive order weakens the centralized review process,[3] it does contain recommendations that agencies use both risk assessment and market-based regulations wherever possible. In terms of reform, these two points—if fully applied—could do much to increase the benefits of new regulations and reduce their costs to society.

One key change made by Executive Order 12866 provides Federal agencies more discretion in proposing and promulgating their regulations. Currently, "significant rules" are submitted for review to OIRA for Executive Office review. "Economically

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[1] The author wishes to acknowledge the significant contributions to this statement made by Dr. Wayne Brough, Director of Research at CSE.

[2] See, for example, Thomas D. Hopkins, "Regulatory Costs in Profile," Washington University in St. Louis, Center for the Study of American Business, August 1996.

[3] On the importance of *centralized* regulatory review, see James C. Miller III, William F. Shughart II, and Robert D. Tollison, "A Note on Centralized Regulatory Review," *Public Choice*, January 1984.

significant" rules must include a formal Regulatory Impact Analysis when sent to OIRA, but other "significant" rules must be accompanied only by the agency's own regulatory evaluation. This may or may not include all of the analysis required by a full Regulatory Impact Analysis, such as a comparison of alternatives.

This change was justified on the grounds that it allowed OIRA to focus its limited resources on those rules with the greatest economic impact. However, this change, while perhaps helping OIRA, has placed additional burdens on the regulatory agencies and, in altogether too many cases, has allowed agencies to evade the requirements of analysis as a basis for informed decisionmaking on proposed rules. For example, Rep. Bud Shuster has requested benefit-cost analysis for two EPA rules that were not submitted to OIRA and has not received a response in almost 4 months.[4]

Examining the number of rules reviewed by OIRA during the Clinton Administration demonstrates why the actual application of regulatory oversight within the agencies is an important component when evaluating President Clinton's regulatory reforms. For example, in 1993 EPA submitted 179 rules to OIRA for review—some 25 percent of all EPA regulations. In 1995, the number of EPA rules submitted to OMB fell to 77, or just 7 percent of all EPA regulations. Moreover, of the 77 rules sent to OMB, only 19 were considered "economically significant," and therefore required a full Regulatory Impact Analysis. Government-wide, the number of regulations submitted to OIRA fell from 2,167 in 1993 to 614 in 1995—a drop of 72 percent.

Perhaps the agencies are doing a better job with analysis and the lessons for regulatory action. But with fewer rules under review by OMB, a proper assessment of the Administration's program of regulatory reform must include a thorough evaluation of the regulatory review processes established within the agencies.

Insight into the nature of the regulatory process at the agencies is offered in a study by the Institute for Regulatory Policy of EPA regulations issued by the Clinton Administration. This study examined all EPA proposed and final rules published in the *Federal Register* during the second 6 months after Executive Order 12866 took effect. Based on an analysis of 222 substantive rulemakings, the study found that in only six cases did the analysis properly conclude that there was a "compelling public need" for the regulation, and in only six cases did the analysis demonstrate that the benefits justified the costs of regulation. Moreover, in only 14 cases did the analysis examine alternative ways of securing the regulatory objectives, and in only eight of these was the most cost-effective alternative actually adopted.[5]

I believe it would be valuable for either Congress or the Administration to conduct a similar review for all agencies covered by the executive order and to report the findings. In addition, I would urge the Administration to require all agencies to conduct a thorough review of their use of risk assessments and market-based incentives in the rulemaking process—both of which are called for in Executive Order 12866. A listing of the number of risk assessments conducted as well as the number of rules where market-based incentives were considered and the number of rules where market-based incentives were actually adopted would be useful.

Both of these tools—risk assessment and evaluation of market-based alternatives—have been identified as effective in minimizing the regulatory burden and ensuring that scarce resources are allocated effectively. For example, Steven J. Milloy has found that sound risk assessment can reduce the costs of Superfund cleanups by 60 percent.[6] Market-based regulations in the acid rain program have reduced emissions at one-quarter of the initial cost projections and 20 percent ahead of schedule. The Administration should use these tools at every opportunity.

In March 1995, President Clinton launched the "Regulatory Reinvention Initiative" to clarify the importance of regulatory reform and to provide guidelines to Federal agencies. In a memorandum, President Clinton stated, ". . . not all agencies have taken the steps necessary to implement regulatory reform. To reaffirm and implement the principles of Executive Order No. 12866, regulatory reform must be a top priority."[7] President Clinton went on to require a "page-by-page" review of each agency's regulatory program.

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[4] "See An Assessment of EPA's Reinvention," Majority Staff of the Committee on Transportation and Infrastructure, with the assistance of staff of the Committee on Government Reform and Oversight, U.S. House of Representatives, September 1996, p. 5.

[5] *Ensuring Accountability for Developing Well-Founded Federal Regulations,* The Institute for Regulatory Policy, Federal Focus, Inc., April 1995, Washington, D.C.

[6] See Steven J. Milloy, *Science-Based Risk Assessment: A Piece of the Superfund Puzzle,* National Environmental Policy Institute, Washington, D.C., 1995.

[7] See "Regulatory Reinvention Initiative," White House Memorandum, March 4, 1995.

Under the Regulatory Reinvention Initiative, agencies are required to implement the regulatory review program outlined in Executive Order 12866. This includes identifying obsolete regulations, making greater use of risk assessment, and establishing flexible regulatory goals that can be met through performance standards and market-based mechanisms. In measuring progress on eliminating unnecessary regulatory burdens, it would be useful to have the agencies report on their reform efforts in each of these areas. A regular 6-month report, for example, would be a useful tool for evaluating progress.

Executive Order 12866 retained the premise of President Reagan's Executive Order 12291. However, the new executive order made significant changes that shifted a large degree of responsibility and oversight to the Federal agencies. Evaluating the regulatory burden, therefore, requires a similar shift in emphasis. Measuring reform based on OIRA's impact on the rules it reviews alone ignores a substantial portion of Federal regulatory activity. Agencies must be held accountable for their newfound responsibilities. Agencies should be required to demonstrate that benefit-cost analysis and risk assessment are applied whenever possible. In addition, they should be required to demonstrate that they have examined feasible alternatives, including performance-based incentives, when promulgating regulations.

The Administration's various pronouncements regarding reform will yield little of substance if agency discretion is overlooked. Efforts to reform the rulemaking process must address this fundamental concern. Monitoring and evaluating agency progress over time would provide a greater degree of accountability that should make agencies more responsive to small businesses and the public in general.

It should be noted that in a December 5, 1994 report on the National Performance Review's first round of reforms, the General Accounting Office found that only one of the 11 recommendations it made in September 1993 had been fully implemented.[8] This Committee's oversight can help ensure better results with the latest round of regulatory reforms.

Whether Federal agencies rely on sound science and objective benefit-cost analysis should not be a political decision. The American public has paid more than $1.5 trillion to comply with Federal regulations over the past 25 years, and it is incumbent upon our elected representatives to make sure that these resources are not squandered.

Thank you.

Chairman THOMPSON. Thank you very much, Mr. Miller.

Boyden Gray, of Wilmer, Cutler & Pickering, former White House counsel. Thank you for being with us.

TESTIMONY OF C. BOYDEN GRAY, ESQ., WILMER, CUTLER & PICKERING

Mr. GRAY. Thank you very much, Mr. Chairman.

Just to summarize a few points from my testimony about the gap between the Administration's rhetoric, or its stated policies, and in fact what it actually does.

The rhetoric is good. The reality is not so good. And I think that they have authority to do the things that they should be doing, but you have to wonder if the legislation your Committee had considered last year were law, these problems wouldn't be occurring.

I don't think they should be occurring, but they are, and so maybe legislation is appropriate.

Now, talk about market incentives. It's a big part of the Executive Order, a big part of Ms. Katzen's testimony, at least highlighted by it. The acid rain program was a great success. EPA acknowledges that, indeed, promotes it. And yet they are doing everything they can really to avoid extending it, so that we get the benefits in other areas under the Clean Air Act, and even by extension, water quality and what not.

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[8] See, General Accounting Office, "From Red Tape to Results: Creating a Government that Works Better and Costs Less," Washington, D.C., December 5, 1994.

They just aren't willing to go any further. They say to the Congress that they have authority to do this, but they tell us in the real world that they can't. And it's sort of a head fake in a way, because when Congress is considering legislation that might make some of these great savings and great benefits available, they say, no, don't give it to us, we already have it. And then, of course, when we deal with them, they say, well, Congress says we can't do it.

Project XL, I mean, this comes through most clearly, as I point out in my testimony, in a current NO_x rule, called the Group Two Boiler Rule, pretty esoteric, except that it's a reflection of their refusal to—EPA's refusal, anyway, to abide by the spirit of the Clean Air Act and what they're being asked to do, or should be being asked to do by the Executive Order.

Project XL is another example, great fanfare, flexibility, performance standards. The New York Times called it the crown jewel of the Administration's environmental program, but it just simply isn't working, primarily because at the end of the day when they get down to approving these things, EPA is saying they really don't have ability to guarantee against lawsuits which will disrupt everything.

I think that probably that legislation is necessary to do all that Project XL promises, but I think EPA and the Administration have to be more honest about what they can and cannot do.

Some of the States—I don't know whether New York State is involved here—but many of the States have gotten together to try to draft legislation that would make it easier for Administrator Browner to do these things.

Hopefully we can work this out in the future. But right now it's kind of stalled.

Sound science, a third area. Sound science has been a requirement of the Executive Order. It was highlighted. Risk management is something that we felt very strongly about in the Reagan-Bush years. EPA is now about to propose very draconian regulation which, Senator Glenn, I think will have a rather dramatic impact on Ohio, if it goes through as they're now talking about it, which is being based on absolutely no data at all.

The Administrator says she's got to issue this rule in order to get the monitors out to measure what it is she's regulating. A lot of us in the private sector think, gee whiz, why don't you measure what it is you think you're going to regulate before you regulate. Why don't you get the data first and then think about what you need to do with it.

It's sort of an Alice in Wonderland verdict now, and trial later.

These are just three examples, fairly important in their individual cases, of problems that wouldn't exist had the legislation that your Committee passed out last year become law.

I don't want to get into the politics of what happened with that, but I do think maybe you might want to consider that again next year.

I would like to close with just a few words about the FDA which I didn't put in my prepared remarks, but I've seen it in Ms. Katzen's testimony. The changes there are, with all due respect, quite minor. They don't really do what the industry needs in order

to realize the promise of the biotechnology revolution which we are about to undergo.

These changes were requested by the industry 4 or 5 years ago and only got adopted when there was legislation promoted after the Republicans took Congress in 1994.

They ignore the two major areas of concern, which is the development time of new drugs. These changes simply don't respond to those. There's reference to lot release for well characterized drugs, but that change is fairly minor, and kicks in only after the drug has been developed and is ready for production, after it's been approved and ready for production.

The other issue is one, Senator Thompson, with which you may be familiar, because of David Hankins, who is your colleague from Tennessee. One of the big problems here is the FDA's prohibition on pharmaceutical companies from sending peer review, New England Journal of Medicine, nature-type articles to doctors to inform them of therapies that have been developed by the teaching hospitals and by trial and error by doctors themselves.

Many of these therapies—take cancer therapy, for example—about 90 percent of all cancer therapies are unapproved, technically, by FDA. Many of them are, in fact, reimbursed by the government.

Even with respect to those therapies that are reimbursed by the government, and are listed on a cancer chart put out by the National Cancer Institute, it is illegal for a private company to send that chart, or any article in the New England Journal of Medicine describing a treatment to a doctor.

And that's what David Hankins does with his eye care project, is to disseminate this information to hospitals, doctors and patients. With just a flick of the risk, EPA could make all of this much more available in a very fast moving field, such as cancer therapy.

In sum, I think that—and again in the case of the FDA, legislation was proposed to remedy this. The Administration argued, oh, no, we can do this internally. Of course, at the end of the day, they didn't.

I would just leave it there, and would say that in many respects it appears with EPA that I would have to agree with Bill Niskanen, in his article cited by Ms. Katzen, that in many ways EPA has really exempted itself from the Executive Order.

Thank you very much.

[The statement of Mr. Gray follows:]

PREPARED STATEMENT OF C. BOYDEN GRAY

Mr. Chairman, and Members of this Subcommittee. Thank you very much for the opportunity to appear before you today. As many of you know, I spent many years in the Reagan and Bush Administrations working on regulatory matters with Jim Miller and others, as Counsel to The Presidential Task Force on Regulatory Relief in the Reagan Administration and as Counsel to President Bush in the next 4 years. I continue to maintain an interest in regulatory matters and have an active practice in this area.

The Clinton Administration has repeatedly issued proclamations beginning with E.O. 12866 about the desirability of relying on sound science and introducing greater flexibility into the rulemaking process, such as by using less command and control and more performance standards like market mechanisms and other innovative approaches to achieve environmental objectives. Unfortunately, the Administration has consistently failed to take actions to match its rhetoric. The gap between the

Administration's statements and its actions on the issue of flexibility is readily apparent by examining two of the most prominent areas where it says it supports the flexible use of market mechanisms—emissions trading of acid rain precursors and Project XL. EPA's unwillingness in fact to take meaningful action in these areas has greatly undermined efforts to develop more effective mechanisms for protecting the environment. And if EPA combines this inflexibility with its reliance on inadequate science in a third area which I will describe below, the result will be a disaster for certain sectors of the economy.

There is widespread consensus that emissions trading can help reduce acid rain and other pollutants by enabling industry to achieve greater reductions at lower costs. The Administration has repeatedly touted these benefits, pointing to the widely acclaimed emissions trading program for sulfur dioxide—enacted during the Bush Administration—as a model for how trading can benefit the environment. In testimony before Congress, David Gardiner, assistant EPA administrator for policy, planning, and evaluation, stated that the "net effect" of SO_2 trading "is a more competitive pollution control industry and a much cheaper control program than anyone had previously thought possible." Indeed, EPA has estimated that the acid rain program has generated 40 percent more SO_2 reductions than statutorily required at this stage; and the current market price for allowances, which is around $80 a ton, is well below the $750/ton cost originally estimated.

In contrast, EPA normally expects a command and control rule to yield in fact only 80 percent of a rule's goal—referred to by EPA as the "R/E Factor" (Rule-effectiveness Factor). If the acid rain experience is repeatable, EPA's insistence on command and control instead of market incentives means that it will be wasting nearly half of the available public health benefits otherwise available, and imposing unnecessary added costs as well.

EPA now has an opportunity to repeat the SO_2 success with NO_x by including trading provisions as part of the Group 2 boiler rule which the Agency is planning to issue sometime in the next few months. That rule, which is being developed under Title IV of the Clean Air Act, is intended to achieve significant reductions in emissions of NO_x by utility boilers. These reductions will address problems of acid rain, ozone, and particulate matter.

EPA, however, is apparently not going to establish a trading program for NO_x because it claims that it lacks legal authority to do so—an assertion that is flawed as a matter of statutory interpretation and blatantly inconsistent with the Administration's public posture as stated in the Executive Order and elsewhere. As a matter of statutory interpretation, EPA's position is flawed because the Agency cannot point to a single provision in Title IV of the Act prohibiting emissions trading of NO_x. Indeed, in the first section of Title IV, Congress stated that the purpose of the Title is to achieve reductions of sulfur dioxide *and* NO_x by establishing emissions limitations, "which limitations may be met through alternative methods of compliance provided by an emission allocation and transfer system." While Congress did not require that EPA establish a NO_x trading program, it clearly left the Agency discretion to do so, and it makes no sense to read congressional silence as a prohibition.

EPA's reasoning is remarkable because at the same time it was publishing a notice in the *Federal Register* questioning whether it has legal authority to require emissions trading, David Gardiner was testifying before Congress that changes in the Clean Air Act to increase the Agency's flexibility are unnecessary. So EPA is telling the regulated community that it wants to promote emissions trading but Congress will not provide it with necessary authority to do so, while simultaneously telling Congress that it has all the authority it needs.

EPA's unwillingness to promote trading is also hard to understand in light of the Agency's efforts to encourage other entities to establish trading programs for NO_x. When commenting on the Federal Energy Regulatory Commission's proposal to promote wholesale wheeling of electricity, EPA expressed concern about potential increases in emissions of NO_x and suggested that FERC establish an emissions trading program for NO_x. Similarly, EPA has strongly endorsed the efforts by the States to develop a proposal for emissions trading of NO_x as part of the OTAG (Ozone Transport Assessment Group) structure. EPA has even stated that if OTAG establishes a broad trading program, EPA will issue Federal implementation plans to force States to participate in the program. It is remarkable that EPA, which apparently is unwilling to develop a nationwide trading program under Title IV, is telling the States and the Federal Energy Commission that they should do just that. Surely EPA should be the leader rather than the follower when it comes to environmental innovation. Indeed, by establishing a trading program as part of the Group 2 boiler rule, EPA could establish a framework to be followed by the States.

EPA's misreading of the Clean Air Act, together with its rejection of the White House Executive Order 12866, could also spell disaster in connection with an impending rule on fine particulate matter, the so-called PM2.5 National Ambient Air Quality Standard. Although the Executive Order requires EPA to base its actions "on the best reasonably obtainable scientific" information, EPA appears determined to issue a new PM 2.5 standard even though it has virtually no monitors in place measuring PM 2.5 to determine how much is out there and how much needs to be reduced.

Indeed, EPA realizes that generating studies of health effects at U.S. exposure levels is its highest priority, though it says that much of the work will have to be done overseas since "in the United States, ambient PM levels tend to be relatively low." EPA says informally that it cannot install monitors to collect the data without issuing a standard even though the Clean Air Act gives it authority to do just that. EPA is turning common sense on its head by leaving the Executive Order and the Clean Air Act to incorporate Alice In Wonderland's "verdict now, trial later." Accordingly, it is critical that EPA's proposed rule include the option of not regulating at all at this time (pending collection of research data) as required by the Executive Order. Failure to abide by the Executive Order in this regard will, of course, result in significant job losses if in addition EPA ignores the Executive Order's requirements for flexibility in connection with any standard it does try to issue. Of course, forbidding NO_x trading will keep this PM precursor unnecessarily high in the interim. If any of you would like a more graphic description of the potential impact of this, I would encourage you to contact your governor, whether Republican or Democrat.

Project XL, described by the New York Times recently as the "crown jewel" of the Administration's environmental policy, provides another example of the chasm that exists between the Administration's actions and rhetoric when it comes to environmental innovation. Eighteen months ago, with much fanfare, EPA established a new program it dubbed Project XL. EPA Administrator Carol Browner explained that the program would encourage companies to exceed environmental standards by reducing certain regulatory requirements for these companies: "In exchange for that commitment of doing something extra, we take away the rules."

In reality, though, Project XL has had virtually no impact since very few proposals have received EPA approval and even fewer have been implemented. A principal reason for the failure to approve more projects is inflexibility on the part of EPA. The environmental trade press is full of stories of efforts by industry to develop proposals that have fallen short because of inflexibility on the part of EPA. For example, 3M Company in Minnesota withdrew from the Project XL process because it could not resolve impasses with EPA that it had resolved with the State environmental agency. Similarly, the State of Massachusetts has been unable to finalize a Project XL proposal to reform the State's permitting system because of repeated criticism by EPA headquarters in Washington.

Recently, some of the States have begun drafting legislation to give EPA more flexibility so that it can begin implementing Project XL. Yet in a speech to State environmental commissioners, Carol Browner stated that EPA does not believe it needs Federal legislation in order to have the flexibility to implement Project XL, again demonstrating how the Agency is head faking the Congress out of providing EPA with the authority it needs in fact to carry out its "crown jewel."

Central to the failure of Project XL are the high transaction costs caused by EPA's refusal to establish a broad program like acid rain that obviates the need for preapproval of every project. By insisting instead on micro managing every single project, EPA is virtually certain to generate a relatively low R/E Factor or yield if the project goes forward at all. It doesn't help, of course, when the mainstream media ignore these shortcomings in providing uncritical praise of Project XL and, moreover, trash successes like acid rain as a failure because the compliance costs have dropped much lower than originally expected.

Another illustration of the gap between the Administration's statements and its actions is the recent effort to restrict gold mining in Yellowstone National Park. In mid August, in a demonstration of his commitment to environmental innovation, President Clinton held a press conference to announce a deal in which a mining company would give up its rights to conduct gold mining in a portion of Yellowstone National Park in exchange for $65 million in Federal lands elsewhere. Yet a month later, newspaper reports indicate that the deal is falling apart because the Administration cannot deliver the lands as promised.

At some point the Administration's actions must match its rhetoric. If EPA's statements that it does not need congressional legislation in order to show greater flexibility are correct, then it should start showing that flexibility. And if EPA's statements about the benefits of using market mechanisms to achieve environ-

mental objectives are genuine, then it should start taking steps to promote the use of market mechanisms. Establishing a trading structure for emissions of NO_x and making the Project XL a meaningful program would be a good start. And gathering PM 2.5 data before regulating it would be another good way of following through on the promise to introduce common sense into the regulatory process.

Chairman THOMPSON. Thank you very much, Mr. Gray.

Senator Glenn, I know you have to be elsewhere.

Senator GLENN. I do. I just got a note that an issue I'm involved with on the International Rubber Agreement is coming up on the Floor, and I have to go over there, and I'm sorry.

I just wanted to clarify one thing—Mr. Miller, you indicated that there's been a real change at OIRA, that it has lost its ability to say no. I just wanted to clarify this, and maybe I'm wrong on this, but I thought that OIRA's authority back in the Reagan and Bush years was that OIRA could send a rule back to the agencies, and that that has been continued under the Clinton Executive Order.

Maybe I'm wrong on that, but I thought that was the case. Am I right or am I wrong?

Mr. MILLER. Well, there's a bit of a nuance there. I remember coming up and getting criticized roundly for OMB saying no, and in fact the authority, under the statutes, rested with the agency. But operationally, the way the Executive Order worked, was the agencies would submit their proposals and if OIRA made a judgment that the proposed regulation was way off base, it would take it to the Presidential Task Force on Regulatory Relief, which was then chaired by then-Vice President George Bush, and the agency head would be allowed to have an opportunity to explain why they wanted to move forward with the regulation.

So, I mean, OMB—the OMB-OIRA administrator didn't have black and white authority over all regulations, but it was a rather substantial impediment to the issuance of non-sensible regulations.

Under the present circumstances, I understand OIRA does not have the authority to identify regulations as requiring a regulatory impact analysis, doesn't have quite the same authority as it had before.

Senator GLENN. Maybe we're reading this differently, then. I thought they had that authority. I think they do have that authority. I see Ms. Katzen back there shaking her head yes, but maybe you want to get into that.

But I do have to go.

Mr. MILLER. I think a reading of the two Executive Orders gives those that are in the community a rather clear indication that there would be a transference of authority to the agencies.

And there was discussion earlier when I arrived about the Executive Order clarifying the primacy of the agencies over that.

Senator GLENN. We've talked about this on the minority staff, and I had thought, and it was their opinion, that the way this—the authorities were exactly the same. That OIRA had to send it back, and that was the same whether it went through the Vice President of the previous Administration or whatever, it still is required to send it back to the agency, for whatever was going to happen, and that that has been continued under the Clinton rule also.

We may want to get that clarified with you for the record here. We will submit some additional questions to you, and I'm sorry I can't stay to the end here.

Mr. MILLER. Yes, sir.

Senator GLENN. Thank you very much. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you. I think that the relevant language here is on the front page of the current Executive Order, and it says part of the purpose of the Executive Orders is to reaffirm the primacy of Federal agencies in the regulatory decision-making process.

Now, of course, that could mean different things to different people, but it clearly states that it's their intent to reaffirm. In other words, they had primacy before, then they lost it, and now we're reaffirming it.

So as you say, it's relevance is in the way it's interpreted and used, and from the GAO report you can look and see the end result in terms of less review. We're going to get in further with OIRA in terms of the number of cases that have been sent back, and that sort of thing.

The language certainly seems to be there. And I think what you're saying is that there's a message that's being delivered to the agency heads. And then if you have a situation where there is no clear indication in the files for an objective observer, or maybe even Congress, to look and see who made what decision when, and based on what information, and what reasoning, then you're just left with whatever somebody says—completely subjective analysis as to those things.

And I thought that was a part of the Executive Order, to get away from that sort of uncertainty, and to open it up and to give accountability. Is that your understanding?

Mr. MILLER. Yes. There is a problem, and I'm sure Ms. Katzen could talk about this, and Mr. Gray in more detail than I could. There is a problem in that the President's discretion to have council from his or her peers, not peers, but subordinates, on major issues is something that does under statute and interpretation of the Constitution, etc.—there is some protection for that.

I think that's an important element of the Executive Branch and the Presidential powers. But it disturbs me that the Reagan Administration and then the Bush Administration was criticized so severely for being secretive, etc. It seems to me this process is not as open as ours was, because more and more—more rules were reviewed under the Reagan Administration than under this Administration, and although the information was not made available prior to the promulgation of the rules and regulations, it was made available after promulgation of rules and regulations.

Chairman THOMPSON. Along that line, you said in your written statement the number of rules submitted for OIRA review has plummeted recently. And you cite a study by the Institute for Regulatory Policy that found that only six of the 222 EPA rules reviewed had an analysis demonstrating that the benefits justified the costs of regulations.

How would you rate OIRA's performance in that regard?

Mr. MILLER. Well, again, I think that OIRA has a charter from the President of the United States, and supervised, presumably by the Vice President of the United States, that limits their discretion.

And listen, people in Washington observe this all the time, that agencies given discretion will get around whatever parameters they are facing, or whatever restraints they are facing. And agencies were good at that.

I'll just be candid. Toward the latter part of the Reagan Administration, agencies developed, in part because of the encouragement of some Members of Congress, ways of getting around OIRA's restraints and supervision and review.

Chairman THOMPSON. Is there a natural tendency in that regard?

Mr. MILLER. Absolutely. The raison d'etre of agencies, regulatory agencies, is to issue regulations. You give them more discretion, they'll issue more regulations, less carefully reviewed, less carefully tailored to maximize benefits and minimize costs.

And that's what OIRA is supposed to be doing, is to make sure that that happens. That they maximize benefits, minimize costs.

Chairman THOMPSON. Mr. Gray, what's your experience?

Mr. GRAY. I would concede to some extent what Sally Katzen says about maybe things were too antagonistic, maybe Jim Miller was too much the junkyard dog that always advertised in the beginning of the Reagan Administration.

But I must say on the other hand, that it bothers me when Ms. Katzen says that she gets thanked by the agencies. If you're being thanked by the agencies on a routine basis, you've got to be doing something wrong. [Laughter.]

Chairman THOMPSON. Mr. Miller, did you ever get any fan mail?

Mr. MILLER. No. Not that kind.

Chairman THOMPSON. Let me, Mr. King, ask you, you've heard this discussion here, and you obviously have a very effective thing going for you in New York. Do you see any of the principles that you derived from your experience that are applicable at this level?

For example, you make the point that it's not the number of pages, or even the number of regulations, but the effectiveness of the regulations. And the question that occurs to me is who decides that.

In your case, do the agencies make that analysis? Are they required to do that? Or do you make an independent analysis of that?

Mr. KING. The answer is it can be both. We have a process that the agencies go through when they are about to promulgate a new rule where they have to submit to us a fairly elaborate workup. A Regulatory Impact Statement is the formal name of it.

And we are demanding of them. What is the impact of this rule on the regulated party? In many instances they have not bothered to do it, or they have done it on a very cursory basis, we send it back.

And until they get it right, in terms of giving us the data, they're not permitted to publish their proposal in the State Register.

What we have done in our assessment—because it was very important to us to be able to say to the Governor, we're not just eliminating pages per se, because I don't think that's very valuable, but we're having a measurable impact on the economy—is as we're get-

ting agencies to either eliminate particular rules, or to take a proposal that they were about to attempt to promulgate and amend it substantially, we are simultaneously not just conferring with them, but conferring with representatives of the intended regulated community, to say what's this going to mean to you.

We just had a series of banking regulations that came through, and they came through with no assessment of what impact this was going to have on cost. We sent it back to the Banking Department, and one of the regulators there said to us, well, it's not really that much. We don't think it's a whole lot.

And I said to one of my people, let me get this straight. Every bank in the State of New York has to do whatever this rule requires, and they've got to do it once a week, and they have to fill out a piece of paper that's only two pages long, but somebody is paying somebody to do that, right? Yes.

Why don't we call the association of savings banks, or whoever it was, and get them to tell us what it costs. Well, it turned out the numbers were quite substantial.

So I guess my concern earlier about what constitutes a significant expense. If it's in the eyes of the regulator, well the regulators rarely see significant expense, or they're always minimizing it because it helps them justify doing what they're trying to do.

If you get out and you talk to the people who are impacted by it, you get a different view. So we try to do both. Obviously it's not a perfect system, and there's always limits on the amount of examination you can do. But we've tried very hard in our assessment to make sure that we can document the kinds of savings that, if we're claiming them, that we're stating.

Some of them are squishy, and you know that, and we tend to stay away from those in terms of including it in our own assessment. But it's starting to add up.

And, frankly, picking up on what Jim said, that 30 percent is not 30 percent of the Federal budget. It's 30 percent over and above the Federal budget, which is essentially the imposition of a tax that may have a positive purpose, but it's a tax, nonetheless, and it's our responsibility, it seems to me, all of us in government, to make sure that we keep those numbers in line with whatever the benefits are going to be that will be derived.

Chairman THOMPSON. It seems to me like the ultimate question is how do you evaluate the effectiveness of what you're doing. We have such a large morass now. Congress is always talking about regulations, and we keep passing laws that do require more and more regulations. To whatever extent is debatable.

Presidents keep issuing Executive Orders that require more regulations while claiming to be doing these objective things that the person on the street can understand. How do you measure the effectiveness, and who does the measuring?

On the measuring question, you're looking for ways to impose some discipline on the process. A regulatory budget, I guess, is part of that. I mean, you could even make the case that that is even a kind of an artificial measure.

But I guess what you're getting at is in some way to have some kind of a measure of what is being done out there. Would you address that?

Mr. GRAY. I think a budget would help, but in the Reagan-Bush years, as Jim Miller well remembers, we did do, on almost an annual basis, an accounting, based on the best estimates we could make, based on the cost-benefit work done at the agency level, we made calculations of how much burden had been added yearly, and how much had been taken off yearly. And we could say what the net savings were.

If you take an example from my own testimony today, we know from the Clean Air Act what we budgeted the Clean Air Act to cost, and we know and can figure out for various portions of it what, in fact, it has cost in practice.

Chairman THOMPSON. What's been the difference?

Mr. GRAY. Well, take the acid rain, it's been a whole lot cheaper, for your State, for TVA, for most of the States. It's been a fraction of the cost, and the program has come in 40 percent ahead of schedule.

Now, any time you can get 40 percent greater benefit for about a tenth the cost of what was anticipated, you ought to say, gee whiz, let's see if we can do this again.

Chairman THOMPSON. You won't see that on "60 Minutes," though, will you?

Mr. GRAY. You won't see that on "60 Minutes." The New York Times trashed the program as a total failure because the cost of compliance had dropped so low. Therefore, it must be a failure. Sort of the root canal theory of regulation. If it doesn't hurt, it can't be a good regulation.

This is sort of nutty. But what EPA is now doing, and I don't know—we don't see any fingerprints from OMB on this—I wish we could see some fingerprints—what OMB is now doing, what EPA is now doing is saying, no, they're not going to do anything.

They're not even going to give you any cost-benefit calculations on a NO_x rule, which is the other component of acid rain and a component of ozone and a component of particulate matter. They're not going to give you any cost data. They're not going to do a replication of the SO_2 program.

So it's going to cost probably four, five, or six times as much and get maybe half the benefits. But it's all going to be hidden, because the analysis is not being done.

Mr. KING. If I could just add a couple of quick examples from our State, of how we're calculating this. The earthquake building codes was fairly simple, because we actually took—the regulators' estimate was 3½ or 4 percent of the cost of new construction, the increase. The industry had a significantly higher number.

We just took—we actually used 3 percent, a low ball number, multiplied it by the amount of construction in the State of New York in 1995 that would have been affected had that rule gone into effect. And we multiplied it out. It was $220 million.

Another rule that we eliminated or modified had to do with the requirements on the closure of landfills, which had enormous impact, particularly on local governments, because many of our landfills are municipally owned and operated.

What we were able to do is we knew going in that this was what it cost to close and cap landfills and do the ongoing monitoring under the current rules, and by changing them the way that we

did, we were able to reduce capping requirements, which was a one time savings, and we were able to reduce monitoring requirements, which was an annual savings over 20 or 30 years.

So that each one of these may have a slightly different methodology for doing the measurement, but it's measurable, in many instances.

And what we're choosing to do is measure as much as we can, and use that as a way of determining whether we're having an impact. Ultimately the big measurement for our State is going to be how many new jobs get grown, because people look at New York as a favorable place to do business.

But in the interim, we can do a lot of this other kind of stuff.

Chairman THOMPSON. Gentlemen, thank you very much.

Mr. MILLER. Could I just add something?

Chairman THOMPSON. Yes, sir.

Mr. MILLER. I think you need a system of accounting to know what the agencies are doing. And right now, without a regulatory budget, I would urge you to do more investigation of what the agencies themselves are doing in terms of the regulatory review process.

But you need to have leadership from the top. Governor Pataki did not go in and back away from regulatory review. He went in and strengthened it, and has the organization reporting directly to him.

President Reagan went in and issued an Executive Order that says the agencies have, to the extent permitted by law, got to show that the benefits exceed the cost, that the lowest cost way has been chosen, and, before you even start, make sure you have requisite information.

Very simple, common sense approach. And you've got to do that. And that approach reduced the number—now this is not the most accurate or the only measure, for sure, but reduced the number of pages in the Federal Register 27 percent in 1 year.

Chairman THOMPSON. Thank you very much, gentlemen. We could go on for a long time, but we do have another panel, and I want to thank them for waiting.

Mr. Stevens, Mr. Hahn, Mr. Portney and Mr. Holman.

Mr. Hahn, I understand you have real time constraints, so we'll go with you first, if we may. Thank you.

TESTIMONY OF ROBERT W. HAHN, AMERICAN ENTERPRISE INSTITUTE

Mr. HAHN. Thank you very much, Mr. Chairman. I'm going to ask that my formal testimony be placed in the record.

Chairman THOMPSON. It will be made a part of the record.

Mr. HAHN. I think at the simplest level you can think of regulation as having one of two effects on the economy. They either expand the size of the pie, or in some cases they shrink the size of the pie.

And I think the experience of the last 20 years, which I'll go into in more detail in a moment, suggests that most new regulations, and those regulations under consideration, are shrinking the size of that pie.

I am going to argue, like some of the speakers before me, that Congress should change the way that it does business, taking more careful account of the benefits of costs of the regulation that it imposes on State and local governments, the private sector, and ultimately American consumers.

Congress should begin by taking a closer look at the economic impacts of the laws it passes. It should allow costs to be considered in the development of all standards and regulations.

Balancing of costs and benefits is prohibited in parts of several statutes, including the Clean Air Act and the Occupational Safety and Health Act.

At the outset, I want to be clear that it may be desirable from a social point of view to pass regulations, even if they have an adverse impact on economic growth, and that's why we have legislators such as yourself making tough decisions.

For example, providing medical assistance or food for society's needy may not increase economic growth, but may be the right thing to do for moral and ethical reasons.

But if the bulk of new regulations have an adverse impact on economic growth, either through the direct cost of implementing them or through their adverse impact on innovation, this can have major consequences for the economy.

Moreover, as you know, individual businesses that are especially hard hit by regulations are in some cases likely to close down or might move overseas.

I want to turn now to an issue that you touched on, Mr. Chairman, when you asked the question, how do you evaluate effectiveness of regulations. And Senator Glenn—I wish he were here—because he made the point that, we do not want to measure the impact of regulations simply by the number of pages in the Federal Register.

My research over the past couple of years provides, I believe, the most comprehensive analysis of the benefits and costs of recent environmental health and safety regulations, based on studies done—and this is important, by government agencies.

I have reviewed over 90 what are called regulatory impact analyses, long documents that agencies prepare in compliance with the Executive Order, for environmental health and safety rules for the last 5 years, from 1990 to mid-1995.

And the bulk of the rules you won't be surprised to know, about 70 come from the U.S. EPA.

There was considerable variation in the quality of these analyses, and I found that while costs, or some part of costs were estimated for almost all the rules, benefit estimates were very incomplete.

Agencies quantified health benefits in just over half of the rules, and monetized—that is to say, attempted to put a dollar value on these benefits—in only one quarter of the rules.

In less than 20 percent of the cases did agencies show that quantified monetary benefits would exceed quantified costs. The RIA's, the regulatory impact analyses, which they are sometimes referred to as RIA's, suffer from a lack of consistency across and within agencies.

After attempting to make these analyses consistent, but still taking the government's numbers basically as given, I find that their

data, the government's data, suggests that there is a present value of about $280 billion in net benefit for the regulations I examined since 1990.

Yet at the same time—and I think this is very important—over half of the final rules, on the order of 60 percent, 57 percent, would not pass a benefit-cost test, even when using the government agency's numbers.

Should we believe the numbers? I think not. There is some work that Dr. Portney and I have done on the Clean Air Act to suggest that parts of the Clean Air Act would result in significant net cost to the economy, even after you consider the health, safety and environmental benefits.

Yet if you look at the regulatory numbers that the EPA suggests for the regulations they've passed pursuant to the Clean Air Act, they get a fairly sizable level of benefits.

How to improve the quality of analysis? I have written on that, and in my written testimony I submit an article which Dr. Portney co-authorized with a number of other leading economists that appeared in Science.

Let me just briefly talk about the most important conclusions for including the quality of analysis, and I do think it could be improved dramatically.

Key things we should consider include making assumptions explicit. What are the assumptions you use to get your results? Something the current regulatory analysis frequently failed to do. Using best estimates and appropriate ranges to reflect uncertainty. Providing estimates of the net present value of cost and benefits. Introducing peer review of analyses, and summarizing sensitivity analyses and base case results.

Much of this was embodied in legislation both in the House and in the Senate that didn't quite make it through to the point of being law. So I know you've considered these issues, but I just wanted to reiterate their importance.

I want to now briefly turn to how you fix the problem, and I don't think there's a sort of panacea or Holy Grail, but let me suggest a few possible solutions here, and then turn it over to the other panelists.

First, I think it's very important for Congress to come clean on the economic costs and benefits of regulation to the American public. Now the costs are hidden from view. For example the consumer is rarely told about the several hundred dollars he or she will have to pay when buying a new car as a result of the Clean Air Act.

Similarly, they're rarely told of the kinds of costs they are going to incur if the anti-terrorist measures which the White House Commission has recommended for air safety go through. And I'm very skeptical about whether those measures will do very much.

My recent research shows that regulatory agencies have failed to measure systematically the costs they impose on the private sector. In a recent survey of regulatory agencies carried out by Congressman Bliley confirms this result.

Mr. Miller talked about the importance of a regulatory budget. I wholeheartedly concur that we ought to have an annual regulatory budget, and in that budget we should include not only the

costs of regulation, but, to the extent they are quantifiable, the benefits as well.

I also concur that Congress should pass a version of one of the recent Executive Orders, because that will add more force to the Executive Order. When Congress speaks, the agency listens, and, I would argue, more seriously than if you pass an Executive Order simply within the Executive Branch.

And Mr. King made this point. I think it's a good one.

Third, a point which hasn't been raised, but I think is very important, is Congress should expand the capacity—I see Ms. Katzen isn't here—but I think Congress should expand the capacity of OMB to review important regulations.

This recommendation is consistent with a book that Justice Breyer, Supreme Court Justice Breyer wrote, entitled, "Breaking the Vicious Circle," before he was confirmed as a Supreme Court Justice.

OMB currently has a staff of about 40 people to review the work of about 130,000 regulators. If I did my arithmetic right, that's a ratio on the order of 3,000 to 1.

I think if we're serious about reviewing regulations, we ought to add more technical expertise there.

Two more recommendations. One, Congress should try to move away from the one size fits all approach. Mr. Gray talked about the success in acid rain as a result of the market-based approach that was initiated by the Congress and President Bush.

Part of the reason for that success is we developed an approach that would allow the ingenuity of the private sector to be harnessed in achieving a 10 million ton reduction for sulphur dioxide. So flexibility should be encouraged.

Finally, if you are serious about making a dent in regulatory reform at the Federal level, you have to revisit the organic statutes. In some cases, you may want to rethink them completely. For example, with Superfund, you may want to move the primary responsibilities for clean up back to the States, or locales.

In other cases, you want to allow for legislation that allows economic costs and benefits to be compared, and for situations involving restrictions on price and entry into certain industries—I'm thinking now of the electric utility industry, or the banking industry—you should allow for greater competition, where it can emerge.

In short, I think you've got a great opportunity now to reform the regulatory process. There seems to be bipartisan support, as was crystallized in the recent best selling book by Phil Howard, called The Death of Common Sense, for moving the process forward.

And I think there have been a lot of good ideas presented today, and I wanted to thank you for giving me an opportunity to speak here today.

[The statement of Mr. Hahn follows:]

Improving Regulation: Steps Toward Reform*

Statement of

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Before the

Subcommittee on Financial Management and Accountability
Committee on Governmental Affairs

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Improving Regulation: Steps Toward Reform

Robert W. Hahn

1. Introduction

Regulations typically have one of two effects on the economy. They either expand the size of the economic pie or they decrease the size of that pie. The experience of the last twenty years has been mixed in that regard; but most new regulations now under consideration are shrinking the size of the economic pie. This is especially true in the area of health, safety and the environment—even when the economic benefits of these regulations are taken into account. It is also true in other more traditional areas of regulation, where prices are regulated, such as cable television.

If Congress is interested in developing regulation that helps the average citizen, it has two basic levers it can control. First, it can pass "smarter" laws that carefully weigh the economic benefits and costs of proposed actions. Second, it can make sure that the regulations that flow from those laws are crafted in ways that enhance economic growth.

I will argue that Congress should change the way it does business to more carefully take account of the benefits and costs of regulation it imposes on state and local governments, the private sector, and ultimately, the American consumer. Congress should begin by taking a closer look at the economic impacts of the laws it passes. It should also allow for costs to be considered in the development of all standards and regulations. Balancing of benefits and costs is prohibited in parts of several statutes, including the Clean Air Act and the Occupational Safety and Health Act. And Congress should not be bashful about asking the agencies it has created to more closely examine how their rules and regulations affect the "quality of life" of the average citizen.

At the outset, let me say that some regulations may be desirable from a social point of view, even if they have an adverse impact on economic growth. For example, providing medical assistance and food for society's poor may not increase economic growth, but may be the right thing to do for moral reasons. Similarly, helping to reduce discrimination may or may not increase economic growth, but is desirable in principle.

But if the bulk of new regulations have an adverse impact on economic growth, either through the direct cost of implementing them, or through their adverse impact on innovation, then this can have major consequences for the economy. Moreover, some individual businesses that are especially hard hit by regulations are likely to close down or move overseas.

My testimony will provide an assessment of the benefits and costs of major

environmental, health and safety regulations passed since 1990; an evaluation of how regulatory analysis can be improved in the future; and a discussion of how to improve the regulatory process (see also Hopkins, 1996).

2. The Benefits and Costs of Recent Regulations[1]

Below I summarize my work, which represents the most comprehensive analysis of the benefits and costs of recent environmental, health, and safety regulation based on studies by government agencies. I surveyed over ninety Regulatory Impact Analyses (RIAs) or environment, health, and safety rules from 1990 to mid-1995. The bulk of the rules, almost seventy, were from the U.S. Environmental Protection Agency (EPA).

Table 1 presents an overview of the major rules reviewed for this study. The table shows the number and percentage of regulations for which some part of benefits and costs were quantified. It also shows the fraction of regulations that the agency found would pass a benefit-cost test. I found that while costs were estimated for almost all rules, benefit estimates were incomplete. Agencies quantified health benefits in just over half of the rules and monetized benefits in only one-fourth of the rules. In less than 20 percent of the rules did agencies show that quantified monetary benefits would exceed quantified costs.

This overview of agency analyses suggests that there is considerable variation in the type of analysis agencies perform for individual rules. There is also considerable variation in the assumptions underlying the analysis and in the quality of analysis itself. For example, the discount rate used varies across regulations. In addition, agencies often present benefits and costs in particular years rather than presenting the full stream of benefits and costs.

The RIAs suffer from a lack of consistency across and within agencies. To make the analysis consistent across different programs and regulations, I converted dollar estimates to 1994 dollars, and I introduced a common discount rate as well as a consistent set of values for reducing health risks. Several conclusions emerge from the analysis. First, government agency data suggest that there is a present value of about $280 billion in net benefits to government regulation since 1990. Yet, as Figure 1 shows, over half the final rules would not pass a benefit-cost test, even when we use government agencies' numbers. Aggregate net benefits are positive because many of the rules that do pass have substantial benefits. For example, ten final rules that make up about 30 percent of the total net costs represent nearly 80 percent of total benefits for all final rules.

The agencies' analyses suggest that a substantial number of their own regulations

[1]The next two sections draw on research presented in Hahn (1996). I am currently expanding this analysis to include a wider array of regulations over a longer time period.

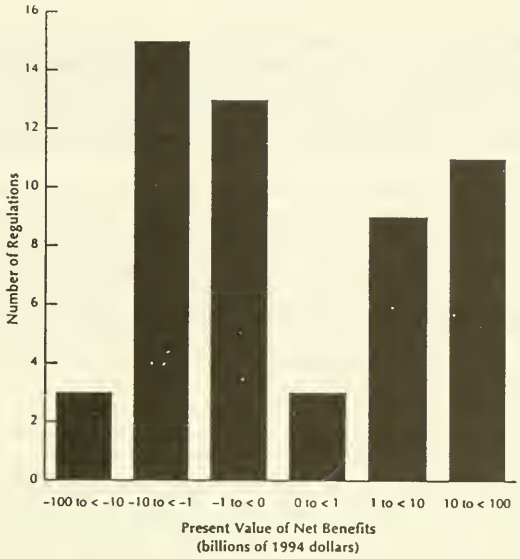
Table 1 Regulatory Scorecard, 1990 to Mid-1995

	All	Final	Proposed	CPSC	MSHA	NHTSA	OSHA-Health	OSHA-Safety	EPA
Number of regulations reviewed	92	58	34	1	1	6	9	5	70
Costs/savings assessed	91	57	34	1	1	6	9	5	69
	(99%)	(98%)	(100%)	(100%)	(100%)	(100%)	(100%)	(100%)	(99%)
Benefits quantified[a]	80	48	32	1	1	6	9	5	58
	(87%)	(83%)	(94%)	(100%)	(100%)	(100%)	(100%)	(100%)	(83%)
Health	51	33	18	1	1	6	9	5	29
	(55%)	(57%)	(53%)	(100%)	(100%)	(100%)	(100%)	(100%)	(41%)
Pollution reduction	41	24	17	0	0	0	0	0	41
	(45%)	(41%)	(50%)	(0%)	(0%)	(0%)	(0%)	(0%)	(59%)
Benefits monetized	23	11	12	1	0	0	0	0	22
	(25%)	(19%)	(35%)	(100%)	(0%)	(0%)	(0%)	(0%)	(31%)
Agency finding that monetized benefits exceed costs	17	9	8	1	0	1	1	1	13
	(18%)	(16%)	(24%)	(100%)	(0%)	(17%)	(11%)	(20%)	(19%)

Note: CPSC=Consumer Product Safety Commission; MSHA=Mine Safety and Health Administration; NHTSA=National Highway Traffic Safety Administration; OSHA=Occupational Safety and Health Administration; EPA=Environmental Protection Agency.
a. This category includes health benefits, benefits from pollution reduction, and any other benefits that were quantified or monetized.

Source: Hahn (1996)

Figure 1 Distribution of Net Benefits of Fifty-four Final Regulations, 1990 to Mid-1995



Source: Hahn (1996)

should not be promulgated if benefit-cost analysis were the sole criterion for judgment. I calculated that eliminating final rules that would not pass a benefit-cost test could increase the present value of net benefits by more than $115 billion.

However, there are reasons *not* to take the agency numbers at face value. Both theory and empirical evidence suggest that agencies are likely to overstate substantially the aggregate numbers for net benefits. Agencies with a single objective (e.g., protecting the environment or improving safety in the workplace) have an incentive to overstate the benefits of their program relative to the costs so that they can better meet the demands of interest groups.

I have found some marked discrepancies between agency estimates and what neutral economists projected in terms of benefits and costs. The 1990 Clean Air Act Amendments provide an instructive example. Involved in the formulation of that Act, I did a benefit-cost analysis for the Council of Economic Advisers. That analysis suggested that the act, when fully implemented, would result in substantial net costs to the economy–on the order of $10 billion to $20 billion annually (Portney, 1990, Hahn, 1994). Those estimated net costs are hard to square with the estimated net present value benefits of $50 billion for regulations based on the 1990 Clean Air Act Amendments.

3. How to Improve the Quality of the Analysis

If benefit-cost analysis is to play a greater role in agency rule making, the quality of the analysis should be improved dramatically. Changes that would improve the quality of analysis include: making key assumptions explicit—something that current regulatory impact analyses frequently fail to do; using best estimates and appropriate ranges to reflect uncertainty; providing estimates of the net present value of benefits and costs; introducing peer review of the analyses; and summarizing sensitivity analyses and base-case results (Arrow et al., 1996, Hahn, 1996). Some of those changes were embodied in regulatory reform bills that the 104th Congress considered.

Agencies could improve the quality of their overall analysis if they used a common set of economic assumptions, as I did in my analysis. Using common baseline assumptions would make it easier to compare results for different regulations. Variables for which common assumptions should be used include the social discount rate, the value of reducing risks of dying and accidents, the value of reducing different kinds of pollution, and the value associated with improvements in health. An agency, such as the OMB, should be given the responsibility for developing key values for different variables based on the best economics and science. The use of a common set of assumptions should not preclude the introduction of other values for variables where such values may be appropriate.

An agency such as the OMB should also develop a standard format for presenting results in a clear and succinct manner. A good summary and clear analysis will make it easier

for policy makers and interested parties to evaluate results. In addition, transparency is necessary if such analysis is to enjoy broad public support.

Improving the quality of benefit-cost analysis is a necessary first step for improving public policy. The appendix to my testimony consists of two items that address this issue. The first is an article from *Science*, in which several economists present guidance on the appropriate use of benefit-cost analysis in environmental, health and safety regulation. The second is an article from the *Wall Street Journal*, in which I discuss some of the problems with a recent EPA analysis on the benefits and costs of clean air regulation.

4. Suggestions for Reforming the Process

The critical question for regulatory reform is how we can best hold regulators and legislators more accountable for regulations. Below, I offer ten specific suggestions for regulatory reform that center on Congress. First, Congress should come clean on the economic benefits and costs of regulation to the American public. Now the costs tend to be hidden from view. For example, the consumer is rarely aware of the several hundred dollars paid for pollution control equipment on a new car, or the costs associated with recent proposals to improve airline safety (Passell, 1996). Indeed, my recent research shows that the regulatory agencies have failed to measure systematically the costs they impose on the private sector. A recent survey of regulatory agencies carried out by Congressman Bliley confirms this result (Bliley, 1996). These regulatory costs should be reported in a "regulatory budget" that goes to Congress each year. Similarly, estimates of the benefits of regulation should be reported where they can be quantified.

Second, Congress should introduce a binding regulatory budget on an experimental basis. The design of this budget is critical. I would suggest a budget that has three key features. First, Congress would set the allowable expenditure limits for different kinds of regulation. This could be done by statute, by program, by agency, or for all regulatory agencies. Second, the Office of Management and Budget would determine whether the expenditure limits are met. If the expenditure limits are exceeded, the Executive could submit a request to Congress for an increase in the regulatory budget authority or Congress could choose to increase the budgetary authority on its own. Third, and this is critical, the budget would only apply to those rules for which the expected costs fall short of the expected benefits. Rules that would pass a benefit-cost test would be exempted.[2] The regulatory budget would thus increase accountability, but not stop rules from going forward that were expected to improve the well being of the average citizen.

[2]I spell out this proposal in greater detail in a forthcoming book I am completing on reviving regulatory reform.

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Third, Congress should provide an additional incentive for agencies to carefully balance benefits and costs by enacting a law that requires such balancing. Such a law is likely to have more force than the Executive Orders issued by recent Presidents. In 1981 the Senate unanimously passed such a law. The new law should apply to both proposed laws and regulations. While it should not require that every regulation pass a strict economic benefit-cost test, the new law should shift the burden of proof so that fewer regulations impose major net costs on the average American consumer. It should also make sure that agencies are not precluded from considering benefits and costs in the development of regulations and standards.

Fourth, Congress should pass a version of one of the recent executive orders on regulatory oversight because a law is likely to have more force than an executive order. Specifically, Congress should highlight the importance of using benefit-cost analysis in the development of regulations, the need to identify and evaluate realistic alternatives, and the importance of selecting alternatives that maximize expected net benefits.

Fifth, Congress should encourage the courts to review regulations based on a kind of benefit-cost criterion by stating that this criterion should be a *primary* factor in developing regulations. Several scholars have argued that the courts are moving in this direction. Warren and Marchant (1993) argue that courts should judge the legality of regulations in the context of doing "more good than harm"—which is a kind of laymen's benefit-cost test.

Sixth, Congress should expand the capacity of OMB to review important regulations. This recommendation is consistent with the thrust of Justice Breyer's book *Breaking the Vicious Circle* (1993). OMB currently has a very small staff of economists and policy analysts; thus, it can only do a cursory review of the most important regulations. In the short term, Congress should allocate more resources to OMB for hiring scientists and economists who would improve the quality and scope of the regulatory review process.

Seventh, Congress should consider vesting the power for regulatory review in an *independent* agency, patterned after the Federal Reserve. A relatively autonomous, independent agency is likely to be more insulated from political pressures. It would be in a better position to make difficult decisions on promoting more effective and efficient regulation.

Eighth, Congress should introduce sunset requirements so that regulations would have to be reevaluated periodically. If sunset requirements are not acceptable, then agencies should be asked to provide Congress with assessments of the effectiveness of regulations they have implemented every two years. These assessments should include a statement of how major programs and regulations actually performed in terms of their economic and social impacts.

Ninth, Congress should move away from the one-size-fits-all approach. Instead of requiring specified technical fixes for smokestacks, or uniform standards regulating food

safety, flexibility should be encouraged so long as the overarching social goals are achieved. Congress and the regulatory agencies should define the overall objectives but allow individuals and businesses the flexibility to achieve these goals in the least expensive way, thus promoting innovation. For example, Congress is using a market-based approach to achieve a 10 million ton reduction in sulfur dioxide emissions. This more flexible approach is expected to save over $10 billion relative to an approach that requires particular technologies.

Furthermore, there are several cases where more flexibility could help achieve social objectives while reducing cost. For example, Amoco's Yorktown Refinery was required to spend $31 million to reduce a small amount of benzene from its wastewater treatment plant, when it could have reduced five times as much benzene elsewhere in the refinery at a cost of only $6 million. Unfortunately, the EPA did not give Amoco the flexibility to make the more prudent investment, despite the fact it would have cost less and improved the environment at the same time.

Finally, if Congress is really serious about changing the nature of regulation, it should revisit the statutes that it has enacted over the last two decades with an eye toward promoting greater flexibility and economic efficiency. In some cases, such as Superfund, Congress may want to move responsibilities back to the states. In other cases, Congress will want to allow for the economic costs of legislation to be weighed against the benefits of the law. For cases involving economic regulation, such as banking and electricity regulation, Congress should allow greater competition. Finally, laws that no longer serve a useful social purpose should be eliminated. A prime candidate is the Davis-Bacon Act, which increases the cost of government contracts and is biased against minority hiring.

5. Conclusion

Congress has a unique opportunity to reform the federal regulatory process. This reform can be best achieved by carefully examining how the existing regulatory process is working. My analytical review of recent regulations suggests that the process is not working as well as it could be.

I have suggested several ways in which the regulatory process could be improved. The most important steps that could be taken in the near term are: making the process more transparent to the public by publishing information on the benefits and costs of proposed and final regulations annually; improving the quality of economic analysis of proposed and final regulations; passing a law that encourages civil servants and administrators to be more sensitive to the benefits and costs they impose on the public; developing smarter regulations that harness the power of the marketplace to achieve social objectives at lower cost; and rethinking the appropriate scope of federal regulation when the substantive statutes are rewritten.

Selected References

Arrow, Kenneth J., Cropper, Maureen L., Eads, George C., Hahn, Robert W., Lave, Lester B., Noll, Roger G., Portney, Paul R., Russell, Milton, Schmalensee, Richard, Smith, V. Kerry, and Stavins, Robert N. (1996), *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles*, AEI Press,Washington, D.C.

Bliley, Jr., Congressman Thomas J. (1996), Letter sent to regulatory agencies, March 5.

Breyer, Stephen G. (1993), *Breaking the Vicious Circle*, Harvard University Press, Cambridge, Massachusetts.

Hahn, Robert W. (1994), "U.S. Environmental Policy: Past, Present and Future," *Natural Resources Journal, 34*, 305-348, Spring.

Hahn, Robert W. (1996), "Regulatory Reform: What Do the Government's Numbers Tell Us?," In Robert W. Hahn, ed., *Risks, Costs, and Lives Saved: Getting Better Results from Regulation*, Oxford University Press and AEI Press, New York.

Hopkins, Thomas D. (1996), "Risk Prioritization: Moving The Debate Forward," Draft paper prepared for Symposium on Climate Change Policy, Risk Prioritization, and U.S. Economic Growth. American Council for Capital Formation, Center for Policy Research, Washington, September 11.

Passell, Peter (1996), "In Airline Safety, Too Much Vigilance Can Be a Bad Thing," *The New York Times*, September 5.

Portney, Paul R. (1990), "Economics and the Clean Air Act," *Journal of Economic Perspectives, 4*, Fall, 173-181.

Warren, Edward W. and Marchant, Gary E. (1993), "More Good Than Harm: A First Principle for Environmental Agencies and Reviewing Courts," *Ecology Law Quarterly, 20*, 379-440.

Appendix 1

1. Arrow, Kenneth J., Cropper, Maureen L., Eads, George C., Hahn, Robert W., Lave, Lester B., Noll, Roger G., Portney, Paul R., Russell, Milton, Schmalensee, Richard, Smith, V. Kerry, and Stavins, Robert N. (1996), "Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?" *Science, 272*, April 12, 221-222.

2. Hahn, Robert W. (1996), "The EPA's True Cost," *The Wall Street Journal*, June 27.

POLICY FORUM

Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?

Kenneth J. Arrow, Maureen L. Cropper, George C. Eads, Robert W. Hahn, Lester B. Lave, Roger G. Noll, Paul R. Portney, Milton Russell, Richard Schmalensee, V. Kerry Smith, Robert N. Stavins

The growing impact of regulations on the economy has led both Congress and the Administration to search for new ways of reforming the regulatory process. Many of these initiatives call for greater reliance on the use of economic analysis in the development and evaluation of regulations. One specific approach being advocated is benefit-cost analysis, an economic tool for comparing the desirable and undesirable impacts of proposed policies.

For environmental, health, and safety regulation, benefits are typically defined in terms of the value of having a cleaner environment or a safer workplace. Ideally, costs should be measured in the same terms: the losses implied by the increased prices that result from the costs of meeting a regulatory objective. In practice, the costs tend to be measured on the basis of direct compliance costs, with secondary consideration given to indirect costs, such as the value of time spent waiting in a motor vehicle inspection line.

The direct costs of federal environmental, health, and safety regulation appear to be on the order of $200 billion annually, or about the size of all domestic nondefense discretionary spending (*1*). The benefits of the regulations are less certain, but evidence suggests that some but not all recent regulations would pass a benefit-cost test (*2*). Moreover, a reallocation of expenditures on environmental, health, and safety regulations has the potential to save significant numbers of lives while using fewer resources (*3*). The estimated cost per statistical life saved has varied across regulations by a factor of more than $10 million (*4*), ranging from an estimated cost of $200,000 per statistical life saved with the Environmental Protection Agency's (EPA's) 1979 trihalomethane drinking water standard to more than $6.3 trillion with EPA's 1990 hazardous waste listing for wood-preserving chemicals (*3*, *5*). Thus, a reallocation of priorities among these same regulations could save many more lives at the given cost, or alternatively, save the same number of lives at a much lower cost (*6*).

Most economists would argue that economic efficiency, measured as the difference between benefits and costs, ought to be one of the fundamental criteria for evaluating proposed environmental, health, and safety regulations. Because society has limited resources to spend on regulation, benefit-cost analysis can help illuminate the trade-offs involved in making different kinds of social investments. In this regard, it seems almost irresponsible to not conduct such analyses, because they can inform decisions about how scarce resources can be put to the greatest social good. Benefit-cost analysis can also help answer the question of how much regulation is enough. From an efficiency standpoint, the answer to this question is simple: regulate until the incremental benefits from regulation are just offset by the incremental costs. In practice, however, the problem is much more difficult, in large part because of inherent problems in measuring marginal benefits and costs. In addition, concerns about fairness and process may be important noneconomic factors that merit consideration. Regulatory policies inevitably involve winners and losers, even when aggregate benefits exceed aggregate costs (*7*).

Over the years, policy-makers have sent mixed signals regarding the use of benefit-cost analysis in policy evaluation. Congress has passed several statutes to protect health, safety, and the environment that effectively preclude the consideration of benefits and costs in the development of certain regulations, even though other statutes actually require the use of benefit-cost analysis (*8*). Meanwhile, former presidents Carter, Reagan, and Bush and President Clinton have all introduced formal processes for reviewing economic implications of major environmental, health, and safety regulations. Apparently the Executive Branch, charged with designing and implementing regulations, has seen a need to develop a yardstick against which the efficiency of regulatory proposals can be assessed. Benefit-cost analysis has been the yardstick of choice (*9*).

We suggest that benefit-cost analysis has a potentially important role to play in helping inform regulatory decision-making, although it should not be the sole basis for such decision-making. We offer the following eight principles on the appropriate use of benefit-cost analysis (*10*).

1) *Benefit-cost analysis is useful for comparing the favorable and unfavorable effects of policies.* Benefit-cost analysis can help decision-makers better understand the implications of decisions by identifying and, where appropriate, quantifying the favorable and unfavorable consequences of a proposed policy change, even when information on benefits and costs, is highly uncertain. In some cases, however, benefit-cost analysis cannot be used to conclude that the economic benefits of a decision will exceed or fall short of its costs, because there is simply too much uncertainty.

2) *Decision-makers should not be precluded from considering the economic costs and benefits of different policies in the development of regulations. Agencies should be allowed to use economic analysis to help set regulatory priorities.* Removing statutory prohibitions on the balancing of benefits and costs can help promote more efficient and effective regulation. Congress could further promote more effective use of resources by explicitly asking agencies to consider benefits and costs in formulating their regulatory priorities.

3) *Benefit-cost analysis should be required for all major regulatory decisions.* Although the precise definition of "major" requires judgment (*11*), this general requirement should be applied to all government agencies. The scale of a benefit-cost analysis should depend on both the stakes involved and the likelihood that the resulting information will affect the ultimate decision. For example, benefit-cost analyses of policies intended to retard or halt depletion of stratospheric ozone were worthwhile because of the large stakes involved and the potential for influencing public policy.

4) *Although agencies should be required to conduct benefit-cost analyses for major decisions and to explain why they have selected actions for which reliable evidence indicates*

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that expected benefits are significantly less than expected costs, those agencies should not be bound by strict benefit-cost tests. Factors other than aggregate economic benefits and costs, such as equity within and across generations, may be important in some decisions.

5) *Benefits and costs of proposed policies should be quantified wherever possible. Best estimates should be presented along with a description of the uncertainties.* In most instances, it should be possible to describe the effects of proposed policy changes in quantitative terms; however, not all impacts can be quantified, let alone be given a monetary value. Therefore, care should be taken to assure that quantitative factors do not dominate important qualitative factors in decision-making. If an agency wishes to introduce a "margin of safety" into a decision, it should do so explicitly (*12*).

Whenever possible, values used to quantify benefits and costs in monetary terms should be based on trade-offs that individuals would make, either directly or, as is often the case, indirectly in labor, housing, or other markets (*13*). Benefit-cost analysis is premised on the notion that the values to be assigned to program effects—favorable or unfavorable—should be those of the affected individuals, not the values held by economists, moral philosophers, environmentalists, or others.

6) *The more external review that regulatory analyses receive, the better they are likely to be.* Historically, the U.S. Office of Management and Budget has played a key role in reviewing selected major regulations, particularly those aimed at protecting the environment, health, and safety. Peer review of economic analyses should be used for regulations with potentially large economic impacts (*14*). Retrospective assessments of selected regulatory impact analyses should be carried out periodically.

7) *A core set of economic assumptions should be used in calculating benefits and costs. Key variables include the social discount rate, the value of reducing risks of premature death and accidents, and the values associated with other improvements in health.* It is important to be able to compare results across analyses, and a common set of economic assumptions increases the feasibility of such comparisons. In addition, a common set of appropriate economic assumptions can improve the quality of individual analyses. A single agency should establish a set of default values for typical benefits and costs and should develop a standard format for presenting results.

Both economic efficiency and intergenerational equity require that benefits and costs experienced in future years be given less weight in decision-making than those experienced today. The rate at which future benefits and costs should be discounted to present values will generally not equal the rate of return on private investment. The discount rate should instead be based on how individuals trade off current for future consumption. Given uncertainties in identifying the correct discount rate, it is appropriate to use a range of rates. Ideally, the same range of discount rates should be used in all regulatory analyses.

8) *Although benefit-cost analysis should focus primarily on the overall relation between benefits and costs, a good analysis will also identify important distributional consequences.* Available data often permit reliable estimation of major policy impacts on important subgroups of the population (*15*). On the other hand, environmental, health, and safety regulations are neither effective nor efficient tools for achieving redistributional goals.

Conclusion. Benefit-cost analysis can play an important role in legislative and regulatory policy debates on protecting and improving health, safety, and the natural environment. Although formal benefit-cost analysis should not be viewed as either necessary or sufficient for designing sensible public policy, it can provide an exceptionally useful framework for consistently organizing disparate information, and in this way, it can greatly improve the process and, hence, the outcome of policy analysis. If properly done, benefit-cost analysis can be of great help to agencies participating in the development of environmental, health, and safety regulations, and it can likewise be useful in evaluating agency decision-making and in shaping statutes.

REFERENCES AND NOTES

1 T. D. Hopkins, "Cost of Regulation: Filling in the Gaps" (report prepared for the Regulatory Information Service Center, Rochester, NY, 1992); Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1996* (Government Printing Office, Washington, DC, 1995).

2 R. W. Hahn, in *Risks, Costs, and Lives Saved: Getting Better Results from Regulation*, R. W. Hahn, Ed. (Oxford Univ. Press, Oxford, and AEI Press, Washington, DC, in press).

3 J. F. Morrall, *Regulation* **10**, 25 (November-December 1986).

4 These figures represent the incremental direct cost of part or all of proposed regulations relative to specified baselines. For examinations of issues associated with estimating the full costs of environmental protection, see (*16*).

5 Office of Management and Budget, *Regulatory Program of the United States Government: April 1, 1992–March 31, 1993* (Government Printing Office, Washington, DC, 1993).

6 If the goals of a program or the level of a particular standard have been specified, economic analysis can still play an important role in evaluating the costs of various approaches for achieving these goals. Too frequently, regulation has used a one-size-fits-all or command-and-control approach to achieve specified goals. Cost-effectiveness analysis, which identifies the minimum-cost means to achieve a given goal, can aid in designing more flexible approaches such as using markets and performance standards that reward results.

7 L. Lave, in (*2*).

8 Several statutes have been interpreted to restrict the ability of regulators to consider benefits and costs. Examples include the Federal Food, Drug, and Cosmetic Act (Delaney Clause); health standards under the Occupational Safety and Health Act; safety regulations from the National Highway and Transportation Safety Agency; the Clean Air Act; the Clean Water Act; the Resource Conservation and Recovery Act; the Safe Drinking Water Act; and the Comprehensive Environmental Response, Compensation, and Liability Act. On the other hand, the Consumer Product Safety Act, the Toxic Substances Control Act, and the Federal Insecticide, Fungicide, and Rodenticide Act explicitly allow regulators to consider benefits and costs.

9 In particular cases, such as the phasing out of lead in gasoline and the banning of certain asbestos products, benefit-cost analysis has played an important role in decision-making (*17*).

10 For a more extended discussion, see (*18*).

11 In this context, "major" has traditionally been defined in terms of annual economic impacts on the cost side.

12 For example, potentially irreversible consequences are not outside the scope of benefit-cost analysis. The combination of irreversibilities and uncertainty can have significant effects on valuation.

13 For a conceptual overview of methods of estimating the benefits of environmental regulation and a brief survey of empirical estimates, see (*19*). For examinations of regulatory costs, see (*16*).

14 For a description of problems that arise when benefit-cost analysis is used in the absence of standardized peer review, see (*20*).

15 G. B. Christiansen and T. H. Tietenberg, in *Handbook of Natural Resource and Energy Economics*, A. V. Kneese and J. L. Sweeney, Eds. (North-Holland, Amsterdam, 1985), vol. 1, pp. 345–393.

16 R. Schmalensee, in *Balancing Economic Growth and Environmental Goals*, M. B. Kotowski, Ed. (American Council for Capital Formation, Center for Policy Research, Washington, DC, 1994), pp. 55–75; A. B. Jaffe, S. R. Peterson, P. R. Portney, R. N. Stavins, *J. Econ. Lit.* **33**, 132 (1995).

17 A. Fraas, *Law Contemp. Probl.* **54**, 113 (1991).

18 K. J. Arrow *et al.*, *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation* (AEI Press, Washington, DC, 1996).

19 M. L. Cropper and W. E. Oates, *J. Econ. Lit.* **30**, 675 (1992); A. M. Freeman, *The Measurement of Environmental and Resource Values* (Resources for the Future, Washington, DC, 1993).

20 W. N. Grubb, D. Whittington, M. Humphries, in *Environmental Policy Under Reagan's Executive Order: The Role of Benefit-Cost Analysis*, V. K. Smith, Ed. (Univ. of North Carolina Press, Chapel Hill, 1984), pp. 121–164.

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The EPA's True Cost

By ROBERT W. HAHN

The Environmental Protection Agency has released a draft report that says it has done stupendous things for the economy and the environment. From 1970 to 1990, the report claims, environmental regulators helped return $20 for every $1 they required you to spend on cleaning the air. The total estimated net benefits to the economy during this 20-year period were about $7 trillion, or the size of America's gross national product for one year. This study of the Clean Air Act will almost certainly have a significant impact on the debate over how environmental regulation affects the economy. And environmental groups will no doubt use the study's results to assert that regulation has been a blessing.

The truth is that regulation has been both a blessing and a curse, but you'd never know it from this report. This report is the outgrowth of a political compromise in the 1990 Clean Air Act Amendments, arguably the most important piece of environmental and economic legislation during this decade. Included in this law was a requirement to analyze the costs and benefits of past, present and future clean air regulations—a good idea, but so far badly executed by the EPA. The report provides no guidance on the critical issue of which regulations have helped consumers.

The report's findings are built on a highly stylized economic model that projects emissions and economic impacts with and without clean air controls over two decades. While this may be a useful academic exercise, it does little to inform the policy debate.

The report suggests, for example, that about three-fourths of the quantifiable benefits of air pollution controls result from reducing hazards from lead and particulate matter. If that is the case, however, the tens of billions of dollars aimed at reducing smog and carbon monoxide may have been a drain on the economy, thus hurting the average citizen.

There are reasons, moreover, to doubt the model's validity. For example, an early version was run using dollar values for particulate reductions based on the most recent estimates of health damages. According to a government official, when these estimates yielded very high benefit numbers that didn't pass a laugh test, the authors decided not to report those results. Instead, they opted to use lower values based on earlier studies, which evidently could be reported with a straight face. Deleting information selectively is in the best interest neither of science nor informed policy analysis.

The model's assumptions for what the environment would look like without the Clean Air Act are also misleading. Staying on the no-control path would have meant that you couldn't see your hand in front of your face in broad daylight in some cities. States would and, in some cases, did implement policies of their own to address these issues without federal intervention. These state and local policies, combined with technological improvements, mean that a significant share of whatever benefits are claimed for the Clean Air Act would have occurred without any federal intervention.

Even if one accepts the finding that trillions of dollars of benefits resulted from enlightened regulation, the report does not examine whether these benefits could have been obtained more cost-effectively. EPA's reliance on command-and-control regulation has often resulted in overly burdensome regulation that continues to have significant adverse impacts on innovation and productivity beyond the direct compliance cost figures used in the report. For example, I estimated in a 1994 study that removing electric car mandates and introducing a market to reduce auto emissions could save over $10 billion.

How do we craft better analysis of regulations that may be considered in the future? A group of 11 economists, including me, addressed that question by developing a set of principles on cost-benefit analysis recently summarized in the journal Science.

Our bottom line is that cost-benefit analysis is neither a panacea nor a poison. Rather, it is a highly worthwhile analytical tool that can and should be used to improve decisionmaking and set better regulatory priorities. While we recommend requiring the analysis for major regulations, we do not recommend that agencies be bound by a strict cost-benefit test—a test based solely on what can be quantified in terms of dollars and cents. Agency heads, however, should be required to present a clear explanation justifying any major regulation that will impose costs far in excess of benefits.

So what difference could a careful study of individual regulations make? A big one. My analysis of federal regulations between 1990 and 1995 reveals that only 23 of the 54 regulations examined would pass a cost-benefit test based on the government's numbers. In my recently released book, I estimate that getting rid of the regulations that did not pass a cost-benefit test could save $100 billion.

There are two important lessons for EPA as it begins a second study on present and future impacts of the clean air law—improve the analysis and focus on individual regulations. Legislators and regulators can then make better decisions about which regulations and programs are worth keeping or adding.

The ultimate solution to the problem of poor regulation is to rethink the scope of the laws and then design smarter regulation. A first step in the process is to carefully examine the impact of proposed major regulations using cost-benefit analysis. The current EPA effort to estimate overall costs and benefits of environmental regulation shows how a well intentioned process can go awry; but it also shows how the process can be fixed with a judicious dose of common sense.

Mr. Hahn is an economist at the American Enterprise Institute and the editor of "Risks, Costs, and Lives Saved: Getting Better Results From Regulation" (Oxford University Press and AEI, 1996).

Chairman THOMPSON. Thank you, Mr. Hahn. Can you stay with us for a little while longer?

Mr. Portney, Resources for the Future.

TESTIMONY OF PAUL PORTNEY, RESOURCES FOR THE FUTURE

Mr. PORTNEY. Thank you very much, Mr. Chairman. Let me say on a personal note how nice it is to have somebody as interested and as informed as you are on regulation here today.

I've long admired Senator Glenn's commitment to this. It's a dry subject, to be sure, but it is an important one, and it is nice to have somebody else who pays as careful attention to it as you obviously do.

Chairman THOMPSON. Thank you.

Mr. PORTNEY. I have slugged away in this field for more than 20 years now, I'm somewhat embarrassed to say, including 2 years doing regulatory oversight as part of the Regulatory Analysis and Review Group in the Carter Administration, which was the immediate precursor to the Office of Information and Regulatory Affairs.

So I have experience both inside and outside of government in this whole thing. One of the things I would say to Sally Katzen were she still here is that as a student of this for a long time, one of the improvements in regulatory oversight in my view has been the increased openness and transparency that we've seen at OIRA since 1993, although in the later years of the Reagan Administration and in the Bush Administration there were also efforts to step up the transparency and openness of that process.

We've talked a lot today about the annual amount of spending necessitated by Federal regulation. Tom Hopkins' number has been brooded about a lot. In my prepared remarks, I try to make clear—and I think Tom would, too, if he were here—that that's really a stab in the dark, and that there's really great uncertainty about how much we spend each year as a result of Federal regulation.

But by any standard, these regulatory burdens are significant, even relative to the $1.6 trillion that we spend on budget. And yet, as any number of the witnesses have pointed out today, while each and every year you and your fellow Senators and Congressmen spend a lot of time scrutinizing on-budget spending, and finding ways to eliminate duplicative programs and cutting unnecessary spending programs, there currently is no systematic effort in Congress to take a look at four important questions that pertain to Federal regulation.

First, how much money are we spending overall each year as a result of Federal regulation?

Second, is this the right amount, in comparison to on-budget spending, and spending on the part of the private sector for important private needs?

Third, are we happy with the allocation of Federal regulatory dollars as between environment, transportation, communications, consumer protection, etc.?

And, fourth and finally, do the individual regulations that the agencies put out pass a benefit-cost test, even qualitatively speaking? Forget trying to translate everything into dollar terms, which

I'm in support of, but I'm here to say we will never be able to do to anybody's complete satisfaction.

We need to know if, qualitatively speaking, these regulations do more good than harm.

The current regulatory review process that you have been hearing about today, and that everybody has been testifying about, ideally suited to question four, are these regulations passing a benefit-cost test.

But even this doesn't help us understand the broader picture of regulation, and even this regulatory review process, as Bob Hahn has pointed out, won't do us a lot of good so long as we have statutes that current prohibit our regulators from even considering cost as one factor in standard setting.

So I would re-emphasize the point that Bob Hahn made there, that there's no substitute in regulatory reform for opening up individual statutes, and at least giving regulators the opportunity to take cost into account as one factor.

I would like to say, and I wish Senator Stevens were here to say this, that the regulatory accountability provisions that I understand may have passed last night, I think, will go someways toward helping us understand the overall annual burden of regulation.

I hope that those estimates that OMB makes, if this becomes law, will be made on an agency by agency basis, because that's important as well.

Let me also point out that one of the reasons that we know a fair amount certainly relative to other Federal regulatory agencies about compliance cost spending on the part of the EPA is that in the early 1970s, Congress wrote a law that required the EPA periodically to report estimates of the cumulative costs associated with complying with its regulations.

And that begs the question why a similar law isn't passed that requires each and every Federal regulatory agency, both independent and those in the Executive Branch, to make a similar annual report.

That would be an alternative to having the Office of Management and Budget do it. Maybe you would want to do both, and look at the battling estimates and try to resolve the differences between them.

We also know relatively more about how much it costs to comply with EPA regulations, because in past years each and every year the Bureau of Economic Analysis at the Census Department has conducted a survey of manufacturing and other firms to get information about environmental pollution control spending.

Unfortunately, because of budget reductions, the Bureau of Economic Analysis at the Census Department is terminating this pollution abatement and control expenditure survey. And that's two steps exactly in the wrong direction.

And so I would urge you to talk with people at Commerce about trying to refund this survey, or change their minds on this. We need that survey to understand environmental regulatory burdens.

Let me briefly talk about recommendations for you here today. And the first is one that came up as I listened to other people testifying. Let me try to do this in sort of a homely analogy, if I can.

Anybody who is going to spend $20,000 to buy a new car isn't going to blanche at the idea of spending $50 to investigate the characteristics of various cars and what one can expect. We all buy a Consumer Reports. We spend a Saturday or two driving around, and our own time is valuable.

We often phone into one of these 800 services and get the dealer sticker price, etc. Similarly if we're going to buy a $200,000 house, we don't think anything about spending $500 for a termite inspection, an engineering inspection, etc.

Well, this is a ratio of $400 of expenditures to one dollar of investigation. If this is a reasonable amount to understand how much we spend for important things, and if we only spend—notice I say only—$400 billion each year on Federal regulation, this would suggest that we would spend $1 billion a year to figure out what good it's going to do, what the alternatives are, etc.

And yet I would be astonished, if we looked at the budgets of OIRA and the policy shops in every Federal regulatory agency, if you could come up with $50 million in annual spending, rather than the $1 billion in annual analytic spending that would be comparable to the amount we would spend if we were going to buy a new car or a house.

We don't spend enough figuring out what regulations' impacts, both favorable and unfavorable, will be, given the amount that we spend each year on this stuff.

So that one might think of increasing the resources available to OIRA and the policy shops and EPA, FDA, OSHA, etc.

Second, for big ticket regulations, I think we ought to consider the possibility of independent peer review. If the agencies, if for some reason it is difficult for OIRA to conduct a thorough review, possibly because they are short staffed, as other witnesses have testified, then maybe on a specially significant regulations, we ought to have a public peer review of the benefit and cost estimates.

Similarly, I don't think it's harmful to get the analyses that OIRA does on certain regulations. Again, back in the Carter Administration, our regulatory analysis program, or the President's program in which I participated, published on the public record detailed comments on the proposed regulations in the same way an environmental group might or a business trade association might.

And then not only was the agency's analysis transparent and available to everybody, so, too, was the comments of the Regulatory Analysis and Review Group, and that helped people outside the government understand regulations, and critique the regulatory process.

Third, and penultimately, it used to be the case that in the annual regulatory agenda of the United States the Office of Management and Budget would publish statistical appendices concerning the number of regulations that come out of the various regulatory agencies each year, etc.

They have abandoned that practice, and as a student of regulation, I found it a lot easier to understand what was going on with regulation when there was statistical material available.

And I would urge Sally Katzen and her colleagues at OIRA to resume the practice of publishing some of that information on the

number of reviews they have conducted, the number of regulations coming out of each of the agencies each year.

Fourth, and finally, pertaining to regulatory analysis, I would just harken back to an old saying my folks had, which is sauce for the goose is sauce for the gander. One of the reasons that a lot of people want regulatory agencies to do benefit-cost assessment is that they suspect, and they're often correct in this suspicion, that it will be difficult for the agencies to justify the costs associated with the regulations by the benefit.

But there are plenty of regulations, in my view, that will pass the benefit-cost analysis with flying colors, and I hope those that are insistent on thorough, vigorous benefit-cost analysis of Federal regulations will, when the benefits clearly exceed the costs, support those regulatory programs, and not come up with another reason not to do this.

Because if you're going to use benefit cost analysis to knock down silly regulations, of which there often are plenty, then you need to use that same analysis to support good regulations, and back the agencies in doing things that will do more good than harm.

Thank you very much, and I appreciate the opportunity to be here.

[The statement of Mr. Portney follows:]

PREPARED STATEMENT OF PAUL R. PORTNEY

Mr. Chairman and distinguished Members of the Senate Committee on Government Affairs. Thank you very much for inviting me here today to testify on the regulatory, review activities of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). Before I begin, let me say by way of self-introduction that I am President of Resources for the Future, an independent, non-partisan research and educational organization concerning itself with natural resources and the environment. The views I will express today are my own, however, and I should point out that Resources for the Future takes no institutional position on legislative, regulatory or other policy matters.

From January of 1979 until September of 1980 I was Senior Staff Economist at the Council on Environmental Quality in the Executive Office of the President. During that time, I had the pleasure of participating in the activities of the Regulatory Analysis Review Group created by President Carter under Executive Order 12044. As you may recall, that group was the precursor to OIRA in the same way that President Carter's Executive Order 12044 set the stage for its successors, Executive Orders 12291 and 12866 in the Reagan and Clinton Administrations, respectively Since it was my interest in Federal regulation, especially environmental regulation, that brought me into government in the first place, I have been thinking about Executive Branch oversight of Federal rulemaking for more than 20 years.

Though I will say a few words about the subject later in my remarks, other witnesses appearing before you today are more up-to-date in their assessments of OIRA's regulatory review activities. One service I thought I might perform is to remind the Members of this Committee why it is that regulatory oversight is so important. This may sound strange, given all the attention regulatory reform has received for the last several years, but I think we sometimes lose sight of why economists and other analysts care so much about Federal rulemaking.

For the fiscal year just ending, total on-budget spending by the Federal Government will be in the neighborhood of $1.6 trillion. In an era of deficit reduction, I need not remind the Members of this Committee how much effort each year goes into finding ways to eliminate duplicative or unnecessary spending programs, consolidate successful programs, and devolve to lower levels of government programs that may fit better there. In other words, you and your colleagues in both houses of Congress scrutinize very carefully each and every year both the overall level of Federal spending, as well as its allocation between national defense, income security, health, energy, education, space, the environment, housing, and other programs. As well you should, given voters' concerns about taxes at all levels of government.

Yet each and every year, Federal regulation also imposes a substantial burden on the electorate. As with on-budget spending, these regulations also generate benefits about which I will say more below. Despite valiant efforts to estimate the overall annual cost of complying with all Federal regulation, most notably those of Thomas Hopkins of the Rochester Institute of Technology, we know precious little about these costs. Hopkins puts the annual "price tag" at $668 billion for 1995, but, as he acknowledges, he includes in this total transfers of approximately $150 billion that wouldn't be counted in a real benefit-cost analysis of Federal regulation. Moreover, Hopkins includes another $220 billion in annual paperwork costs (principally from income tax preparation). While these are real costs, they are of a qualitatively different nature than pollution control or occupational safety and health expenditures and probably should not be commingled with the latter.

Suppose we subtract from his grand total the $150 billion in annual transfers that Hopkins estimates result from regulation, as well as the $220 billion in paperwork. Even then, Federal regulation would cost corporations, individuals and governments nearly $300 billion annually. In this very optimistic case, for every single dollar of the $1.6 trillion we spend on-budget each year, we spend an additional $0.20 in a much less visible and accountable way through regulatory mandates. I cannot emphasize how strongly I believe that Congress must pay the same kind of broad and careful attention to the annual compliance costs mandated by Federal regulation as it does to on-budget spending. There simply must be some regular exercise through which Congress determines: (i) how much is being spent annually pursuant to regulatory goals; (ii) whether that amount is about right in comparison to other national objectives pursued either on- or off-budget; (iii) whether that total is appropriately divided between economic regulation (that pertaining to price and entry), financial regulation, and social regulation (that dealing with environment, safety and health); and (iv) whether specific regulations—especially economically significant ones—provide benefits commensurate with their costs.

Enter Executive Branch oversight of the regulatory process. While it has never been intended as a substitute for closer congressional scrutiny of the rulemaking process, it has since its earliest days played an important role in making the information available that would be required for such an undertaking, especially as pertains to objective (iv) above. Indeed, though we know relatively little about overall regulatory burdens today, we would know next to nothing about them were it not for the efforts of the last five administrations to push agencies into making information available on the costs and benefits of their major rules.

I should add that Congress deserves a measure of credit here, too. Since the mid-1970s, the Environmental Protection Agency has been required to make regular reports of the cumulative costs of complying with its rules, a responsibility it has taken quite seriously and discharged with considerable professionalism. This is why we have a better idea of annual compliance costs for EPA (somewhere between $120 billion and $150 billion) than for any other agency. This begs the question, of course, why not require every Federal regulatory agency to make such estimates on a regular basis? If you did, we would know a great deal more in the next several years about the compliance costs associated with regulations emanating from the Occupational Safety and Health Administration, the Consumer Product Safety Commission, the Food and Drug Administration and other regulatory agencies. And since EPA's estimates of its own compliance cost burden make heavy use of the Commerce Department's annual Pollution Abatement and Control Expenditure (or PACE) survey, I cannot help but observe what a loss it will be if shrinking budgets force Commerce to abandon the PACE survey, as is presently planned.

This leads me back to OIRA and regulatory review. First of all, for regulatory review requirements to do any good, the affected agencies must take them seriously. After all, a purely perfunctory benefit-cost analysis, or one done at the 11th hour after all the important decisions have been made, will do little to inform the agency engaged in rulemaking about potentially more attractive alternatives. Nor will it be of much use to OIRA or anyone else interested in comparing the favorable and unfavorable effects of the proposed or final rule. During the years in which I participated in the Regulatory Analysis and Review Group, I saw both very careful and also very sloppy analyses. I suspect that OIRA sees the same thing today.

As a long-time observer of regulatory oversight, it is my view that the quality of the analyses performed by agencies covered under presidential executive orders is driven more than anything else by the attitudes of the heads of the regulatory agencies and their top officials. If the administrator of an agency takes seriously the requirement to identify the benefits and costs of the regulatory approach the agency chooses, and those of a reasonable set of alternatives as well, the regulatory analyses usually reflect this interest. If, on the other hand, the agency head regards analysis as a necessary evil (or, worse yet, an unnecessary evil), it is highly unlikely

that much effort will go into the analytic process or that much useful will result. This is in part due to the resources that agency heads put into their analytical offices. Often, those who care little about regulatory review end up bleeding resources from their analytical staffs, while those who understand and support the role of regulatory oversight within an administration generally fight to maintain an adequate capability in their policy shops (even though this oversight function can occasionally be a great aggravation).

Other witnesses here today will have more informed views than I about the quality of analysis coming out of the agencies these days. They will also know more about the behind-the-scenes efforts of OIRA to improve the quality of agencies' analytical work, and about the support that OIRA gets from above in internal regulatory policy debates. There is little point in my speculating about such matters.

I do have one suggestion to make, however. In a limited number of cases where proposed regulations would have very significant economic implications, as is the case with the National Ambient Air Quality Standards, for instance, it might be useful to subject the agencies' analyses to a carefully organized outside peer review. In the case of the agencies, the prospect of a serious vetting of its analytical work beyond that of OIRA might prompt it to consider more seriously alternative ways of accomplishing the goal of the standard in question, and to better justify the approach that is chosen. For example, an agency might be inclined to be especially careful in choosing health studies on which to base a standard if it knew that several of the outstanding researchers in the health profession would be reviewing its work, and offering up for public consumption their view of the quality of that work.

It would not hurt for there to exist some mechanism through which OIRA's reviews are vetted, for that matter. Back in the Carter Administration, the comments of the Regulatory Analysis Review Group were entered into the public record during the comment period that followed a proposed regulation. In other words, the RARG commented on proposed regulations in the same way and during the same period of time as did environmental advocacy groups, State and local governments, business trade associations and other interested and affected parties. I can assure you that knowing that they would be made publicly available to all improved the quality of RARG's comments on agencies' proposed rules. This practice also helped create a belief that regulatory review was a fair and transparent process. Interestingly, there has been more controversy about White House oversight of regulation since 1981, the year in which OIRA's comments began no longer appearing in the public docket. It might be useful, again in the case of quite significant regulations, to require OIRA to prepare detailed written comments on an agency's proposed rule and to make those comments available for the world to see.

If I might, let me make an additional observation about regulatory oversight. It has become more difficult for "outsiders" like myself to keep track of the volume of regulatory activity these days than it was in the past. This is due to a change in the way OIRA reports to the public. Specifically, during the 1980s and early 1990s, OIRA published on several occasions a *Regulatory Program of the United States Government.* While the main body of this report was interesting in its own right (if also a bit overwhelming), of greater utility was a series of appendices to these reports. One of these appendices provided extremely useful information on the number of regulations sent to OIRA by each agency each year, the actions taken by OIRA, the average length of time for review, the number of *Federal Register* pages devoted to regulatory matters, and the number of final rule documents published by each agency in the *Federal Register.* In fact, this was the only place one had access to any kind of historical data on Federal regulatory activity.

Not all of this information was equally useful, I hasten to admit, and some of it was occasionally misused especially the number of pages in the *Federal Register*, an ambiguous indicator of Federal regulatory activity at best. Nevertheless, taken as a whole and used carefully, this information helped paint a picture of what was happening with both the overall level of Federal regulatory activity, and with its composition between agencies. It made it possible for those interested in regulation to have some sense of what was going on.

As best I can determine, this information is no longer available. The Regulatory Information Service Center published in October, 1995 *The Regulatory Plan and the Unified Agenda of Federal Regulations.* While this weighty tome contains some of the same information as its predecessor volume, there are no appendices to which one can turn to compare recent regulatory activity with that of past years. I view this as unfortunate and perhaps unnecessary, since I assume that these data are maintained internally by OIRA. If they are, it would not be difficult to pull together in summary form.

Why not make these data available to the interested public to facilitate the analysis of regulatory trends? This would be consistent with the spirit of information pro-

vision embodied in such laws as the Community Right to Know Act in the 1986 Superfund Amendments. In the same way that EPA and other agencies have begun requiring regulated parties to make public information on releases of various substances and quantities of materials stored in various places, why should these agencies not be required—to make available to an interested public information about the number of proposed and final rules they issue each year, the economic significance of these rules, and so on?

Two final points. First, I alluded earlier to the benefits of Federal regulation. We need to keep in mind amidst discussions of regulatory burdens that benefits can exceed costs, sometimes substantially. That appears to be the case for the 1970 amendments to the Clean Air Act, based on the nearly completed study done by EPA as required under Section 812 of the 1990 amendments to that same act (a study which, incidentally, has been carefully peer-reviewed since its inception by a distinguished group created expressly for that purpose). Other regulations have passed the benefit-cost test with flying colors, and more will do so in the future. Even in those cases where it is too difficult to quantify the benefits of rules, or to translate their physical or aesthetic effects into dollar terms, it is essential that a careful case be made why these favorable effects are expected to result. (By the same token, regulatory agencies and their overseers should be equally careful to support claims about the possibly adverse effects of Federal rules.)

Finally, most of what I have said here about regulatory oversight pertains to ensuring that individual rules are designed to accomplish their goals as inexpensively as possible, and that the benefits of these rules justify these minimized costs. A bigger challenge for Congress is devising a means through which you and our other elected officials can address the broader issue I raise above. That is, how do we ensure that the right amount of resources are being devoted to regulatory goals, in contrast to all the other important objectives we have, both public and private? This is even more difficult than ascertaining the benefit-cost balance for a regulation or set of rules. But honing our ability to do the latter, through both improved agency practice and effective oversight, will better equip us to address the former, and will pay handsome dividends of its own in the interim.

Again, thank you for inviting me to appear before you this morning. I would be happy to answer any questions you might have.

Chairman THOMPSON. Thank you very much. And while I've still got you here, if the other gentlemen will indulge me just a minute, let me ask you to comment on a couple of things.

It seems to me like so much of the debate last time on regulatory reform, and the legislation we tried to pass, had to do with the age old concern of the qualitative side of things. And you might comment on to what extent you took that into consideration in your own analysis.

But it looks to me like that is the crux of the problem. On the one hand, you have people saying that nothing should be exempt, because if there are qualitative reasons, put that into the mix, and it will win out.

On the other hand, some people say, well, if you open it up to that extent, as the Executive Order does—I mean, it includes qualitative considerations—and that is almost a totally subjective kind of exercise, you can do with it what you will. Do you think that we must in all of our analysis include the qualitative benefits and qualitative costs, even on such things as clean air?

And if so, then how do we make sure that it's being measured in good faith. Either one of you gentlemen, or both.

Mr. HAHN. I'll be happy to take a stab at that. There is no easy answer to that question. But I think—we're so far away from that point that I think that we can make a lot of progress simply by giving an honest accounting of what we know.

And then suppose we add up the score sheet, and the benefits fall far short of the costs for regulation X, and then somebody says,

ah, but you didn't consider this qualitative result related to ecosystems or the quality of life or what have you.

Then I would like the administrator of EPA, or whomever, to make the case, either to the President or to the Congress, that I am still going to go ahead with this, because I think these qualitative benefits are so large.

The alternative, though, to not having any of this analysis readily available in a form that is easily digestible is for rhetoric to take over.

So that's the first point. The second point, and this relates to what Jim Miller said earlier, and what I advocate, is sure, since we can't quantify all of the benefits and costs associated with regulation, we ought to seriously consider a regulatory budget.

In the same way, companies have a budget for how many projects they're going to invest in in the coming year, the government should have a budget in terms of the regulatory costs it can impose on the private sector.

And at this point, just to make one closing remark, I alluded to this survey that Congressman Bliley had sent out to 12 regulatory agencies. What he did is he asked them for a list of documents describing their regulatory costs, their administrative costs, costs that they might impose on other agencies, costs they impose on the private sector, and costs they impose on consumers.

The salient results of this survey is that for no single regulation was an agency able to list documents that told you completely what the costs were in those categories. Moreover, the majority of these agencies couldn't provide a list of a single document describing a single cost.

So in my view, what we have here is a few agencies keeping track of a few selected costs of regulation, and a majority of agencies not listing a single document containing a single cost.

Chairman THOMPSON. Because there's no requirement under law.

Mr. HAHN. Precisely. There's nothing that gives them an incentive to do this. Dr. Portney talked about the fact that OMB is not printing in its reg program a review of the regulations each year which would make it easier for disinterested analysts like ourselves to analyze what the costs and benefits of regulation are.

What I am telling you is even if OIRA makes a good faith effort to do this, and even if we keep the survey over at Commerce, which I endorse—I believe that's a good idea—we still are only seeing the tip of the iceberg. Because, as you point out, Senator, they have no incentive to supply this.

Chairman THOMPSON. Well, I will quote you the next time we have this debate when others who oppose regulatory reform talk about the cost-benefits of the life of a child, and things of that nature. That's what we're confronting, as you well know.

Mr. Portney, do you have any comment on that?

Mr. PORTNEY. I would second what Bob says. I think if you do not allow the agencies to take into account qualitative considerations that the general public knows are important benefits, or adverse effects of regulation, then you are going to create the impression that the deck has been stacked and we are only focusing on narrow things that we can measure. And I think that will undermine public confidence in this.

The downside to admitting these qualitative concerns of course is that you get a regulator who may say: "Well, and it is going to do a little good for visibility and that is worth all of the other costs."

But in a sense, he or she will have had to do that openly, and if that is not a tradeoff that the American public supports, then you vote for a new administration and you get a new regulatory official. And that is the way this process ought to work.

The advantage of requiring information on benefits and costs, whether it is qualitative or quantitative, is that it means you put in front of the public the pros and cons of this, and you provide information so that the public can decide whether our regulators are making the right tradeoffs in our interests. That is the best we can do.

Chairman THOMPSON. Thank you very much.

I am going to call on Mr. Holman right now. Scott Holman, president of Bay Cast, Inc., representing the U.S. Chamber of Commerce.

TESTIMONY OF SCOTT L. HOLMAN, PRESIDENT, BAY CAST, INC., BAY CITY, MICHIGAN, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. HOLMAN. Thank you, Chairman Thompson.

Thank you for this opportunity to present testimony on behalf of the Chamber and its more than 15,000 members, 96 percent of which are small businesses like my own.

I am owner and president of Bay Cast, Inc., which is a small manufacturer of steel castings for the automotive, tooling, machine tools, steel mill and construction industries. In other words, a foundry.

I have also been a delegate to the White House Conference on Small Business. I am a director of the Chamber, and regional implementation chair for that White House Conference on Small Business.

First, I want to salute you and your colleagues for historic efforts to make the Federal regulatory process more accountable and responsive to small business.

Certainly, this Congress had done more to provide meaningful changes to the Federal regulatory system than has ever been achieved before. But much more needs to be done to fix the system.

Presidential directives such as the 1993 Executive Order on Regulatory Planning and Review were intended to ease the burden of Federal regulations on all regulated communities.

Despite the promises of the 1993 Executive Order, small businesses see little evidence to suggest that the regulatory burdens have been reduced, or that fundamental changes have occurred in the process by which Federal regulations are created.

Many regulations continue to impede the ability of small businesses to compete in the emerging global economy. For example, a regulation relevant to just one of the many raw materials used in the metal casting industry, my industry, deals with sand.

Every year, foundries use and dispose of 7 to 8 million tons of sand in the metal casting process. Ninety to 95 percent of this is not toxic when tested with the TCLP method. That portion of the

used sand that fails to past the TCLP test is easily identifiable by specific production process.

An independent study in Wisconsin showed used foundry sand to be less than a threat to the environment or human health, and even natural background soils. This material is, in fact, a commodity that can be made available for re-use in numerous construction-related applications.

Foundries across the Nation face tremendous hurdles in getting approval for beneficial re-use, paying ever-increasing disposal costs for sand. Disposal costs for these and other reusable materials approach $500 million for the industry, and consumes valuable landfill space.

This is too much to pay for materials which have been judged to be cleaner than dirt.

Another example deals with the Hazard Communication Standard, commonly known as the "employee right to know" regulation. It requires employers to identify workplace chemical hazards, provide implant training, at least annually, and provide written precautions for their safe use and handling through material safety data sheets, MSDS sheets.

In theory, the regulation sounds quite reasonable. In practice, it is a blizzard of incoming and outgoing paperwork. Most of the information contained in the MSDSs is so esoteric that it could only be understood by professionals trained in chemistry and toxicology.

When it is not complicated, it borders on the absurd. MSDSs are required for hand soap, white-out and blackboard chalk. And castings, by the way; steel castings.

Small businesses want to have a safe and healthful workplace. We typically live where we work, we care about our environment, and our employees, who are also our neighbors. We want to comply with the laws and regulations.

This past summer, the Chamber's Regulatory Affairs Committee completed a survey of a sampling of Chamber members from all industry sectors about the effect of Federal regulation.

The survey showed that small businesses find it extremely difficult to stay on top of the regulatory rulemaking process, and compliance requirements.

When asked which aspects of compliance are most burdensome, keeping track of new regulations rank the highest, followed by employee training, MSDS sheets, and recordkeeping.

The survey reported that businesses hardly ever find out about new regulations from the regulatory agency themselves. Or when an agency is in the process of drafting a regulation so that they can be a part of having the input.

Paperwork requirements specifically in the area of tax compliance are one of small businesses' greatest burdens. The Paperwork Reduction Act of 1995, and the White House Conference on Small Business Goals, targeted a 10 percent reduction during the first 2 years. The government, as a whole, however, will only attain about 1 percent of this reduction, this year.

This effort has not been helped by the IRS exempting itself from the act. Despite EPA's attempt to mop up, more is being put into the regulatory pipeline than is coming out.

There is no gain for small business if getting rid of old, unnecessary paperwork is just replaced by forms required by new regulations. We hope that our years of effort in strengthening the act will not have been wasted because it is not being properly and fully implemented.

Let me close by making a few comments about how the realities of running a small company relate to how Federal agencies can and should operate.

The free market system makes me fully accountable, believe me, for my decisions. The Federal regulatory infrastructure should be just as accountable, if not more so, given its role with the public trust.

Efforts to promote regulatory accountability, efficiency, flexibility, are vital to win back the confidence of small business in a regulatory system that suffers from a serious gap.

Small business is proud of the vital role it plays in the American economy, having to deal with an out-of-control, unfair, and just plain silly regulatory system that undermines that pride.

Mr. Chairman, and Members of the Subcommittee, thank you for the privilege of allowing me to speak to you today. I am pleased to answer any questions.

[The statement of Mr. Holman follows:]

PREPARED STATEMENT OF SCOTT L. HOLMAN

Chairman Thompson and Members of the Subcommittee, I am Scott Holman, owner and President of Bay Cast Inc., of Bay City, Michigan. My company is a small manufacturer of large custom steel castings for the automotive tooling, machine tool, steel mill and construction industries.

I am a member of the Board of Directors and the Small Business Council of the U.S. Chamber of Commerce. I also serve as Chairman of the Chamber's Regulatory Affairs Committee. I was a delegate to the 1995 White House Conference on Small Business and served as the Michigan State Chair for both the regulatory and taxation committees.

Thank you for this opportunity to present testimony on behalf of the Chamber and its more than 215,000 members, 96 percent of which have fewer than 100 employees and 83 percent of which have fewer than 25 employees. I am here representing the vast majority of Chamber members who must deal daily with meeting a payroll and the myriad of confusing Federal regulations and the burdens they impose.

First, I want to salute you and your colleagues for your historic efforts to make the Federal regulatory process more accountable and responsive to small business. Certainly this Congress has done more to provide meaningful changes to the Federal regulatory system than has ever been achieved before. The Unfunded Mandates Act, the Small Business Regulatory Enforcement Fairness Act and the Paperwork Reduction Act will, hopefully, help provide some common sense and rationality to the fragmented and overly complex system with which we must deal.

Much more needs to be done to fix the system. Presidential directives such as the 1993 Executive Order 12866 on Regulatory Planning and Review were intended to ease the burden of Federal regulations on all regulated communities by eliminating or reducing unnecessary red tape and regulations, and requiring use of cost-benefit analysis and market-based incentives. According to a recent report by the Competitive Enterprise Institute, the opposite is occurring. In the past several years, new rules affecting small business have increased seven percent. The regulatory costs for small businesses are much greater than those for large firms. The cost for new rules imposed this year is expected to be more than $11.6 billion annually. Also, more than 4,500 new rules are in the regulatory pipeline.

Despite the promises of the 1993 Executive Order, small businesses see little evidence to suggest that regulatory burdens have been reduced or that fundamental changes have occurred in the process by which Federal regulations are created.

As a small business owner, I find it frustrating that regulators can't seem to figure out that Federal regulations and paperwork cost not only money but time spent figuring out how to comply.

Many regulations continue to impede the ability of small business to compete in the emerging global economy. For example, a regulation relevant to just one of the many raw materials used in the metalcasting industry deals with sand.

Every year, foundries use more than 100 million tons of sand in the metalcasting process, and dispose of 7 to 8 million tons of this material. Approximately 90–95 percent of used foundry sand is not toxic when tested by the toxicity characteristic leaching procedure (TCLP) used to determine toxicity under the Resource Conservation and Recovery Act (RCRA). That portion of the used sand universe that fails to pass the TCLP test is easily identifiable by a specific production process that is its source. An independent study in Wisconsin showed used foundry sand to be less of a threat to the environment or human health than even natural background soils.

This material is, in fact, a commodity that can be made available for reuse in numerous construction-related applications. Technology also exists to convert used foundry sand into glass for use in roofing and other materials. Yet foundries across the nation face tremendous hurdles in getting approval for beneficial reuses of this byproduct of their process, so foundries end up paying ever-increasing disposal costs for sand.

The burdens imposed by these restrictions amount to a significant cost for small facilities. Instead of building incentives into our regulations that allow small metalcasters to make comparatively more productive investments, restrictions are imposed on both reuse as well as disposal. Disposal costs for these and other reusable materials approach $500 million for the industry—depending on landfill tonnage fees. This is too much to pay for materials which have been judged to be "cleaner than dirt."

It is sad and ironic that our society and small metalcasters are forced to pay a double cost because of this excessive regulation: we lose the opportunity to convert the sand into useful economic items and we pay the cost of disposal.

Over the last year, the Environmental Protection Agency (EPA) has become more receptive to the idea of reusing and recycling sand within our facilities and for other uses but we have yet to see it reflected in any rulemaking proposal.

Another example deals with the Hazard Communication Standard, commonly known as the "employee right to know" regulation. It requires employers to identify workplace chemical hazards, communicate them to employees and provide written precautions for their safe use and handling. Information must be provided in the form of material safety data sheets (MSDSs). In theory, the regulation sounds reasonable. In practice, the result often is a blizzard of paperwork. Most of the information contained in the MSDSs is so esoteric that it could only be understood by professionals trained in chemistry or toxicology. Consequently, there is not much impetus for the worker to retain the little information that can be comprehended, no matter how much training I provide. When it is not complicated, it borders on the absurd. MSDSs are required for hand soap, white-out and charcoal dust.

Small businesses want to have a safe and healthful workplace. Typically, small business people like myself live where we work. We care about our environment and the needs of our employees who are also our neighbors. We want to comply with the laws and regulations. But due to limited staff and resources, we are unable to devote the enormous time and effort necessary to assimilate the ever-growing body of Federal regulations that may apply.

This past summer, the Chamber's Regulatory Affairs Committee completed a survey of a sampling of Chamber members from all industry sectors about the effect of Federal regulation and regulatory reforms they would like to see occur. The survey showed that small businesses find it extremely difficult to stay on top of the regulatory rulemaking process and compliance requirements. When asked which aspects of compliance are most burdensome, keeping track of new regulations ranked highest, followed by employee training, MSDSs and record-keeping.

The survey reported that businesses hardly ever find out about a new regulation from a regulatory agency or when an agency is in the process of drafting a regulation. Only one in ten companies learn from the relevant Federal agency about a new rule. Most find out either during the legislative process or more often, after the new regulation becomes final, and in some cases, only after the regulation has been broken. Most small businesses have limited management and administrative staffs, as in the case of my business, and none of them have the resources or time to scrutinize the *Federal Register* daily or focus on which government regulation may be applicable in any given situation.

One in six survey respondents reported having to lay off employees in order to offset the costs of labor and employee benefit regulations. One in ten businesses reported having to lay off workers to meet the cost of environmental and natural resource regulations.

Among the recommendations for fixing the regulatory process, 91 percent of survey respondents felt Federal agencies should be required to utilize the best available science (risk assessments) in developing regulations affecting environment, health and safety. Other recommendations include the urgent need to offer greater flexibility in complying with Federal laws and regulations, cost benefit analysis, regulatory accountability, fewer paperwork requirements and safeguarding property rights. Small businesses need Federal agencies to be more responsive to their needs and to be more helpful in making clear the obligations asked of small business.

Paperwork requirements, specifically in the area of tax compliance, are one of small business's greatest burdens. According to a recent study by Thomas Hopkins of the Center for the Study of American Business, the cost of tax compliance for business is estimated from $109 to $123 billion annually. As with other regulatory burdens, the tax compliance burden for small businesses is much greater in proportion to large businesses. However, efforts to rein in paperwork burdens in this area are being evaded because the Internal Revenue Service which is responsible for three-quarters of the government-wide paperwork burden, has been exempted from the 1995 Paperwork Reduction Act.

Even in cases where agencies such as the EPA are attempting to make serious paperwork reductions, these efforts are totally undermined by paperwork requirements from new regulations. There is no gain for small business if getting rid of old unnecessary paperwork is just replaced by new forms required by new regulations. We hope that our years of effort to strengthen the Act will not have been wasted because it is not being properly and fully implemented.

Let me close by making a few comments about how the realities of running a small company relate to how Federal agencies can and should operate. The free market system makes me fully accountable for my decisions. The Federal regulatory infrastructure should be just as accountable, if not more so, given its role with the public trust. The Chamber is committed fully to working with you in overseeing Federal agencies and their performance in complying with all administrative laws governing the rulemaking process. This is an absolutely essential function. Meaningful change will not occur unless uncompromising accountability is a part of the system. Furthermore, proposals like the Stevens Regulatory Accounting Act pending before Congress is an important step in determining the cumulative costs and benefits of the Federal regulatory programs. Conservative estimates of Federal regulations place the cost at over $650 billion—that's more than $6,500 a year for the average American household. It is time that the unknown costs of the regulatory system be brought to light. Greater knowledge about the true cost of regulatory burdens is necessary to build the will to change them.

Changing the regulatory process so that it makes sense will help build the confidence of the public that its concerns are being heard and responded to. Efforts to promote regulatory accountability, efficiency and flexibility are vital to win back the confidence of small business in a regulatory system that suffers from a serious credibility gap. Small business is proud of the vital role it plays in the American economy. Having to deal with an out-of-control, unfair and just plain silly regulatory system undermines that pride.

Mr. Chairman and Members of this Subcommittee, thank you for the privilege of allowing me to speak to you today. I am pleased to answer any questions.

Chairman THOMPSON. Thank you very much. Mr. Stevens.

TESTIMONY OF L. NYE STEVENS, DIRECTOR, FEDERAL MANAGEMENT AND WORKFORCE ISSUES, GENERAL GOVERNMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE

Mr. STEVENS. Yes, sir. Mr. Chairman, there has already been a good deal of discussion of our findings and the work that we did for the Committee, and I do not think I need to reiterate them because most of them were pretty well explored. There are two or three points that did not get covered or were not covered precisely accurately, and I would like to clear those up.

I would also like to recognize Curtis Copeland who is behind me, who is the leader of the team that did this work. It included Ellen Weinholt, Theresa Roberson, and Liz Powell. They will be glad to hear, I am sure, that page counts of 16,000 pages in the Federal Register are probably not going to be nearly so much sought after

in the future, as they were for this work. It did take a good deal of their time.

You are already aware, or have already noted that 28 out of the 29 rules that should have had full-blown cost-benefit analyses did have them. There was not comparable attention to the fact that those rules that are not economically significant still have to have, under the Executive Order, an "assessment" of the costs and benefits. We looked at 23 of those issued in 1995, and found that 14 of them, more than two-thirds, did not have even that minimal threshold.

You also noted earlier in the hearing that it is often impossible to tell what impact OIRA had on rules. The statistics just say the rules changed while they were at OIRA and not necessarily that OIRA changed them.

We did find, however, that four or five of these rules really did have a pretty good account. They were all from EPA. They really did have a pretty good after-the-fact account of what the relationship between OIRA and EPA had been on this particular rule, and laid out the three or four major changes that OIRA had stimulated. And it was very clear to us.

We did not find that in very many of these cases, but I did not want to leave the impression that it was an impossible task. It is not.

The page eliminations, I would agree, most of them, as has already been said, did just clear up deadwood in regulations, duplications, and obsolete requirements, and Mrs. Katzen then said that she placed more faith in the comparable effort to revise or reinvent the 31,000 pages of regulations that the NPR had also committed to.

And we did look at those as well. There has not been any discussion of it yet. And in about half the cases, we really could not tell whether there was a reduction of burden, any actual reduction of burden arising from the work to reinvent. A lot of it seemed to us just to be regular regulatory maintenance. Certainly there was not any reduction when, for example, the National Park Service proposed to recognize the official Park Police insignia. That did not seem, to us, to bear any relationship at all to regulatory burden.

And we did find that in about 21 percent of the cases, there could be some discernable relationship to regulatory burden, but that was outweighed by the 26 percent where we judged that there was not.

And then finally, I would agree that page counts are really not the point here. Ultimately, it is going to depend on the reactions and the perceptions of the regulated community, and some of which you have heard today, and others you will hear in other hearings like this. I would urge this Committee to stay involved in this subject.

We are issuing a major report to the Committee and others, in a month or so, that will have some insights into the reactions and the perceptions of the regulated community and we look forward to sharing that with you.

[The statement of Mr. Stevens follows:]

PREPARED STATEMENT OF L. NYE STEVENS

SUMMARY

Executive Order 12866 was intended to improve regulatory planning and coordination and is administered by OMB's Office of Information and Regulatory Affairs (OIRA). At the Committee's request, GAO examined three issues: (1) implementation of the order's cost-benefit analysis requirements, (2) OIRA changes to agencies' proposed regulations, and (3) agencies' efforts to eliminate and revise regulations. GAO did not attempt to assess the quality of the cost-benefit analyses or their effect on rules, the quality of the regulatory reviews OIRA conducted, or the ultimate value of the administration's regulatory reform effort.

The executive order states that agencies should submit detailed cost-benefit analyses to OIRA for all economically significant regulatory actions, and GAO found such analyses at OIRA for 28 of the 29 such final rules issued in 1995. OIRA said the other such rule did not need a full cost-benefit analysis because it was implementing a statutory requirement. The order also states that all regulatory actions that are significant for noneconomic reasons should have an "assessment of costs and benefits." GAO found that 14 of the 23 significant rules that it examined did not have such an assessment, and OIRA said these rules did not need an assessment because of particular circumstances in each case.

Although aggregate statistics indicate that the proportion of regulations that changed while under OIRA review has increased, the source of those changes is not clear. GAO examined OIRA and agency files for the Environmental Protection Agency (EPA) and Department of Transportation (DOT) regulations that the aggregate data indicated had changed. It appeared that most of these rules were changed at least in part because of suggestions or recommendations by OIRA, and most of the changes appeared significant. However, in about a third of the cases it was unclear whether any OIRA-recommended changes had been made. In contrast to the executive order's requirement, only a few of the files clearly indicated what changes had been made to the rules because of OIRA.

GAO found that EPA and DOT reports on the number of pages of regulations they had eliminated were generally accurate. However, because new regulations are being added at the same time that regulations are being eliminated, the total number of pages of regulations may actually increase in some agencies. Page eliminations are often being done because the rules are obsolete or duplicative; revisions are often intended to clarify or update rules. GAO's analysis indicated that many of the page eliminations did not appear to reduce regulatory burden, but GAO could not determine whether burden was likely to be reduced as a result of most of the revisions.

REGULATORY REFORM: IMPLEMENTATION OF THE REGULATORY REVIEW EXECUTIVE ORDER

Mr. Chairman and Members of the Committee:

We are pleased to be here today to discuss the implementation of Executive Order 12866, "Regulatory Planning and Review." Issued on September 30, 1993, the order was designed to, among other things, "enhance planning and coordination with respect to both new and existing regulations." It outlines the administration's regulatory philosophy and principles, describes the organization of the Federal regulatory system, and initiated a process to review and revise or eliminate certain existing regulations. That review process ultimately became part of the administration's overall regulatory reform effort.[1] The order also allocates responsibilities to both Federal agencies and the Office of Management and Budget (OMB) in a centralized regulatory review process, and recognizes OMB's Office of Information and Regulatory Affairs (OIRA) as the repository of expertise on regulatory issues.[2]

As the Chairman and Ranking Member of this Subcommittee requested, we focused our review on three issues: (1) the extent to which agencies are adhering to and OIRA is applying the executive order's cost-benefit analysis requirements; (2)

[1] Regulatory reform is one element of the administration's "reinventing government" initiative. For a discussion of the reform proposals, see *Regulatory Reform: How Can Congress Assess the Administration's Initiatives?* (GAO/T–GGD–95–206, July 18, 1995).

[2] OIRA was created by the Paperwork Reduction Act of 1980. It oversees agency activity in three areas: regulation, collection of information, and information resources management. Regulation and information collection review staff currently include a deputy administrator, three branch chiefs, three administrative support assistants, and 20 analysts.

whether OIRA is significantly changing agencies' proposed regulations during its review process; and (3) whether agencies are eliminating regulations and, if so, whether the elimination and revision of regulations are reducing regulatory burden. The methodology we used concerning each issue will be discussed in detail later, but in general we met with OIRA and agency officials and reviewed OIRA and agency files regarding specific regulations.

It is also important that I also describe what we did *not* do. We did not reach any overall conclusions regarding the quality of the regulatory reviews OIRA conducted or the ultimate value of the administration's regulatory reform effort. Neither did we attempt to assess the quality of the cost-benefit analyses that agencies conducted or how those analyses affected agencies' decisionmaking. However, another GAO review currently underway is examining qualitative aspects of selected cost-benefit analyses prepared by the Environmental Protection Agency (EPA), including the extent to which common assumptions are used in preparing such analyses, regulatory alternatives are being evaluated, and potential benefits are monetized. Our review focused on the three issues I mentioned, and as I will describe later, data limitations prevented us from fully addressing some of those issues.

Cost-Benefit Analysis Requirements

Agencies' responsibilities in the executive order to assess the costs and benefits of their proposed regulations vary depending on whether the regulatory action involved is "significant" or "economically significant."[3] A significant regulatory action is defined in the order as any action "that is likely to result in a rule that may

> (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
>
> (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
>
> (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
>
> (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."

Any regulatory action that meets the first of these criteria is considered "economically significant." If the action does not meet the first criterion but meets any of the other three criteria, it is considered "significant for noneconomic reasons."

OIRA's Interpretation of the Order's Cost-Benefit Requirements

For each significant regulatory action, the executive order requires the issuing agency to provide OIRA with "an assessment of the potential costs and benefits of the regulatory action."[4] OIRA officials told us that the degree to which agencies should assess regulatory cost and benefits varies depending on the nature of the regulatory action at issue. However, they said that agencies should, at a minimum, include a statement in the preamble to proposed significant regulations indicating that they considered the potential costs and benefits of the regulations during their development.

For economically significant actions, the order requires agencies to provide to OIRA

> "(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
>
> (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the

[3] According to the executive order, a "regulatory action" is any substantive action by an agency, normally published in the *Federal Register*, that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

[4] The executive order permits the OIRA Administrator to waive review of any significant regulatory action, in which case the agency need not comply with the order's cost-benefit requirements.

government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and

(iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives."

OIRA officials told us that these provisions mean that agencies should provide OIRA with a copy of a cost-benefit analysis when economically significant proposed regulations are submitted to OIRA for review. However, they also said that, in practice, agencies do not do cost-benefit analyses for all economically significant proposed rules. For example, they said that it would not be worth the time and effort required for an agency to do a cost-benefit analysis for economically significant crop price support regulations based on legislated formula.

As interpreted and administered by OIRA, the cost-benefit requirements in Executive Order 12866 are similar to the requirements in the order it replaced. Executive Order 12291, issued by President Reagan in 1981, required agencies to submit a "regulatory impact analysis" with every "major rule." A major rule was defined as one that was likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the international competitiveness of U.S. enterprises—criteria similar to those used to describe "economically significant" rules in Executive Order 12866. Like the cost-benefit requirements in the Clinton executive order, the Reagan order said regulatory impact analyses should contain descriptions of the potential costs and benefits of the rule and of the costs and benefits of alternative approaches.

Implementation of Cost-Benefit Requirements for Economically Significant Rules

To determine the extent to which agencies provide a copy of a cost-benefit analysis for each economically significant rule, we asked the Regulatory Information Service Center (RISC) to provide us with a listing of all such rules that were published in the *Federal Register* as final rules during calendar year 1995.[5] RISC provided us with a listing of 39 rules that it said met those criteria.[6] However, we discovered that 10 of these 39 rules were not economically significant and/or were not final rules, and therefore should not have been part of our analysis.[7]

Of the remaining 29 rules, the largest number were from the Department of Agriculture (13 rules), followed by the Department of Transportation (DOT) (5 rules), and EPA (4 rules). The subject matter of the rules ranged widely, including

—agricultural regulations (e.g., rice acreage reduction; wheat, feed grain, and oilseed programs; and crop sugar cane and sugar beet price support loan rates);
—standards for the use of double hull tankers carrying oil in bulk;
—migratory bird hunting regulations;
—National Emission Standards for Hazardous Air Pollutants for petroleum refineries; and
—regulations on the payment of covered outpatient drugs under rebate agreements with manufacturers.

We reviewed OIRA's files for each of these rules to see if they contained a cost-benefit analysis. If we could not locate the analysis in OIRA's files, we asked OIRA staff for a copy of the analysis. For 28 of the 29 economically significant rules, a cost-benefit analysis document was either in OIRA's files or was provided by OIRA

[5] RISC works closely with OMB to provide information to the president, Congress, and the public about Federal regulatory policies. Its primary role is to coordinate the development of the *Unified Agenda of Federal Regulatory and Deregulatory Actions*, a comprehensive listing of proposed and final regulations.

[6] In this review, we did not attempt to determine whether other rules should have been classified as "economically significant" or "significant."

[7] OIRA staff told us that 8 of the 10 rules were not economically significant, and the text of some of the rules also indicated that they were not economically significant. One rule was a proposed rule, not a final rule, and another rule was neither economically significant nor final. None of the files for these 10 rules contained a cost-benefit analysis.

staff. Although we did not attempt to assess the quality of the analyses conducted, the analyses for 26 of the 28 rules appeared to have all three of the elements the executive order requires—assessments of costs, benefits, and the costs and benefits of alternative approaches. One analysis covering two rules (the early- and late-season migratory bird hunting rules) appeared to lack a discussion of the costs and benefits of alternative approaches.

The one economically significant final rule for which we could not find a cost-benefit analysis was issued by the Department of Veterans Affairs (VA) in response to a Supreme Court decision interpreting a statutory requirement that VA provide compensation for disability or death resulting from VA hospitalization, medical or surgical treatment, or examination. The file for the rule did contain a discussion of the rule's "costs and budgetary impact" that centered on how to calculate the overall cost of the payments. OIRA officials said that the file contained no discussion of the benefits of the payments or alternative approaches because the payments were statutorily required, and therefore the cost discussion alone met the requirements of the executive order.

Implementation of Cost-Benefit Requirements for Rules Significant for Noneconomic Reasons

We also asked RISC to provide us with a list of all final rules issued in 1995 that were significant for noneconomic reasons. RISC provided a list of 259 such rules, from which we randomly selected a 10 percent sample (26 rules). Although the size of this sample prevents us from generalizing our findings to all 259 rules, the sample can demonstrate the kinds of cost-benefit "assessments" OIRA said satisfied the executive order's requirement.

We determined that three of the 26 significant rules were proposed, not final, rules and therefore should not have been part of our review.[8] Of the remaining 23 rules, 4 had a separate cost-benefit analysis document in the OIRA files, and 5 other rules contained language discussing the costs and benefits of the regulatory action. The remaining 14 rules contained neither a cost-benefit analysis nor language in the rule discussing the rules' costs or benefits.

OIRA officials said a cost-benefit assessment was not prepared for these 14 rules because of particular circumstances in each case. They said that some of the rules were simply implementing a detailed statutory or procedural requirement, some were essentially administrative in nature (e.g., harmonizing two existing programs in different agencies), one eliminated an outdated requirement, and one was significant only because of its relation to a larger rule. In such cases, OIRA officials said they do not recommend that agencies conduct a cost-benefit assessment because it would not contribute substantially to decisionmaking. In essence, they said, a blanket requirement that agencies conduct a cost-benefit assessment would not pass a cost-benefit test.

OIRA Changes to Regulations

The second major issue we were asked to address was whether OIRA is significantly changing agencies' proposed regulations during the review process. Although we found evidence of some OIRA involvement in all of the regulations we investigated, the data available did not provide sufficient evidence to conclusively determine whether OIRA-recommended changes were made to all of the regulations. Aggregate data compiled by RISC indicate that the proportion of regulations that were changed during the time period they were under OIRA review increased substantially between 1981 and 1996, but the data do not reveal the source of those changes. OIRA and agency files and interviews with OIRA staff indicated that most of the rules that the aggregate data indicated had changed while at OIRA were changed at least in part because of suggestions or recommendations by OIRA, and most of those changes appeared significant. However, in many other cases it was unclear what changes had been made to the rules during the review process or whether OIRA had recommended those changes. Despite this lack of documentation, OIRA and agency officials said OIRA does affect the development of regulations through discussions that occur before and during the rulemaking process or simply by its presence in that process.

OIRA Regulatory Review Process

OIRA has been responsible for reviewing proposed rules since its creation in 1981. Under Executive Order 12291, OIRA reviewed both major and nonmajor rules (on

[8] All three of the proposed rules had either cost-benefit analyses or language discussing the costs and benefits of the regulatory action

average, about 2,300 regulatory actions at proposed and final rulemaking per year) from all Federal agencies except independent regulatory agencies. The order authorized OMB to review any preliminary or final regulatory impact analysis, notice of proposed rulemaking, or final rule "based on the requirements of this order."[9] OIRA's reviews under this executive order were highly controversial, with critics contending that OIRA exerted too much control over the development of rules and that decisions were being made without appropriate public scrutiny.

Executive Order 12866 requires the OIRA Administrator to "provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency." As was the case under Executive Order 12291, the current order does not authorize OIRA to review rules from independent agencies. However, instead of reviewing both major and nonmajor regulations, OIRA's reviews are currently limited to significant regulatory actions (about 800 per year at proposed and final rulemaking). OIRA conducts those reviews before the publication of the rule in the *Federal Register* as a notice of proposed rulemaking and before its publication as a final rule. OIRA also sometimes reviews rules prior to the proposed rulemaking stage. In general, OIRA must complete its review with an agency within 90 days of receiving the rule.

One of the stated objectives of Executive Order 12866 is "to make the process more accessible and open to the public." In conjunction with that objective, the order requires agencies to "[i]dentify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA" after the action has been published in the *Federal Register*. The OIRA Administrator pointed out that requirement in guidance that was sent to the heads of departments and agencies in October 1993.

Another objective of the executive order is to "reaffirm the primacy of Federal agencies in the regulatory decisionmaking process." In a May 1994 report to the President on the first 6 months of the executive order, the OIRA Administrator said the relationship between OIRA and the agencies had "vastly improved" and that "rule writers and rule reviewers were learning to work together as partners rather than as adversaries." Agency officials we spoke with at both EPA and DOT confirmed this perception. OIRA officials told us that, during this administration, they work with the agencies before the formal submission of the rules. Because of the often informal nature of this process, the OIRA Administrator suggested in her May 1994 report to the President that the order's requirement that agencies document OIRA changes "may warrant further consideration" because "changes that result from regulatory review are the product of collegial discussions" often involving multiple agencies. She said that after such an extended process, "it is not clear that identifying changes made at the suggestion of OIRA is accurate . . . or meaningful."

EPA and DOT officials told us that regulations are frequently developed and changed as a result of meetings and telephone calls between agency and OIRA staff at various stages of the rulemaking process. They also said that OIRA frequently affects the development of rules in ways that may not be reflected in their or OIRA's files. For example, DOT officials said that they will not even propose certain regulatory provisions because they know that OIRA will not find them acceptable.

Aggregate Statistics Indicate Rules Change While at OIRA, but Source of Changes is Unclear

At the conclusion of each stage of the review process, OIRA staff complete a regulatory review worksheet that indicates whether the proposed rule was (1) "consistent (with the executive order) without change," (2) "consistent with change," (3) "withdrawn" by the agency, (4) "returned" by OIRA for further consideration, (5) required to be issued under a statutory or judicial deadline (thereby attenuating OIRA's review), or (6) whether some other action was taken.[10] OIRA does not have the authority under the executive order to disapprove regulatory actions.

At our request, RISC provided data on the disposition of all rules submitted to OIRA from 1981 through June 1996.[11] During this period, an average of 92 percent of the regulatory actions were coded as either "consistent with change" or "consistent without change." Relatively few actions were withdrawn by the agencies (an av-

[9] For a description of and statistics relating to OIRA's review process under Executive Order 12291, see *Regulatory Review: Information on OMB's Review Process* (GAO/GGD–89–101FS, July 14, 1989).

[10] The proportion of regulatory actions with mandated deadlines has increased between 1985 and 1992. See *Regulatory Reform: Information on Costs, Cost-Effectiveness, and Mandated Deadlines for Regulations* (GAO/PEMD–95–18BR, Mar. 8, 1995).

[11] Up to October 1, 1993, OIRA reviews were done under Executive Order 12291. Subsequently, the reviews were done under Executive Order 12866.

erage of less than 3 percent per year), and even fewer were returned or fell into some other status category. The proportion of rules returned by OIRA for further consideration appears somewhat less under Executive Order 12866 than under Executive Order 12291. Between 1981 and September 30, 1993, OIRA returned an average of about 1.3 percent of the rules it reviewed. Between October 1, 1993, and June 30, 1996, OIRA returned 0.2 percent (5 out of 2,366) of the rules it reviewed.

The percentage of actions that fell into the "consistent with change" or "without change" categories has varied dramatically over time. For example, in 1981, 87 percent of the regulatory actions were coded "consistent without change," and only 5 percent were coded as having been changed. However, by the first half of 1996, a greater percentage of regulatory actions were "changed" (48 percent) than were described as "consistent without change" (45 percent). Some of the difference in the degree to which rules were changed was probably due to the change in the number and type of rules that OIRA reviewed. Under Executive Order 12291, OIRA reviewed about 2,300 major and nonmajor rules per year; under Executive Order 12866, OIRA has reviewed fewer than 800 significant rules per year.

However, these data do not necessarily mean that OIRA is more likely to recommend changes to proposed rules than it did in the past. OIRA staff told us that they code regulatory actions as "consistent with change" if *any* changes are made to the actions while under review at OIRA, regardless of their source. They said that a regulatory action could be coded as "consistent with change" even if the changes were solely at the initiative of the agency promulgating the rule. Therefore, it is unclear whether the increased rate of "changes" over time means that OIRA is increasingly asking for changes in agencies' rules or whether agencies are more likely to submit rules as "works in progress," making further changes to the rules while they are under review at OIRA.

OIRA and Selected Agencies' Files Often Did Not Clearly Indicate OIRA's Effect

To better understand the nature of the changes being made to these rules, we asked RISC to provide a list of all rules that were initially submitted to OIRA for review during calendar year 1994.[12] RISC provided a list of 319 such rules and the action taken with respect to each rule (e.g., "consistent with change" or "consistent without change") at each stage of the rulemaking process (prerule, notice of proposed rulemaking, and final rulemaking) between their submission to OIRA in 1994 and the time we began our review in July 1996.

The RISC data indicated that, at some point in the rulemaking process, nearly 55 percent of the rules had changed while at OIRA. About 38 percent of the rules were coded "consistent without change" throughout the process, and about 7 percent had some other type of disposition (e.g., judicial deadline, withdrawn, or returned). Major differences existed in the number of rules that changed across the agencies. For example, 40 of the 54 EPA rules submitted to OIRA in 1994 (about 74 percent) were coded "consistent with change" in at least one stage of the rulemaking process.[13] In contrast, only 9 (30 percent) of the 30 DOT rules were coded "consistent with change" at some stage of the rulemaking process.[14] OIRA officials said that some of the differences in the number of changes made to rules are attributable to the level of centralized review at the agencies. They said that well-developed review processes in agencies reduce the need for OIRA-suggested changes to rules.

Of the 84 combined EPA and DOT rules, the RISC data indicated that 49 had changed while at OIRA, 21 were "consistent with no change," and 14 had some other disposition. We then focused our review on the 49 rules that the aggregate data indicated had changed. We first reviewed OIRA files and interviewed OIRA staff regarding each of the rules to determine the nature of the changes made and whether the changes were made at the suggestion or recommendation of OIRA. We also reviewed EPA and DOT files for these rules to determine whether agencies had identified for the public the changes that were made at the suggestion or recommendation of OIRA.

OIRA or agency files indicated that OIRA suggested changes that were made to 29 of the 49 combined EPA and DOT rules, and OIRA staff said that they had suggested changes that were made to 3 other rules. The file for one rule indicated OIRA had no suggested changes. For the remaining 16 rules, though, it was unclear whether OIRA had recommended any changes that were made to the rules.

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[12] We focused on 1994 rules to allow time for OIRA to review the rules at both the proposed and final rule stages.

[13] Only 1 rule was "consistent without change" throughout the process, and the remaining 13 rules were deadline cases, withdrawn, or returned or had one of those codes in conjunction with a "consistent with change" or "consistent without change" code.

[14] Twenty of the 30 DOT rules were "consistent without change" throughout the process, and 1 rule was withdrawn.

The OIRA and DOT files frequently did not indicate what changes were made to the rules or, if they did, whether the changes were made at the suggestion or recommendation of OIRA. The EPA files were usually more complete and often indicated substantial discussions between agency and OIRA representatives. They also sometimes contained copies of drafts of the rules indicating the changes that had been made during the review process. However, some of the EPA files did not have this type of documentation, and even those that did frequently did not clearly indicate whether OIRA had recommended those changes. For example, the EPA file for one of the 16 rules for which we could not determine OIRA changes contained more than two dozen faxes, letters, memos, or other forms of communication between the EPA and OIRA officials. Many of those documents referred to changes that had been made to the rule, but it was not clear whether the changes had been suggested by OIRA.

For those 29 files that we determined resulted in OIRA-suggested changes, we sometimes made those determinations by accumulating evidence from different sources or by reading notes written in the margins of documents. None of the DOT files and only a few of the EPA files contained a memo clearly documenting for the public that changes were made to the rules at the suggestion or recommendation of OIRA. Therefore, we do not believe that either EPA or DOT has closely adhered to the executive order's requirement to document changes made at the suggestion or recommendation of OIRA. As a result, the public would frequently find it difficult to determine what changes were made to regulatory actions because of OIRA.

Most OIRA Changes Appeared Substantive

In 21 of the 32 rules for which evidence existed of OIRA-suggested changes, the changes made to the rules appeared to be substantive in nature. For example:

—One EPA file indicated that EPA decided to make four "significant changes" to the rule's compliance criteria because of OMB's comments. The changes included limiting the technical and scientific information the rule required to be submitted and reducing the list of conditions that must be monitored from seven to three.

—Another EPA file indicated that OMB's comments resulted in the elimination of recordkeeping requirements from the rule and that language was added to the rule allowing waiver of certain requirements to avoid conflicts with requirements from another agency.

—An OIRA file indicated that DOT redrafted a rule's implementation schedule in response to an OMB request, allowing a more gradual implementation of the rule for certain elements of the regulated community.

In the other 11 rules, the changes appeared relatively minor. For example, one of the EPA files stated that the only changes made during the OMB review were "minor deletions of preamble language" and that "[n]o substantive changes to the proposal were suggested or recommended by OMB."

The lack of documentation of OIRA changes to the rules or documentation that reflects only a relatively minor change does not necessarily mean that OIRA did not play a significant role in the development of the rules in question. As I mentioned earlier, OIRA officials told us that during this administration they work with the agencies before rules are formally submitted. These kinds of discussions may not be reflected in documents at either the agencies or OIRA.

Elimination and Revision of Regulations

The third major issue we were asked to address was whether agencies were eliminating the regulations that the administration claimed were being eliminated, and whether the eliminations and revisions of rules were reducing regulatory burden. We found that EPA and DOT reports on the number of pages of regulations they had eliminated were generally accurate. However, because new regulations are being added at the same time that regulations are being eliminated and revised, the total number of pages of regulations may actually increase in some agencies. Available data indicate a variety of reasons why the regulations are being eliminated (e.g., because rules are outdated or are duplicative of other requirements) and revised (e.g., to clarify or update rules or to establish new procedures). Most of the page eliminations did not appear to reduce regulatory burden, but it was often unclear whether the regulatory revisions would do so.

Order's Requirement for Review Leads to Page Elimination and Revision Goals

Section 5 of Executive Order 12866 required each agency to submit a program to OIRA by December 31, 1993, under which it would periodically review its existing significant regulations to determine whether any should be modified or eliminated.

According to the order, the purpose of the review was to make the agency's regulatory program more effective, less burdensome, or better aligned with the President's priorities and the principles in the order.

There had been several previous requirements that Federal agencies review their existing regulations. For example, Executive Order 12044 ("Improving Government Regulations"), issued by President Carter in 1979, required agencies to review their existing rules "periodically." The Regulatory Flexibility Act of 1980 required agencies to publish in the *Federal Register* a plan for the periodic review of rules that "have or will have a significant economic impact upon a substantial number of small entities."[15] In 1992, President Bush sent a memorandum to all Federal departments and agencies calling for a 90-day moratorium on new proposed or final rules during which agencies were "to evaluate existing regulations and programs and to identify and accelerate action on initiatives that will eliminate any unnecessary regulatory burden or otherwise promote economic growth."

In an October 1993 memo to the heads of Federal departments and agencies, the Administrator of OIRA noted that previous administrations had undertaken similar review efforts but said that some of those efforts had been "so broad in scope that necessary analytic focus has been diffused, or needed followup has not occurred." She said the effort under the new executive order should be more productive because, among other things, "it focuses only on significant regulations and the legislation that mandates them." In its report on the first year of implementation of the order, OIRA further clarified the intent of this effort.

> "It is important to emphasize what the lookback effort is and is not. It is *not* directed at a simple elimination or expunging of specific regulations from the Code of Federal Regulations. Nor does it envision tinkering with regulatory provisions to consolidate or update provisions. Most of this type of change has already been accomplished, and the additional dividends are unlikely to be significant. Rather, the lookback provided for in the Executive Order speaks to a fundamental reengineering of entire regulatory systems. . . ."

On March 4, 1995, the President sent a memorandum to the heads of departments and agencies describing plans for changing the Federal regulatory system because "not all agencies have taken the steps necessary to implement regulatory reform." Among other things, the President directed each agency to conduct a page-by-page review of all its regulations in force and eliminate or revise those that were outdated or in need of reform. In June 1995, 28 agencies provided reports to the President describing the status of their regulatory reform efforts, often noting the number of pages of Federal regulations that would be eliminated or revised. On June 12, 1995, the President told participants at the White House Conference on Small Business that the page-by-page review effort had resulted in commitments to eliminate 16,000 pages of regulations from the 140,000 page *Code of Federal Regulations (CFR)*, and another 31,000 pages would be modified either through administrative or legislative means.

Since that time, agencies have periodically reported to OIRA on their progress in eliminating and revising rules. As of June 30, 1996, the agencies reported that 11,569 pages of the *CFR* had been eliminated (72 percent of the 16,000-page goal) and another 1,421 pages (9 percent) had been proposed for elimination. The agencies also indicated that 13,216 pages of the *CFR* had been "reinvented" (43 percent of the 31,000-page goal), and another 5,271 pages (17 percent) had been proposed for reinvention.

Page Elimination Totals Appear Generally Accurate, but Methodology Differs

Any analysis of the effect of reductions in the number of pages of regulatory text must recognize that one sentence of a regulation can impose more burden than 100 pages of regulations that are administrative in nature.[16] Thus, the number of pages eliminated in the *CFR* is, at best, an indirect measure of burden reduction. Nonetheless, it is one of the measures that the administration is using to gauge its own efforts.

To determine whether agencies were actually eliminating the number of pages of regulations that they claimed in their reports to OIRA, we obtained details of two

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[15] See 5 U.S.C. 601, 610. In *Regulatory Flexibility Act: Status of Agencies' Compliance* (GAO/GGD–94–105, Apr. 27, 1994), we reported the results of a study by the Small Business Administration that indicated many agencies had not planned for or conducted a review of their rules.

[16] See *Regulatory Reform: How Can Congress Assess the Administration's Initiatives?* (GAO/T–GGD–95–206, July 18, 1995) for a more complete discussion of this issue.

agencies' page elimination efforts—EPA's and DOT's.[17] Specifically, the agencies provided us with *Federal Register* citations for actions related to the pages that they claimed to have eliminated as of June 30, 1996. We then reviewed those citations, confirmed that the actions were final or interim final rules, noted what *CFR* parts or sections they eliminated, and then counted the eliminated pages in the *CFR* that were designated for removal.

Our analysis indicated that these agencies' page elimination claims were generally valid. EPA claimed to have eliminated 1,292 pages from the *CFR* (89 percent of the 1,457 pages it had promised in its 1995 report to the President), and we counted a total of 1,230 pages that had been removed. DOT claimed to have eliminated 1,247 pages (102 percent of the 1,221 pages it had promised), and we counted 1,232 pages that had been removed.

OIRA officials said that they had not provided guidance to the agencies in how to carry out the *CFR* page elimination and revision exercise. Perhaps as a consequence, the agencies we visited differed in the manner in which they counted the pages being eliminated and revised. EPA officials said they only counted *CFR* changes that occurred in 1995 (primarily after their June report to the President) or 1996. However, DOT officials said they counted any regulatory elimination or revision since the start of the Clinton administration in coming up with their tally of *CFR* pages eliminated or revised. Officials in both agencies also said there were differences within each of the agencies in the manner in which *CFR* pages were counted. For example, an EPA official said that some units within EPA simply "eyeballed" the pages being eliminated, whereas other units used more sophisticated methods of measuring the number of *CFR* pages being removed.

Page Elimination Effort Does Not Count Pages Added

OIRA officials said that the administration's goal was to eliminate 16,000 pages from the *CFR* as it existed at the start of the reinvention effort. They said the page elimination total does not take into account any pages that were added to the *CFR* during that effort, and therefore the *CFR* may not have 16,000 fewer pages than at the start of the administration's effort. However, they added that many of the pages being added to the *CFR* are statutorily mandated regulations, not new rules developed at the initiative of regulatory agencies.

The effect of pages being added to the *CFR* at the same time they were being eliminated can be seen at one of the agencies included in our review. An EPA official said that the agency had 14,384 pages of regulations in the *CFR* as of July 1, 1995. As of July 1, 1996, EPA said it had eliminated 1,292 pages in the *CFR*, but an EPA official told us in August 1996 that the number of pages of EPA regulations had expanded to 14,690 pages—a growth of more than 300 pages. The official said this growth was primarily driven by statutory requirements to develop new Clean Air Act regulations.

Government-wide data on changes in the number of regulatory pages are incomplete, but the data that are available suggest that, despite the contemporaneous addition of new regulations, the page elimination effort is having some effect on the size of the *CFR*. According to the Office of the Federal Register (OFR), the total number of pages in the *CFR* increased from 105,935 pages in 1985 to 138,186 in 1995. Data on the number of pages in the entire *CFR* for 1996 will not be available until the spring of 1997. However, an OFR official said that 1996 data for about half of the *CFR* volumes (titles 1 through 27) that have been revised indicate that the number of pages in those sections dropped from 68,282 in 1995 to 64,802 in 1996—a decline of 3,480 pages (about 5 percent). Those titles include regulations involving such topics as agriculture, banks and banking, energy, commerce and foreign trade, employees' benefits, food and drugs, highways, and housing and urban development.

Reasons for CFR Page Eliminations and Revisions

We also attempted to assess the reasons why the page eliminations and revisions were undertaken and whether those actions appeared to reduce substantive regulatory burden. To do so, we analyzed the *Unified Agenda of Federal Regulatory and Deregulatory Actions*, which provides uniform reporting of data on regulatory activities under development throughout the Federal Government.[18] The October 1995

[17] We selected these agencies because we were already examining the changes made to their regulations in another part of this review. We did not attempt to verify the number of pages being revised because of the difficulty involved in making that determination. Elimination of pages seemed more straightforward and, therefore, verifiable.

[18] The Regulatory Flexibility Act (5 U.S.C. 601–612) requires that agencies publish semiannual regulatory agendas describing regulatory actions that they are developing. Executive Order 12866 and OMB memorandums implementing section 4 of the order establish minimum

and April 1996 editions of the *Unified Agenda* contained a "reinventing government" data element that indicated whether the regulatory action was part of the administration's reinventing government effort and, if so, whether the result would be elimination of *CFR* text or revision of *CFR* text. In those entries, brief abstracts were usually included describing the action or proposed action. We discovered during our review that at least one agency (EPA) did not list all of its page elimination and revision efforts in the *Unified Agenda*. Nevertheless, the *Unified Agenda* is the most complete governmentwide compendium of those activities available.

Of the 5,354 separate entries in the October 1995 and April 1996 editions of the *Unified Agenda*, a total of 1,562 entries had a "reinventing government" data element. Of these, 211 entries indicated that the action involved the elimination of text in the *CFR*, and 1,351 entries said that the action would revise text. The agencies with the most reinvention entries were DOT (212 entries), the Department of the Interior (171 entries), and the Department of Health and Human Services (165 entries). Of the 211 rule elimination entries in the *Unified Agenda*, only 1 was considered economically significant, and 22 were classified as significant for noneconomic reasons. Forty-three of the 1,351 revisions were considered economically significant, and 386 were considered significant for noneconomic reasons.

Twenty-nine of the 211 page elimination entries did not contain an abstract describing the elimination effort. In about half of the remaining 182 entries, the abstracts indicated that the pages were being eliminated because the regulations were obsolete. In some cases, the agencies indicated that the regulations had not been enforced for some time. For example:

—VA said it was eliminating a regulation providing lump-sum payments to veterans involved in an incident in Texas in 1906.
—The Department of Energy said it was removing regulations "related to defunct programs of financial assistance for electric and hybrid vehicle research and methane transportation research."
—A proposed Department of Agriculture rule would eliminate the import licensing system for sugar exempted from an import licensing fee, which the Department said had been suspended in 1985 and eliminated on January 1, 1995.
—Another Department of Agriculture action removed its regulation pertaining to the Special Agricultural Workers program because "the program expired on December 1, 1988."
—FDA said it was proposing to eliminate certain regulations "that refer to substances no longer used in product formulations or to products that are no longer marketed."

The abstracts also frequently indicated that *CFR* text was being eliminated because the requirements were duplicative of other requirements that remained in the *CFR* (about 28 percent of the rule elimination abstracts).

The remaining 1,351 "Reinventing Government" entries indicated they would revise text in the *CFR* "to reduce burden or duplication, or streamline requirements." Of these, 287 did not contain an abstract describing the nature of the reinvention effort. Of the 1,064 entries that did have an abstract, the most common reason given for the action being taken was to clarify a regulatory requirement (about 28 percent of the entries). For example:

—The Department of the Interior said it was rewriting its civil penalty procedures "in plain English."
—The Occupational Safety and Health Administration said it was proposing to revise its regulations on confined spaces "to state more clearly the employer's duty to ensure effective rescue capability."
—The Department of the Treasury said revisions to one of its rules would "provide greater clarity by defining previously undefined terms."
—The Department of Justice proposed an amendment to "clarify the requirement for installation of curb ramps at existing pedestrian walkways" in response to "public concerns about the unique and significant capital expense" of such ramps.
—The Department of Labor said it was giving guidance to employers on the information they must keep to determine compliance with the Fair Labor Standards Act "to ensure that applicable standards are easily understandable and reasonable."

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standards for agencies' agendas. The Office of Federal Procurement Policy Act Amendments of 1988 (41 U.S.C. 421[g]) require the development and semiannual publication of a report on procurement regulations. The *Unified Agenda* helps agencies fulfill all of these requirements.

Other commonly cited reasons for the revisions were to update requirements to reflect current statutes, science, or conditions (about 26 percent); to establish new regulatory procedures or standards (about 18 percent); and to change a regulation found to be overly burdensome to industry, State or local governments, or Federal agencies (about 14 percent).[19] In 110 of the entries (about 10 percent), the changes appeared to be implementing statutory requirements. For example, one of the Department of the Treasury entries indicated that its Office of Thrift Supervision had issued an interim final rule that revised its risk-based capital standards "as required by Sections 208 and 350 of the Riegle Community Development and Regulatory Improvement Act of 1994." In these and other cases, the revisions appeared less like "reinventions" than part of the standard rulemaking process.

Page Eliminations Appear Unlikely to Reduce Burden, but Effect of Revisions is Unclear

We also examined the *Unified Agenda* abstracts to determine whether the actions being announced appeared to reduce substantive regulatory burden. We defined the term "regulatory burden" broadly to include the cost of compliance, any lack of flexibility allowed by the rule, and related paperwork requirements. We also said the regulatory burden could be on industry, State or local governments, or the Federal Government. Although we attempted to determine as objectively as possible whether the actions described in the abstracts were likely to decrease regulatory burden, our results should be viewed as informed opinions rather than the result of rigorous analysis because (1) no commonly agreed-upon way to measure regulatory burden exists, (2) the determination of whether burden is increased or decreased by a related action is an inherently subjective process, and (3) the abstracts in the *Unified Agenda* sometimes provided only cursory information about the regulatory action at issue.

Nevertheless, in more than 60 percent of the page elimination entries, it did not appear that the *CFR* pages being eliminated would reduce substantive regulatory burden. As noted previously, most of these actions were being taken because the regulations being eliminated were obsolete, and many of these did not appear to have been enforced for some time. Therefore, for these entries there did not appear to be any reduction in substantive regulatory burden. In some cases, the agencies themselves indicated that the page eliminations would not alter existing regulatory requirements, as shown in the following examples:

—The Department of Justice said one of its actions to eliminate obsolete sections was "editorial and non-substantive in nature and . . . [has] no impact on governmental or nongovernmental entities."

—The Department of Commerce said that although an entire part within the *CFR* was being removed, "[t]his final rule does not make substantive changes to the existing regulations."

—The Department of Housing and Urban Development (HUD) said it was eliminating provisions that were unnecessary because they were redundant of the Mortgagee Review Board (MRB) statute, and would "not change the substantive requirements of the MRB regulations." HUD also said it was eliminating provisions that were redundant of the Community Development Block Grant's regulations without substantively changing the requirements.

—Another HUD rule removed "nearly identical provisions" in various parts of the *CFR*, but again HUD said it did not change the substance of the provisions.

Officials from both EPA and DOT told us that at least one of the goals of their rule elimination effort was to remove "dead wood" and that no substantive regulatory burden was being eliminated in many instances. One EPA official said that no substantive regulatory burden would be eliminated by any of EPA's rule elimination efforts.

In about a quarter of the cases, the *Unified Agenda* abstracts did not provide enough information to allow us to determine whether the rule elimination action would reduce burden. However, 19 of the rule elimination actions (about 10 percent) appeared to reduce substantive regulatory burden. For example:

—The Food Safety Inspection Service proposed removal of a requirement that it approve facilities and equipment before they are used in official establishments. The agency also proposed amending its prior approval of most voluntary, plant-operated partial quality control programs.

[19] The most common beneficiary of the burden reduction efforts appeared to be private industry, followed by State and local governments and then Federal agencies.

—The Department of Health and Human Services issued a proposed rule to "revoke the requirement for increased frequency reports to FDA for postmarketing adverse experience reporting."
—DOT proposed rescinding its standards regarding the location, identification, and illumination of motor vehicle controls and displays, relying on market forces instead of regulatory requirements to ensure proper markings.

We could not clearly determine whether substantive regulatory burden would be reduced for more than half of the 1,064 *CFR* revisions for which there was an abstract. In about 26 percent, the revisions did not appear to reduce burden, and in about 21 percent, the action did appear to reduce burden. Actions that did not appear to reduce substantive regulatory burden include the following:

—A proposal by the Bureau of Alcohol, Tobacco, and Firearms to permit the use of the word "unaged" as an alternative to "immature" to describe grape brandy that has not been stored in oak containers.
—A National Park Service proposal to "recognize an official United States Park Police insignia, provide for its future protection, and prevent the unauthorized use of the insignia."
—A VA action to "update various cross-references and authority citations and to make other nonsubstantive changes."
—An OSHA action to extend a general industry rule on preventing suffocation and explosions in confined spaces to the construction industry.
—A DOT action to correct obsolete references in field office addresses and terminology.
—A DOT plan to remove an appendix to a rule, which was described by the Department as an administrative action that "has no impact on the marine industry as it does not change any requirements imposed upon them."
—A DOT plan to change a regulation on state matching of planning and administration costs from a regulation to an "agency directive."
—DOT's plan to remove a regulation that implemented a statutory provision for which funds have not been authorized since 1994.
—An EPA action implementing the Asbestos School Hazard Abatement Reauthorization Act extending training and accreditation requirements and increasing the number of training hours required, which EPA said "will increase regulatory costs" for the owners and managers of public and commercial buildings.

Entries that appeared to reduce substantive regulatory burden include the following:

—A proposal by the Department of the Treasury to exempt depository institutions from currency transaction reporting obligations with respect to transactions with certain businesses.
—A Department of Justice proposal to waive a requirement for registration and allow the use of records required to be kept under FDA regulations instead of maintaining separate records for the Drug Enforcement Administration.
—A DOT rule permitting official filing of international air carrier rules tariffs in an electronic format.
—An EPA proposal to exempt certain pesticides from registration requirements and another proposal to remove isopropyl alcohol from the list of chemicals for which reporting is required under the Emergency Planning and Community Right-to-Know Act.
—An EPA proposal to allow the use of a financial test rather than more expensive mechanisms such as surety bonds or letters of credit to ensure that adequate funds are available to cover certain closure costs. EPA estimated this change would save owners and operators of municipal solid waste landfills about $45 million annually. Another EPA proposal in this area would reportedly save local governments $138 million annually.

Again, I would like to emphasize that our characterizations of actions that appear to reduce substantive regulatory burden and those that do not appear to reduce burden are based on a review of what was, at times, very limited information. Also, even though an action to eliminate or revise a regulation may not reduce the substantive regulatory burden imposed by that regulation, it may result in a reduction in other types of burden by making the regulation clearer or easier to find. Some of the proposed changes may also make the regulatory process more effective or results oriented, even though their effect on regulatory burden may be unclear or negligible. A final verdict regarding the value of these initiatives will have to await the reaction of the regulated community.

Mr. Chairman, this completes my prepared statement. We would be pleased to answer any questions.

Chairman THOMPSON. Thank you very much. Just a couple of questions.

Mr. Holman, the GAO found a lot to question about the Administration's cutting red tape initiative. They also said that the final verdict regarding the value of these initiatives will have to await the reaction of the regulated community. So what is your reaction?

Mr. HOLMAN. Well, if they have been cutting red tape, it is the best kept secret in Washington because it has not reached Michigan yet. I think we have seen a net increase, and it is pretty burdensome, and if you are waiting for the wolves to guard the sheep, to get a reaction from the agencies, then I think you are probably going to get more red tape than less.

One other thing. I just think that this just puts such an increased risk, an increased barrier to entry, I think back 10 years ago, when I acquired my business or started the business, is quite a leap.

Would I have done that under today's regulatory environment? I think maybe I would not have, and I just wonder if the next generation, my kids, would have the opportunity to do the same thing, and I think that is the future.

Chairman THOMPSON. Is there any way for you to quantify the difference for us, from 10 years ago, what a small business person has to go through now as compared with what it was like when you started?

Mr. HOLMAN. I can do it in a sense that I am a small business and I cannot afford to have full-time people doing this. But we kind of split responsibilities, and so maybe 90 percent of my office managers' resources are spent on recordkeeping and some compliances.

Even my foundry manager and my finishing managers all have responsibilities in that area, that takes away from their ability to produce our product and to serve the customer.

I cannot, off the top of my head, give you dollar amounts, but it is also a perception, and I think when you are looking at starting a business as an entrepreneur, and you look at the gold ring there, and you wonder if you can leap that gap, and look at the risks that are involved, is the reward still there or is that being reduced through taxes, and other methods? And the risks certainly are there, and it increases that gap.

Chairman THOMPSON. Do you have any ideas as to what Congress can do in this process, after listening to all this?

Mr. HOLMAN. I think if they are truly interested in regulatory reform, and allowing small businesses to flourish, entrepreneurs to flourish, and you really want to get meaningful legislation—it has been handled very well by a number of the other speakers here—but I firmly believe that you not only need a cost-benefit analysis on those regulations that are being promulgated, that affect us. You also need to have risk assessment.

You also need to have congressional oversight. You need to have a transparent system where people can see what is going on in this process of doing it, not done behind closed doors, not fooling with the numbers and the models that are being set up on the computers.

Chairman THOMPSON. Thank you very much.

Mr. Stevens, I understand that your staff worked hard on this report with limited time and resources. But I think we need to have a little more dialogue, maybe, regarding what we expect and what you deliver.

And I do not think it needs to be done here today in a public forum, because I may have a misperception as to what the expectations ought to be.

We asked you to answer three questions. Are the agencies adhering to and is OIRA enforcing the cost-benefit requirements of the Executive Order?

Two: Is OIRA significantly changing agency rules, and if so, what changes is it making?

Three: Are agencies eliminating unnecessary regulations and are they reducing regulatory burden?

On question one, on the cost-benefit analysis, you state that, "We did not reach any overall conclusions regarding the quality of the regulatory reviews OIRA conducted or the ultimate value of the Administration's regulatory reform effort. Neither did we attempt to assess the quality of the cost-benefit analysis that agencies conducted, or how those analyses affected agencies' decision making."

On question two, on whether or not OIRA is significantly changing rules, I would simply ask you to go to the bottom of page seven—not now, unless you want to—but just in the privacy of your own office, you and your people—compare the question that was asked with the answer that is given, and see if you see any relationship between the two, or what that answer means, because I cannot figure it out.

On the third question, on the cutting of red tape, I think your answer is quite responsive, and definitive, and quite good.

So again, I do not want to be unduly critical, but what I see here is kind of a far cry from what I was expecting. I realize there are a lot of counter pressures with regard to these things, and all of that. But your responsibility is to the Congress and if we cannot get assessments, whether they are pro or con, or whatever, on the questions that we ask, we need to understand whether we are asking the wrong questions, or we are not entitled to that information, or we are asking something that is impossible to discern.

So I would just ask you to be open and work with us in the future, and let us have some private conversations in the future, and see if we cannot have a better understanding of what we are trying to get at here, and what we can do to work together to get the job done.

Mr. STEVENS. We would certainly be willing to do that, Mr. Chairman. I believe that we have worked with both the majority and the minority, and have a written agreement in this area.

On the matter of cost-benefit analyses, basically in the time available, and given the complexity of these documents, an assessment of whether they indeed justified the rules was well beyond what we could do.

There is another GAO job going on, though, as the Committee is aware, in which for a very limited part of EPA's responsibilities, we are trying to draw some judgments on the cost-benefit analyses. That work has been going on for a good many months, much longer

than we had. It is very complicated. It takes a great deal of technical expertise to make these judgments. We were really looking at OIRA's role, and I think that we do not have any more technical expertise than OIRA does.

We can say that there is a cost-benefit analysis, but to say whether it is pulling the wool over an expert's eyes was beyond our capability.

Chairman THOMPSON. All right. I understand that. Maybe we have to revisit, you know, what we do in these very technical areas.

Anyway, I appreciate the testimony of each of you. I think it has been very helpful, and hopefully, we have had a productive hearing here. Thank you very much.

The hearing is adjourned.

[Whereupon, at 12:52 p.m., the Subcommittee adjourned, subject to the call of the Chair.]

APPENDIX

Additional Statement for the Record by Sen. Glenn
Governmental Affairs Committee Subcommittee Hearing
September 25, 1996

Following up on my final question regarding the assertion of Mr. Miller that the Clinton executive order represented a revocation of the Reagan order, I would like to include in the record of this hearing a number of statements from 1993 from organizations supporting the Clinton order. The statements are from the National Federation of Independent Business, National Small Business United, the U.S. Chamber of Commerce, and the Business Roundtable. The Chamber of Commerce statement, for example, says in part, "We are particularly pleased that the central role of OMB's Office of Information and Regulatory Affairs is retained."

Such statements make it clear that the Clinton order is, and has always been, understood to continue the central cost/benefit analysis and OMB review requirements first established under President Reagan's E.O. 12291.

NFIB SMALL BUSINESS NEWS

600 Maryland Avenue, Southwest, Suite 700 • Washington, DC 20024 • 202-554-9000 • Fax 202-554-0496

The Guardian of Small Business for Fifty Years

Contact: Terry Hill or Angela Jones (202) 554-9000

SMALL BUSINESS LIKES PRESIDENT'S EFFORTS
TO REVIEW REGULATORY BURDENS

WASHINGTON, Sept. 30---Federal regulations will soon get closer scrutiny from those they affect thanks to an a White House Executive Order President Clinton signed today.

"Small-business owners will be among the first people to benefit from the president's efforts to make government more open to the public," National Federation of Independent Business President Jack Faris said. "This executive order will ensure that all public sectors will get a fair opportunity to voice their concerns about federal regulations."

As a small-business concern, government regulation is rapidly climbing the ladder of entrepreneurial headaches. According to a 1992 NFIB-Visa Business Card study, The Problems and Priorities of Small Business, noted a leap of 11 spots to eighth place among Main Street's worries. Small-business researchers believe that regulation will, by the turn of the century, be first on the list.

Faris said the president's executive order takes an important step in requiring that both risk assessments and less-burdensome alternatives to regulations are thoroughly explored before a regulation is implemented. Most importantly, he said, it requires agencies to determine whether no regulation might be a better choice.

The small-business leader also commended the president for ensuring that the Office of Information and Regulatory Affairs remains the coordinating center for regulatory review. Faris lauded OIRA Director Sally Katzen, appointed by President Clinton, for her willingness to listen to all interested parties and make fair decisions.

NFIB, the nation's largest small-business advocacy organization, represents more than 600,000 small and independent firms in all 50 states.

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1155 15TH STREET, N.W.
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WASHINGTON, D.C. 20005
202-293-8830
FAX: 202-872-8543

September 27, 1993

The President
The White House
Washington, D.C.

Dear Mr. President:

Having had an opportunity to review your Executive Order on regulatory procedures, we want to indicate our association's strong support for the approach you have outlined. We look forward to working with you as you implement this new structure, in order to place the least possible regulatory burden on small businesses.

The open and fair process created by your Order allows small business input to the process while closing the door on behind-the-scenes lobbying. The Order's emphasis on cost-benefit analysis, combined with identification of the most appropriate and efficient response, is encouraging to us. We are also glad to see a thorough review of existing regulations as an important component of the plan.

We think the plan you have laid out should work well, but we look forward to an opportunity to provide input about the overall process once we have all had some experience with it. There may be areas where targeted changes could improve the Order and the process. We hope you will invite our comments for potential modifications to the Order, at some defined point in the future.

Finally, we would like to emphasize the need for involvement of the Small Business Administration (SBA) during the regulatory process. The SBA's Chief Counsel for Advocacy has a statutory responsibility--unique among the agencies--to review regulations for compliance with the Regulatory Flexibility Act (RFA), arguably the most important law governing the regulation of small businesses. Involving the SBA Chief Counsel in the Administration's regulatory review process could be a key step toward finally enforcing the RFA.

Again, thank you for allowing us to review the Executive Order and for carefully crafting a process that is open and fair for all.

Yours truly,

John C. Rennie
President

John P. Galles
Executive Vice President

U.S. Chamber of Commerce
1615 H St., NW
Washington, DC 20062-2000

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NEWS

FOR IMMEDIATE RELEASE

Contact: Thomas Love

COMMENT ON THE PRESIDENT'S REGULATORY REVIEW EXECUTIVE ORDER
BY RICHARD L. LESHER, PRESIDENT
U.S. CHAMBER OF COMMERCE

WASHINGTON, Sept. 30 -- The U.S. Chamber of Commerce is encouraged by the executive order on regulatory review signed today, but recognizes that its successful implementation will require constant vigilance by the business community.

The order provides a fair and balanced approach and affords the public substantial opportunity to comment on the potential impact of proposed regulations. We are particularly pleased that the central role of OMB's Office of Information and Regulatory Affairs is retained. The order provides a series of constructive hurdles that agencies must overcome before imposing new regulatory burdens, including the requirement for cost-benefit analysis. Special emphasis is placed on minimizing potential negative impacts on U.S. competitiveness, jobs and the economy.

For nine months, the U.S. Chamber has been working very hard to bring some common sense to the regulatory process. It is one thing to have a balanced executive order. It is another to fully implement its intent. Our position is simply put: "trust but verify." That is why we have established a regulatory watchdog committee.

The committee will focus on the day-to-day oversight of new and existing regulations imposed on our members with emphasis on cost-benefit analysis, paperwork reduction and flexibility for small business. We intend to get involved early in the regulatory process to oppose unnecessary regulations and minimize the burden of those mandated by statute. The committee also will focus on the legislative process to insure that economic implications are considered before new unfunded mandates are imposed.

We now call on the administration to support passage of the Paperwork Reduction Act of 1993 -- the Nunn version in the Senate -- and reauthorization of the Regulatory Flexibility Act with judicial review, which lessens the burden on small business by providing alternative means of implementing regulations.

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93-109

The Business Roundtable

For Immediate Release

THE BUSINESS ROUNDTABLE SUPPORTS PRESIDENTIAL EXECUTIVE ORDER ON GOVERNMENT REGULATION

Washington, D.C., September 30 -- The Business Roundtable said today that it supports President Clinton's new Executive Order on the management of government regulation.

The order was signed today by the President and establishes a process for managing the development of new Executive Branch regulations as well as a mechanism for the review of existing ones.

"The business community is vitally concerned about the impact of overly burdensome regulation that has resulted in job loss, higher prices, decreased productivity, and lack of competitiveness," said Edgar S. Woolard, Jr., Chairman and CEO of DuPont and Chairman of the Roundtable's Government Regulation Task Force. "It is our expectation that the President's Executive Order will lead to better management of the regulatory process and, therefore, help accelerate the pace of economic recovery."

Woolard said that business was "pleased" that the new Executive Order contains a cost-benefit requirement, requires priority-setting based upon risk, mandates the use of sound science, requires agencies to take into account the costs of cumulative regulation, encourages the use of performance standards, and requires agencies to consider alternatives to traditional regulation.

While Woolard expressed overall enthusiasm for the Executive Order, he cautioned that "having a well-articulated statement of process and intent is one thing, but effective implementation of the order will be absolutely necessary if we are to improve the quality of government regulation and reduce its burdens on the economy."

# # #

Contact: Lee Tashjian
(202) 774-3852

September 30, 1993

October 8, 1996

The Honorable Sally Katzen
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC

Subject: Oversight Hearing on Regulatory Review Activities of the Office of Information and Regulatory Affairs

Dear Ms. Katzen:

I appreciate your participation at the September 25 oversight hearing before the Senate Subcommittee on Financial Management and Accountability, Committee on Governmental Affairs. To supplement the hearing record, I would like to request certain additional information about the implementation of Executive Order 12866 and the regulatory review process. Please provide this information to the Subcommittee no later than October 25, 1996.

A. Cutting Red Tape Initiative

A focal point of the hearing and the related investigation of the General Accounting Office was the National Performance Review ("NPR") "cutting red tape" initiative. As you know, this initiative aims to cut 16,000 pages from the Code of Federal Regulations and to streamline another 31,000 pages.

The most recent NPR report claims that this initiative is saving nearly $28 billion a year. Yet, GAO found that the vast bulk of the page elimination actions do not appear to be producing any reduction in regulatory burden. GAO determined that about half of the page elimination actions deleted obsolete rules, and another 28 percent eliminated duplicative rules. Indeed, according to GAO, one EPA official said that no substantive regulatory burden would be eliminated by any of EPA's rule elimination efforts.

1. At the hearing, you said that most of the "cutting red tape" cost savings were

or would be realized by the 31,000-page "reinventing" regulation efforts. But GAO found that most of the "reinventing" efforts merely clarified an existing regulatory requirement. GAO found that only 11 percent of the "reinventing" efforts were targeted at changing an overly burdensome regulation. Based on the information we have, it is difficult to understand how the "cutting red tape" initiative could save $28 billion a year.

Accordingly, we would appreciate it if you could document how this $28 billion annual savings will be achieved by the "cutting red tape" initiative. Please provide the Subcommittee with specific, detailed information on that initiative -- including any information on burden reduction, changes or eliminations of regulations, and cost savings -- achieved or projected for the future. Please also provide a clear summary of the initiative to date, including the sources of cost savings, as well as any actions anticipated in the future.

2. On a related point, I would like to clarify the facts surrounding OSHA's "cutting red tape" efforts. Specifically, at the September 25 hearing, I asked you about OSHA's recent decision to unbundle certain general industry standards from specific construction industry standards. I expressed concern that OSHA's action would reverse an earlier decision to clarify the construction industry standards by consolidating them in one place. While the consolidation of standards resulted in more pages in the Code of Federal Regulations ("CFR"), it was easier to comply with the regulations -- a laudable result.

Apparently, OSHA's decision to reverse itself was motivated by the desire to reduce pages in the CFR. You disputed my description of the facts surrounding this action, so we asked the Congressional Research Service to analyze again the question I asked you. CRS concluded that my question fairly presented the underlying facts.

Please provide the Subcommittee with a precise statement of the history and current status of these regulations.

B. OIRA Changes to Regulations

1. The hearing also raised the issue of whether OIRA is having an appreciable impact on the regulations it reviews. You indicated that OIRA was having a major impact. You testified that you are changing far more regulations than the previous OIRAs during the Bush and Reagan Administrations. While it is our understanding that you are coding a higher percentage of rules that you review as "consistent with change," it is not clear that you are significantly improving those rules.

We would appreciate it if you could provide us with documentation that would allow us to determine whether or not OIRA is deeming more rules "consistent with change" than under previous Administrations, and whether the changes made significantly alter the text of the rule as it would appear in the CFR. Please explain the criteria used to categorize rules as "consistent with change."

2. On a related point, the Subcommittee is also interested in whether OIRA is rejecting rules it reviews where there is significant noncompliance with the Executive Order. Please provide us with documentation indicating how many rules you have returned to the agencies on that basis for each year since the inception of Executive Order 12866, as well as how these statistics compare with the Bush and Reagan Administrations.

C. Paperwork Reduction

1. The hearing also inquired into OIRA's implementation of the Paperwork Reduction Act of 1995. When President Clinton signed the Act in 1995, he pledged that EPA would reduce its paperwork burden by 25%. This goal was supposed to be met by June 30, 1996.

The information available to us indicates that EPA has not come close to meeting this goal. In testimony at a June 5, 1996 hearing before the Senate Small Business Committee, GAO said that "despite EPA's burden-reduction efforts during this period, EPA's burden-hour estimate at the end of this fiscal year is expected to be about what it was at the start of those efforts." At our September 25 hearing, you disputed the conclusion that EPA has achieved little net decrease in its paperwork burden.

Please provide us with documentation to support your testimony that EPA will achieve a 25% reduction in its paperwork burden this year, and that EPA has already realized an 18-23 percent reduction in its paperwork burden.

2. At our September 25 hearing, I asked you what progress had been made in meeting the Paperwork Reduction Act's requirement of a government-wide 10% reduction in paperwork in fiscal years 1996 and 1997. You indicated that substantial progress had been made toward reaching that goal.

Please provide the Subcommittee with documentation that would allow us to determine what net change in government-wide paperwork burden has occurred in

fiscal year 1996. Please also describe what action, if any, you have taken to meet the goal for fiscal years 1996 and 1997.

* * * *

As you know, many members of Congress are deeply committed to ensuring that the regulatory process functions effectively and efficiently. It is, therefore, very important for Congress and the public to assess how the Executive Order is working and what changes it has brought about. Your answers to these questions will assist us in making this assessment.

Please contact Claudia McMurray, at 224-4944, or Paul Noe at 224-4751, to follow up on this request. Thank you for your cooperation.

Sincerely,

Fred Thompson
Chairman
Subcommittee on Financial Management
and Accountability

FT:cmcm

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

Honorable Fred Thompson
Chairman, Subcommittee on Financial
Management and Accountability
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

I appeared before your Subcommittee on September 25, 1996, to discuss the activities of the Office of Information and Regulatory Affairs (OIRA) implementing Executive Order No. 12866, "Regulatory Planning and Review." On October 6, 1996, you asked me to provide certain additional information to supplement the hearing record. I am pleased to respond to your request with my comments following each question.

Your Letter:

"A. Cutting Red Tape Initiative.

"A focal point of the hearing and the related investigation of the General Accounting Office was the National Performance Review ("NPR") 'cutting red tape' initiative. As you know, this initiative aims to cut 16,000 pages from the Code of Federal Regulations and to streamline another 31,000 pages.

"The most recent NPR report claims that this initiative is saving nearly $28 billion a year. Yet, GAO found that the vast bulk of the page elimination actions do not appear to be producing any reduction in regulatory burden. GAO determined that about half of the page elimination actions deleted obsolete rules, and another 28 percent eliminated duplicative rules. Indeed, according to GAO, one EPA official said that no substantive regulatory burden would be eliminated by any of EPA's rule elimination efforts.

"1. At the hearing, you said that most of the 'cutting red tape' cost savings were or would be realized by the 31,000-page 'reinventing' regulation efforts. But GAO found that most of the 'reinventing' efforts merely clarified an existing regulatory requirement. GAO found that only 11 percent of the 'reinventing' efforts were targeted at changing an overly burdensome regulation. Based on the information we have, it is difficult to see how the 'cutting red tape' initiative could save $28 billion a year.

"Accordingly, we would appreciate it if you document how this $28 billion annual savings will be achieved by the 'cutting red tape' initiative. Please provide the Subcommittee with specific, detailed information on that initiative -- including any information on burden reduction, changes or eliminations of regulations, and cost savings -- achieved or projected for the future. Please also provide a clear summary of the initiative to date, including the sources of cost savings, as well as any actions anticipated in the future."

My response:

1. As you note, the $28 billion of estimated savings was calculated by the National Performance Review.[1] This number was calculated in August 1995 based on input from agencies and from material drawn from agency press releases. It was intended to describe the total NPR regulatory reinvention effort, including sector-specific agency initiatives, thus going beyond the 31,000-page reinvention. For many of the regulatory reinvention initiatives, it is difficult to estimate actual dollar savings, although they clearly reduce burden. For example, NPR informs us that the $28 billion of estimated savings did not include savings that the agencies thought would be gained through the following reinventions:

--HCFA will actively pursue legislative opportunities to reduce the burden on long-term care facilities to eliminate duplicate annual assessments of the mentally ill and mentally retarded, and to make it easier for nurse aides to obtain the training they need to provide quality services to nursing home patients. Actual savings: unestimated.

--FDA will allow regulated companies to use electronic records and signatures in place of paper, resulting in substantial administrative cost savings. Actual savings: unestimated.

--DOL will streamline the Form 5500 series annual reporting requirements for employees benefit plans which will reduce burden for both employers and DOL employees. Actual savings: unestimated.

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[1] "We're slashing the regulatory and administrative burden of government on citizens and businesses by nearly $28 billion a year." Report of the NPR, September 1996, "The Best Kept Secrets in Government," p. 7.

"Regulatory and administrative burdens on the public will be reduced by nearly $28 billion." Common Sense Government Works Better and Costs Less, Vice President Al Gore, Random House, New York, 1995, at p. 8. This is a reprint of the Third Report of the National Performance Review [NPR], released September 7, 1995. For a more specific discussion of a number of savings due to reinvention, see Common Sense at p. 71.

--IRS will enable employers to file W-2 data through a single return filed electronically with both the State and Federal governments, eliminating duplicative filing burdens. Actual savings: unestimated

Of the $28 billion of estimated savings, the bulk comes from reinvention activities at EPA, many of which were included in last year's NPR report,[2] such as the following:

--EPA is revising PCB disposal regulations to allow less expensive disposal methods. EPA's estimated actual savings: $4 billion a year.

--EPA is streamlining RCRA corrective action procedures. EPA's estimated actual savings: $4 billion a year.

--EPA is implementing effluent trading on a national scale as a cost-effective approach for reducing water pollution. EPA's estimated actual savings: range from $1.2 billion to $15 billion a year.

--IRS, Labor and SSA are working together with the States to eliminate duplicate tax data filing requirements. The agencies' estimated savings from burden reduction to taxpayers is $2.5 billion a year.

Neither NPR nor OIRA have a cost estimate for savings or benefits attributable to the 16,000-page elimination or 31,000-page reinvention.

Your Letter:

"2. On a related point, I would like to clarify the facts surrounding OSHA's 'cutting red tape' efforts. Specifically, at the September 25 hearing, I asked you about OSHA's recent decision to unbundle certain general industry standards from specific construction industry standards. I expressed concern that OSHA's action would reverse an earlier decision to clarify the construction industry standards by consolidating them in one place. While the consolidation of standards resulted in more pages in the Code of Federal Regulations ('CFR'), it was easier to comply with the regulations -- a laudable result.

"Apparently, OSHA's decision to reverse itself was motivated by the desire to reduce pages in the CFR. You disputed my description of the facts surrounding this action, so we asked the Congressional Research Service to analyze again the question I asked you. CRS concluded that my question fairly presented the underlying facts.

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[2] See Third Report, cited in footnote 1, above.

"Please provide the Subcommittee with a precise statement of the history and current status of these regulations."

My Response

You ask about the history and current status of the regulations relating to the construction industry standards issued by the Occupational Safety and Health Administration (OSHA). Many provisions of the construction industry standards, found in 29 CFR 1926, duplicated provisions applicable to all industries in 29 CFR 1910. OSHA's action to remove these duplicative provisions as a means of streamlining and simplifying their regulations is one of an ongoing series of reforms being taken by the agency to reform the way in which OSHA does business, as discussed below.

OSHA responded to the President's March 1995 instruction to agencies to conduct a page-by-page review of their regulations by issuing a May 31, 1995 plan outlining how their regulations could be improved through revoking out of date and obsolete provisions, consolidating repetitious provisions, and clarifying ambiguous requirements. OSHA issued the first regulatory action to implement this plan on March 7, 1996; this rule consolidated duplicative cross references, health standards and agriculture standards, eliminated design provisions not relevant to employers and simplified and made easier to understand regulations, and indicated that more such rules would be issued in the future. The elimination of duplicative provisions between OSHA's general industry, construction and shipyard equipment standards (29 CFR 1915) was done through a June 20, 1996 notice that both continued the consolidation initiated on March 7, 1996, and added clear finder guides to the consolidated provisions in the regulatory text for each of the individual industries. OSHA also noted that where provisions were not duplicative, the industry-specific standards would remain.

OSHA committed in that document to assist employers in the construction industry who prefer a single document with all of the standards that apply to their work by publishing a nonregulatory booklet that includes all such material. Thus, construction firms who find it easier to comply with regulations by looking in one place will have ready access to such a source, which is to be released shortly. In addition, the firms that had previously been confused by thinking that two different standards in two different places meant that they had to follow two different substantive requirements will now only have to deal with one set of standards.

Your Letter:

"B. OIRA Changes to Regulations

"1. The hearing also raised the issue of whether OIRA is having an appreciable impact on the regulations it reviews. You indicated that OIRA was having a major impact. You testified that you are changing far more regulations than the previous OIRAs during the Bush and Reagan Administrations. While it is our understanding that you are coding a higher percentage of rules that you review as 'consistent with change,' it is not clear that you are significantly improving these rules.

"We would appreciate it if you could provide us with documentation that would allow us to determine whether or not OIRA is deeming more rules 'consistent with change' than under previous Administrations, and whether the changes made significantly alter the text of the rule as it would appear in the CFR. Please explain the criteria used to categorize rules as 'consistent with change.'"

My Response:

1. You ask whether agencies are changing more regulations during OIRA review under E.O. 12866, issued by President Clinton, than under E.O. 12291, issued by President Reagan, and followed under the Administration of President Bush and the first nine months of this Administration.

As I explained in my testimony, under E.O. 12866, we first work with the agencies to preselect which regulations we will review, using a triage system to determine which regulations are "significant". Under E.O. 12291, OIRA reviewed many more regulations -- although under both Orders, OIRA exempted a large number of routine, administrative regulations from review.

Under E.O. 12291, in over 12 and a half years, OIRA reviewed 29,789 proposed and final regulations. In the course of OIRA review, the agency changed 5,578 regulations, 18.7% of the total reviewed. Under E.O. 12866, in three years, OIRA reviewed 2,306 proposed and final regulations. In the course of OIRA review, the agency changed 872 regulations, 37.8% of the total reviewed.

2. You ask for the criteria OIRA staff use to categorize a rule as "consistent with change," and whether that criteria itself has changed from that used for the previous Executive Order.

When OIRA staff conclude their review of regulations -- both as it was done under E.O. 12291 and as it is now done under E.O. 12866, they mark on their regulatory review worksheets whether the agency has or has not changed the text of the preamble or the draft rule itself during the course of review. For example, if an agency includes in the preamble of a Notice of Proposed Rulemaking an additional regulatory option, the staff person will indicate on his or her worksheet that the rulemaking has changed.

The criteria that the OIRA staff use is straightforward and has not changed under the two Executive Orders -- if words in the rulemaking submitted for review changed (other than typographical errors), then they mark "with change." Our computer records do not distinguish whether the change was in the preamble to the rulemaking as it appears in the daily Federal Register or in the text of the rule as it would appear in the Code of Federal Regulations.

We have not tried to implement more substantive criteria for change because we have found that it is almost impossible, in any uniform, consistent way, to indicate whether a change is -- as you refer to it -- "significantly improving" a rule. First, "improvement" is often viewed subjectively, depending, for example, on whether one wants a stronger or weaker regulation. Second, the nature of a change cannot be broken readily into a common metric -- a uniform way of articulating the nature of the change. Changing just a few words may change the substantive standard in the rule in dramatic ways; adding a new regulatory alternative may open the rulemaking -- through the dynamics of public comment and resulting agency reconsideration of its rulemaking strategy -- in new, unanticipated directions. On the other hand, deleting or adding a number of pages may have the effect only of simplifying the issue being discussed, or avoiding extraneous confusion. All such changes can be very useful and would be considered improvements -- depending on whether one is the agency, the person being benefited by the rule, the person bearing the costs of compliance, or the reviewing court -- but there is no uniform, consistent way of describing this simply in terms of "change."

3. You also ask a qualititative question -- whether the changes that the agencies made during E.O. 12866 review "significantly alter the text of the rule as it would appear in the CFR." In some cases, the answer is "yes;" in probably more cases, the answer is "somewhat." But, as I suggest in my comments, above, what is deemed "significant" depends on the eyes of the beholder.

Your Letter:

"2. On a related point, the Subcommittee is also interested in whether OIRA is rejecting rules it reviews where there is significant noncompliance with the Executive Order. Please provide us with documentation indicating how many rules you have returned to the agencies on that basis for each year since the inception of Executive Order 12866, as well as how

these statistics compare with the Bush and Reagan Administrations."

My Response:

Under E.O. 12291, in over 12 and a half years, OIRA reviewed 29,789 proposed and final regulations. During that time period, OIRA returned 387 regulations for reconsideration (1.3% of the total). Also during that time period, agencies withdrew 792 regulatory submissions (2.7% of the total), and OIRA found that 162 (0.5% of the total) were sent improperly.

Under E.O. 12866, in three years, OIRA reviewed 2,306 proposed and final regulations. During that time period, OIRA returned 5 regulations for reconsideration (0.2% of the total). Also during that time period, agencies withdrew 132 regulatory submissions (5.7% of the total), and we found that 20 (0.9% of the total) were sent improperly.

I should note that sending a letter to an agency returning a regulation for reconsideration is not in my view a measure of "where", as you state it, "there is significant noncompliance with the Executive Order, as much as it is a measure of bureaucratic impasse -- a failure to bring the rule into compliance with E.O. 12866. Where there is a need to change an agency's rule to meet the principles of E.O. 12866, and that change is made, then OIRA staff would indicate "consistent with change" on the regulatory review worksheet.

Your Letter:

"C. Paperwork Reduction

"1. The hearing also inquired into OIRA's implementation of the Paperwork Reduction Act of 1995. When President Clinton signed the Act in 1995, he pledged that EPA would reduce its paperwork burden by 25%. This goal was supposed to be met by June 30, 1996.

"The information available to us indicates that EPA did not come close to meeting this goal. In testimony on a June 5, 1996 hearing before the Senate Small Business Committee, GAO said that 'despite EPA's burden-reduction efforts during this period, EPA's burden-hour estimate at the end of this fiscal year is expected to be about what it was at the start of those efforts.' At our September 25 hearing, you disputed the conclusion that EPA has achieved little net decrease in its paperwork burden.

"Please provide us with documentation to support your testimony that EPA will achieve a 25% reduction in its paperwork burden this year, and that EPA has already realized an 18-23 percent reduction in its paperwork burden."

My Response:

EPA reports that it has identified 23 million hours of reporting and recordkeeping burden to be eliminated (out of the target of 25 million hours), and EPA program officers are working to identify the additional hours necessary to meet the target. As a result of EPA's efforts through August, 15 million hours of paperwork burden required of businesses and communities at the beginning of 1995 are no longer required of them. This includes 12 million hours from requirements changed or deleted, and three million hours from requirements completed or expired.

EPA reported this paperwork burden reduction effort in the September 1996 NPR report, "The Best Kept Secrets in Government," at pp. 90-91. EPA has also developed a list identifying the specific information collections which contributed to this success. As part of our paperwork clearance procedures, we maintain copies of agency submissions and our resulting approvals or disapprovals in our public file. If you would like we would work with you or your staff to collect these files (based on EPA's list), and make them available to you.

Your Letter:

"2. At our September 25 hearing, I asked you what progress had been made in meeting the Paperwork Reduction Act's requirement of a government-wide 10% reduction in paperwork in fiscal years 1996 and 1997. You indicated that substantial progress had been made toward reaching that goal.

"Please provide the Subcommittee with documentation that would allow us to determine what net change in government-wide paperwork burden has occurred in fiscal year 1996. Please also describe what action, if any, you have taken to meet the goal for fiscal years 1996 and 1997."

My Response:

The Information Collection Budget (ICB), published in August 1996 as part of the Information Resources Management Plan of the Federal Government, identifies the information collection burden reduction accomplishments for FY 1995 and the planned initiatives for FY 1996. The ICB is an annual report required by the Paperwork Reduction Act and submitted to Congress. As you can tell from the enclosed table, the ICB indicates that while some agencies made significant commitments to reduce the net information collection burden they would impose in FY 1996, others made less of a commitment.[3]

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[3] The FY 1995 Total Hour Burdens, and Estimated FY 1996 Total Hour Burdens are copied from Table 3, "The Total Information Collection Burden for FY 1995 and Estimated for FY 1996," Information Resources Management Plan of the Federal Government, August

Based on our current inventory, I am pleased to note that many of the agencies accomplished a greater paperwork burden reduction than they originally estimated -- a few, substantially so.

OIRA is preparing to issue guidance for next year's report, which will contain burden reduction information for FY 1996 and planned initiatives for FY 1997. The guidance we plan to issue to agencies for next year's report will emphasize the need to reduce Federal paperwork burden much more strongly than we did in the guidance we issued last year. The guidance will also ask agencies to verify the FY 1996 base that we now carry in our computerized inventory. We will send you a copy of the guidance when it is complete.

I appreciate the opportunity to provide the additional information to supplement your hearing record. If I can be of any other assistance, please let me know.

Sincerely,

Sally Katzen

Enclosures

1996 (the ICB), p. 10. The FY 1996 Actual Total Hour Burdens are copied from the OMB Inventory of active information collections approved under the Paperwork Reduction Act as of September 30, 1996.

TOTAL INFORMATION COLLECTION BURDEN

	FY '95 TOTAL	FY '96 EST.	FY '96 ACTUAL
Government Totals	6,900,931,627	6,847,570,527	6,714,759,793
Totals, excluding Treasury	1,569,633,594	1,500,635,517	1,379,115,091
Departments:			
Agriculture	131,001,022	111,911,340	120,510,162
Commerce	8,239,828	7,833,665	7,941,049
Defense	205,847,538	154,006,794	152,490,295
Education	57,554,905	60,633,666	49,640,235
Energy	9,187,531	9,187,531	4,656,053
HHS	152,615,502	168,361,748	137,321,103
HUD	33,769,554	32,412,560	37,149,748
Interior	4,165,429	4,063,329	4,357,370
Justice	36,670,323	35,100,158	36,092,808
Labor	226,447,906	258,903,192	241,039,796
State	8,678,480	8,678,480	594,478
Transportation	91,022,665	91,022,665	66,342,522
Treasury	5,331,298,033	5,346,935,010	5,335,644,702
Veterans Affairs	11,133,887	10,000,000	9,434,552
Subtotal	6,347,632,603	6,299,050,138	6,203,214,873
Agencies:			
USAID	482,257	482,257	457,313
EPA	103,066,374	100,200,000	107,676,582
FAR	22,146,676	22,237,650	23,445,460
FCC	22,644,046	22,924,669	23,863,041
FDIC	8,502,121	8,688,340	8,633,570
FEMA	5,175,501	4,754,062	4,802,083
FTC	146,149,460	146,169,304	146,149,127
GSA	391,368	391,368	137,178
NASA	9,561,494	8,411,668	9,556,874
NARA	251,811	270,389	251,811
NSF	5,691,560	6,091,560	5,755,203
NRC	8,726,244	8,925,853	9,940,057
OPM	1,038,719	764,426	993,086
SEC	191,527,284	189,890,436	142,105,083
SBA	2,355,150	2,269,430	2,241,032
SSA	25,307,594	25,767,612	25,249,851
USIA	281,365	281,365	287,569
Subtotal	553,299,024	548,520,389	510,551,834

WE'RE CHANGING THE WAY WE TREAT BUSINESSES

President Clinton and Vice President Gore told government regulators to cut obsolete regulations and to start acting like partners. Agencies are eliminating 16,000 pages of regulations and dramatically simplifying another 31,000.

- We're doing it the right way—rewarding companies that cooperate with us. But for those companies that don't work with us to ensure the public's safety and protect our environment, we will apply every penalty and sanction that the law allows.
- The Health Care Finance Administration eliminated the Physician Attestation Form. This ended the filing of 11 million forms each year and saved doctors 200,000 hours of time.
- The Department of Agriculture dropped three million pages of government forms.
- We're slashing the regulatory and administrative burden of government on citizens and businesses by nearly $28 billion a year.

WE'RE CHANGING THE WAY WE WORK WITH COMMUNITIES

We're letting states try new ways to reform health care and welfare so they can see what works best by focusing on results, not red tape. President Clinton and Vice President Gore have:

- Created more than 100 federal-local partnerships to focus on the needs of individual communities. These partnerships allow community residents to implement plans to solve what they—not Washington—see as their biggest problems.
- Approved welfare demonstration projects in more than 40 states in the three years before President Clinton signed the welfare reform bill.
- Approved 13 comprehensive Medicaid reform demonstrations in partnerships with states to expand coverage to 2.2 million low-income uninsured Americans.
- Signed agreements with two states—Connecticut and Oregon—to pilot new ways of doing business with less burden, and dramatically streamlined planning and other processes in a range of programs in other states.

Government Is Becoming Less Intrusive

- Agencies are sending 16,000 pages of obsolete regulations to the scrap heap, of 36,000 pages of regulations reviewed.
- Agencies are reworking another 31,000 pages of regulations.
- Regulatory and administrative burdens on the public will be reduced by nearly $28 billion.
- Attitudes are changing; in many cases, fines will be waived for honest mistakes.
- Agencies are closing more than 2,000 field offices.

Congress Is Helping

- Congress has enacted 36 NPR-related laws, including the biggest procurement streamlining bill ever, with a second in progress.
- Congress has passed 66 of the 280 NPR items requiring legislation (24 percent).
- Nearly 70 NPR-related bills are currently pending in Congress.
- Congress has held more than 120 hearings on various NPR recommendations.

flexible rules, and the uncooperative attitude. But we're even angrier that our great dream seems to be slipping away—the dream of a government that is "of the people, by the people, and for the people," a government that isn't "them" but "us." And we don't want to give up on that dream. It is what set us apart from the rest of human history nearly 220 years ago, when we

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

EXECUTIVE SUMMARY

In this statement, the National Association of Manufacturers expresses its concerns that regulatory oversight by the Office of Information and Regulatory Affairs under both the Paperwork Reduction Act and Executive Order 12866 has not been aggressive enough. The NAM also suggests a review of agency and OIRA determinations of "significant" regulations subject to full-scale review to be sure that the designation provision of the executive order is not being abused. In addition, policy and guidance documents need to be more scrutinized and made more publicly available. Finally, the NAM questions the effectiveness of the Reinventing Government initiative and Project XL for relieving the regulatory burden on the private sector.

* * *

Mr. Chairman, Members of the Subcommittee, thank you for allowing the National Association of Manufacturers (NAM) to submit this statement for the September 25, 1996, hearing record on oversight of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.

The NAM is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers, are in every State and produce about 85 percent of U.S. manufactured goods. Through its member companies and affiliated associations, the NAM represents every industrial sector and more than 18 million employees.

The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the general public about the importance of manufacturing to America's economic strength.

Because of our belief that regulatory agencies need strong, centralized oversight, the NAM has been an ardent supporter of OIRA since its inception. During the transition between President George Bush and President Bill Clinton, the NAM (along with a wide array of other groups and organizations) had numerous discussions with the transition staff—which continued into the beginning of the Clinton Administration—about what concepts should be included in what became Executive Order 12866 (E.O. 12866 or "the executive order"). For the most part, the NAM was pleased with much of the wording of this executive order. Certain portions, however, gave us pause since we feared that agencies and even OIRA itself could use these sections as loopholes to avoid diligent supervision of agency regulatory zeal.

In particular, the NAM has been concerned about the ability of agencies to designate on their own what does and does not constitute a "significant" regulation. While OIRA retains the ability to designate a regulation as significant notwithstanding an agency's contention that it is not, E.O. 12866 provides for only a 10-day time frame, which is much too short for the affected regulated entities to appeal to OIRA. Perhaps the question about whether this section is being abused could be included in the next General Accounting Office investigation regarding implementation of E.O. 12866.

A far greater problem, which has continued into the legislative process, is that policy and guidance documents were not explicitly included. These documents clarify for enforcement personnel (such as inspectors) the true meaning of regulations. For the most part, these are not shared with the regulated community, which is kept in the dark about agency interpretations of the *Code of Federal Regulations (CFR)* until cited. While on the one hand, E.O. 12866 allows OIRA to review actions that an agency "intends to have the force and effect of law," on the other hand, it is only given authority to review a "regulatory action," which is defined separately. In addition, the executive order explicitly states that "[r]egulations or rules that are limited to agency . . . management . . ." are not included. NAM members know first-hand that *CFR* interpretations are every bit as important as the regulation itself and wishes that the executive order had included them.

The NAM's concern about the lack of policy and guidance document oversight was heightened this year when OIRA took the lead on behalf of the Administration to oppose H.R. 3307, the Regulatory Fair Warning Act. This common-sense legislation, sponsored by Representative George Gekas (R–PA–17), would have prevented agencies from citing or fining regulated entities when the meaning of a regulation is not clear. The NAM believes that, at a minimum, agencies should share regulatory interpretations with those affected in order to promote voluntary compliance. Given the twelfth principle of regulation in E.O. 12866—that "[e]ach agency shall draft its

regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty"—the NAM was perplexed about the strength of OIRA opposition on behalf of the Administration to H.R. 3307. A similar measure, offered by Senator Kay Bailey Hutchison, passed the Senate in 1995 as an amendment to S. 343, the Comprehensive Regulatory Reform Act, by a vote of 80–0. The NAM hopes that this Committee—and this Subcommittee, in particular—will revive and push for this legislation in the 105th Congress.

Having worked with her in various contexts, the NAM appreciates the commitment of OIRA Administrator Sally Katzen to implement (in her words) "smarter regulations." The NAM also recognizes that under her tutelage that OIRA and the executive order have had some successes in restraining some outrageous regulations. Earlier this month, for example, OIRA questioned EPA compliance with the Paperwork Reduction Act in its attempt to expand its Toxics Release Inventory (TRI) program. But the NAM will be watching continued development of this rule since anonymous EPA staff comments in the trade press indicate that EPA does not view OIRA objections in this case as "significant." *(See "Inside EPA," September 6, 1996, pages 11–12.)*

Agency resistance to "smarter regulations" is endemic and has been a problem for all OIRA administrators. While the collegiality emphasized by Administrator Katzen is admirable and may have led to some understanding about the goals of commonsense regulating by some agency heads, the NAM strongly believes that a firmer accent on this aspiration needs to be realized. Published EPA staff reaction to OIRA regarding the TRI rule referenced in the previous paragraph is an example of this. As to Administrator Katzen's comments "that program officers or senior regulatory officials within agencies have thanked [her] for [her] staff's work," our members continually let us know that they are still hobbled by regulatory excesses.

Perhaps a model agency for how a strong commitment to reform can result in concrete agency actions is the Federal Trade Commission (FTC or commission) under current Chairman Robert Pitofsky. Only two decades ago, the FTC was nicknamed the "national nanny" because of its overzealous regulatory activity. During the 1980s, a paradigm shift in regulatory philosophy began to take hold, and has culminated under Chairman Pitofsky's leadership and guidance. Last fall, the chairman presided over an in-depth series of hearings to determine how the agency could effectively fulfill its mission while decreasing its regulatory burden. These hearings resulted in some very logical and practical recommendations for agency policies into the 21st century. In addition, the commission has voted to grant a presumption of termination for competition and consumer protection orders after 20 years, in recognition of the fact that corporate cultures and personalities that led to the orders in the first place likely will have changed. Another example is the promulgation of the Telemarketing Sales Rule. As initially released, the proposal would have crippled legitimate commerce. After a studious investigation on the impact, however, the staff proposed and the commissioners adopted a very sound final rule that allows for due diligence against fraudulent telemarketers while allowing legitimate business practices to proceed unencumbered. While this hearing is not on the effectiveness of the FTC, the commission nevertheless can serve as a paragon for profound and perceptible procedural change in regulatory policies.

Two regulatory reform initiatives have been especially touted by the Clinton Administration as successful in decreasing the regulatory burden. Specifically, these are the Reinventing Government project undertaken by Vice President Albert Gore, and the Project XL program that particularly pertains to the Environmental Protection Agency (EPA).

Reinventing Government has, indeed, achieved tangible results. Unfortunately, these have mainly decreased the burden that one agency's regulations impose on another agency. Members of the NAM would have appreciated the same regulatory relief that Reinventing Government has given to Federal agencies. Indeed, in at least one case, Reinventing Government increased the complexity of regulatory compliance for the private sector so that the Office of the National Performance Review (NPR) could claim additional elimination of *CFR* pages.

When the Occupational Safety and Health Administration (OSHA) attempted to comply with the NPR's goal to reduce *CFR* pages, one of the actions the agency took was to combine the requirements for general industry and construction into one document. Although this successfully reduced the number of *CFR* pages, it failed to reduce the burden or provide relief to employers. In fact, through this exercise, OSHA actually increased the burden on construction employers by forcing them to comply with the general industry requirements and then referencing them to construction-specific rules found in documents other than the *CFR*. OSHA did not deal with any

substantive issues or real burdens. The old cliche about rearranging the deck chairs on the Titanic is very apt to the effectiveness of OSHA's actions.

OSHA's performance regarding general industry and construction compliance requirements have been repeated in the responses of other agencies to the Reinventing Government initiative. To the NAM and its members, the primary defect of the effort is the overriding emphasis on paperwork rather than regulatory burden. Simply converting to on-line compliance and shortening forms does nothing to abate the time and effort need to obtain, document and record required information.

As for Project XL, the NAM is not aware of businesses clamoring to participate. Indeed, although the initiative was announced on March 16, 1995, the first approval did not come until July 1996. Perhaps this is because the legal authority for implementation of Project XL has been questioned. More importantly, however, the experience of companies that have tried to use Project XL provisions have raised caution flags for other companies. First and foremost, the corporate resources necessary for those which have submitted applications appear to be more than most potential participants would like to bear. In addition, the requirement that "citizen groups" be given full participation makes companies understandably cautious about allowing access to sensitive proprietary documents by environmental activists who may care less about the success of a particular project than obtaining documents that they could then misread and misuse for publicity purposes. Finally, even for those firms willing to take part—or at least inquire about it—EPA has been far less flexible than the spirit of the project would have one believe. For these reasons, the NAM strongly disagrees with the assessment that Project XL is a regulatory "success" and would encourage OIRA to review closely EPA's real-world implementation.

Several examples exist where E.O. 12866 has failed to prevent agencies from proceeding with unnecessary or overly burdensome regulations despite apparent violation of several of its regulatory principles:

- *National Ambient Air Quality Standards (NAAQS).* EPA continues to move forward in lowering particulate matter and ozone standards under the Clean Air Act Amendments of 1990. There is nothing in the statute requiring the EPA to tighten its standards, and its own scientific panel has questioned the need for such action. One has to wonder how the agency reconciles this with the executive order's seventh Principle of Regulation: "Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information on the need for, and consequences of, the intended regulation."
- *Employee Contributions to Employee Benefit Plans.* Since the preamble to the final rule states that 94 percent of plans are already in compliance, the NAM questions the need for this regulation. In addition, the methodology proposed does not meet any cost-benefit standard.
- *OSHA Recordkeeping Requirements for Occupational Injury and Illness.* The NAM is appreciative of OIRA's May 17, 1996, comments on the rule that OSHA "review and discuss other substantive issues raised in public comments that address burden, utility, or duplication involved in the final rule." But, OSHA's estimates of burden clearly are not credible, far underestimating the burden they will have. In addition, neither the need for nor the practical utility of the proposed rule have been established. It would have been preferable had OIRA simply asked OSHA to better justify the proposed rule under the Paperwork Reduction Act and E.O. 12866 before moving to the next stage, or to withdraw the rulemaking altogether.

The Center for the Study of American Business recently issued a pamphlet entitled *Federal Regulation's Impact on the Productivity Slowdown: A Trillion-Dollar Drag*, which concludes: "If regulatory buildup has lowered our growth rate in productivity by 0.58 percent a year over time, the impact of that slowdown over 30 or more years is profound. The growth in the regulatory state may well be a trillion-dollar misunderstanding." The Paperwork Reduction Act of 1980, augmented by amendments adopted in 1993, established OIRA as a guardian against unwise, unsound and unnecessary regulatory policies. Presidents since Ronald Reagan have reinforced this mission with executive orders. The NAM strongly urges OIRA to strictly enforce the current executive order to rid the American economy of any unnecessary regulatory drag.

For those with an inclination toward reducing the regulatory burden, E.O. 12866 reads well. It would be helpful, however, if OIRA concentrated more on holding agency proverbial feet to the fire to comply with its dictates.

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