ANSWERS TO QUESTIONS POSED BY SUBCOMMITTEE MEMBERS

Questions from Senator Whitehouse

Howard Shelanski was confirmed as the new Administrator of the Office of Information and Regulatory Affairs on June 27. He said repeatedly during his confirmation process that he is committed to reducing backlogs at OIRA. In fact, we have already begun to see results. In May, I wrote a letter to OMB—where OIRA is located—urging the Bureau to release three important rules. One rule—which reduces the amount of arsenic in apple juice—has already been released. Mr. Shelanski seems to be open to fresh ideas and eager to move forward with the important work of his office.

a. Do you have any suggestions for him as he begins the process of reviewing stalled regulations and identifying the causes of this delay?

As a preliminary matter, I do not endorse OIRA review of regulations. The problems it creates far outweigh any benefits it might yield in terms of improved decision-making. I recognize, however, that the institution of centralized review that OIRA oversees will remain in place for the foreseeable future. Bearing that in mind, there are ways that OIRA's review processes can be improved to reduce the negative impacts it has on the effective functioning of the regulatory system. By taking the following three steps, Administrator Shelanski can help to mitigate the problem of persistent OIRA delays.

First, OIRA should limits reviews to just rules that meet the definition of being "economically significant." In fact, Executive Order 12866 instructs OIRA to focus on these "economically significant" rules, generally defined as rules imposing more than $100 million in annual compliance costs for affected industries. The order also allows OIRA to extend the scope of its review in very limited circumstances: for example, with respect to rules that interfere with other agencies' work, materially change entitlement programs, or present "novel" legal or policy issues. But this exception has proved unworkable, as OIRA has routinely ignored these limits, extending its reach into every corner of the EPA's and other agencies' work. While OIRA reviews approximately 500 to 700 rules each year, only about 100 are economically significant, with the remainder supposedly falling under the limited exceptions of Executive Order 12866. Or, in other words, "non-economically significant rules" are reviewed at a ratio of six to one with the rules that should be the primary focus of OIRA's work.

Similarly, OIRA should end its practice of reviewing agency guidance documents. These are not rules, and thus are not even covered by Executive Order 12866. (The Obama Administration did issue an obscure memorandum soon after coming into office asserting review authority over agency guidance documents.) These documents benefit industry by reducing regulatory uncertainty, and thus should not be subjected to unnecessary delay. Nevertheless, OIRA review has delayed several important guidance documents, including currently the EPA's guidance document clarifying the scope of the Clean Water Act with respect to wetlands and other inland water bodies.

Second, OIRA should confine its reviews to either facilitating interagency coordination on particular rules or offering constructive criticism on agency's economic analyses. By facilitating interagency coordination, I mean that OIRA should help agencies to ensure that their rules don't overlap with those of other agencies or don't produce gaps in protections—such as those that led to the West, Texas, fertilizer explosions. I do not mean that OIRA should enable one agency to protect its constituent's interests by trumping the regulatory decision-making of another. (For example, the Department of Energy should not be permitted to block EPA rules that are opposed by the fossil fueled power plants that certain Department of Energy offices seek to promote.) On economic analyses, OIRA should limit itself to double-checking an agency's work to ensure that no huge mistakes have been made. Under no circumstances should OIRA seek to nitpick these analyses with the effect of zeroing out regulatory benefits while exaggerating regulatory costs. OIRA has employed these practices in the past in order to blog needed safeguards.

It is likewise important that OIRA not seek to interfere in matters beyond its limited expertise on economic issues. In the past, OIRA has sought to substitute its judgment on complex scientific, medical, and other technical matters for those of the expert agencies. For example, OIRA has routinely sought to interfere in EPA scientific assessments underlying the agency's Integrated Risk Information System program. This practice may stop.

Third, OIRA should stop meeting without side groups during rule reviews. The Center for Progressive Reform conducted an exhaustive study of the corrosive effects these reviews can have. This study is available here: http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf. One of the study's findings is that meetings with outside groups leads to longer review times at OIRA. These meetings weaken the quality of reviews since they are highly biased toward advancing industry interests, they are not adequately transparent, and they are duplicative of other public participation processes already available in the rulemaking process, including the solicitation and consideration of public comments on regulatory proposals.

b. How can Congress, agencies, and other actors assist him in making the OIRA review process more efficient?

Congress must conduct more thorough oversight of OIRA's activities, particularly with respect to whether OIRA is following the requirements of the executive orders that guide its activities. I would especially encourage those committees with substantive jurisdiction over the rulemaking activities of agencies (for example, the Senate Environment and Public Works Committee with respect to the EPA) to conduct thorough oversight of OIRA's interference with specific rulemaking activities. Ultimately, OIRA interference undermines the ability of the EPA and other regulatory agencies to carry out their statutory missions. The committees of substantive jurisdiction have an important role to play in ensuring that these statutory missions are being fulfilled and to investigate when those missions are not being fulfilled because of OIRA interference.

A longer term solution would be to amend the Administrative Procedure Act (APA) to ensure that presidential executive orders affecting administrative process (*i.e.*, Executive Order 12866) are designed to be consistent with the APA. The APA sets up a framework for the administrative

process that emphasizes rulemaking based on agency expertise on scientific and other technical matters, adherence to the requirements of applicable organic statutes authorizing rulemakings, and transparency at every step in the rulemaking process. Executive Order 12866 runs directly counter to these principles. It prioritizes OIRA's crabbed economic analysis over agency expertise, it elevates cost-benefit analysis over agencies' organic statutes, and it enables OIRA to meet with politically well-connected interests to weaken or block agency rules behind closed doors.

Dr. McLaughlin mentioned in his testimony that the Mercatus Center has been evaluating rules through a Regulatory Report Card. The Report Card looks to the impact analyses agencies conduct when proposing rules. Many of the criteria seemed highly subjective and it is questionable whether they would actually lead to better rules. In particular, the Report Card places a strong emphasis on cost-benefit analysis. Not only does it evaluate an agency's CBA assessment, but it also looks to whether the agency chose the least-costly regulation and maximized net benefits. This seems to conflict with Congressional intent when we design agency mandates.

a. You have done a lot of work on the coal ash rule. Can you give me an assessment of the Regulatory Report Card's score on that rule?

Unfortunately, I am unimpressed by the Mercatus analysis of the coal ash rule because it appears to have been written without the benefit of a close study—or even a careful reading—of the EPA coal ash proposal. For example, Mercatus says that EPA's analysis would have benefited from greater clarity on how the subtitle C proposal would reduce pollution caused when poorly designed coal ash ponds leak into groundwater. But EPA did present an extensive analysis of those issues, pointing out, with significant support, that storing coal ash in a modern landfill with a liner and a leak detection system would great enhance the chances that such leeching would be prevented.

b. Have you found that the Regulatory Report Card's criteria would lead to better rules?

No, I have not. The Report Card is a one-way street—it always argues against the imposition of rules, and never considers when they might be helpful. Because of this strong bias against regulatory controls, the Report Card's clear intention is to undercut rules as opposed to enhancing their effectiveness.

c. How does the Report Card's emphasis on cost-benefit analysis affect agency decision-making when promulgating rules?

Cost-benefit analysis as practiced in agencies today underestimates benefits and overestimates costs. Because it is, in practice, an instrument biased against protective rules and because it has become a convoluted exercise that takes many months—and often years—to complete, it frustrates good policies that are often mandated by statute.

d. Does the Report Card's emphasis on cost-benefit analysis take into consideration the human costs of unregulated areas?

The Report Card does not acknowledge problems with cost-benefit analysis, pays scant attention to the benefits side of the equation, and therefore systematically overlooks the human costs of decisions not to regulate.

Janette Fennell testified about the Department of Transportation's proposed Rear Visibility Rule, which has gotten bogged down in the regulatory process. One of the issues that has come up with the Rear Visibility Rule seems to be a recurring theme in cases of regulatory delay: overestimated costs. The Department of Transportation's initial estimate of the cost of a rearview camera is $200 per unit, amounting to $2.7 billion overall. However, Jackie Gillan, president of the group Advocates for Highway and Auto Safety, has stated that this number is greatly inflated. She argues that the price of these cameras will naturally go down if they are mandated and their use becomes more widespread.

a. Is it typical to not take into account the fact that the cost of a rule may decline as the rule is implemented?

The *ex ante* cost estimates that agencies use in cost-benefit analysis systematically overstate the actual costs that rules impose. This occurs for several reasons.

To generate these cost estimates, agencies primarily rely on surveys of representative companies that the regulation will likely affect. Because companies know the purpose of the surveys, they have a strong incentive to overstate costs in order to skew the final cost-benefit analysis toward weaker regulatory standards.[1] Agencies must also fill in any data gaps they encounter by making various assumptions. Due to fear of litigation over the regulation, they tend to adopt conservative assumptions about regulatory costs, such that the cost assessment ends up reflecting the maximum possible cost, rather than the mean.[2]

Industry cost estimates—and therefore the cost estimates that agencies develop—also do not account for technological innovations that reduce the cost of compliance and produce non-regulatory co-benefits, such as increased productivity. When companies are asked to predict which technology they will employ to comply with a particular environmental regulation, they often will point to the most expensive existing "off-the-shelf" technology available. Once the regulation actually goes into effect, however, companies have a strong incentive to invent or purchase less costly technologies to come into regulatory compliance. As a result, compliance costs tend to be less, and often much less, than the predicted costs. Moreover, the technological innovations tend to produce co-benefits unrelated to the regulation—such as increased productivity and efficiency—that the company strives to achieve in any event. Given these co-

[1] Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2011, 2044-45 (2002).
[2] *Id*. at 2046.

benefits, only a portion of the innovative technology's costs can fairly be counted as compliance costs.[3]

As the following chart indicates, retrospective studies of regulatory costs find that the initial cost estimates are often too high.

[3] *Id*. at 2049-50. Studies of OSHA's vinyl chloride and cotton dust standards concluded that actual compliance costs were much lower than predicted costs in part because of overall productivity gains achieved by regulatees. When company scientists and engineers were forced to concentrate on cost-effective compliance techniques, they also identified ways to improve the overall productivity of an industrial process, or even an entire industry. *See* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, OFFICE OF PROGRAM EVALUATION, REGULATORY REVIEW OF OSHA'S COTTON DUST STANDARD (2000) (identifying extensive technological improvements and increased productivity in the textile industry spurred by OSHA's cotton dust standard); RUTH RUTTENBERG, REGULATION IS THE MOTHER OF INVENTION 42, 44-45 (Working Papers for a New Society, May/June 1981), (identifying six regulation-induced changes in the vinyl chloride industry that resulted in increased productivity).

Retrospective Studies of Regulatory Costs

Study	Subject of Cost Estimates	Results
PHB, 1980[4]	Sector level capital expenditures for pollution controls	− EPA overestimated capital costs more than it underestimated them, with forecasts ranging 26 to 126% above reported expenditures
OTA, 1995[5]	Total, annual, or capital expenditures for occupational safety & health regulations	− OSHA overestimated costs for 4 of 5 health regulations, with forecasts ranging from $5.4 million to $722 million above reported expenditures
Goodstein & Hedges, 1997[6]	Various measures of cost for pollution prevention	− Agency and industry overestimated costs for 24 of 24 OSHA & EPA regulations, by at least 30% and generally by more than 100%
Resources for the Future, 1999[7]	Various measures of cost for environmental regulations	− Agency overestimated costs for 12 of 25 rules, and underestimated costs for 2 rules

Agencies can and should do better at generating *ex ante* cost estimates to account for all of these factors that lead to their systematic overstatement, and this is an area where OIRA's centralized review could actually improve agency decision-making. OIRA is uniquely well situated to study the problem of regulatory cost overestimates and to help guide agencies to develop more accurate estimates. This subcommittee should urge OIRA to examine this problem and to help develop meaningful solutions.

b. Could this have an impact on cost-benefit analysis?

Yes, the systematic overestimate of costs leads to skewed cost-benefit analysis results that inaccurately portray needed safeguards as a drain on society. This problem is further compounded by the fact that cost-benefit analysis suffers from several methodological flaws that lead to systematic under-estimates of regulatory benefits. In short, cost-benefit analyses typically involve overstated costs and understated benefits. As a result, cost-benefit analysis

[4] Winston Harrington, Richard D. Morgenstern, & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates* 6 (Resources for the Future, Discussion Paper 99-18, 1999) (citing PUTNAM, HAYES, & BARTLETT, INC., COMPARISONS OF ESTIMATED AND ACTUAL POLLUTION CONTROL CAPITAL EXPENDITURES FOR SELECTED INDUSTRIES (Report prepared for the Office of Planning & Evaluation, U.S. Envtl. Protection Agency, 1980)), *available at* http://www.rff.org/documents/RFF-DP-99-18.pdf.

[5] OFFICE OF TECHNOLOGY ASSESSMENT, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH 58 (1995).

[6] Eban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, 8 AM. PROSPECT 64 (Nov./Dec. 1997).

[7] Harrington, Morgenstern, & Nelson, *supra* endnote 27. The Resources for the Future study notes that actual compliance costs can also be less than an agency estimates because there can be less regulatory compliance than the agency anticipates. If an agency overestimates the extent of pollution reduction, or some similar benefit, then the regulation may cost less than the agency estimates. In such cases, the original agency estimate might have been accurate, but it turns out to be wrong because the regulatory industry does not obey the regulation to the extent that the agency predicted. *Id*. at 14-15.

invariably distorts the true value of regulations—one that is heavily skewed against effective regulations—which is precisely why those opposed to regulations support the use of cost-benefit analysis.

The systematic overestimate of regulatory costs is especially problematic, because the results of cost-benefit analysis play an unduly influential role in regulatory decision-making. Former OIRA Administrator Cass Sunstein stated in his recent book that, under his leadership, OIRA by and large would not approve a rule if it did not pass a cost-benefit analysis test—that is, if the rule's benefits did not "justify" its costs. As noted above, this test is stacked heavily against effective regulations, because it trades on a methodology that overstates costs and understates benefits. As a result, appropriately strong rules are prevented from passing this test. Instead, agencies must resort to drafting weaker rules to improve their chances of passing the cost-benefit analysis test, which leaves people and the environment inadequately protected.

Ms. Fennell's testimony raised an issue that really struck me. When they estimate the costs and benefits of a rule, agencies are expected to calculate the dollar value of a life. Putting aside for a second whether we can appropriately and accurately put a dollar value on life, what strikes me is what gets ignored in this calculation.

One of the main harms that could be addressed by the Rear Visibility Rule that Ms. Fennell spoke about is the risk that parents will accidentally back over their own children. Apparently 99 of the more than 220 people killed last year in backovers were children, and most of the time they were backed over by their own parents. Yet the mental anguish of a parent who has just accidentally killed their own child is not considered when agencies decide whether to address this problem.

a. In your experience, are costs like this frequently ignored? Does this have an impact on the regulatory process?

I would put this problem a little differently. The goal of cost-benefit analysis is to produce a comparison of all the costs and all of the benefits of a particular regulation in order to identify the most "efficient" regulatory option (*i.e.*, the regulatory option that produces the greatest net benefits). Generally, the task of quantifying and assigning a monetary value to the cost that a rule imposes on regulated industry is much more straightforward (though, as noted above, methodological flaws lead to systematic overestimates of these costs). The bigger problem comes with efforts to calculate regulatory benefits. In many cases, a particular type of benefit cannot be quantified (*e.g.*, we don't know how many fish the EPA's cooling water intake rule for power plants will save) and/or it cannot be monetized (*e.g.*, even if we know many fish the EPA's cooling water intake rule will save, we don't know how to assign a meaningful monetary value to saving those fish). In this case, the benefit isn't simply ignored—it's arbitrarily assigned a value of $0. We know there is a benefit, but we just don't know how to state it in the language of cost-benefit analysis. The cost-benefit analyst could respond to this problem in any number of ways. He could, for example, make up a monetary value—$1 million perhaps (which is no less arbitrary than $0 and undoubtedly closer to the "right" answer)—and employ that value in the cost-benefit analysis. But cost-benefit analysis does not follow this approach. Instead, it

treats all unquantifiable and all un-monetizable benefits as worth $0. Needless to say, this helps contribute to the huge systematic underestimate of regulatory benefits I described above.

As also noted above, the systematic underestimate of regulatory benefits contributes to skewed cost-benefit analysis results, which in turn leads agencies to develop inadequately weak rules.

b. If these costs lead to tangible, economic harms—like depressed parents seeking counseling, dropping out of the workforce, or engaging in destructive behavior—are those costs still ignored?

There's no question that cost-benefit analysis routinely fails to account for benefits that involve real economic costs. This is true of the example you give of depressed parents seeking counseling, etc., as well as of protecting fish that have some indiscernible economic value from being killed in power plants' cooling water intake structures. Likewise, cost-benefit analysis techniques routinely fail to account for benefits that transcend monetary values, such as avoiding the anguish a parent feels when he or she is responsible for his own child's death. In either case, if a cost-benefit analyst cannot devise a plausible method for quantifying and monetizing this benefit, it is treated as having a value of only $0.

In his submitted testimony, Dr. McLaughlin wrote about the disproportionate negative effect of regulations on low-income populations. However, Ms. Seminario made a compelling argument in her testimony regarding the astronomical costs of healthcare that workers face when they become injured or ill due to unregulated hazards in the workplace. Half of these costs are borne by workers and nearly a third are shifted to society as a whole in the form of public benefits and private health insurance.

a. As a general rule, have you found that regulations have a regressive effect that harms low-income populations?

To the contrary, regulations often have a disproportionately beneficial effect on low-income populations. Consider, for example, regulations that address hazardous air pollutants from power plants or refineries. These air pollutants primarily harm the "fenceline communities" that live adjacent to these facilities. These communities in turn are primarily populated by lower income individuals and people of color. In short, the benefits of addressing hazardous pollutants from these plants would fall primarily on these fenceline communities. I take it that Dr. McLaughlin point is that the costs of generating these benefits would be passed on as higher prices of goods (*e.g.*, through higher electricity prices or higher gas prices), and that these higher prices will disproportionately harm low-income populations. Even if Dr. McLaughlin's correct about regulations raising prices, his view is fundamentally incomplete and therefore misleading, because it ignores all the benefits that would flow to these communities as a result of these regulatory safeguards. With cleaner air, these individuals would have lower medical costs and experience fewer missed work days and school days. With improved health, these individuals could seek out better, higher paying jobs. And so on. Dr. McLaughlin's crabbed view is that regulations inevitably restrict individual freedom. My view, as illustrated above, is that the benefits that regulations produce can be freedom-enhancing, especially for low-income populations.

Mr. McLaughlin and Mr. Batkins suggest in their testimony that the rate at which agencies issue rules has been skyrocketing. They have provided some statistics, but those statistics look at things like the number of pages in a rule or the number of words—not the factors that would tell us whether we are really seeing more stringent regulations. Senator Whitehouse pointed out at the hearing that regulations typically are not removed from the record, but instead, we replace them with new ones that are enforced. As Dr. McLaughlin conceded, counting the number of pages in the federal record can be deceiving since defunct regulations would be part of that calculation.

a. Based on your experience, do you believe we are seeing more rapid regulation?

As I noted in my testimony, the regulatory process has grinded to a virtual halt during the last decade or so. As Ms. Seminario noted in her testimony, OSHA has finished only two real regulations of note during the Obama Administration—and both had been initiated prior to Obama assuming office. In my testimony, I examined eight pending rulemakings at EPA that have been subject persistent and unnecessary delays. Given all of the available evidence, it is difficult to take seriously the claim that the Obama Administration is unleashing anything like a "regulatory tsunami."

If anything, the regulatory process is moving too slowly, undermining the ability of agencies to respond effectively to new and emerging threats to public health, safety, and the environment. Congress and the Obama Administration need to examine carefully the causes of this regulatory delay and adopt reforms to help eliminate it. As I explained above, reforming the way OIRA conducts centralized review would be a fruitful place to begin this examination.

You mentioned in the hearing that the Rear-View Visibility rule has been delayed in part because OIRA has requested that NHSTA withdraw the rule. It is appropriate to send rules back that need further analysis and amendments, but they should not unnecessarily be stuck in a cycle of OIRA review.

a. When rules are sent back or OIRA requests that they be withdrawn, do agencies amend them and try again?

It's not clear what happens to rules after they are "withdrawn," because this process is completely lacking in transparency. It's possible that OIRA could ask an agency to withdraw a rule, not to fix any defects in the rule, but just so that it is no longer on OIRA's docket with the clock ticking. In other words, this may be a tactic that OIRA uses to avoid having too many rules stuck there beyond the 120-day limit permitted under Executive Order 12866. Later, the agency may be invited by OIRA to resubmit the rule, unchanged to OIRA to resume review.

The issue of "withdrawn" rules is one that merits further attention by this committee. In theory, there are two ways that an OIRA review can end prematurely without formal OIRA approval. First, OIRA can "return" the rule to the agency. This process is more transparent, because OIRA must issue a letter explaining why the draft rule was returned to the agency. In other words, OIRA must make clear what problems arose during OIRA review that could not be resolved.

The Obama Administration has largely avoided the use of return letters using it only once when it rejected the EPA's draft final rule to set a new national ozone standard. Instead, the Obama Administration has preferred to rely on the second process for prematurely ending a rule: withdrawal. In theory, an agency withdraws its own rule of its own volition, because it discovers some problem with the rule during the review that must be corrected before review can resume. In practice, the withdrawal process appears to have functioned as a less transparent "return" during the Obama Administration. In other words, it appears that the Obama Administration has frequently directed an agency head to "choose" to withdraw a rule. This end-run around the return letter allows the White House to send a rule back to the agency quietly and with no public explanation for the reason that the OIRA review ended prematurely. This is likely what transpired when the Department of Transportation "withdrew" the Rear-View Visibility rule.

I would urge this subcommittee to press the Obama Administration to refrain from relying on the withdrawal process to prematurely end OIRA review. Alternatively, this subcommittee should press the Obama Administration to issue a public statement when a rule is withdrawn explaining the reasons for the withdrawal, so that the process is at least as transparent as the return process.

b. What types of changes are typically incorporated when proposed rules are amended for a second-look from OIRA? What impact do these changes have on the strength of the rule?

As noted above, the process for withdrawals is not transparent (much like virtually every aspect of OIRA review), so it is impossible to know what, if any, changes result from it. The available evidence suggests that rules are likely weakened in response to withdrawals.

First, as numerous previous studies have found, OIRA review often operates as a "one-way ratchet" such that rule changes made during OIRA review have served to weaken regulatory safeguards.[8] In part, this is because of industry's successful lobbying efforts to weaken rules, as documented in the CPR study discussed above. In part, this is because of the elevated role that cost-benefit analysis plays in OIRA review, which, as described above, is heavily biased in favor of weaker regulations.

If we assume that the withdrawals are functionally similar to returns, as described above, this would also suggest that the resulting rule changes are in the direction of weaker safeguards. The George W. Bush Administration issued several return letters, and virtually all of them directed the rulemaking agency to make changes to a rule that would result in weaker safeguards.

[8] *See, e.g.*, Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 72-73 (2006) (a survey of top political appointees at EPA under Bush I and Clinton, in which 89 percent of respondents agreed that OIRA never or rarely made changes that would enhance protection of human health or the environment, and often or always made regulations less burdensome for regulated entities); David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLORADO L. REV. 335, 365 (2006) (examining 25 rules identified by the GAO as "significantly changed" by OIRA between June 2001 and July 2002, and concluding that for 24 of the 25 rules, OIRA's suggested changes "would weaken environmental, health, or safety protection").

However, one thing about withdrawals and returns is clear: They both often result in significant rulemaking delays—delays that impose unacceptable costs on people and the environment. For example, in September of 2011 the Obama Administration issued a return letter on the EPA's draft final rule, which would have strengthened the national ozone standards. Here we are almost two years later, and no new final rule to strengthen the national ozone standards is on the horizon. As I noted in my testimony, any final rule is unlikely to be released until sometime in 2015. In short, Obama's return letter precipitated at least a four-year delay for this critical rulemaking.

Ms. Seminario told a compelling story during the hearing concerning a meeting with OIRA Administrator Sunstein on a silica rule. She described Mr. Sunstein's surprise that he was meeting with health and safety representatives rather than industry.

a. What impact, if any, does industry capture have on regulatory delay?

There is no question that industry has captured OIRA and that industry's dominance of OIRA review is a significant contributor to regulatory delay. CPR's study on industry lobbying of OIRA, referred to above, found that industry overwhelmingly dominates the OIRA review process: Industry groups participating in the meeting process outnumber public interest groups by a ratio of 4.5 to 1. Of those OIRA reviews that involved meetings with outside groups, fully 73 percent involved meetings with industry representatives only (*i.e.*, OIRA did not meet with any public interest representatives regarding these reviews). In contrast, only 16 percent involved meetings with outside groups from across the spectrum of "stakeholders" (*i.e.*, both industry and public interest representatives).

Moreover, the CPR study finds that those reviews that were the subject of meetings with outside lobbyists tended to be longer than those reviews during which OIRA held no meetings with outside lobbyists. One remarkable example of this dynamic was OIRA's review of the EPA's draft proposed coal ash rule. The review for this rule lasted well over six months—far beyond the 120-day maximum permitted by Executive Order 12866—as OIRA hosted nearly 50 meetings with outside groups on the rule, the vast majority of which involved various industry groups opposed to the rule.

But the problem goes beyond OIRA. I would say industry interests have also captured much of the rulemaking process—in the sense that they have distorted this process so that it works in their favor and against the public interest. Perhaps the most notable example of this dynamic is how industry has effectively hijacked the notice-and-comment process. Notice-and-comment was introduced into rulemaking to ensure that the voice of the public interest was heard. Industry, though, has leveraged its vast resources to dominate this process so completely that it works against the public interest. My colleague Prof. Wendy Wagner has documented how industry's participation rate in the public comment process is far greater than that of public interest groups. She also explains how industry has taken advantage of what she calls "filter failure"—or tricks that industry employs to literally inundate agencies with information, regardless of whether this information is useful or duplicative. The result is that agencies are overwhelmed with too much information, and thus are delayed from making decisions or are bullied into making decisions that favor regulated interests. Because of their limited resources, public interest groups cannot

respond to this information, and their voice ends up being drowned out in the notice-and-comment process.

In all of these various ways, the rulemaking process does not work for the public interest anymore—it has been captured by industry. I urge this subcommittee to work with the Obama Administration to identify and institute reforms that will help level the playing field, so that the regulatory system is better able to advance the public interest.

b. How does industry end up with more meetings with OIRA than public interest groups and do you have any suggestions for how to change to this?

OIRA operates under what it calls an "open door policy" in which it generally will accept any meeting request it receives. OIRA facilely asserts that this policy is neutral, but, as the statistics cited above reveal, regulated industry is able to take advantage of the vast resource disparity it enjoys over public interest groups and overwhelm OIRA staff with meetings. Industry continues to lobby OIRA at such high rates, because it works. As noted above, reviews that are the subject of meetings tend to last longer than those without meetings. (These delays in turn translate into money saved for industry.) Moreover, a rule is more likely to be changed if OIRA meets with outside groups during the review, and, as the past studies cited above confirm, these changes often result in weaker rules that benefit regulated industry at the expense of the public interest.

The only surefire way to prevent industry lobbyists from dominating OIRA would be for OIRA to stop meeting with outside groups as part of its review process. OIRA should instead base the evaluations it performs during the review process on input from agency staff and, if necessary, review of the ample comments in the rulemaking record. The agency process of reviewing public comments is the appropriate venue for outside parties to make their case about how best to enforce the nation's laws via regulation. Unlike OIRA review, the public comment process is required to be transparent under the APA, and industry's arguments in the public comment process must at least in theory be grounded in either the law or in any relevant science. In contrast, OIRA review is not transparent, and nothing prevents industry from relying on irrelevant factors—such as petty politics—to make the case for weakening regulatory safeguards.

I recognize that this essential reform is unlikely to come to fruition in the near future. So, if OIRA continues to meet with outside parties, it should at least assume an active role in balancing the participation, whether through consolidating meetings with likeminded participants (*i.e.*, seeing them all at once), reaching out to the relevant public interest groups to encourage their input, or both.

When identifying causes of regulatory delay, many experts cite the burdens of judicial review on agency action. This can come in the form of years of litigation as industry challenges rules, the striking down of rules, and new burdens placed on agencies when promulgating rules.

a. What impact, if any, does judicial review have on rulemaking?

Judicial review adds to the expense and length of rulemaking. Agencies expect that almost any rulemaking of any consequence will be subjected to challenge in the courts, and, since

implementation of the challenged rule is stayed until the litigation is complete, this process effectively adds several years to the rulemaking process (even assuming the rule is not struck down or remanded to the agency). This process is expensive for agencies and diverts their limited resources from pursuing other elements of their statutory mission. (Of course, this process is also expensive for regulated industries. Nevertheless, they still have strong incentives to pursue litigation as a matter of course, because the resulting delays save regulated industries even more money on balance.)

Industry abuse of judicial review can also have a destructive chilling effect on how agencies develop regulations. For one thing, agencies draft weaker rules than they might otherwise to avert particularly bruising court battles. For another, agencies face strong incentives to engage in endless rounds of analysis in order to try to make their rules "bulletproof" enough to withstand the brutal judicial review that industry will undoubtedly pursue. This counterproductive dynamic is further aided and abetted by reviewing courts, which generally require that agencies demonstrate that they have considered and respond to every element of every public comment they receive, no matter how mundane or tangentially related. (This judicial review requirement in turn reinforces the "filter failure" problem that I identified above. Industry recognizes the large risks agencies face for failing to adequately respond to their voluminous comments. So, for the relatively small cost of inundating agencies in comments, industry can ensure that agencies remain bogged down with reviewing and responding to all of them—an unhelpful task ultimately geared toward satisfying judicial review requirements rather than producing "high quality" rules.) To be sure, judicial review can and does encourage improved regulatory decision-making. We want agencies to face strong incentives to put out high-quality rules that are consistent with the law and supported by the best available science, and judicial review does provide these strong incentives. However, industry has abused judicial review to such an extent that this once healthy check has transformed into a detrimental source of regulatory delay and dysfunction.

Questions from Senator Klobuchar

1. The Office of Information and Regulatory Affairs' (OIRA) key analytical tool is a "cost benefit analysis," which requires the Office to weigh economic costs against benefits that can be more difficult to measure. This kind of exercise may require agencies to expend significant resources to build a record that ultimately may not even be capable of adequately quantifying the "benefits" at issue. Is this the best analytical tool OIRA can reach for? Why or why not? What analytical tools could OIRA use that would be less burdensome to agencies and that would yield results that more closely approximate the real policy calculus the government is trying to make?

Cost-benefit analysis—as practiced by OIRA—is an inherently flawed means for evaluating the quality of regulations, and its methodological flaws leads it to provide a distorted picture of the real value of regulation—one that is heavily skewed against protective safeguards. In fact, regulatory opponents—including corporate interests and small government ideologues in government—have long embraced cost-benefit analysis precisely because of its strong bias against effective regulations. I would strongly urge OIRA to abandon it overreliance on cost-benefit analysis, and instead restore agencies' statutory standards as the primary guide for evaluating agency decision-making.

Cost-benefit analysis provides a distorted view of regulation in two ways. First, it systematically overestimates regulatory costs. To generate cost estimates, agencies primarily rely on surveys of representative companies that the regulation will likely affect. Because companies know the purpose of the surveys, they have a strong incentive to overstate costs in order to skew the final cost-benefit analysis toward weaker regulatory standards.[9] Agencies must also fill in any data gaps they encounter by making various assumptions. Due to fear of litigation over the regulation, they tend to adopt conservative assumptions about regulatory costs, such that the cost assessment ends up reflecting the maximum possible cost, rather than the mean.[10]

Industry cost estimates—and therefore the cost estimates that agencies develop—also do not account for technological innovations that reduce the cost of compliance and produce non-regulatory co-benefits, such as increased productivity. When companies are asked to predict which technology they will employ to comply with a particular environmental regulation, they often will point to the most expensive existing "off-the-shelf" technology available. Once the regulation actually goes into effect, however, companies have a strong incentive to invent or purchase less costly technologies to come into regulatory compliance. As a result, compliance costs tend to be less, and often much less, than the predicted costs. Moreover, the technological innovations tend to produce co-benefits unrelated to the regulation—such as increased productivity and efficiency—that the company strives to achieve in any event. Given these co-benefits, only a portion of the innovative technology's costs can fairly be counted as compliance costs.[11]

As the following chart indicates, retrospective studies of regulatory costs find that the initial cost estimates are often too high.

[9] Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2011, 2044-45 (2002).
[10] *Id*. at 2046.
[11] *Id*. at 2049-50. Studies of OSHA's vinyl chloride and cotton dust standards concluded that actual compliance costs were much lower than predicted costs in part because of overall productivity gains achieved by regulatees. When company scientists and engineers were forced to concentrate on cost-effective compliance techniques, they also identified ways to improve the overall productivity of an industrial process, or even an entire industry. *See* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, OFFICE OF PROGRAM EVALUATION, REGULATORY REVIEW OF OSHA'S COTTON DUST STANDARD (2000) (identifying extensive technological improvements and increased productivity in the textile industry spurred by OSHA's cotton dust standard); RUTH RUTTENBERG, REGULATION IS THE MOTHER OF INVENTION 42, 44-45 (Working Papers for a New Society, May/June 1981), (identifying six regulation-induced changes in the vinyl chloride industry that resulted in increased productivity).

Retrospective Studies of Regulatory Costs

Study	Subject of Cost Estimates	Results
PHB, 1980[12]	Sector level capital expenditures for pollution controls	- EPA overestimated capital costs more than it underestimated them, with forecasts ranging 26 to 126% above reported expenditures
OTA, 1995[13]	Total, annual, or capital expenditures for occupational safety & health regulations	- OSHA overestimated costs for 4 of 5 health regulations, with forecasts ranging from $5.4 million to $722 million above reported expenditures
Goodstein & Hedges, 1997[14]	Various measures of cost for pollution prevention	- Agency and industry overestimated costs for 24 of 24 OSHA & EPA regulations, by at least 30% and generally by more than 100%
Resources for the Future, 1999[15]	Various measures of cost for environmental regulations	- Agency overestimated costs for 12 of 25 rules, and underestimated costs for 2 rules

Second, cost-benefit analysis systematically underestimates regulatory benefits. In many cases, a particular type of benefit cannot be quantified (*e.g.*, we don't know how many fish the EPA's cooling water intake rule for power plants will save) and/or it cannot be monetized (*e.g.*, even if we know many fish the EPA's cooling water intake rule will save, we don't know how to assign a meaningful monetary value to saving those fish). In this case, the benefit isn't simply ignored—it's arbitrarily assigned a value of $0. We know there is a benefit, but we just don't know how to state it in the language of cost-benefit analysis. The cost-benefit analyst could respond to this problem in any number of ways. He could, for example, make up a monetary value—$1 million perhaps (which is no less arbitrary than $0 and undoubtedly closer to the "right" answer)—and employ that value in the cost-benefit analysis. But cost-benefit analysis does not follow this approach. Instead, it treats all unquantifiable and all un-monetizable benefits as worth $0. Needless to say, this helps contribute to the huge systematic underestimate of regulatory benefits I described above.

[12] Winston Harrington, Richard D. Morgenstern, & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates* 6 (Resources for the Future, Discussion Paper 99-18, 1999) (citing PUTNAM, HAYES, & BARTLETT, INC., COMPARISONS OF ESTIMATED AND ACTUAL POLLUTION CONTROL CAPITAL EXPENDITURES FOR SELECTED INDUSTRIES (Report prepared for the Office of Planning & Evaluation, U.S. Envtl. Protection Agency, 1980)), *available at* http://www.rff.org/documents/RFF-DP-99-18.pdf.

[13] OFFICE OF TECHNOLOGY ASSESSMENT, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH 58 (1995).

[14] Eban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, 8 AM. PROSPECT 64 (Nov./Dec. 1997).

[15] Harrington, Morgenstern, & Nelson, *supra* endnote 27. The Resources for the Future study notes that actual compliance costs can also be less than an agency estimates because there can be less regulatory compliance than the agency anticipates. If an agency overestimates the extent of pollution reduction, or some similar benefit, then the regulation may cost less than the agency estimates. In such cases, the original agency estimate might have been accurate, but it turns out to be wrong because the regulatory industry does not obey the regulation to the extent that the agency predicted. *Id*. at 14-15.

In addition, many of the benefits that regulations produce involve values that transcend simple dollar-and-cents valuation. These benefits include human life, fairness, equality, diverse and robust ecosystems, etc. Trying to put a dollar figure on these values isn't merely difficult—it raises intractable ethical questions. Generally, though, OIRA and other practitioners of cost-benefit analysis avoid these ethical questions by simply assigning these values a monetary "worth" of $0 in the manner described above.

The bottom line is that a more accurate name for cost-benefit analysis would be "exaggerated costs-incomplete benefits analysis." The biased results it generates are especially problematic, because they play an unduly influential role in regulatory decision-making. Former OIRA Administrator Cass Sunstein stated in his recent book that, under his leadership, OIRA by and large would not approve a rule if it did not pass a cost-benefit analysis test—that is, if the rule's benefits did not "justify" its costs. Under the biased methodology described above, it is difficult for agencies to demonstrate that a rule's benefits justify its costs. As a result, appropriately strong rules are prevented from passing this test. Instead, agencies must resort to drafting weaker rules to improve their chances of passing the cost-benefit analysis test, which leaves people and the environment inadequately protected.

Congress was well aware of the flaws in cost-benefit analysis, and this is why they have largely relied on other approaches to guide agency regulatory decision-making—approaches that are less wasteful of scarce agency resources and that provide a more meaningful benchmark for evaluating regulations. These approaches include the technology-based standards included in many provisions of the Clean Air Act and Clean Water Act, the effects-based standards included in many provisions of the Clean Air Act and Clean Water Act, and the multi-factor balancing standards included in CERCLA and FIFRA. For a summary of these alternative approaches and their relationship to cost-benefit analysis, see this chart:
http://www.progressivereform.org/articles/CPR_RegStandardsChart.pdf

These existing approaches are superior, because they enable agencies to apply their expert analysis to complex technical, scientific, and legal issues that underlie regulatory decision-making, ultimately resulting in higher quality regulations—that is, regulations that are both firmly grounded in the best available science and consistent with applicable law. These approaches also allow for agencies to account for and compare the "pros" and "cons" of various regulatory options, but without the highly stylized quantification and monetization methodologies of cost-benefit analysis that are at best unhelpful and at worst fundamentally misleading.

2. The Administrative Procedure Act and other statutes allow courts to reject certain regulatory actions that they consider "arbitrary [and] capricious." Some people argue that the availability of judicial review for administrative rules has allowed private parties to game the system to slow down or even reverse the will of Congress. Do you think this dynamic is a significant problem?

I would agree that there has been some abuse of judicial review of agency rulemaking by regulated industries, and this abuse adds to the expense and length of rulemaking. In particular,

industry abuse of judicial review can also have a destructive chilling effect on how agencies develop regulations. For one thing, agencies draft weaker rules than they might otherwise to avert particularly bruising court battles. For another, agencies face strong incentives to engage in endless rounds of analysis in order to try to make their rules "bulletproof" enough to withstand the brutal judicial review that industry will undoubtedly pursue.

To be sure, judicial review can and does encourage improved regulatory decision-making. We want agencies to face strong incentives to put out high-quality rules that are consistent with the law and supported by the best available science, and judicial review does provide these strong incentives. However, increased abuse of judicial review by regulated industries risks transforming this once healthy check into a detrimental source of regulatory delay and dysfunction.

3. Although there can be significant costs of delayed or insufficient regulation, there can also be costs associated with excessive, contradictory, or duplicative regulation. What mechanism could we used to efficiently identify and weed out these kinds of regulations that are harmful to society?

I am not opposed to a mechanism for periodically reviewing existing regulations to ensure that they are still fulfilling their intended purpose. It is critical, however, that agencies be provided with adequate resources to undertake these reviews, so that they do not prevent these agencies from responding in a timely and effective manner to new and emerging threats to the public interest.

Of course, there are likely a few examples of existing regulations that have outlived their usefulness. This problem, however, is not as nearly extensive as regulatory opponents portray. More to the point, eliminating these existing regulations will not deliver the economic miracles that regulatory opponents claim.

At this point, the real harm to society comes not from excessive regulation. The real harm comes from inadequate regulation. The regulatory system is supposed to protect people and the environment against unacceptable risks, but inadequate resources and excessive procedural constraints have prevented regulatory agencies from fulfilling this task in a timely and effective manner. Evidence of inadequate regulation and enforcement abounds—from the BP oil spill in the Gulf of Mexico to the Upper Big Branch Mine disaster that claimed the lives of 29 men, from the decaying natural gas pipeline networks running beneath our homes to the growing risk of imported food tainted with salmonella, botulism, or other contaminants showing up on grocery store shelves. It was inadequate regulation of the financial services industry that triggered the current economic recession and left millions unemployed, financially ruined, or both.

If this committee is concerned about the reducing harms to society, then it must focus its efforts on identifying ways to reenergize the regulatory system, so that agencies are better able to carry out the mission of protecting people and the environment that Congress has assigned to them. Congress needs to work with the president to identify the resources that agencies need to carry out their statutory missions, including the development, implementation, and enforcement of

regulations. In addition, Congress and the President each need to identify any unnecessary analytical requirements and procedural constraints that prevent agencies from issuing effective rules in a timely manner. Taking these steps will not be simple, but without them, the U.S. regulatory system will continue to operate in an ad hoc, reactionary fashion, leaving public health, safety, and environmental protection to the whims of the marketplace.