QUESTIONS FOR "JUSTICE DELAYED"

FROM SENATOR BLUMENTHAL
For Peg Seminario

OIRA and Howard Shelanski

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?

Yes. I have a number of suggestions.

First, Mr. Shelanski should simply follow Executive Order 12866. The EO sets clear deadlines for the review of rules – 90 days for draft proposed and draft final rules with one 30 day extension. In order to meet these deadlines, OIRA should focus its efforts on rules that are economically significant. Over the years OIRA has expanded its reach demanding to review virtually all rules under development by an agency. According to OIRA review statistics, in 2012 OIRA concluded review on 1164 regulatory, only 200 of which were classified as economically significant rules.

Mr. Shelanski should also ensure that OIRA's role is limited to reviewing draft agencies' regulations and analyses to determine whether they comply with the EO. OIRA should not be second guessing agencies' scientific, technical, policy and legal determinations, a practice which has become the norm for many regulations.

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

Congress can provide continuing oversight on OIRA review practices to ensure that reviews are proceeding in a timely manner. Congress should also request regular reports from both agencies and OIRA on the status of important rules, along with timetables for when the various steps of the rulemaking are anticipated to be reached (e.g. ANPRM issued, draft proposal submitted for OIRA review, proposed rule issued, draft final submitted for OIRA review and final rule issued).

Overestimated Costs

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?**

   Agency cost estimates are based upon the knowledge and information that is available at the time the rule is developed. Much of that information comes from the regulated industry, which tends to overestimate the cost of compliance.
   The experience with many rules has been that the cost of compliance are often less than estimated by the agency or industry at the time of the rule's promulgation. In some instances, there are unseen innovations that occur as a result of the rule, in other instances, the rule may lead to a new design or new product that is more efficient or a new production method that increases productivity. These kinds of cost savings are not taken into account when rules are developed.

b. **Could this have an impact on cost-benefit analysis?**
   Yes. Cost estimates often overstate the cost of compliance, while the benefits are often undervalued, since many benefits are hard to quantify.

Key Benefits Ignored

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?**
   Many of the benefits of regulations are difficult to quantify. For example, workers may be disabled from falls on the job. These disabilities may limit their ability to undertake basic life activities, such as playing with their children. Another example is poultry workers and meatpackers who suffer carpal tunnel syndrome and other

musculoskeletal disorders who are unable to hold their children due to the pain and disability. Under EO 12866, agencies are allowed to consider non-quantifiable benefits, but the fact of the matter is that few do, and these impacts are not considered in setting regulations.

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?

None of these types of costs are considered in setting regulations.

The Distributive Impact of Regulation

In his submitted testimony, Dr. McLaughlin wrote about the disproportionate negative effect of regulations on low-income populations. However, you made a compelling argument in your 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?

No. My experience has been just the opposite. Many of those individuals who suffer the greatest harm due to hazardous conditions and hazardous exposures are those who are the lowest paid workers and poorest citizens. They have no real choice about what kinds of jobs to work in or where to live. The only way they will be protected from harms like unsafe jobs, hazardous air pollution and lead in the environment is through government regulation.

b. Your testimony also mentioned the disproportionate risks faced by Latino and foreign-borne workers. Can you say a bit about the impact of regulatory delay on these groups?

Latino and foreign-borne workers are at higher risk of job fatalities and injuries. They work in some of the most dangerous industries and most dangerous jobs and often are subject to abuse and exploitation. One of the industries with a high number of Latino and foreign-borne workers is construction. In 1994 OSHA issued a fall protection standard for construction, but implementation of the rule in residential construction and roofing was delayed for many years due to employer objections. During this delay, deaths from falls increased particularly among Latino workers in construction. Since the standard was fully implemented, the number of deaths from falls overall, and among Latino workers has declined significantly.

Is Government Regulating More Rapidly?

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?

In the area in which I work, occupational safety and health, there has been no increase in the pace of regulation or the number of regulations issued. In fact just the opposite has occurred. There are fewer regulations being issued and it is taking longer and longer to issue rules. For example, under the Obama administration there have only been 2 economically significant final rules issued since 2009, compared to 3 economically significant rules issued during the second term of the Bush administration. According to a 2012 study conducted by GAO, the average time for developing and issuing OSHA rules is about 8 years. But that doesn't include rules which are still in process, such as OSHA's silica rule which has been under development for 16 years, and the confined space entry standard for construction which has been under development for 20 years and has still not been finalized.

To the extent there has been an increase in the number of rules issued in other areas, this is largely a result of legislation enacted by Congress, including the Affordable Care Act and the Dodd-Frank Financial Reform Act. If Congress wants these and other laws to be implemented, it requires the promulgation of regulations.

Amending Proposed Rules

Professor Steinzor 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?

In my experience, there are very few rules that are withdrawn and sent back to the agencies. The few that are, seem to go into a black hole at the agency, never to emerge. For example, in January 2011, at OIRA's request, OSHA withdrew a draft final rule that would require employers to check a box on workplace injury and illness logs to identify which injuries and illnesses were musculoskeletal disorders. This rule reinstated a longstanding requirement eliminated by the Bush administration. OIRA wanted OSHA to get more input from small businesses, even though most small businesses are excluded

from OSHA's recordkeeping requirements, and there had been public hearings for anyone who wanted to be heard by OSHA on the rule. OSHA jointly with SBA held special sessions to get small business input. But now more than 2 years later the final rule has not been resubmitted, nor is there any indication as to when it will be issued.

For most rules, the negotiations with OMB over the rule and analyses take place out of the public view, either before the rule is officially sent to OIRA for review, or while the rule is at OIRA often times during an extended review period.

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?

Virtually all of the changes that are made to draft rules as a result of OIRA review are changes that weaken the rule. For workplace safety rules, OIRA has insisted on higher exposure limits than OSHA proposed and limiting requirements for exposure monitoring and medical exams to only the most highly exposed workers. OIRA has also tried to get OSHA to change its scientific risk assessments in ways that would reduce the estimated risk to workers so it would justify less stringent standards for toxic substances.

Industry Capture

Ms. Seminario told a compelling story during the hearing concerning a meeting of workers and families who had lost loved ones due to workplace injuries and illnesses with OIRA Administrator Sunstein to talk about the delay in worker health and safety rules. You related Mr. Sunstein's comment that this was a very unusual meeting since average citizens and workers didn't ask to meet with OIRA, and that most meetings were with industry.

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

One of the common tactics used by industry groups opposed to regulations is to raise objections at every stage of the rulemaking process. By doing so, they hope to drag out the process, delay rules and ultimately block or weaken them. They do this directly with the agencies, through the SBREFA process at SBA, with OIRA and the Congress. Routinely they question agency science and object to agency cost estimates. Often times, industry groups produce their own risk assessments and cost analyses and demand that the agencies respond to them even before there is a proposed rule issued for public comment. Even if industry groups have not "captured" the regulatory agencies, they simply overwhelm the process. Agencies spend huge resources and huge amounts of time responding to and defending against these industry campaigns against regulations, all of which delay the development and issuance of needed protections.

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?

The OIRA review process is a Washington, D.C. based activity that is largely inaccessible to the general public. Under the EO, OIRA holds meetings with interested parties upon request, but these meetings are conducted in private outside of the public view. The only record of the meetings is a web posting of the fact the meeting occurred, a list of attendees and copies of any documents transmitted. Meeting attendees are almost exclusively Washington representatives of groups, the vast majority of which are industry trade associations. These industry groups simply have greater numbers of representatives and greater resources than groups that represent the public or workers.

My recommendation is that OIRA hold no meetings with outside groups during the review process. There is no reason for these meetings to be held. If OIRA wants more information on a rule, they should request it from the agencies themselves, not from industry or other groups. The involvement of outside groups should be limited to the regulatory process that is conducted by the agencies. This can and often does include requests for information and input at the pre-rule stage and public meetings and informal hearings, in addition to public comments on proposed rules. The agency rulemaking processes are much more open and accessible and provide greater opportunity for real meaningful input by the public.