

**Questions for the Record**  
**Senate Committee on Homeland Security and Governmental Affairs**  
**Subcommittee on Regulatory Affairs and Federal Management**

*“Reviewing the Office of Information and Regulatory Affairs’ Role in the Regulatory Process”*

**CHAIRMAN JAMES LANKFORD**

**Transparency of OIRA Determinations and Feedback in Agency Dockets**

1. **In 2009, GAO found that agencies used various methods to document OIRA’s reviews, but the transparency of this documentation could be improved.<sup>1</sup> In particular, attribution of changes made during the OIRA review period was uneven and interpretations regarding which changes are “substantive” and thus require documentation differed. GAO recommended that OIRA “define in guidance what types of changes made as a result of the OIRA review process are substantive and need to be publicly identified to more consistently implement the order’s [12866] requirement to provide information to the public ‘in a complete, clear, and simple manner.’” What action has OIRA taken in response to this recommendation?**

OIRA has worked with agencies to help them with their Executive Order (EO) disclosure requirements, and we are aware of several agencies that have provided guidance to their program offices on how to docket changes that take place during OIRA review.

2. **In 2014, GAO recommended that OMB explain its reason for any changes to an agency’s initial assessment of a regulation as non-significant and encourage agencies to clearly state in the preamble of final significant regulations the section of Executive Order 12866’s definition of a significant regulatory action that applies to the regulation.<sup>2</sup> In a March 3, 2015 hearing with the House Committee on Oversight and Government Reform, Mr. Shelanski stated when questioned about the recommendation that OIRA was “in the process of discussing the GAO’s report.” In our hearing you responded, “[O]f the most common [reasons why rules are designated significant] that usually isn’t stated because maybe it just seems evident on the process is that another agency wants the opportunity to comment on what the rule-issuing agency is doing.”**
  - a. **Such determinations are often not “evident” to many shareholders; will OIRA take steps to make available its determination of significance is due to, as you put, “interagency equities”?**
  - b. **What actions has OIRA taken in response to this recommendation?**

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<sup>1</sup> U.S. GOV’T ACCOUNTABILITY OFFICE FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS THE TRANSPARENCY OF OMB REGULATORY REVIEWS, GAO-09-205 (April 20, 2009).

<sup>2</sup> U.S. GOV’T ACCOUNTABILITY OFFICE FEDERAL RULEMAKING: AGENCIES INCLUDED KEY ELEMENTS OF COST-BENEFIT ANALYSIS, BUT EXPLANATIONS OF REGULATIONS’ SIGNIFICANCE COULD BE MORE TRANSPARENT, GAO-14-714 (Sept. 11, 2014).

In the response letter to this study sent in May 2015, OMB Director Donovan stated that OMB agreed with some of the report recommendations. In particular, we agree that OIRA should be clear with agencies on the reasons why we determine a rule is significant under the Executive Order, and I asked my senior management to emphasize this to staff. With regards to public disclosure of a significance determination, we also pointed out that nothing in EO 12866 prevents an agency from disclosing this information, and that a designation of a rule as economically significant under Section 3(f)(1) of the Executive Order has a very specific monetary threshold. We believe the significance determination process is transparent and well understood by the agencies and the public.

### **On Waters of the US**

3. **Correspondence discussed in a House Science, Space, and Technology committee hearing with Administrator McCarthy on July 9th, 2015 suggested OIRA pushed back on EPA that they consider the Waters of the U.S. rule economically significant due to indirect cost. Ultimately, the final rule was considered economically significant. Executive Order 12866 and Circular A-4<sup>3</sup> requires that an agency conduct a Regulatory Impact Analysis (RIA) for economically significant rules, but we see no evidence that EPA conducted an RIA. The final rule states that EPA’s economic analysis “was done for informational purposes only, and the final decisions on the scope of “waters of the United States” in this rulemaking are not based on consideration of the information in the economic analysis.” Why did EPA not complete a regulatory impact analysis if the rule was considered economically significant?**
  - a. **Does OIRA consistently require agencies to consider indirect benefits when determining whether rules are economically significant? Please explain.**
  - b. **How does OIRA ensure that agencies consider indirect costs as consistently as they consider indirect benefits?**

EPA and the Army Corps of Engineers conducted an economic analysis that did explore the costs and benefits of a potential increase in jurisdictional waters. In general, OMB guidance requires agencies to consider whether there are significant indirect benefits or costs of a chosen regulatory approach, and indirect impacts may be a subject under discussion during OMB’s review of rules under Executive Order 12866.

4. **The Administrative Conference of the United States has recommended that OIRA consider formulating a guidance document that highlights considerations to agency retrospective analyses.<sup>4</sup> Please comment on any actions OMB has taken or plans to take in response to this recommendation beyond the current executive orders and**

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<sup>3</sup> 58 Fed. Reg. 51735 (Oct. 4, 1993) and OMB Circular A-4, [https://www.whitehouse.gov/omb/circulars\\_a004\\_a-4/](https://www.whitehouse.gov/omb/circulars_a004_a-4/) (last accessed July 21, 2015).

<sup>4</sup> Admin. Conference of the United States, *Retrospective Review of Agency Rules*, Recommendation 2014-5 (December 9, 2014).

**accompanying guidance— would something like Circular A-4 be helpful for agencies as they attempt to introduce heightened rigor to their retrospective reviews?**

OIRA works closely with agencies to ensure retrospective review remains a high priority. We have not yet provided any formal guidance of the level of Circular A-4. We would emphasize, however, that the analytical principles of Circular A-4 are just as relevant to the analysis of a potential reform to a current regulation as they are to a new regulation.

- 5. In 2014, GAO recommended that OIRA (1) update its guidance to agencies, where needed, to improve the reporting of outcomes on agency retrospective review, (2) improve how retrospective reviews could be used to help inform assessments of progress towards agency priority goals, and (3) monitor the extent to which agencies have implemented guidance on retrospective review and confirm that agencies have identified how they will assess performance of regulations in the future.<sup>5</sup> What action has OIRA taken in response to these recommendations?**

OIRA has adopted several of the recommendations of this report. For example, the report suggested the agency retrospective review plans were hard to find on their websites, and that we consider posting the reports on a central OMB site. We have adopted that recommendation. We also have worked closely with OMB's performance management leads to track the progress of retrospective reviews in a manner similar to other priority goals. OIRA's goal is to institutionalize retrospective review as a standard activity routinely conducted by the agencies.

- 6. In M-11-19, OIRA directed agencies that “future regulations should be designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses. To the extent consistent with law, agencies should give careful consideration to how best to promote empirical testing of the effects of rules both in advance and retrospectively.”<sup>6</sup>**

- a. How has OIRA incorporated this principle in its review of proposed regulations?**
- b. Beyond the NOAA example mentioned by Administrator Shelanski in his testimony, to what extent, if at all, have agencies complied with this OMB directive? Please explain.**

OIRA regularly asks agencies to consider the incorporation of a retrospective review planning component in forward-looking regulations. For example, to date, several DOT rules have discussed plans for looking back at their effectiveness in the future.

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<sup>5</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, REEXAMINING REGULATIONS: AGENCIES OFTEN MADE REGULATORY CHANGES, BUT COULD STRENGTHEN LINKAGES TO PERFORMANCE GOALS, GAO-14-269 (Apr. 11, 2014).

<sup>6</sup> Memorandum from Cass Sunstein, Admin'r, OIRA, to the Heads of Executive Departments and Agencies (Apr. 25, 2011)(M-11-19). The memorandum directed agencies, to the extent consistent with law, to give careful consideration to how best to promote empirical testing of the effects of rules both in advance and retrospectively.

## On Social Cost of Carbon

7. **During the course of the hearing, you and I discussed the social cost of carbon (SCC) estimates. Specifically, I asked you why the Interagency Working Group on the Social Cost of Carbon (Working Group) did not use OMB Circular A-4's suggested range discount rates in arriving at their 2010 and 2013 SCC estimates. You responded that "Circular A-4 doesn't mandate that in every case a particular discount [] range ... be used ... A good range of discount rates were from 3 to 7 percent, but which one is appropriate in a particular context would depend very much on the circumstances." You go on to say that the 2013 revision has "review[ed] whether we think we have the right inputs ... And what we're doing next in the social cost of carbon process, which I might add the GAO commented I think favorably on, what we are doing now is moving forward in the process that we recently announced with the national academies development—again a very robust estimate that will go out for public comment and for peer review."**
- a. **Were you referring to the July 2014 GAO report on "Development of Social Cost of Carbon Estimates" (GAO-14-663)?<sup>7</sup>**
  - b. **GAO-14-663 states that "GAO did not evaluate the quality of the working group's approach."<sup>8</sup> Based on this statement, could you clarify what you meant by "GAO commented [] favorably on" the Working Group's approach?**

Yes, I was referring to the GAO report from July 2014 (GAO-14-663). The report has a favorable review of the process undertaken to generate the estimates of the Social Cost of Carbon (SCC), though it did not go further to evaluate the accuracy of those estimates. The GAO Report states that the Working Group's approach is "consistent with the control activities standard in the federal standards for internal control" (p. 11). The Report further states that "interagency working groups use a variety of mechanisms to implement interagency collaborative efforts, including temporary working groups, and that not all collaborative arrangements, particularly those that are informal [which the Working Group was], need to be documented through written guidance and agreements." (p. 11) However, the Report notes that "OMB staff and EPA officials stated that all major issues discussed during working group meetings are documented in the Technical Support Document and its 2013 update." (p. 11) The Report finds that the Working Group's processes and methods employed the following three principles: (1) Used consensus-based decision making; (2) Relied on existing academic literature and models; and (3) Took steps to disclose limitations and incorporate new information. The Report does not evaluate the merits of specific modeling choices or other analytic assumptions in

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<sup>7</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, DEVELOPMENT OF SOCIAL COST OF CARBON ESTIMATES, GAO-14-663 (July 2014).

<sup>8</sup> *Id.* (Highlights page).

developing the SCC. The Working Group is in the process of seeking advice from the National Academies on a wide range of technical issues related to future updates of the SCC.

8. **At the hearing, I expressed concerns about the effects of using inputs like the SCC in creating analytical asymmetries in the regulatory impact analyses or cost-benefit analyses in which SCC is used. Specifically, my concern is that the SCC estimates allow agencies to weigh 300 years of benefits accrued globally,<sup>9</sup> on the one hand (and without otherwise considering costs) against costs of a particular regulation, incurred over 10-20 years<sup>10</sup> and borne by much smaller groups of consumers and manufacturers, on the other.**

**Intuitively, comparing vastly different time frames over vastly different populations seems to put the proverbial thumb on the scale in favor of promulgating the regulatory policy at issue. Further, it seems inconsistent with basic cost-benefit analysis principles, as articulated in OMB's RIA Primer. For example, the primer directs agencies to "cover a period long enough to encompass all the important benefits and costs likely to result from the rule."<sup>11</sup> How is the inclusion of SCC modeling into a rule with a 10- or 20-year cost horizon consistent with the best practice of estimated accrued costs and benefits over a single time period?**

The basic benefit-cost analysis principles in OMB's Circular A-4 provides specific guidance for analyzing the likely effects of regulations. Agencies are directed to select appropriate time horizons in their analyses so that important anticipated benefits and costs are captured. Due to difficulties and uncertainties in forecasting, the timelines tend to center around 10-20 years, though many regulatory impact analyses employ time horizons that are longer.

When dealing with long-term environmental effects, it may appear that agencies are using two different time horizons for benefits and costs when they are not. Like many investments, up-front costs in the first few years that a rule is effective may generate benefits much further in the future. In these cases, Circular A-4 gives guidance on how to discount costs and benefits from different time periods in order to make them comparable.

Likewise, the Technical Supporting Document on SCC provides monetized estimates of damages associated with CO<sub>2</sub> emissions in years 2010 through 2050. When agencies monetize the value of CO<sub>2</sub> emission reduction, the agencies must estimate the level of reductions in specific years and apply the appropriate SCC estimates. Consistent with standard economic theory and practice, the SCC represents the present value of the stream of damages associated with forgone emissions in a given year, accounting for the long-lived nature of greenhouse gases. The

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<sup>9</sup> See, e.g., Interagency Working Group on Social Cost of Carbon, U.S. Gov't, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (Feb. 2010).

<sup>10</sup> The White House, Regulatory Impact Analysis: Frequently Asked Questions (FAQs) 4 (Feb. 7, 2011) ("For most agencies, a standard time period of analysis is 10 to 20 years, and rarely exceeds 50 years).

<sup>11</sup> The White House, Regulatory Impact Analysis: A Primer 5 (undated),

[https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4\\_regulatory-impact-analysis-a-primer.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf) (emphasis added).

damages that result from a ton of CO2 emitted in the year 2020, for example, accrue over time, and focusing only on the year of the CO2 emissions change—or the subset of years covered by the rulemaking—would be inconsistent with standard economic theory and practice as it would fail to account for a substantial portion of the benefits associated with the emissions reduction.. Correspondingly the benefit-cost analysis should provide the costs associated with producing those reductions. The timelines for CO2 emission reductions and costs to produce such reductions tend to correspond well.

The rationale for the use of a global SCC rather than domestic SCC is laid out in the Technical Support Document. We recognize that the science underpinning the methodology in the Technical Support Document is rapidly evolving and we are committed to updating the SCC as appropriate.

### **On Midnight Regulations**

- 9. Throughout the hearing, we discussed the importance of OIRA’s advisory role in providing agencies guidance for best practices including, for example, direction on conducting thorough regulatory impact analyses. If guidance results in improved agency best practices, why would OIRA decline to issue clear guidance on rulemaking during the “midnight” period if agencies should, as you testified, “prioritize the rulemakings... [and] get your ducks in a row because what we care about at OIRA is having time to review the significant rules, and to do good and rigorous evaluation of the executive orders. And I can't do that if I'm getting rules too late in the day”?**

My priority as OIRA Administrator is making sure that regulations are carefully reviewed by this office and are in compliance with our governing executive orders and OMB circulars. I am determined to ensure that OIRA’s standards for review will not diminish as we get closer to the end of the Obama administration. As I mentioned in my testimony, OIRA is making a similar effort to ensure that the rulemaking process remains orderly over the next 16 months. We are currently engaging with the agencies in an effort to help them set priorities for rulemaking, and we place a high priority in preserving the ability for OIRA and the interagency community to have sufficient time to develop and review proposed and final rules.

### **On OIRA Reviewing Legal Issues**

- 10. Executive Order 12866 reads in part, “The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency’s regulatory actions are consistent with applicable law...”<sup>12</sup> Yet, when asked if OIRA reviews the legality of rules under review, you testified, “We focus overwhelmingly on the analytics of the rule and how well it is functioning,” and remarked “a couple of people in my office happen to have law degrees, but it’s not been unknown for there not to be a single lawyer in OIRA.” Although you said you are not “blind” to legal questions, “they would lie in the first instance with the agency...” You also said that White House counsel and the**

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<sup>12</sup> Exec. Order 12866 Sec. 6(b), 58 Fed. Reg. 51735 (Oct. 4, 1993).

**Justice Department would “alert us if there were legal concerns, and we do require those concerns to be resolved.”**

- a. How do you reconcile Executive Order 12866’s mandate with the lack of formalized OIRA legal review?**
- b. Even if OIRA does not undertake a legal analysis of its own, does the office ensure that the legal office of the promulgating agency, White House counsel, or the Justice Department has conducted a legal analysis of the rule and concluded that the rule does not present statutory or constitutional concerns? If so, please explain. If not, why not?**

OIRA has an inclusive and robust process for the review of the legal implications of rules. Regulations that may raise novel legal issues are deemed to be “significant,” and subject to review under E.O. 12866. Although OIRA does not conduct its own formal legal review, OIRA typically functions as a coordinator for the discussion of legal issues, relying on our colleagues in other Executive branch offices to understand any legal uncertainty the rule creates for regulated entities.

### **When Independent and Executive Branch Agency Agendas Conflict**

- 11. On questioning from Senator Portman about OIRA’s role in independent agency review, in light of one-quarter of major rules coming from independent agencies, you testified that “I still have some reservations about extending OIRA review to independent agencies... My concern is [] with OIRA as the review of those [cost-benefit] determinations. I have worked at two independent agencies. I really have some appreciation for the value of how those agencies function, for the value of the independence, and the way they are set up... and I do worry about an executive branch review process that could interfere with that independence and possibly interview with their functions under their authorizing statutes.”**

**In response to Senator Lankford’s follow-up hypothetical where an independent agency and executive branch agency share overlapping jurisdiction (or purport to do so), you testified that “[W]e do ask that executive branch agency—and here, we do have the authority to really push an answer—for an explanation of how the rule interrelates, what the cumulative burdens will be, whether there’s been duplication or whether they’re really doing something different from what the independent agencies [are doing].” You pushed back against my characterization of a “pecking order” only so much as to say that that’s not “necessarily the case. A dialogue can result... I don’t know that there’s any pre-established pecking order, but we do require the executive branch agency to answer questions.”**

- a. How can OIRA, without additional authorities, make independent agencies come to the table with executive branch agencies, on equal footing, to discuss duplicative or conflicting rules when their rulemaking jurisdictions overlap**

**and when the OIRA review process, by its very structure, subjects executive branch agencies to far more scrutiny than independent agencies?**

**b. How does OIRA ensure that independent agencies do not promulgate rules that are within the proper jurisdiction of executive branch agencies?**

In July 2011, the President issued Executive Order 13579, which encouraged independent agencies to follow the same regulatory principles that executive agencies must follow. I believe this balanced approach continues to protect the unique status that independent agencies have within the Executive Branch.

Additionally, Executive Order 12866 requires that Executive agencies avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies, including independent agencies. Any executive agency regulation that may create a serious inconsistency or otherwise interfere with an action taken or planned by another agency would be considered a “significant regulatory action” under E.O. 12866 and therefore be subject to OIRA’s centralized regulatory review. This would include circulation of the rule to independent agencies that may have similar or conflicting regulations.

Similarly, independent agencies are encouraged to consult and coordinate with executive branch agencies if any of their regulations have the potential to overlap executive agency regulations. However, under E.O. 12866, OIRA does not play a role in coordinating these consultations on behalf of independent agencies.

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*“Reviewing the Office of Information and Regulatory Affairs’ Role in the Regulatory Process”*

**SENATOR RON JOHNSON**

- 1. In your testimony, you explained that cost-benefit analyses of potential agency rules are performed by OIRA, but that costs and benefits are not always measured using the same timeframe. For example, a rule’s costs may only be considered in a short-term of five years, while benefits may be calculated over a period of twenty years. On June 2, I wrote to your office regarding OIRA’s review of the EPA’s Waters of the United States (“WOTUS”) rule. What cost-benefit analyses did OIRA complete relating to WOTUS?**

OIRA does not perform cost-benefit analysis of regulatory actions. We review cost-benefit analyses prepared and submitted by agencies when promulgating rules. For the interagency review of the Clean Water Rule under Executive Order 12866, OIRA reviewed an Economic Analysis prepared by EPA and the Army Corps of Engineers that included quantified estimates and qualitative discussions of expected costs and benefits

- 2. In your testimony, you explained that cost-benefit analyses of potential agency rules are performed by OIRA, but that costs and benefits are not always measured using the same timeframe. For example, a rule’s costs may only be considered in a short-term of five years, while benefits may be calculated over a period of twenty years. On June 2, I wrote to your office regarding OIRA’s review of the EPA’s WOTUS rule. What time period was used to calculate and measure costs of the WOTUS rule by OIRA?**

OIRA reviewed an Economic Analysis that was prepared by EPA and the Army Corps of Engineers. In their Economic Analysis, the promulgating agencies looked at available historical data, such as recent CWA jurisdictional determinations, to prepare an illustrative analysis of how the new rule would impact historical practices. This served as a baseline for calculating how the rule was expected to affect the costs and benefits of specific Clean Water Act programs. The agencies conducted this analysis for a representative future year, thus the costs and benefits of the rule were meant to represent what the impacts of the rule would be in a typical year in the future, following promulgation.

- 3. In your testimony, you explained that cost-benefit analyses of potential agency rules are performed by OIRA, but that costs and benefits are not always measured using the same time-frame. For example, a rule’s costs may only be considered in a short-term of five years, while benefits may be calculated over a period of twenty years. On June 2, I wrote to your office regarding OIRA’s review of the EPA’s WOTUS**

**rule. What time period was used to calculate and measure benefits of the WOTUS rule by OIRA?**

Please see answer to Question 2.

- 4. In your testimony, you explained that cost-benefit analyses of potential agency rules are performed by OIRA, but that costs and benefits are not always measured using the same time-frame. For example, a rule's costs may only be considered in a short-term of five years, while benefits may be calculated over a period of twenty years. On June 2, I wrote to your office regarding OIRA's review of the EPA's WOTUS rule. What justification was given by OIRA for the cost and benefit time periods used during its analyses, respectively?**

The basic benefit-cost analysis principles in OMB's Circular A-4 provides direction on how agencies should analyze the likely effects of regulations. Agencies are directed to consider time horizons used in the analyses to incorporate important anticipated benefits and costs. Due to difficulties in forecasting, the timelines tend to center around 10-20 years, though many regulations employ time horizons that are longer or shorter than that.

When dealing with long-term environmental effects, it may appear that agencies are using two different time horizons for benefits and costs when they are not. Like many investments, up-front costs in the first few years that a rule is effective may generate benefits much further in the future. In these cases, Circular A-4 gives guidance on how to discount costs and benefits from different time periods in order to make them comparable.

- 5. In reference to my June 2 letter, I asked whether OIRA agreed that the EPA's online outreach efforts to generate "support" for WOTUS violated the Anti-Lobbying Act. Additionally, I asked what steps OIRA will take to ensure compliance with the Anti-Lobbying Act in the future. Although your response to my June 2 letter stated that OIRA merely "develops general regulatory policies," your testimony before the Subcommittee indicates that OIRA should have been open to reviewing issues of inadequate legal authority presented during the inter-agency review process. Were any issues related to legal justification for the WOTUS rule raised during OIRA's review process? If so, how did OIRA address those issues? Please explain.**

During its review of the final Clean Water Rule, OIRA conducted 30 meetings with over 100 individual stakeholder organizations. These were conducted under the formal external review process outlined in the E.O. 12866 and lists of attendees and copies of the materials provided to OIRA are available online. During those meetings OIRA heard a variety of comments some of which raised legal concern while others offered legal support for the rule. In general, as I have mentioned before, the legal basis for an agency's rulemaking is a legitimate subject of interagency review, and legal issues were among those considered during the interagency review.

- 6. In your testimony before the Subcommittee, you stated that while OIRA is "not blind" to legal issues and authorities behind proposed agency rules, that most issues**

**are highlighted through the inter-agency review process by offices such as the White House Office of General Counsel and the Department of Justice. In addition, you testified that under your leadership, not a single rule has been rejected on grounds of inadequate legal authority. Given the opportunities for conflicts of interest and exertions of inappropriate influence in relation to an administration's policy goals and executive agency rulemaking initiatives, do you believe greater independence is warranted while analyzing the legal authorities behind executive agency rulemaking? Please explain.**

Legal considerations are referenced in several places under the Principles of Regulation in E.O. 12866. Agencies must be cognizant of their respective legal jurisdictions in setting regulatory priorities and strive to minimize the potential for uncertainty and litigation. Regulations that may raise novel legal (or policy) issues are deemed to be "significant," and subject to review under E.O. 12866.

OIRA has an inclusive and robust process for the review of rules, including their legal implications. OIRA typically functions as a coordinator for the discussion of legal issues, relying on our colleagues in other Executive branch offices. For these reasons, I do not believe greater independence is warranted.

- 7. During the Subcommittee's hearing, you and Members of the Subcommittee discussed issues of early engagement between the agency and stakeholders when promulgating rules and the importance of the agency serving as a neutral decision-maker in the rulemaking process. Do you believe the EPA's social media campaign to generate support for its WOTUS rule compromised the agency's role as a neutral decision maker? Please explain.**

I will defer to EPA's previous responses on this issue.

- 8. In regard to your discussion before the Subcommittee relating to the Michigan v. EPA decision, you stated that the EPA was not required to perform a cost-benefit analysis during OIRA's review of the regulation because the Clean Air Act is a statute often held "by a number of authorities as a place where cost-benefit analysis is not something that can be mandated." In light of the Supreme Court's decision requiring agencies to engage in "reasoned decision-making" and consider all relevant factors, including costs, in rulemaking proceedings, do you anticipate requiring cost-benefit analyses for all reviews conducted by OIRA? Please explain.**

EPA did conduct a Regulatory Impact Analysis for their Electric Utility Mercury and Air Toxics Standard that included an estimate of the costs and benefits of both the proposed and final rule. Michigan v. EPA focused on a particular regulatory finding (an "appropriate and necessary" finding) that was very specific to a particular section of the statute. The extent to which EPA consider costs and other balancing factors in their rulemakings under the Clean Air Act (CAA) is very specific to the section of the CAA under which EPA is regulating.

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**SENATOR HEIDI HEITKAMP**

- 1. Congressman Peter DeFazio, Ranking Member of the House Transportation and Infrastructure Committee, recently submitted a question to the Pipeline and Hazardous Materials Safety Administration with respect to PHMSA’s delay in the finalizing the proposed hazardous liquid pipelines rule.**

**This is his question verbatim:**

**“The Department of Transportation’s (DOT) website states the proposed rule has been with the Office of Information and Regulatory Affairs since May 2014. Executive Order 12866 issued by President Clinton in September 1993 and still in effect states that the review by the Office of Information and Regulatory Affairs (OIRA) should be completed within 90 days but that the reviews may be extended by the Director of OMB for 30 days or at the request of the agency head. Has OIRA requested an extension and if so, how many times? Since OIRA received the rule, has anyone in DOT requested an extension of the OMB review and if so, how many times? Did OIRA require an informal review of the rule prior to formal submission? Did OIRA require DOT to get OIRA approval before formal submitting the rule?”**

**This is the response he received:**

**“The review of this rule at OIRA has been a collaborative effort to identify all available data, in order to produce the strongest possible analysis, which can then inform the decision on what provisions should be proposed to provide the greatest safety benefit to the public. We are continuing to work closely with OIRA to publish our NPRM as soon as possible.”**

**That is not an answer. Why is there no transparency in terms of what happens to a proposed rule once provided to OIRA, the communication between OIRA and the agency during review, and why OIRA refuses to give a substantive answer when it misses deadlines prescribed under Executive Order 12866?**

With regard to the duration of interagency review, it can take a substantial amount of time to complete the review of a complex rule. I believe it is more important to get the rule done right than it is to get it done quickly. Having said that, I can assure you that my staff is working diligently with PHMSA’s staff to complete review as soon as possible.

2. **In 2011, the rail car industry proactively petitioned the Administration to develop a rule for rail car safety. They were willing to build new cars to a tougher standard to reduce the risk of moving hazardous materials. Yet not until 2013 after the Quebec rail car accident that killed 47 people did the Department propose a rule. The rule was not finalized until May of this year.**

**This is a rule that the industry wanted, were willing to take on costs to implement, and yet it took four years for the final rule to be released. In the interim, OIRA and the agencies were unresponsive to Congressional inquiries about reasons for delay.**

- a. **Why does OIRA refuse to provide substantive answers to Congress about a proposed rule's status?**
- b. **What Executive Order or law does OIRA follow in terms of non-disclosure to Congress?**

OMB's interagency review of both the proposed and final High-Hazard Flammable Train rules took less than the normative 90 day review period established in Executive Order 12866. I can't speak to the state of the rulemaking prior to my term as Administrator; however, I can assure you that developing a strong and timely final rule enhancing tank car safety was one of our highest priorities. In addition to rail car standards, the recently issued final rule included speed restrictions, braking standards, emergency response and notification procedures, and an extensively thought out phase-in period that was responsive to significant industry concern about feasibility. In addition, our final standards were closely coordinated with rail car standards simultaneously announced by Canada, which was important to avoid disruption on the integrated rail system.

OMB's and agency disclosure procedures are governed by Executive Order 12866. In terms of timing, agencies are required under the Executive Order to provide a timeline for all their rulemakings in the semi-annual regulatory agenda.

3. **Further, the industry, safety advocates and other stakeholders requested the rule mandate rail cars have thermal blankets, which cost approximately \$3000 per car. When the proposed rule was submitted to OIRA, it included the thermal blanket requirement. Yet when the final rule was approved by OIRA, the thermal blanket requirement was absent. What reasoning did OIRA use for removing a safety device that stakeholder groups, including industry, wanted?**

Neither the proposed nor final rule submitted to OIRA for interagency review included a design requirement for thermal blankets. Both the proposed and final rules submitted for review included a performance standard that a tank car's thermal protection system be capable of preventing a release of lading (except through the pressure release device) when subject to a pool fire for 100 minutes and a torch fire for 30 minutes. That standard did not change during interagency review of either the proposed or final rules.

The final rule contained a performance standard that allows industry flexibility and does not preclude the use of thermal blankets. DOT expects that industry will likely choose to utilize thermal blankets to meet the final rule's performance standard.

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**Committee on Homeland Security and Governmental Affairs**  
**Senate Subcommittee on Regulatory Affairs and Federal Management**

*“Reviewing the Office of Information and Regulatory Affairs’s Role in the Regulatory Process.”*

**SENATOR ROB PORTMAN**

- 1. On June 30, 2015, the U.S. Environmental Protection Agency promulgated a new National Emission Standards for Hazardous Air Pollutants (NESHAP) air regulation (80 Fed. Reg. 37366) applicable to the U.S. production of ferroalloys, an essential ingredient in the manufacturing of steel. It is my understanding that for one of the affected U.S. companies, EPA has found that the new regulation will cost at least \$25 million in capital costs over the next two years, with millions more per year in increased operating costs. This U.S. company already has a difficult time competing with foreign ferroalloy producers, and the asymmetrical costs of production imposed by the new NESHAP air regulation could challenge its ability to remain in business.**

**Did OIRA review the regulation to determine if it would have any negative material impact on productivity, competition, the economy, or jobs? If so, please describe your assessment. If not, please explain why not.**

OIRA determined that EPA’s National Emissions Standards for Hazardous Air Pollutants applicable to U.S. Ferroalloys production was not a “significant regulatory action” under the criteria established under Executive Order 12866 and therefore did not review the regulation. OIRA reviews approximately 500-700 regulations per year that meet the significance criteria in Executive Order 12866, out of about 6,500 regulations issued each year by U.S. Federal agencies. We would defer to EPA on further questions about this rulemaking.

- 2. The George W. Bush administration acknowledged the historical tendency of outgoing administrations to issue a flood of regulations before the new administration takes office. In May 2008, in an effort to control the rush of midnight regulations, John Bolton issued a memo to the heads of federal agencies that set deadlines for the proposal and issuance of rules that were to be finalized before President Bush left office.**

**Does the Obama administration plan to take similar action?**

My priority as OIRA Administrator is making sure that regulations are robustly reviewed by this office and are in compliance with our governing Executive Orders and OMB circulars. I am determined to ensure that OIRA’s standards for review will not diminish as we get closer to the end of the Obama administration. As I mentioned in my testimony, OIRA is making a similar

effort to ensure that the rulemaking process remains orderly over the next 16 months. We are currently engaging with the agencies in an effort to help them set priorities for rulemaking, and we will continue to place a high priority in preserving the ability for OIRA and the interagency community to have sufficient time to develop and review proposed and final rules.