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

on
"From Beginning to End: An Examination of Agencies Early Public Engagement and Retrospective Review"

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Chairman Lankford, Ranking Member Sinema, Members of the Subcommittee. I understand that this hearing is intended to explore specific areas of the process for federal rulemaking that would likely garner bipartisan support. To that end, I am pleased to participate and thank you for inviting me to testify today.

I have worked on regulatory issues during most of my career in private practice, government service, and teaching and writing. I served as the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) for the first five years of the Clinton Administration, then as the Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council, and then as the Deputy Director for Management of OMB. Before entering government service in 1993, I was a partner at the law firm Wilmer, Cutler & Pickering (now WilmerHale), specializing in regulatory and legislative issues, and among other professional activities, I served as the Chair of the American Bar Association Section on Administrative Law and Regulatory Practice (1988-89). During my government service, I was the Vice Chair (and Acting Chair) of the Administrative Conference of the United States (ACUS). After leaving the government in January 2001, I have been teaching courses in administrative law at various law schools, and since 2011 I have been at New York University School of Law, where I am currently a Professor of Practice and Distinguished Scholar in Resident.

As this Committee well knows, the regulatory system – and the rules that it develops, promulgates and enforces – is an integral component of governance. Congress makes the law but it typically does not have the time, the expertise, or sometimes the ability to identify and resolve all the details. That responsibility is usually delegated to the agencies that are expected to issue regulations that translate general statutory directives into concrete requirements or prohibitions with which the public must comply. There are appreciably more regulations than statutes: some have depicted it as a pyramid, with the Constitution, the supreme law of the land on top, hundreds of statutes enacted by Congress on the next level, and then thousands of regulations issued by the agencies.

Apart from the delegations from Congress – which provide the primary direction and constraint on an agency's substantive and procedural authority – the principal law that governs the development and promulgation of regulations is the Administrative Procedure Act ("APA"). It was enacted in 1946 and, with relatively few amendments – mostly having to do with the Freedom of Information Act – and with a series of federal

court cases fleshing out the general terms of the Act, it has generally withstood the test of time.

Most of the criticism and praise of the administrative state is focused on regulations produced by notice-and-comment rulemaking – the subject of Section 553 of the APA. While it is commonly referred to as "informal rulemaking," there is nothing informal about the process. It is resource intensive and time consuming – some rulemakings take years rather than months to go from concept to a final rule, plus whatever additional time and effort goes into judicial review.

The current process has its critics, from both conservatives and progressives. That suggests that perhaps the process is just about right. Conservatives are concerned that there are not sufficient checks along the way; progressives are concerned that the number of checkpoints has created ossification. In my view, process is good, but too much process can be counterproductive. The issuing agency should think, research, consult, analyze, question and continually refine. The public, both those who would bear the costs or burden of the regulation and those that would benefit from it, should be informed of what the agency is thinking and why, and be engaged in supplying and reviewing the information the agency is relying on and in critiquing the options the agency is considering. The public has a great deal to contribute, but the process should not be so extended as to unduly delay or disrupt the work of the agencies. And, most importantly, each step in the process (and any new steps imposed) should be evaluated in terms of its contribution to good decision-making, to what would help produce the most sensible, effective and efficient way forward.

I understand that this Committee is focusing today on two specific aspects of the rulemaking process: the beginning and the end. I think that each of these pieces can be improved, whether by legislation, executive order, OMB guidance or simply agency practices. Regardless of the vehicle, however, it is important to be clear about what the problem is and how best to solve that problem without introducing unintended consequences.

The Beginning: an Advanced Notice of Proposed Rulemaking.

The first official step in a rulemaking proceeding is the issuance of a notice of proposed rulemaking ("NPRM"). Lawyers in practice and in the academy generally agree that by the time the agency issues the NPRM, the staff involved have invested so much time and energy in developing the proposal and supporting data (as they are required to do) and analyzing the likely effects of the proposal (as they are required to do) and justifying their proposal (as they are often called upon to do by their agency

decision-makers and OIRA review) that they are virtually locked into their proposal and are less receptive to new ideas (or even significant modifications of their proposal). While all the up-front work (and documentation) is desirable, it often has the unintended result of restricting the options going forward.

To counter this tendency, there have been various efforts to encourage the agencies to consult with the public even before they have essentially made their decisions reflected in the NPRM. This has been true of both Democratic and Republican Administrations. For example, Executive Order 12866 clearly states that "before issuing a notice of proposed rulemaking, each agency should . . . [consistent with its own rules] seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials)." Section 6(a) emphasis added. And Executive Order 13563 expanded on this concept with an entire section devoted to "Public Participation." See Section 2. Among other things, it states in subsection (a) that "regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole." And it specifically provides in subsection (c) that "[b]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking." Section 2, emphasis added.

Several agencies use an Advance Notice of Proposed Rulemaking (ANPRM) to solicit ideas at the outset of a rulemaking proceeding. It is especially useful when the agency is unsure what direction to take, what data to consider, how prescriptive to be, and the like. It is also more useful when it is done early in the process or even at the outset of agency deliberations (for example, when the agency first sends notice of its undertaking a rulemaking for inclusion in the Unified Agenda). It is less useful when the authorizing statute is itself prescriptive or if there is general agreement about the nature of the regulation necessary to respond to the identified problem. In short, it can be helpful at times; at other times, it may just add an unproductive, but time consuming, step to the already extended process.

For this reason, it is important that any requirement for an ANPRM should be limited to economically significant (or "major") regulations that are required to use notice and comment under Section 553. Similarly, it is important that any such provision should not impose on the agency multiple requirements for explanations, analysis, data, etc. The purpose would be to alert those affected by the regulation, so

they can contribute to its development and formulation in advance of the NPRM, not to lock the agency into a particular mind-set before the process even begins. The more the agency has to incorporate in an ANPRM, the more the agency will become invested in a particular outcome. This is the opposite of what an ANPRM should do – namely, obtain ideas and information from interested entities before the agency settles on a particular course.

I understand that your and your staffs have been working on a draft bill that reflects these considerations and takes a sensible (but appropriately limited) step towards expanding the opportunity for public participation at the pre-NPRM stage. If the product of those efforts adheres to the principles (and specific provisions) we have been discussing, I would be supportive of the effort.

The End: Retrospective Review

For almost 40 years, there have been concerns that there are too many rules, and that so many of the rules on the books are obsolete, unnecessarily burdensome, unworkable, or just plain wrong. This was one of the themes President Reagan campaigned on, and, after his election, he set on a course to deregulate. President George H.W. Bush followed the same path with his Competitiveness Council, searching the existing stock of regulations for those that could be eliminated. President Clinton ordered agencies "to submit to OIRA a program . . . under which [they] will periodically review existing significant regulations to determine whether any such regulations should be modified or eliminated . . .." E.O. 12866, Section 5. President George W. Bush launched a similar effort. President Obama also emphasized the need for retrospective review of rules in his Executive Order 13563. And President Trump's "two-for-one" Executive Order is designed in part to accomplish the same objective – weed out unnecessary, out-of-date, ineffective rules.

Despite these efforts, it doesn't happen. One reason may be that since 1980, new regulations are not issued unless their benefits justify their costs; to eliminate such a regulation would likely mean that the costs of rescinding the regulation would be greater than the benefits. [Note: This is so because removing a rule means that the foregone benefits of the existing rule become the costs of the new rule, and the foregone costs of the existing rule become the benefits of the new rule]. Other reasons for the limited success of these efforts are that agencies have not undertaken to collect data along the way that would inform their retrospective reviews and, importantly, any retrospective analysis requires resources and, for at least the last few decades,

regulatory agency budgets have generally been decreasing or straight-lined, with the situation compounded by continuing resolutions and sequestration.

Nonetheless, there is growing support for one step that can be taken – namely, encouraging agencies to plan for retrospective review when they are in the process of developing a final rule. This idea came from a study by Joseph Aldy for the Administrative Conference of the United States (ACUS), *Learning from Experience: An Assessment of Retrospective Reviews of Agency Rules & the Evidence for Improving the Design and Implementation of Regulatory Policy* (Nov. 2014). This led to a series of ACUS recommendations designed to promote "a culture of retrospective review at agencies," which stressed the need to carefully select regulations for reevaluation and to coordinate with OIRA, other agencies and outside entities (including stakeholders) when designing and conducting retrospective reviews." For present purposes, it is instructive that, among other things, ACUS adopted a specific recommendation for "agencies to plan for retrospective review when drafting new regulations." A similar recommendation was part of a report to the 2016 transition teams developed by the Institute of Policy Integrity after consultation with almost all of the past OIRA Administrators. *Strengthening Regulatory Review* (2016).

Requiring agencies to provide, along with the NPRM and the final rule, a plan for a later retrospective review of a newly issued regulation would in most circumstances be salutary. If nothing else it would force agency personnel to focus on describing precisely what they want to accomplish and how to evaluate whether or not the rule is successful in achieving that objective, at a time when the rule (and all its alternatives) is foremost in their minds. It also would enable those affected by the rule to participate in the framing of the subsequent retrospective review while they too are keenly focused on the provisions of the proposed rule.

It is very important, however, to provide flexibility for the eventual implementation of the retrospective review. The agency can (and should) commit to a framework in the proposed and final rule, identifying the data and the metrics it anticipates using for that purpose. But this should not be cast in concrete. We learn a lot with time, including how to better analyze and measure what is going on around us. This is amply demonstrated by the increased sophistication of cost-benefit analysis itself over the last decade or two. It is also demonstrated by the general preference for performance standards, which specify the desired results, rather than design standards, which lock in a particular way to achieve those results.

In addition, while periodic review is useful, there will likely be some (or many) situations where repeated retrospective reviews will yield greatly diminishing returns.

After a decade or so, rules that survive a retrospective review intact are likely to have established their worth, and it would be wasteful to continue retrospective review after retrospective review. In this connection, Section 553(e) of the APA provides for petitions for rulemaking that can be used if, at some later point in the future, a consensus develops that a particular rule should be modified or rescinded. This would place some responsibility on the regulated entities, but that is appropriate because they are in the best position to identify (and document) rules that have outlived their usefulness.

As above, I understand that you and your staffs have been working on a draft bill that would implement these recommendations in a straightforward, targeted way. Again, if the product of those efforts reflects the principles (and specific provisions) we have been discussing, I believe such a bill would be a constructive addition to the rulemaking process.

Again, I appreciate this Committee's efforts to fine tune critical steps rather than redesign the whole rulemaking process. I emphasize this because, unfortunately, you are not writing on a blank slate. For the past three decades, there have been concerted efforts underway to revise and revamp the rulemaking process that have mostly proceeded on a highly partisan path. Not only have they not been successful in terms of being enacted into law, but they have also sown suspicion and distrust. As a result, bipartisan efforts on regulatory reform have been difficult to achieve. The limited, surgical approach that you are considering will likely face an uphill battle, but it might well have a better chance to succeed.

Thank you again for giving me an opportunity to speak to these issues. I look forward to any comments or questions you may have.