

Written Testimony of

**Katherine McFate**  
**President, Center for Effective Government**

before the

Senate Homeland Security and Governmental Affairs Committee

Subcommittee on the Efficiency and Effectiveness of Federal Programs  
and the Federal Workforce Hearing on

**A More Efficient and Effective Government:**

**Improving the Regulatory Framework**

March 11, 2014

Testimony of Katherine McFate, President and Chief Executive Officer,  
Center for Effective Government before the  
Senate Homeland Security and Governmental Affairs Committee Subcommittee  
on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce Hearing on  
**A More Efficient and Effective Government:  
Improving the Regulatory Framework**  
March 11, 2014

Chairman Tester, Ranking Member Portman and members of the Subcommittee, thank you for the opportunity to testify on the effectiveness and efficiency of the federal government's regulatory system. My name is Katherine McFate, and I am President and Chief Executive Officer of the Center for Effective Government, a national policy organization formerly known as OMB Watch, and co-chair of the Coalition for Sensible Safeguards (CSS). CSS is a coalition of more than 150 consumer, small business, labor, scientific, research, good government, health, and environmental organizations joined in a commitment to protect and improve the system of public protections that secures the American quality of life and encourages economic innovation and equitable growth.

For 30 years, my organization has scrutinized the operations of the executive branch of the federal government, with the aim of ensuring that government operations are as open and transparent as possible, that our regulatory system protects people and the environment, and that public officials advance the interests and priorities of working Americans.

A critical function of government is to protect us from preventable hazards and harm. We expect our government to keep contaminated food off the grocery store shelves and out of restaurants; to ensure employers follow health and safety rules, obey labor standards, and prevent toxic emissions from poisoning our air, water, and communities; and to keep unsafe drugs and toys out of the hands of children. Americans know that the system of standards and safeguards that was put in place in this country over the past hundred years has encouraged our businesses to innovate, produced broadly shared prosperity, and given us among the highest living standards on the planet.

Our system of public protections has made this country a safer, better place. Workplace fatality rates are a fraction of what they used to be. Our air is less polluted. Cars are phenomenally safer than just a few decades ago. Lead paint and asbestos have been largely relegated to the past. Our rivers are cleaner. Tainted food is a public health emergency, not a weekly occurrence. American companies produce safer toys than when I was a child.

But continued progress is at risk. Our infrastructure – both public and private – is aging, increasing the risks of chemical spills like the one that occurred in West Virginia or the Chevron

explosion in Richmond California or the coal ash containment pond collapse in North Carolina. Resources for enforcement are declining.<sup>1</sup> A substantial proportion of the skilled workforce involved in inspection and oversight will soon retire.<sup>2</sup> And our standards and safeguards are not keeping up with the fast march of scientific knowledge.

It simply takes too long to modernize health and safety rules so that they reflect current scientific evidence about health and environmental risks and hazards. And as more obstacles, duplicative analyses, and legal challenges have been put in place to slow or prevent scientific knowledge from being translated into public action, children and elderly people develop preventable cancers, toddlers are run over in driveways, workers are debilitated by respiratory diseases, and the planet warms.

As requested, my testimony will focus on only one step in the current federal regulatory process: the way review of proposed and final rules by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) impacts the timeliness of rulemaking and the character of the final rules that emerge.

### **OIRA's Regulatory Review Process: Slow and Opaque**

Our federal regulatory system is slow, complex, and opaque. It allows big firms in regulated industries multiple opportunities to represent their concerns about the costs of health, safety, and environmental standards. At the same time, the voices of public interest advocates, workers, parents, consumers, and small businesses are less often heard and seem to be less valued.

Although OIRA was created by an act of Congress in 1980,<sup>3</sup> its responsibilities have significantly expanded through executive orders. President Ronald Reagan used an executive order to require all federal rulemaking agencies to submit proposed rules to OIRA for review and approval, and this practice has continued under Democratic presidents. Centralized review of federal agency actions by the Office of Management and Budget is a way for presidents to exert more control over the actions of federal agencies as they work to implement congressional laws.

The current regulatory review framework was established by President Bill Clinton in 1993. His E.O. 12866 requires agencies to submit drafts of proposed and final significant rules (defined as rules estimated to cost over \$100 million). By focusing on significant rules, OIRA was able to dramatically cut its workload while maintaining its ability to oversee the most important agency regulations.

---

<sup>1</sup> Nick Schwellenbach, *What's At Stake: Austerity Budgets Threaten Worker Health and Safety*, Center for Effective Government, August 2013. Available at: <http://www.foreffectivegov.org/whatsatstake-workersafety>; "Public Protections Budget Dashboard – FY 15," Center for Effective Government, March 6, 2014. Available at: <http://www.foreffectivegov.org/public-protections-budget-dashboard-fy15>.

<sup>2</sup> See Schwellenbach, p. 4.

<sup>3</sup> PL 104-13. The Paperwork Reduction Act. Available at: <http://www.gpo.gov/fdsys/pkg/PLAW-104publ13/html/PLAW-104publ13.htm>.

Under President George W. Bush, OIRA took a more aggressive posture and imposed rigorous guidelines for cost-benefit analyses and peer review on proposed rules. OIRA began commenting on drafts of proposed rules earlier in their development, before the agency had officially submitted them for review. These changes gave OMB even more political control over the rulemaking process and increased its opacity. In January 2007, President Bush even amended Clinton's policies with Executive Order 13422.<sup>4</sup> The order was controversial: the regulatory policy officers at agencies were given authority to quash new rulemakings unilaterally, a power that had formerly rested only with appointed agency heads. And for the first time, agency guidance documents (voluntary, often interpretive statements of an agency's stance on a particular issue) were subject to OIRA's centralized review.

### **Current Policy**

When President Obama came into office, he revoked the Bush-era order<sup>5</sup> and reaffirmed Clinton-era policy (Executive Order 12866). However, OMB has continued to subject agency guidance documents to centralized OIRA review.<sup>6</sup> And President Obama's first term OIRA Administrator, Cass Sunstein, used the power the position afforded, as Georgetown Law Professor Lisa Heinzerling expertly documented in a recent law review article. He imposed cost-benefit analysis "wherever the law allows" and would not allow rules to go forward if they didn't pass OIRA's tests. Heinzerling writes, "The person who leads OIRA is, in the rule-making domain, effectively the boss of members of the President's Cabinet."<sup>7</sup>

So, while the executive order essentially establishes another set of review hurdles for agencies tasked with developing public health, labor, and environmental standards, it also sets a deadline for OIRA to review rules and requires OIRA to be transparent about the changes that it asks agencies to make to the rules they propose.

The executive order requires that OIRA review a proposed regulation (or take a pass on reviewing it) within 90 days of receiving it from an agency. That deadline can be extended once for up to 30 days upon agency request and OMB Director approval. In other words, *at the most*, OIRA has four months to review a proposed standard and either approve it or send it back to the agency with proposed changes.

---

<sup>4</sup> George Bush, "Executive Order 13422 of January 18, 2007, Further Amendment to Executive Order 12866 on Regulatory Planning and Review," The White House, Jan. 18, 2007. Available at: <http://edocket.access.gpo.gov/2007/pdf/07-293.pdf>.

<sup>5</sup> Barack Obama, "Executive Order 13497 of January 30, 2009, Revocation of Certain Executive Orders Concerning Regulatory Planning and Review," The White House, Jan. 30, 2009. Available at: <http://edocket.access.gpo.gov/2009/pdf/E9-2486.pdf>.

<sup>6</sup> Peter R. Orszag, "Memorandum for the Heads and Acting Heads of Executive Departments and Agencies: Guidance for Regulatory Review," Office of Management and Budget, Executive Office of the President, March 4, 2009, M-09-13. Available at: [http://www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m09-13.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-13.pdf).

<sup>7</sup> L. Heinzerling, "Inside EPA: A Former Insider's Reflections on the Relationship between the Obama EPA and the Obama White House", Pace Environmental Law Review, 2014. Available at: <http://digitalcommons.pace.edu/pelr/vol31/iss1/5/>.

Executive Order 12866 also requires the agency that submitted a rule to identify to the public, “in plain understandable language,” the substantive changes between the draft action the agency submitted for review and the action subsequently announced after OIRA review. Further, it requires the agency to identify to the public the changes made *at the suggestion or recommendation of OIRA*.

**But neither the timeliness nor the transparency required by the Executive Order is occurring.**

### **Timeliness: Formal Review Deadlines**

A December 2013 report prepared for the Administrative Conference of the United States<sup>8</sup> (ACUS) assessed the timeliness of OIRA’s review of federal agency regulations from 1981 to mid-2013. The report found a dramatic increase in the average length of time of OIRA’s regulatory reviews in 2012, growing from 55 days to 79 days. In the first half of 2013, the average review time increased to 140 days. The number of rules that exceeded OIRA’s standard 90-day review limit nearly doubled, from 68 in 2010 to 133 in 2012. It had reached 93 in the first half of 2013, although in the third quarter of 2013, the number of overdue rules fell.

As of the end of February 2014, 51 rules pending at OIRA had exceeded the 90-day review period, including seven “economically significant” rules. Forty-three of these rules have been pending for more than 120 days. These extensive delays may be related to the sheer number of rules, notices, and guidance documents that OIRA now considers to be under its purview. In recent years, OIRA has typically undertaken reviews for 600-700 rules considered either “economically significant” or deemed significant for other reasons, such as raising “novel legal or policy issues” or causing “a serious inconsistency or otherwise interfere with an action taken or planned by another agency.”

Delayed rules have real world impacts. One of the delayed proposed rules would provide the Food and Drug Administration (FDA) with the authority to regulate tobacco products, including hookah, electronic cigarettes, cigars, pipe tobacco, other novel tobacco products, and future tobacco products (under the Federal Food, Drug, and Cosmetic Act, as amended by the Family Smoking Prevention and Tobacco Control Act.)<sup>9</sup> Tobacco products contribute to over 400,000 deaths each year and are responsible for chronic illnesses in approximately 8.6 million Americans.<sup>10</sup>

Another final rule delayed beyond the 120-day review limit would give the Mine Safety and Health Administration (MSHA) authority to reduce coal miners' exposure to coal dust. The rule

---

<sup>8</sup> Curtis W. Copeland, Length of Rule Reviews by the Office of Information and Regulatory Affairs, Prepared for the Administrative Conference of the United States, December 2, 2013.

<sup>9</sup> Family Smoking Prevention and Tobacco Control Act, PL111-31, <http://www.gpo.gov/fdsys/pkg/PLAW-111publ31/pdf/PLAW-111publ31.pdf>.

<sup>10</sup> Ibid, Sec. 2(13)

has been under OIRA review since August 2013 and is considered an important element in MSHA's Comprehensive Black Lung Reduction Strategy to "End Black Lung Now."<sup>11</sup> Over the period of 1998-2007, more than 10,000 miners died from black lung disease, and the prevalence of black lung cases has more than doubled since the mid-1990s.<sup>12</sup>

These examples of delayed rules would impose stricter controls over products and processes in which the health impacts are widely known. But U.S. scientists and businesses continue to experiment with new commercial processes and to create new materials, and our failure to regulate new products may be even more disturbing. For example, nanoscale materials have become increasingly pervasive in our society, utilized not only in medical and technological applications but extensively in consumer products.<sup>13</sup>

An expanding body of scientific literature indicates potentially significant health risks are associated with the nanoscale materials that are in current use. The Environmental Protection Agency (EPA) submitted a proposed rule to OIRA in November 2010, *more than three years ago*, that would allow it to require manufacturers of certain nanoscale materials to provide EPA with exposure and release information, as well as available health and safety data related to these materials. This information is critical to EPA's ability to evaluate the safety of these products and proactively work to mitigate and/or minimize risks to human health or the environment.

But instead of investigating the potential risks of emerging technologies and new materials, OIRA has forced agencies to engage significant amounts of their time in "regulatory look backs." Although identifying and removing outdated and inefficient regulations is sensible in theory, in practice, the savings to the economy from retrospective reviews conducted by executive agencies have been relatively modest at best (Administrator Shelanski has estimated \$10 billion<sup>14</sup>), and the opportunity costs to the agency and to public health unmeasured.

The budgets of federal regulatory agencies are under pressure and over the past decade, most have barely held even.<sup>15</sup> For example, OSHA's enforcement budget today is at the level it was in 1981 even though the number of workplaces it is supposed to oversee has doubled. Funding in recent years for the EPA's compliance and enforcement efforts, which support the majority of inspections and enforcement to ensure compliance with major environmental laws, have been at historical low levels.

And with new risks from nanoscale materials and new chemicals and industrial processes emerging, the time regulatory agencies are forced to spend looking back reduces the time they

---

<sup>11</sup> <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201310&RIN=1219-AB64>.

<sup>12</sup> <http://blogs.cdc.gov/niosh-science-blog/2008/08/18/mining/>.

<sup>13</sup> See for example The Project on Emerging Nanotechnologies Consumer Products Inventory, which currently lists 1854 consumer products that contain nanomaterials, <http://www.nanotechproject.org/cpi/products/>.

<sup>14</sup> <http://judiciary.house.gov/files/hearings/113th/09302013/Shelanski%20testimony.pdf>.

<sup>15</sup> "Public Protections Budget Dashboard – FY 15," Center for Effective Government.

have available to complete the rulemakings already underway and to identify and investigate new risks to public health. The time required for regulatory look backs probably contributes to agency delays in completing rules.

### **Recommendations for Reducing Delay**

**Recommendation:** OIRA should not be allowed to exceed the 90/120-day deadline. *Once a rule has been formally submitted for OIRA review, a failure to meet the 90/120 deadline should be considered “default approval” of the rule.* Agencies would be allowed to issue the proposed or final rule under this scenario. Delaying the ability of agencies to issue crucial standards and safeguards by ignoring the executive order review deadlines is inconsistent with the executive order’s mandate that the process “reaffirm the primacy of Federal agencies in the regulatory decision-making process.” This is not acceptable.<sup>16</sup> *If the first recommendation is not followed, and rules continue to be delayed at OIRA beyond the 120-day limit, then the public should be able to petition the agency responsible for the proposed or final rule to publish the rule.*

**Recommendation:** E.O. 12866 provides OIRA with discretion in determining which rules qualify as significant, and OIRA’s expansive definition of “significant” rules, as well as the inclusion of guidance documents and pre-rulemaking actions, has resulted in an unwieldy and inappropriately broad portfolio. Additionally, the economic threshold of \$100 million for defining “economically significant” rules was established in 1978 and has not been updated since. *Congress should stipulate that OIRA may not review agency guidance documents, pre-rulemaking actions, or rules that are not economically significant. The economic threshold for defining “economically significant” rules should be adjusted to a level equivalent to the ratio with nation’s gross national product in 1978, which in today’s terms is \$660 million.*

**Recommendation:** Regulatory “look backs” require significant amounts of staff time, effort, and resources. *Since the primary mission of regulatory agencies is to evaluate and protect against potential risks to the American people, the economy, and the environment, agencies should not be forced to engage in resource intensive backward exercises in paring back outdated rules when they need to be scanning the future for emerging threats.* The recent string of incidents that have put community and worker health at risk – in West Virginia, West, Texas, North Carolina, California, and more – demonstrate the need to focus on more immediate issues. With an aging physical infrastructure and declining enforcement staff, these kinds of incidents are likely to become more common.

---

<sup>16</sup> OIRA apparently interprets the extension provision in Section 6(b)(2)(C) of E.O.12866 to mean that agency-initiated requests can be of an unlimited duration, yet has never provided formal justification for this interpretation, which is inconsistent with the plain reading of the E.O. 12866 language that “the review process may be extended once by no more than 30 calendar days”. The ACUS report includes accounts from numerous senior agency officials who reported that agency requests for extensions of review were actually made because OIRA suggested they do so.

## **Failures of Transparency: Informal Reviews and Substantive Changes**

OIRA's public database only reflects the amount of time that the rules are under *formal review*. But the ACUS report and the article by Heinzerling previously referenced document how staff at OIRA review proposed rules *informally* prior to the rules being submitted to the formal review process. Interviews with senior agency employees conducted for the ACUS report indicate that many rules are informally reviewed for weeks or months prior to formal submission. At least some agencies have had to obtain permission from OIRA to submit their rules for formal review, and that some rules were not logged into the OIRA database until well after they were submitted by the agency. The informal reviews are typically not included in the agency rulemaking dockets, so it is impossible to verify whether informal reviews occurred or determine how long they lasted.

And of course, this informal review process completely undermines the public's ability to understand how and when and where OIRA inserted itself into the substance of the rulemaking and how rules changed as a result. OIRA has long operated as a "black box" in the rulemaking process; informal review enlarges the box.

The pattern is for rules to emerge from the OIRA review process significantly changed, almost always with weaker public protections or lower health and environmental standards. The reasons for these changes are almost never revealed – even though current policy (E.O. 12866) requires agencies to disclose "those changes in the regulatory action that were made at the suggestion or recommendation of OIRA."

OIRA has interpreted this provision to require disclosure of the changes suggested or recommended by OIRA during *formal* review. OIRA's interpretation of the disclosure requirements means that discussions regarding substantive changes to rules made during the *informal* review process remain completely hidden from the public. Interagency planning and consultation are supposed to be part of the federal government's deliberative process, so OIRA has plenty of opportunity to make its views known, but the extensive use of informal reviews and demands for more cost-benefit analyses and new studies before rules are allowed to move forward – outside of the public scrutiny of the formal review process – violates the spirit of the executive order.

Even when a rule is undergoing formal review, OIRA and agencies typically withhold communications or edits that occur. Unless an agency chooses to disclose its dealings with OIRA in an online rulemaking docket, it is nearly impossible for the public to determine what impact OIRA had on the rule. The public has to wait until the rulemaking process is completed to determine what changes were recommended by OIRA or other agencies.

While OIRA is required to reveal all communications between its staff and non-executive branch personnel during rule reviews, including "the subject matter discussed during such communications," this doesn't happen, either. OIRA's disclosure of such meetings with non-

executive branch government personnel and outside groups is limited to the name of the rule under review, the name and affiliation of the persons attending the meeting, and any meeting materials provided to OMB by the meeting participants. There is no public record of the “subject matter” discussed during these meetings, so the public is unable to discern the potential influence of outside groups on OIRA’s rule reviews.

***Recommendation: OIRA should be required to provide copies of the pre- and post-review versions of the rule in the rulemaking docket; a description in clear and simple language of the all substantive changes made to the rule by OIRA during both informal and formal review, as well as any changes made by an entity of the Executive Office of the President, by an agency not responsible for the rule, or by an individual not employed by the executive branch.***

***OIRA should also be required to provide a summary of the subject matter discussed in meetings with non-executive branch government personnel and outside groups and to post these summaries together with the current meeting materials on its website.***

### **Regulation to Assist Small Businesses and Family Farms and Promote Competitive Markets**

Small business owners are also parents, homeowners, consumers, and concerned neighbors who want their families protected from environmental contamination, contaminated foods, and unsafe toys, just like other citizens. So it should not be surprising that public opinion research shows their views on a host of regulations mirror those of their fellow citizens. In fact, research shows more small business owners support energy and climate legislation than oppose it, and many believe such legislation would aid their businesses.<sup>17</sup> One poll found 86 percent of small business owners believe “some government regulations are necessary for a modern economy,” and 78 percent believe “regulations are important to level the playing field with big business.”<sup>18</sup> They report that inadequate demand and uncertainty about overall economic trends are their biggest problems – not regulations.

Unfortunately, trade associations and corporate lobbyists often cloak their anti-regulatory arguments in discussions of the purported “burdens” they would impose on small businesses (which I am defining as the 4.5-4.7 million employers with under 50 workers;<sup>19</sup> some would use an even lower number). We too are concerned about small businesses and family farmers but believe the real problems they face have more to do with industry consolidation and unfair competition from large producers, not from health and safety standards. Small retailers face an

---

<sup>17</sup> Small Business Majority, Opinion Survey: Small Business Owners Believe National Standards Supporting Energy Innovation Will Increase Prosperity for Small Firms, [http://www.smallbusinessmajority.org/energy/pdfs/Clean\\_Energy\\_Report\\_092011.pdf](http://www.smallbusinessmajority.org/energy/pdfs/Clean_Energy_Report_092011.pdf) (accessed June 3, 2011).

<sup>18</sup> Opinion Survey: Small Business Owners’ Opinions on Regulations and Job Creation, February 1, 2012 [http://asbcouncil.org/sites/default/files/files/Regulations\\_Poll\\_Report\\_FINAL.pdf](http://asbcouncil.org/sites/default/files/files/Regulations_Poll_Report_FINAL.pdf).

<sup>19</sup> <http://www.census.gov/epcd/www/smallbus.html>.

uphill struggle to compete against big box chains that has to do with economies of scale and market power.

We urge Congress and regulators to reinvigorate antitrust and competition policy. Agribusiness monopolies are particularly damaging. Oligopolistic control over seed markets squeeze farmer costs and threaten biodiversity.<sup>20</sup> Small livestock and poultry farmers are increasingly unable to sell to competitive markets and instead work as *de facto* contract workers for giant packers and processors.<sup>21</sup>

While some regulations could create issues for small businesses (the expense of wheelchair access under the Americans for Disabilities Act), most include exemptions in such situations. The Small Business Administration had dedicated funds to provide regulatory compliance assistance to small enterprises, but currently they are only required to answer inquiries and provide compliance guides. Congress might ask them to be more proactive.

***The Small Business Regulatory Enforcement Fairness Act could be amended to require agencies to conduct more outreach, education, and compliance assistance to small businesses.*** Many agencies already have existing Small Business Ombudsman offices specifically created to help small businesses with compliance issues once regulations are issued.<sup>22</sup> But legislation could encourage (and fund) these offices to proactive reach out to and educate small businesses about how they can comply with existing rules more efficiently. With a proactive approach, real small businesses would receive direct and tangible assistance to help them comply with regulations and allow the benefits that public health and safety regulations to be preserved.

## **Conclusion**

In the United States' system of "checks and balances," Congress passes the laws and the executive branch executes them. In a perfect world, the lag time between the first and second would be short, so that a president who signs a piece of legislation would also be responsible for its implementation. In the real world, one Congress creates new regulatory authority and it is likely that a very different Congress and/or president will oversee the rules that implement that law. This time lag creates the space for all manner of mischief.

Government scientists and career civil servants have the scientific and technical expertise and regulatory experience to develop the rules that protect public health and safety *while* balancing a myriad of competing economic and political interests. Regulated industries should weigh in, and

---

<sup>20</sup> W. Hauter, *Foodopoly: The Battle Over the Future of Food and Farming in America*. New York: New Press, 2012.

<sup>21</sup> C. Leonard, *The Meat Racket: The Secret Takeover of America's Food Business*, New York: Simon & Schuster, 2014.

<sup>22</sup> A list of small business ombudsman offices can be found at <http://www.sba.gov/category/navigation-structure/starting-managing-business/starting-business/business-law-regulations/contact-government-agency/fe>.

do. Public interest groups, citizens, and communities hurt by the absence of effective regulation should also be heard but rarely have the time and resources to devote to a process that plays itself behind closed doors over years. Rulemaking is a balancing act. In a democracy, it should be done in public, not in secret.

Citizens have a right to know the individuals, lobbyists, associations, and companies that influence the standards and safeguards on which our quality of life is built. We have many successes to celebrate in our regulatory history – cleaner air, purer water, safer drugs. But our rulemaking system needs reform.

OIRA needs to meet its required review deadlines or trust agency expertise and let the rules stand. It needs to stop “gaming” the executive order by engaging in off-the-record early, informal reviews and putting pressure on scientists and content experts. It needs to be transparent with the public about the groups and individuals with whom it consults and gathers information. And OIRA needs to help increasingly resource-constrained regulatory agencies focus on immediate public health and environmental issues and emerging challenges of the future instead of requiring them to use precious resources looking backward.