Statement of Sally Katzen
Professor, NYU School of Law

before the

Senate Committee
on
Homeland Security and Governmental Affairs

on
"Toward a 21st Century Regulatory System"

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Chairman Johnson, Ranking Member Carper, Members of the Committee. Thank you for inviting me to testify today. I understand that this hearing is intended to provide an overview of the current state of the federal regulatory system, and that there will be other hearings over the next few months focused on perceived problems and specific proposed solutions. This hearing is thus designed to ensure that Members of this Committee have access to the same information and understand the different perspectives (and passions) that come to the fore when discussing these issues.

I have worked on regulatory issues during most of my career in private practice, government service, and in my 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. After leaving the government in January 2001, I taught administrative law courses at the University of Pennsylvania Law School, University of Michigan Law School, George Mason University Law School, and George Washington University Law School, and also taught American Government courses to undergraduates at Smith College, Johns Hopkins University, and the University of Michigan in Washington Program. Since 2011, I have been at New York University School of Law, serving as co-director of its Washington DC Clinic for third-year law students and teaching a first-year required course entitled "Legislation and the Regulatory State." Before entering government service in 1993, I was a partner at the law firm Wilmer, Cutler & Pickering (now called

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). Since leaving the government in 2001, I have written articles for scholarly publications and have frequently been asked to speak on administrative law in general and on rulemaking in particular.

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 which 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.

Since the 1970's, we have heard a lot about the steady increase of regulations, and more recently we have heard that the resulting burden from these regulations (and the likelihood of more regulations in the next two years) is a drain on the economy, the reason why job growth has not been as strong as expected, and the reason why American industry is at a competitive disadvantage in the global market. This leads to one of the threshold questions for this hearing – how do you measure or evaluate regulations? More specifically, is this Administration engaged in an unprecedented (and unjustified) amount of regulatory activity? With respect, I think not.

Measuring/Evaluating Regulatory Activity

One measure frequently invoked is the number of pages in the Federal Register, with critics of regulation citing the increased size of that publication over time. But the Federal Register includes much more than new regulations. It also includes notices and other announcements published to inform the general public of activities or actions they may be interested in, such as upcoming agency meetings (including agendas), administrative hearings, notices of data availabilities, opportunities to apply for benefits (with detailed instructions), and settlement agreements. Even with respect to new rules, when a Notice of Proposed Rulemaking (NPRM) is published in the Federal Register, it is always accompanied by a "preamble" that sets forth, among other things, all the data and the analyses that the agency is relying on so as to provide interested

people a meaningful opportunity for comment. Similarly, when the final rule is published in the Federal Register, it is again accompanied by a "preamble," which then serves as the agency's statement of "basis and purpose" for the rule. Responding to a series of juridical decisions over the last several decades, the preamble now not only restates the history of the rulemaking and all the underlying data and analyses, but it also explains (often at great length and with specific examples) what the agency intended the rule to cover or to accomplish, and, most importantly, the agency's response to the factual, policy and legal arguments raised during the comment period, thereby demonstrating that the agency has read and considered those comments and either agrees or disagrees with them (and why). Obviously, the more complex the subject matter, the more voluminous the data and analyses, the more extensive the comments, the longer the preamble is, regardless of the length of the actual rule. I have seen some preambles go on for several hundred pages whereas the text of the final rule itself might take only a page or two.

Another proxy for the amount of regulation is offered by a joint project of the Regulatory Studies Center at George Washington University and the Weidenbaum Center on the Economy, Government and Public Policy at Washington University in St, Louis. They use the growth in the annual federal budget and number of employees (FTEs) for selected regulatory agencies. Data on federal outlays and staffing may be interesting as a longitudinal study, but do not really tell us very much about regulatory activity. What are those employees doing? Are they all writing new rules? Some may be gathering data and undertaking the analysis underlying proposed regulatory actions; others might be deregulating. Are some of the employees providing compliance assistance? Or protecting our security? The staffing numbers shot up after 9/11 when the inspectors at the airports became federal employees of the Transportation Security Administration (TSA) (a regulatory agency) rather than private contractors. Did that mean we were being inundated with new regulations? I don't think so.

Another commonly invoked metric is the annual cost of regulations, which by some reports increases each year. We have a pretty good handle on the expected costs of individual "major" or "economically significant" regulations from the annual OMB Report to Congress on the benefits and costs of regulations issued each year**.** It should be noted that often the estimated costs of regulations are overstated: when something is *proposed*, it can seem very difficult, burdensome, or costly; when it is *adopted* (and affirmed), American ingenuity can kick in and the difficulty or burden or cost is significantly reduced. It should also be noted that caution is called for when making comparisons because often the numbers are driven by a few large rulemakings. With that caveat aside, it appears from the OMB reports that, at this point, the cost of new

regulations issued by the Obama Administration is roughly comparable to the cost of those issued during George W. Bush's Administration and less than the cost of those issued during the Clinton Administration.

In any event, these data are to be distinguished from the often-cited $2 trillion (plus) annual cost of regulations produced by Crain and Crain. The Crain and Crain studies have taken on a life of their own as supposedly unimpeachable calculations, even though highly reputable scholars and economists (and experts at the Congressional Research Service) have filled pages of print criticizing both the assumptions and the methodologies used, and it earned several Pinocchio's from Glen Kessler, the "Fact Checker," at The Washington Post. The Crain studies have been called a lot of names; perhaps the most polite is "urban legend." It is interesting that some of the proposals for "improving" the regulatory system would require agencies to submit their economic analyses to independent peer-review to ensure they are reliable. It is significant, then, that the Crain studies could not possibly survive such review.

It also bears emphasis that all of this discussion is about the costs of regulation and says nothing about benefits. Rarely do we hear that regulations save lives, prevent injuries, reduce risks to our health and safety, provide information to enable more intelligible choices for our lives, promote competition and fair practices in our markets, and protect civil rights, just to name a few obvious truths (more about this below).

Maybe the best way to measure regulatory activity would be to simply count the number of new regulations. Twice a year, the Administration publishes the Unified Agenda, a compendium of proposals in (or likely to join) the rulemaking pipeline. Apparently, some have checked that document and then announced that thousands of new regulations are on their way. Apart from the fact that some of the entries do not ever see the light of day, the total number of regulations does not really tell much about them, because all regulations are not the same. In fact, far from being a monolithic group, the rules issued by the federal agencies each year encompass a very wide variety and great diversity – both in scope and import – of regulatory activity.

One salient point is that the vast majority of the regulations issued each year are ministerial or routine – e.g., changing the day for filing income taxes to the following Monday when the 15th of April falls on a Saturday or Sunday, or setting the times for changing the locks on the St. Lawrence Seaway. Others are as noncontroversial as they are necessary – e.g., the Federal Aviation Administration's air worthiness directives generally and its rule last year prohibiting certain flights in the Simferopol (UKFV) flight region because of on-going conflicts in the Ukraine and Crimea.

Perhaps the best example of a non-controversial rule that is actually eagerly awaited by the regulated entities is the rule issued each year by the Department of Interior setting an annual quota for migratory bird hunting under the Migratory Bird Treaty; absent an implementing rule, no one could shoot game birds as they fly to or from Canada. This was identified as a favored activity during the regulatory reform debates in Congress during the Clinton Administration; as a result, hunting, fishing or camping rules were explicitly exempt from many of the federal statutes enacted in the 1990s, and their preferential status continues to be zealously guarded in some of the bills in this Congress.

There are other types of non-controversial rules, as well as rules that are actually favored by regulated entities, which are not so protected. It may be counter-intuitive, but it is not unusual for regulated entities (or segments within the affected industries) to support or even champion certain rules – such as those that level the playing field, provide needed guidance, or provide certainty or regularity for operations for the foreseeable future. For example, a few years ago, the automobile companies supported the Environmental Protection Agency (EPA)/Department of Transportation (DOT) joint rules for "Passenger Car and Light Truck Corporate Average Fuel Economy Standards for MY 2012-2016." More recently, industry stakeholders voiced broad support for DOT's "Inspection, Repair, and Maintenance; Driver-Vehicle Inspection Report" rule, which removed a significant information collection burden for motor carriers without adversely affecting safety; and beneficial users of coal ash supported EPA's "Coal Combustion Residuals" final rule, which cleared the way for the continued recycling of coal ash in a variety of products.

There are also rules that specify the structure, eligibility requirements or enrollment procedures for government programs, such as the Department of Agriculture's (USDA's) "Agriculture Risk Coverage and Price Loss Coverage Programs," and the Department of Veterans Affairs' (VA's) "Expanded Access to Non-VA Care Through the Veterans Choice Program." Rules such as these enable the programs authorized and funded by Congress to operate as they were envisioned or modified by Congress, and the potential participants in the program often eagerly await these rules. In a similar vein, there are multiple so-called "transfer" rules (which primarily cause transfers from taxpayers to program beneficiaries as specified by Congress and do not impose any significant costs on the private sector). Recent examples include USDA's "Rural Broadband Access Loans and Loan Guarantees," the Department of Education's "Federal Pell Grant Program," and the Department of Defense's "TRICARE: Reimbursement of Sole Community Hospitals."

As this Committee well knows, regulatory agencies are not free agents; they can only do what Congress has authorized them to do, and often Congress is quite specific about what it wants, leaving little or no discretion to the agency. Examples of recent rules where an agency simply followed the provisions of the authorizing act – virtually no discretion was provided for, or exercised by, the agency – are the VA's Choice rule mentioned earlier and DOT's "Pilot Certification and Qualification Requirements" rule, which was the one rule reviewed by OIRA that had estimated costs greater than estimated benefits. In the 1990's, I recall that the Government Accountability Office found that many of the regulations that businesses found most burdensome were required by the terms of the underlying statute; notwithstanding that information about the statutory requirements had been widely known for some time, Congress had not addressed the source of the problem, but nonetheless continued to criticize the agencies' implementation of its mandate.

To be sure, the agencies also issue regulations where they have discretion (often substantial discretion) under the authorizing act, and each year there are several dozen such regulations that are controversial, some of which are very controversial. It is these regulations that typically produce an outcry from regulated entities, which are often quite vocal about the need for relief from proposed regulations, particularly when there are policymakers who are receptive to such pleas. During my tenure at OIRA, I often heard heartfelt claims that a proposed regulation would bring their industry to its knees or prevent them from providing a product or service that is essential to the nation's well being. I also heard genuine concerns that the government was overreaching or going out of control. I did not doubt their sincerity, even though during my tenure, so far as I know, no industry was destroyed by the rules we issued.

But this reaction to proposed regulations is not new. In a recent book on Victorian England, I read that there was great concern when the police were given the authority to direct traffic and they created a separation between those traveling in opposite directions (e.g., northbound traffic was to stay on one side of the road; southbound traffic on the other). Contemporary reports indicated there were quite vociferous objections against the police exercising such power. And every student of American political history will recall the resistance in our own country to regulations that we now take for granted – like restrictions on child labor, standards for cleanliness in meat packaging plants, prohibitions on adulteration of foods, or requirements for safety and efficacy testing for our medicines. I recall one of the biggest pushbacks in the 1970's and 80's was against proposed regulations requiring passive restraints in automobiles (e.g., air bags) that the automobile companies fought at the National Highway Traffic Safety Administration, in the White House, in Congress, and all the way

to the Supreme Court. Today, many automobile companies advertise how safe their cars are by driving into brick walls (and the dummy survives thanks to the air bag).

I understand that one's view of the merits of a particular regulation may well turn on whether it comes from the perspective of the regulated entity or the intended beneficiary of the regulation. Consider, for example, the Department of Health and Human Service's rule on "Gluten-Free Labeling of Foods," or the Department of Energy's "Energy Efficiency Standards for Microwave Ovens," or the Department of Labor's "Affirmative Action and Non-Discrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans. " These rules were viewed as unnecessary and burdensome by some, but by others as important to their health and safety, or consistent with our nation's long-held values.

In any event, while reasonable people may disagree about whether any or all of the above are "good" rules or "bad" rules, there is general agreement on a relatively objective tool for evaluating regulatory proposals – namely, cost/benefit analysis. When someone says "cost/benefit analysis," people tend to look away or their eyes glaze over. The analysis itself – that is, the actual work product – may be complicated, highly technical and often difficult to follow, but the concept is quite simple. It is a way to think about the consequences of a proposed action and then try to translate diverse consequences into the same metric – typically money – so we can evaluate whether the proposal is, on the whole, good for us or not. We do this every day of our lives, whether it is for something trivial (walk or take a taxi) or significant (purchase a home or launch a new business), with the extent of the analysis roughly commensurate with the importance of the decision we are trying to make.

Requirements for cost/benefit analysis to inform, or support, important regulatory proposals adopted through rulemaking have been around at least since President Nixon established a "Quality of Life Review" program for certain high-profile regulations. Beginning in 1981 with President Reagan's Executive Order 12291, all Presidents (both Republicans and Democrats) have required regulatory agencies within the Executive Branch (both Cabinet Departments and stand-alone agencies like EPA) to assess the costs and benefits of proposed actions, and, among other things, to the extent permitted by the laws that Congress has enacted, ensure that the benefits of the intended regulations justify the costs. The requirements to undertake this economic analysis and to submit it along with a draft proposed or final rule to OIRA, which are the foundational principles of President Clinton's Executive Order 12866 (reaffirmed by President Obama in Executive Order 13563), were designed to make sure that the agency has thought through, in a disciplined and rigorous way, the obvious and the less

obvious costs and benefits that are likely to occur if the proposal is adopted and has the force and effect of law. Needless to say, I strongly support cost/benefit analysis.

Over a decade ago, Congress asked OMB to compile the information it had on the costs and benefits of the major regulations issued by federal regulatory agencies in that year and for the preceding ten years, and to provide that information (on an annual basis) to the Congress. OMB's draft 2014 Report to Congress – the most recent report available to the public – provides data on the costs ($57-$84 billion) and the benefits ($217-863 billon) of major rules issued by Executive Branch agencies over the most recent ten-year period (FY 2003-2013). Even if one uses the highest estimate of costs and the lowest estimate of benefits (and this is only monetized benefits), the regulations issued over the past ten years have produced *net benefits* of at least $133 billion to our society. This cannot be dismissed as a biased report by the current administration, because OMB issued reports with similar results (benefits greatly exceeding costs) throughout the George W. Bush Administration (e.g., for FY 1998-2008, major regulations cost between $51 and $60 billion, with benefits estimated to be $126 to $663 billion dollars).

There are, of course, significant limitations to the estimates in the OMB Report, which OMB is quick to acknowledge (e.g., "[m]any rules have benefits or costs that cannot be quantified or monetized with existing information" and "[i]n some cases, quantification of various effects is highly speculative" (citing the benefits of certain disclosure requirements) or "particularly challenging" (citing protection of homeland security or personal privacy)). Nonetheless, what these data make clear is that regulations, at least over the past several decades, have generally benefitted, rather than harmed, our nation. They have improved the quality of our lives in various ways – some in trivial, some in very significant, ways. They should not, therefore, be thought of as an evil to be contained or rendered ineffective.

One more thought before leaving the subject of the number of regulations, either new regulations or total regulations. It is not as though there is some optimal number of regulations, some number that, if exceeded, in any given year or over a period of years, would be detrimental or destructive of our society and below which, we could all breathe a sigh of relief. Our society does not stand still, and neither should our protections from unexpected (or unintended) threats. A recent chemical spill in West Virginia led to a declaration of a state of emergency (including the relocation of families and warnings about drinking, bathing or cooking with tap water affecting thousand of families) as well as to calls for filling the regulatory gaps in our chemical control laws. Should those calls go unheeded and risk another spill? It is difficult to say when

something benign becomes problematic or when an emerging technology warrants the development of a sensible framework, either under existing or new legislation. Derivatives were creative and exciting until they contributed to the financial crisis at the end of the last decade. And drones were not a problem until they became one by potentially interfering with commercial airlines and falling on peoples' property. Should we draw the line on any new regulations and not address emerging problems? Or should we continue to protect ourselves but take care that when we do regulate, we do so consistent with sound regulatory policy and processes? I would choose the latter course of action.

Regulatory Impact Analyses

I mentioned earlier that under existing Executive Orders, agencies assess the costs and benefits of their regulatory proposals and, to the extent feasible, provide a quantification of those costs and benefits to ensure that the benefits of a proposed rule justify its costs. Agencies are also to consider various alternatives to achieve their objective(s), choosing the alternative that maximizes net benefits. This analysis, with the underlying data, are typically included in the Regulatory Impact Analysis (RIA), which frequently accompanies the NPRM and is an important part of the "final rule package" that is reviewed by OIRA and made available to the public with the publication of the final rule.

RIAs are very important, not only for what the final RIA says about the final rule, but also because of the value of going through the process of preparing the RIA. Gathering the relevant data and structuring the analysis help the agency staff refine its thinking in drafting the proposal; the presentation of the analysis to the agency decision-makers can reinforce existing assumptions or it can cause rethinking of conventional wisdom; the review of the analysis by the OIRA staff provides a dispassionate second opinion and quality control for the analysis; and the availability of the data and the analysis throughout the process enables the various stakeholders, their elected officials and the public generally to evaluate in a more objective way the merits of the regulatory action – what is at stake and for whom?

To be sure, the quality of the work done by these agencies –how solid or how sophisticated the economic analysis is – is mixed, with some agencies doing very good work on some rules and the same agencies or other agencies producing RIAs that are appreciably less thoughtful or less informative on other rules. Some scholars and economic experts have studied selected agencies and given them mediocre (or even failing) grades, but others have been generally complimentary while suggesting areas

for improvement. This should not be surprising because agencies are very different from one another, with different missions, different cultures, and different resources. The latter is particularly important in the case of economic analysis because thoughtful, careful, comprehensive analysis takes time and resources, and the more significant the proposed regulatory action, the more time and resources it should consume. Stated another way, this exercise is not cost free, and today many agencies are faced with straight-lined or shrinking budgets that make investment in additional serious, rigorous analysis very difficult, if not impossible.

While I do not disagree with those who say that the agencies could and should do a better job in their analyses (and particularly that the work could and should be better integrated with their decision making), I am struck by the fact that virtually all Executive Branch agencies have come a very long way from the early 1980's when they were first required to do these analyses. During my tenure at OIRA in the 1990's, some agencies were still resistant to the value of doing such an analysis; others had taken the first steps but did not yet have the expertise or experience to make much headway; and others were able and willing to learn from the guidance and advice provided by OIRA. It might surprise some of the critics, but the most serious and competent agency was EPA, which, along with DOT, probably devoted the most time and resources to the process. Today, EPA and DOT still do generally good work, and more and more agencies are becoming more and more proficient. Some might wish for greater or faster progress, but change in any large institution often comes haltingly, and, as noted earlier, improvement in this area requires resources that agencies often do not have to devote to this process, particularly in the last few years. Guidance from OIRA (e.g., Circular A-4), constructive criticism from stakeholders or others, and incentives are all useful, but, realistically, this is something that will change over time and not overnight.

Retrospective Review of Existing Rules

For as long as I have been involved in this arena, there have been complaints that there is too much red tape and too many rules, and that so many of them 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, early in his administration, signed Executive Order 12866.

Section 5 of the Order was premised on the conventional wisdom: that there may be rules that "have become unjustified or unnecessary as a result of changed circumstances . . . [or are] duplicative or inappropriately burdensome in the aggregate . . . " Agencies were required "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 . . .." In addition, Vice President Gore led the National Performance Review, one component of which was a retrospective review of existing regulations.

During my tenure as Administrator of OIRA and then Deputy Director of Management at OMB, we found some rules we were able to eliminate or modify. But the primary lesson I learned was that there was not a lot of low-hanging fruit and, more importantly, there were not very many candidates that would produce great savings. One of the realities is that the bulk of the costs of many regulations came in the initial implementation, and these costs had already been sunk, whether it was ten years ago or ten months ago. So if we took seat belts out of cars or scrubbers out of smokestacks (not that I favor either of those), it would cost (rather than save) industry to change the assembly line or rebuild the facility. There could be savings from curtailing on-going operating and maintenance expenses, or continuing monitoring or reporting costs, although the latter at least were being reduced significantly as most businesses transitioned from manual reporting to electronic reporting. While these potential savings were not of the magnitude envisioned, they were certainly worth pursuing.

The bottom line, however, is that we undertook a review of existing regulations and called on all the agencies to be partners in the project. And then President George W. Bush undertook a review of existing regulations. And then President Obama launched a review of existing regulations.

Having lived through several iterations of this exercise, I have the distinct impression that the current effort is being pursued much more aggressively than any of its predecessors. Like Clinton, President Obama included a review of existing rules in his regulatory review Executive Order 13563; indeed, it was a featured piece in the accompanying press release and fact sheet. And then he issued two other Executive Orders on the subject (EO 13579 for Independent Regulatory Commissions and EO 13610 for Executive Branch Agencies), and the President spoke of the importance of the initiative at a Cabinet Meeting. Meanwhile, OIRA issued guidance to the agencies and followed that up with several memoranda and data calls.

In roughly the same time period, the Administrative Conference of the United States (ACUS) picked up the subject for review and commissioned a consultant's report. (Joseph E. Aldy*, Learning from Experience: An Assessment of Retrospective Reviews of Agency Rules & the Evidence for Improving the Design and Implementation of Regulatory Policy*, Nov 2014.) At the Plenary Session in December 2014, ACUS adopted a recommendation outlining best practices for agencies to follow in reanalyzing and modifying existing regulations, with the objective of promoting "a culture of retrospective review at agencies." Among other things, it "urges agencies to plan for retrospective review when drafting new regulations; highlights considerations germane to selecting regulations for reevaluation; identifies factors relevant to ensuring robust review; and encourages agencies to coordinate with the Office of Management and Budget, other agencies, and outside entities (including stakeholders and foreign regulators) when designing and conducting retrospective reviews." Importantly, ACUS recognized the substantial cost of performing robust retrospective reviews and specifically noted that it was critical that agencies have adequate resources for the task.

To be successful, an effort such as this requires serious and persistent leadership, which the President has certainly shown. It requires methodological and analytical know-how, which both OIRA and ACUS are providing. It also needs the constructive engagement of the regulated entities – who better to identify the specific rules that are problematic? (Too often, regulated entities have complained about overregulation as a general condition but have not singled out specific rules where a strong case can be made that they can be modified or eliminated without compromising legitimate regulatory objectives.) Apparently the Administration is beginning to reach out to external stakeholders who can contribute constructively to the process, so perhaps this ingredient will no longer be missing.

Sadly, one essential element is still not there: resources. As noted above, the last few years have seen agency budgets straight-lined or decreasing, with the situation compounded by Continuing Resolutions and sequestration. But absent resources, the best intentions may not take us where we want to go.

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As noted above, this hearing is to provide an overview of the regulatory state and future hearings will consider some of the proposed solutions to the perceived problems. I hope I am not getting ahead of myself, or you, but based on my experience in the field and what you are hearing today, I wanted to offer some general concluding

thoughts that might provide a useful framework for evaluating the various regulatory reform bills that will likely be referred to this Committee over the next few years.

I fully recognize that Congress, unlike federal agencies, is not constrained (other than by the Constitution) from enacting legislation that it deems salutary. Nonetheless, as a prudential matter, I think that before this Committee endorses a particular regulatory reform bill, it should ask (and answer) the same foundational questions that an agency should confront (and satisfy) before taking regulatory action – what is the compelling need and how significant is it, what is the particular problem that should be addressed, what is causing the problem, will the proposed action remedy the problem in an effective and efficient way, what are the other likely consequences (intended as well as unintended) of adopting the proposal, and are there available alternative ways of achieving the desired objective.

It is worth noting that Congress has imposed a series of process and analytical requirements on the federal agencies over the last 30 years, including the Paperwork Reduction Act, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, and the Unfunded Mandates Reform Act, to name just a few, without substantially increasing agency funding to carry out the tasks assigned in those statutes. Doing more with the same or less is unsustainable over the long run. Even now, it takes years rather than months for most agencies to dot all the I's and cross all the T's necessary before issuing a final rule. Adding additional requirements will undoubtedly further encumber the process, if not lead to paralysis by analysis. Perhaps before adding another set of requirements and making it more difficult for even the most desirable rules to be issued, Congress should rationalize the current set and/or provide more resources to the agencies to do what they are already required to do.

It is also important to note that Congress has available many alternatives to legislation, including hearings and other oversight tools, by which to monitor agency activity, evaluate current practices, spotlight any deficiencies, and bring public pressure to improve agency performance if that is what is called for. Among other things, you would then be able to identify the "bad actors" or the most problematic rules and explore why those situations exist. Such a targeted response would be far more efficient (and likely more effective) than some of the very broad regulatory reform proposals that will come before this Committee that apply, by their terms, across the board to all federal regulatory agencies – from the USDA and EPA to DHS and DOD – even though they have very different missions and very different resources. Clearly a one-size-fits-all proposal would have wildly disparate effects, not only on the different agencies, but also on the different types of rules that are developed by these agencies.

I have tried today to emphasize that regulations are an important and valuable force in our society and are the reason that the air we breathe and the water we drink is clean, our foods and medicines are safe, our workplaces are secure, our markets operate as advertised, and our values are embodied in both our public and private institutions. The system that has produced these regulations is the most transparent system in the world. Agencies give notice of what they intend to do, those affected are afforded an opportunity to provide input, and agency action is subject not only to congressional review but also judicial review which is subject to well established criteria for procedural fairness and substantive support. Every system has problems and can be improved, but I hope that by looking at the problems presented, you will not lose sight of the big picture – the U.S. administrative state in the envy of the world and a 21st century regulatory system should build on our progress and our successes.

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