Statement of Sally Katzen

before the

Senate Committee
on
Homeland Security and Governmental Affairs

on

"Federal Regulation: A Review of Legislative Proposals, Part II"

July 20, 2011

Chairman Lieberman, Ranking Member Collins, Members of the Committee. Thank you for inviting me to testify today. This is the Committee's third hearing on federal regulations and the regulatory process. The subject is critically important to our economy, our society and our nation, and I commend the Committee for undertaking this effort. I have been engaged with, and worked on, these issues during most of my career in private practice, government service and in my teaching and writing, and I welcome the opportunity to discuss these matters with you.

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; this coming academic year, I will be teaching a seminar in advanced administrative law and a first-year course, the Administrative and Regulatory State, as a Visiting Professor at NYU School of Law. I am also a Senior Advisor at the Podesta Group here in Washington. Before entering government service in 1993, I was a partner at Wilmer, Cutler & Pickering, 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 rulemaking in particular.

Regulations and the process by which they are developed, promulgated, and enforced have gotten a lot of attention in the past year – most of it unfavorable – and

there have been dozens of bills introduced in the Senate and in the House to "remedy" some of the perceived problems with the process. The proposals are generally well-intentioned and, at first blush, have considerable appeal. But I would urge the Committee to take a step back and seriously consider both the need for and the intended (and unintended) consequences of such legislation at this time.

In this regard, I am influenced by the principles that have governed regulatory actions by the federal agencies for the last several decades. Specifically, one of the first provisions in Executive Order 12866 is that "agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or *are made necessary by compelling need . . . .*" The agency should then "*identify the problem it intends to address* (including, where applicable, *the failures of . . . public institutions that warrant new . . . action)* as well as assess the significance of that problem;" it should "examine whether *existing regulations (or other law) have created, or contributed to, the problem . . .* and whether those regulations (or other law) should be modified to achieve the intended goal . . ."; and it should "identify and assess *available alternatives to direct regulation . . . .*"

I recognize that federal agencies are delegated their authority by Congress and that Congress is not constrained (other than by the Constitution) from enacting legislation. Nonetheless, as a prudential matter, I think that before Congress takes action, it should ask (and answer) the same foundational questions that an agency should confront (and satisfy) before taking action – what is the compelling need, 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 of adopting the proposal, etc.

With respect to "compelling need," I do not believe the case has been made for most of the proposed legislation. Much of the support is based on the assumed astronomical cost of regulations, with champions relying on the results of the Crain and Crain study of $1.75 trillion annually. This number has taken on a life of its own even though highly reputable scholars and economists have filled pages of print criticizing both the assumptions and the methodologies used to produce these cost estimates. Administrator Sunstein testified at your last hearing that the $1.75 trillion (and growing) figure is, quite simply, an "urban legend;" in fact, I thought his characterization was an understatement of the unreliability of this figure to support legislation affecting the regulatory process.

Another driver for some of these bills is the numerous complaints from regulated entities about burdensome, costly or inconvenient regulations. Admittedly there are pleas for relief from many quarters, especially small business, but this is nothing new; regulated entities have always resisted being regulated, often claiming that a proposed regulation will bring their industry to their knees or prevent them from providing a product or service that is essential to the nation's well being. I do not doubt the sincerity of their concerns, particularly when they are being encouraged to articulate their grievances with federal regulators. But I think it is instructive to read the report issued by Chairman Issa of the House Committee on Oversight and Government Reform after he

asked the business community to identify existing regulations that should, in their opinion, be modified or eliminated. It does not provide a rich trove of examples of agency overreach, and many of the regulations cited are regulations that simply do what Congress told the agency to do.

This Committee does not need to be reminded that 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 has scrupulously followed the provisions of the authorizing act – virtually no discretion was provided for, or exercised by, the agency -- include the Department of Defense (DOD) rule on "Retroactive Stop Loss Special Pay Compensation" and the Department of Transportation (DOT) rule on "Positive Train Control" (where, because of the underlying statute, the costs of the proposal were 20 times the benefits), both of which resulted in a great deal of criticism of the issuing agency. In the 1990's, the Government Accountability Office (GAO) 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 has been widely known for some time, Congress has not addressed the source of the problem, but continues to complain about agency implementation of their mandates.

In any event, what is missing from this discussion about what is wrong with regulations is an honest recognition of what is right about them. 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, protect civil rights, just to name a few obvious truths. Congress can enact a law setting forth a goal, but in most cases, it is the regulations issued by the relevant agency that gives effect to Congress' will. The regulations are the means by which the air we breath and the water we drink are clean, the food and medicines we consume are safe, our workplaces are secure, and the products and services we use daily are what they say they are.

I understand that one's views of the merits of a particular regulation may well depend on whether you are the regulated entity or the intended beneficiary of the regulation. Many of the "major" or "economically significant" regulations (those having an annual effect on the economy of $100 million annually) are therefore typically quite controversial, at least within some segments of the population. Consider, for example, the Food and Drug Administration's "Shell Egg" rule dealing with salmonella; the DOT rules on "Reduced Stopping Distances for Truck Tractors" and "Standards for Increasing the Maximum Allowable Operating Pressure for Gas Transmission Pipelines;" and, in terms of equities, the Department of Justice (DOJ) rules on non-discrimination on the basis of disabilities. These rules were viewed as unnecessary and burdensome by some, but important to public health and safety, and consistent with our nation's long-held values, by others.

While many major rules are controversial, there are other important rules that are not controversial. Perhaps the best examples of non-controversial rules that are actually eagerly awaited each year by the regulated entities are those issued 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. Having been identified as a favored activity during the debate in Congress on regulatory reform during the Clinton Administration, 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 the many of the bills in this Congress.

There are, however, 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 to support or even champion certain rules – such as those that level the playing field or provide needed guidance or provide certainty or regularity for operations for the foreseeable future. For example, the automobile companies supported the Environmental Protection Agency (EPA)/DOT joint rules for "Passenger Car and Light Truck Corporate Average Fuel Economy Standards for MY 2012-2016;" industry stakeholders supported the Department of Labor rule updating the Occupational Health and Safety Administration's (OSHA's) "Cranes and Derricks" rule; the same for the Department of Energy's rule on "Weatherization Assistance for Program for Low Income Persons," which, among other things, reduced procedural burdens on evaluating certain housing applications.

There are also rules that specify the structure or eligibility for government programs, such as the Department of Education rule on "Investing in Innovation Fund," and the DOD rule relating to the "Homeowners Assistance Program;" these rules enable the programs authorized and funded by Congress to operate as they were envisioned or modified by Congress, and they are often eagerly awaited by the potential participants in the program. In a similar vein, there are multiple so-called transfer rules (which primarily cause transfers from taxpayers to program beneficiaries as specified by Congress), such as the Department of Agriculture's (USDA's) rules on the "Sugar Program," the "Emergency Loss Assistance and Livestock Forage Disaster Programs," and the "Biomass Crop Assistance Program," as well as the Department of Veterans Affairs' rule on the "Post 9/11 GI Bill." Delay or derailment of these rules would mean delay in starting up or carrying on the programs.

This partial list of recent rules should also demonstrate the very wide variety and diversity of rules issued by federal agencies each year. Simply stated, all rules (even all major rules) are <u>not</u> the same – either in scope or import – which has serious implications for across-the-board, one-size-fits-all reform initiatives.

In any event, while reasonable people may disagree over 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 be 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 in support of, 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 (recently 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.

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 2011 Report to Congress – the most recent report available to the public – provided data on the cost ($44-$62 billion) and the benefits ($132-$655 billon) of major rules issued by Executive Branch agencies over the most recent ten-year period (FY 2000-2010). 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 $70 billion to our society. This cannot be dismissed as a partisan 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). And Administrator Sunstein has testified that during the first two years of this administration, the amount by which benefits exceeded costs is greater than at any time in the past, including during my own tenure as Administrator.

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 are not an evil to be contained or rendered ineffective. It is therefore critical that any proposed legislation that would further encumber the process, make it more difficult

to develop regulations, or add additional review or approval steps should be carefully evaluated to ensure that the benefits to be achieved by the legislation justify the cost of delaying or eliminating beneficial regulations as well as the cost of increased uncertainty or unpredictability that will attend the regulatory process.

The legislative proposals before you have a number of common threads which are important to address in some detail. First are those provisions that would codify some or all of the cost/benefit principles of Executive Order 12866 – including, assessing the costs and benefits of a proposed regulation and, to the extent feasible, providing a quantification of those costs and benefits, ensuring that the benefits of a proposed regulation justify its costs, and selecting the alternative that maximizes net benefits – along with the provisions for review of those regulations by OIRA. I understand the impulse behind these proposals, because I am a strong supporter of the Executive Order and especially the provisions for economic analysis and centralized review. In my view, gathering the 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 cause rethinking of conventional wisdom; the review of the analysis by the staff of OIRA 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? But given the recent reaffirmation of these principles in Executive Order 13653, and the now more than 30-year implementation of these provisions by presidents of both political parties, it is fair to ask why do we need such legislation and will it significantly improve the process?

The Executive Branch agencies routinely undertake economic analysis as part of the process of developing major rules, and if further analysis is needed, OIRA works with the agency to accomplish that. To be sure, the quality of the work done by these agencies -- how solid or sophisticated is the economic analysis -- is mixed but it has improved over the years. Some scholars 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 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. Yet some of the very people who call for more analysis are the first to suggest straight-lining or reducing the agencies' budgets.

Those who support codifying provisions of the Executive Order argue that legislation would be better than an Executive Order in producing more rigorous analysis by the agencies and/or more critical review by OIRA. I am dubious about that proposition, because OIRA is well situated to impress upon Executive Branch agencies in real time the need for compliance with the terms of the Executive Order, whereas legislation is not self-executing. But even if the case were made that legislation is

somehow superior to an Executive Order, there are serious problems with legislating these principles.

Among other things, the principles (and their application with respect to particular rules) are not simple or straightforward. There are, for example, several different definitions of "costs" in the various proposals. Trying to capture the complexities of cost/benefit analyses in a few sentences (or even paragraphs) is not easy; OMB's Circular A-4, which provides guidance to agencies on how to prepare a regulatory impact analysis, is over 50 single-spaced pages. Moreover, while undertaking economic analysis in the course of developing regulations provides important information that usually affects, for the better, the shape or scope of a proposed regulatory action, it is only an input. Economic analysis is useful and clearly instructive; indeed, I cannot imagine making regulatory choices (or legislative choices for that matter) without a systematic consideration of the intended (and unintended) consequences of a proposed action. But economic analysis, carried out by the most eminent economists according to tried and true methodology, is not and cannot be dispositive. I believe it was Professor Einstein who supposedly had a sign over his desk at Princeton saying: "Not everything that can be counted counts and not everything that counts can be counted." Under the Executive Order (and common sense), costs and benefits that cannot be quantified and monetized are nonetheless "essential to consider." And there are often other considerations that should properly be taken into account, such as disparate effects, or cumulative effects. In addition, as noted above, these bills would apply government-wide to very different agencies facing very different challenges. The Department of Homeland Security (DHS), for example, has its own issues, such as quantifying the reduction in risk of a terrorist attack and making such information public, with which this Committee is undoubtedly familiar. Thus, while cost/benefit analysis is valuable, it is hardly a silver bullet to resolve all issues – you can't just turn it on and declare the job is done.

Moreover, if Congress were to codify the analytical requirements of the Executive Order, it would be amending a host of previously enacted statutes (dating back over half a century or more). At this point, it is unclear how many and which statutes would be amended and what the implications of such amendments would be, for both the regulated entities and the intended beneficiaries of these statutes. I am referring to the fact that under the Executive Order, agencies are required to conduct economic analysis, but in developing regulations the agencies are, in the first instance, bound by their authorizing legislation. Some legislation is silent on the question of the role of costs in the formulation of regulations; others do not permit consideration of such factors. For example, Section 109(b) (1) of the Clean Air Act provides that the Administrator (of EPA) should set standards for certain pollutants at a level "requisite to protect the public health" with "an adequate margin of safety." The Supreme Court (in a unanimous decision written by Justice Scalia) was emphatic that the Administrator cannot lawfully take account of costs in setting the standards. Whitman v American Trucking Associations, 531 US 457 (2001). For that reason, the Executive Order repeatedly prescribes certain practices "to the extent permitted by law."

However, if provisions of the Executive Order were codified, they would become decisional criteria. As a result, a proposed regulation -- even a regulation under a statute

that does not permit the consideration of costs – could not become effective unless, among other things, the "benefits of the intended regulation justify its costs." And, notwithstanding the terms of the underlying statute, the agency would be required "in choosing among alternative regulatory approaches, [to choose] those approaches that maximize net benefits." Such a super mandate would effectively abrogate previously enacted Congressional decisions; one example that comes to mind is the requirement after 9/11 that airlines reinforce the steel in their cockpit doors. And such a super mandate might well delay such time-sensitive rules as those implementing the Migratory Bird Treaty, which must be issued on an annual basis and for which cost data has never been collected or analyzed. Congress can, of course, rewrite the Clean Air Act or the Occupational Health and Safety Act, or the National Traffic and Motor Vehicle Safety Act, or any other existing authorizing legislation. But it should do so directly, not indirectly by creating a super mandate in the guise of promoting cost/benefit analysis and the consideration of that analysis in developing regulations.

There is one area where I think Congress can and should act to support the use of economic analysis in developing regulations without codifying the Executive Order – namely, extending the requirements for such analysis and centralized review to the Independent Regulatory Commissions (IRCs). The rules proposed by IRCs – those multi-headed commissions, such as the Securities and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, the Consumer Product Safety Commission, the Federal Election Commission, the Commodities Future Trade Commission and the Federal Reserve, whose Members do not serve at the pleasure of the President and can be removed from office only for cause –were not subject to the relevant provisions under the Reagan Executive Order or the Clinton Executive Order. In both cases, the legal advisors to the draftsmen concluded that the President had authority to impose these analytical requirements and review the rules of IRCs, and the decision not to do so was essentially for political reasons – namely, out of deference to the Congress.

For several years now, there have been many of us – across the political spectrum – who have urged reconsideration of that decision. Our concern is that the IRCs do not typically engage in the analysis that has come to be expected for Executive Branch agencies. For example, in the 2011 OMB Report to Congress referred to above, it appears that roughly half of the rules developed by the IRCs over a ten-year period have no information on either costs or benefits, and those that do have very little monetization of benefits and costs; of the 17 rules issued during FY2009, none monetized both benefits and costs. This is not a good sign because we are about to see a large increase in regulations from the IRCs; in Dodd-Frank alone, there are over 300 provisions saying that agencies shall or may issue rules, most of them directed at IRCs. Several months ago, Resources for the Future (a centrist think tank) held an all-day conference here in Washington, where various scholars and former government officials (from both sides of the aisle) from five different IRCs explored the status of IRC analysis in rulemaking and the agencies' potential to do more. The materials compiled for that conference would provide a solid foundation for your further consideration of this issue.

While some of the legislative proposals would extend the requirements for economic analysis to the IRCs, there is no provision made for review and critiquing of

those analyses the way OIRA (and other agencies during the inter-agency process) review the work of Executive Branch agencies. Nothing focuses the mind like knowing that someone will be reading (or listening) to your paper (or presentation). For all practical purposes, the way Executive Branch agencies and IRCs conduct rulemaking is the same, but the differences between the two types of agencies in terms of their structure and their relationship to the President would suggest that the review process or the "enforcement" of any requirement for economic analysis should not – possibly, cannot -- be the same without compromising the independence of the IRCs when they do not acquiesce in OIRA's assessment. Congress confronted this very question in the Paperwork Reduction Act, where it provided for OIRA review of information collection requests (i.e., government forms) from all agencies, Executive Branch and IRCs. The solution adopted there was to authorize OIRA to approve or disapprove paperwork from Executive Branch agencies directly (Sec. 3507(b) and(c)), but when it disapproved paperwork from an IRC, the IRC is able to void any disapproval by majority vote, explaining the reasons therefor (presumably in a public meeting) (Sec. 3507 (f)). A variation on that approach for review of the analysis underlying IRC rulemakings could be that OIRA would provide its views in writing to the IRC, and that document would be presented to the Commission (presumably in a public meeting), where the critiques/suggestions could be discussed and disposed of (accepted or dismissed) per the will of the Commission before final approval of the regulatory action.

As noted above, past presidents have been reluctant to extend requirements for economic analysis and centralized review by OIRA to the IRCs out of deference to Congress. A Sense of the Congress that such a course would be desirable would go a long way to ameliorate any concerns in that regard. Or Congress could designate an entity outside the Executive Branch as the reviewer of the economic analysis undertaken by the IRCs. Two obvious candidates are the GAO and the Congressional Budget Office. The former was given a limited (check the box) role in reviewing and commenting (to Congress) on the regulations issued by IRCs under the Congressional Review Act (CRA), and the latter already has analytical capacity that could be directed to this effort. Neither of these entities has the expertise or experience that OIRA has with reviewing economic analyses, but both have the "virtue" of being identified with Congress rather than the President, which may be important to those who read "independent regulatory commission" as independent of only one and not the other political player.

Apart from requirements for cost/benefit analysis (either codifying the Executive Order or extending the requirements to the IRCs) and centralized review, many of the legislative proposals would impose additional procedural or analytical requirements on the regulatory process -- such as increasing the frequency of retrospective analyses of existing regulations, expanding both the scope and the depth of data to be included in the economic and regulatory flexibility analyses for new rules, specifying the amount of time for the public comment period, and requiring affirmative Congressional approval before rules become effective. The statements from the sponsors or champions cite the relatively slow recovery from the recent economic meltdown (which some commentators attribute to inadequate, rather than too many regulations), the aggregate number of regulations issued each year by federal agencies (the numbers have not in fact increased in the first two years of the Obama Administration) and the total regulatory burden on the

US economy (discussed above). With rare exceptions, they do not identify what the agency or agencies are doing wrong, or how the legislative proposal(s) would actually improve the regulatory process or the decision-making process to produce better regulations. Have some agencies been less diligent than others in soliciting public input in developing regulations? Have some agencies been less meticulous than others in compiling an administrative record in support of a regulation? Have some agencies been more cavalier than others in responding to public comment?

Perhaps the most important question is what has been (and is likely to be) the effect of President Obama's regulatory reform initiative, which was announced on January 18th 2011 (just six months ago) and is continuing to date (as recently as two weeks ago with another Executive Order affecting the IRCs? President Obama has set in motion a regulatory look-back to determine if there are regulations in stock that are outdated, ineffective or otherwise in need of modification or elimination; having lived through several of these efforts, I sense that this one is being pursued much more aggressively than others. President Obama has also stressed greater public participation in the rulemaking process and the use of technology to empower all those affected by regulations. And his Executive Orders and Memoranda specifically stress the importance of promoting the economy, innovation, competitiveness and job creation. How will these edicts from the President to those who report to him and for whom he is constitutionally accountable play out? Will the results of his efforts at least inform us where we should be focusing our concern, so that we can tailor remedies (and perhaps resources) to where changes will be salutary?

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; OSHA has several rules that have taken a decade (literally) or more to provide protections for workers. Each of the proposed additional requirements will further encumber the process, if not lead to paralysis by analysis or due process to due death. Perhaps before adding another set of requirements and making it more difficult for even the best 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. If there is an implementation problem, Congress should address the source of that directly and not just add another requirement that also cannot be implemented.

Congress also has a host of 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, Congress would then be able to identify the "bad actors" or the rules considered most problematic and determine why those situations exist. Such a targeted response would be far more efficient (and likely more

effective) than the broad proposals before you that apply across the board to all federal regulatory agencies -- from the USDA and EPA to DHS and DOD -- even though, as mentioned earlier, 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.

Another critically important issue presented by many of the legislative proposals is judicial review of the various existing and proposed process and analytical requirements; indeed, in virtually all of the bills, judicial review is either provided explicitly or implicitly (by not precluding judicial review). Despite the fact that I am a lawyer who greatly respects our judicial system (or perhaps because I am a lawyer who greatly respects our judicial system), I think that would be a most unfortunate step, especially where it is authorized before final agency action. Even where there is final agency action, consider the costs and the benefits of asking the courts to be yet another check (in addition to OIRA and the Congress) on agency implementation of these analytical requirements.

We are, as you know, a very litigious nation, and there is little disincentive for those who are disappointed at the agency level to take the matter to court if there are any conceivable grounds to do so. Economic analysis will become yet another way to appeal agency rulemakings. Along with the lawyers debating whether the new decisional criteria trump the authorizing legislation, we can expect armies of competing economists with various theories about how to quantify or monetize the diverse effects of a proposed regulation, and there will inevitably be inordinate inquiry into the weight to be accorded to the costs and benefits which cannot be quantified and monetized. With Chevron and the hard look doctrine framing the inquiry, one would expect substantial deference to the agency's determinations, but there will nonetheless be substantial money and time (and the ensuing uncertainty) devoted to litigating whether benefits justify the costs or whether the alternative selected is the one that maximizes net benefits, or other concepts that will inevitably be placed before the court.

I think it important to emphasize the time element and the uncertainty that comes from judicial review. I do so because in private practice and in the consulting work I do, I hear again and again from businessmen who understand (even if they do not like it) that an agency will impose certain requirements on them. They want to do the responsible thing and are willing to comply, but they want to be able to plan rationally and to allocate their capital and human resources in an efficient way. What they often find most objectionable, therefore, is regulatory uncertainty. As noted earlier, it can often be months, if not years, between a proposed rule and a final rule; with additional opportunities for judicial review, we can add another year or two before the issue is finally resolved. And for the intended beneficiary, the delay may well undermine important safeguards of public health and safety or the fair functioning of our markets.

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