

Statement of Sally Katzen

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before the

Subcommittee on Courts, Commercial and Administrative Law
of the
House Committee on the Judiciary

on

“The Office of Information and Regulatory Affairs: Federal Regulations and Regulatory
Reform under the Obama Administration”

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Chairman Coble, Ranking Member Cohen, Members of the Subcommittee. Thank you for inviting me to testify today about the Office of Information and Regulatory Affairs (OIRA) and the state of federal regulatory policy and practice under the Obama Administration. The last oversight committee hearing was in July 2010, and much has happened since then. I believe that the record is strong and positive, and the path charted during the last few years is the right path to pursue.

I served as the Administrator of 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 and constitutional law courses at various law schools and courses in American Government at several undergraduate institutions. Currently I am 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.

There has been a great deal of rhetoric about the increase of regulations, and the drain on the economy of the resulting regulatory burden, under the Obama Administration. There have, however, been very few facts to support these assertions or to put the available data in context. The data that I have seen – filed in Reports to Congress by OMB and in testimony and other statements by those who have compiled and analyzed the information -- tell a very different story.

Last Friday, March 16th, OIRA posted to its website a draft of its 2012 Report to Congress on the benefits and costs of federal regulation, which contains the latest available data. [These Reports to Congress have been submitted annually for over a decade now, by administrations of both political parties, presenting consistent data sets compiled by the career staff using the same methodology over the years.] The draft 2012 Report shows that while the number of significant rules issued in the first three years of the Obama Administration was higher than the number issued during the last three years of the Bush Administration, the estimated total cost of those rules was virtually the same. More importantly, the total estimated benefits of the rules issued during the first three years of the Obama Administration was significantly greater than the costs of those rules, leading to substantial net societal benefits from the rules issued during the Obama Administration. The draft Report candidly discusses the difficulties of and limitations on monetizing costs and benefits, but clearly if one is going to speak of regulatory *costs*, and embrace cost/benefit analysis, then it is critical that one also acknowledge regulatory *benefits*.

It was interesting to note that, contrary to the claims of ever increasing regulatory activity by the Obama Administration, the data in the draft Report show that the number and costs (but not the benefits) of significant rules issued in 2011 was actually lower than those issued in 2010. It is possible that the number and/or cost of regulations would increase in 2012 (although I would be surprised if the net benefits would not also increase significantly). I say this because the 111th Congress enacted several major pieces of legislation, including the Patient Protection and Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act, both of which include delegations of authority to federal agencies and called for hundreds of regulations to implement these laws. That is what the Constitution assigns to the Executive: “to take care that the laws be faithfully executed.” (Art. II, Sec. 3.) There may be some in the current Congress who want to repeal these laws, but their efforts to that end have so far been unsuccessful, and as long as the laws are on the books, the agencies are responsible for issuing implementing regulations giving effect to the legislative mandates.

Since the last oversight hearing, there have been other events involving OIRA that are worth mentioning. The most important is President Obama’s signing Executive Order 13563, which called for restoring a proper balance in regulations (protecting public health, safety and the environment while promoting economic growth) and which reaffirmed the importance of centralized review and OIRA’s role in that effort. It is obvious from a number of well publicized actions that these directives are having an effect. It is also obvious that the agencies are taking seriously the President’s directive to engage in a retrospective review of existing regulations to reduce, improve or eliminate those regulations that are outmoded, ineffective or unduly burdensome. I should note that every recent President has called for a review of existing regulations, including Presidents Clinton and George W. Bush, but I have never seen the emphasis and energy that the current Administration is putting into this effort.

President Obama has also been more aggressive than his predecessors in extending sound regulatory principles to the Independent Regulatory Commissions (IRCs) -- those multi-headed agencies, such as the SEC, FCC, FTC, FEC, etc., whose members do not serve at the pleasure of the President and can be removed only for cause.

Since the inception of centralized regulatory review by OIRA, the IRCs were treated differently than Executive Branch agencies. Neither President Reagan's Executive Order (EO 12291) nor President Clinton's Executive Order (EO 12866) extended the requirements for economic analysis or OIRA review of proposed rules to the IRCs (although President Clinton did include the IRCs in Section 4's Planning Mechanism provisions of EO 12866). In both 1981 and 1993, the legal advisors to the executive order draftsmen concluded that the President had authority to impose these analytical requirements and review the rules of IRCs, but they decided not to do so for political reasons – namely, out of deference to the Congress.

Like his predecessors, President Obama did not extend centralized review to the IRCs in EO 13563. But he did issue an Executive Order in July 2011 (EO 13579) urging the IRCs to “promote th[e] goal” in EO 13563 of producing a regulatory system protecting “public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness, and job creation.” Moreover, he singled out the requirements concerning “public participation, integration and innovation, flexible approaches, and science” and stated that “[t]o the extent permitted by law, independent regulatory agencies should comply with these provisions.” In addition, he directed the IRCs to develop plans within 120 days for retrospective review of their existing rules, “consistent with law and reflecting [their] resources and regulatory priorities and processes.”

I would encourage the President to go further and extend the provisions of the applicable Executive Orders relating to economic analysis and OIRA review of proposed regulations to the IRCs. There is considerable support across the political spectrum for such an effort, and the President's Council on Jobs and Competitiveness specifically included this as one of its recommendations for regulatory reform in both its interim and final reports (although it called on Congress, rather than the President, to take the lead on this issue). About a year ago, Resources for the Future (a centrist think tank) held an all-day conference 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.

The 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 draft 2012 OMB Report to Congress referred to earlier, 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; the draft cites the Government Accountability Office (GAO) for reporting that “none of the 17 rules [issued during FY2011] assessed both anticipated benefits and costs.” This is very troubling because, as noted above, there is likely to be a large increase in regulations under the Dodd-Frank Act, the vast majority of which will be originating from IRCs.

While there appears to be a growing consensus on requiring IRCs to conduct economic analyses in developing their rules, there is less agreement on whether and, if so, what entity should review and critique those analyses the way OIRA reviews the work of Executive Branch agencies. It is generally accepted that nothing focuses the mind like

knowing that someone will be reading (or listening) to your paper (or presentation), and that such review virtually always improves the product. 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 have led me to conclude 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 Congress adopted was to authorize OIRA to approve or disapprove paperwork from Executive Branch agencies directly (Sec. 3507(b) and(c)), but to allow IRCs to void any disapproval by majority vote, explaining the reasons therefor (presumably in a public meeting) (Sec. 3507 (f)). A variation on that approach could be used for regulatory review, whereby OIRA would provide its views of the underlying analysis 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 of both political parties have been reluctant to extend executive order 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 pass a bill authorizing the President to take such action, which I think the President would likely sign. Alternatively, 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 (CBO). 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, and the latter already has analytical capacity that could be directed to this effort. Both of these entities would need additional staff and resources if they were assigned this task, as would OIRA. While neither GAO nor CBO has OIRA’s level of expertise or experience with reviewing economic analyses, 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.

President Obama has also focused needed attention on the issue of the cumulative costs of regulation. Often an industry or a sector of the economy is subject to regulation under various programs -- indeed, under various offices or divisions within a single agency or by several agencies. Over time, the risk of contradictory or inconsistent requirements or unreasonable cumulative requirements becomes more of a possibility. EO 12866 mentioned “the costs of cumulative regulations” toward the end of a statement of principles governing rulemaking. (Sec.1 (b) (11).) EO 13563 gave it more prominent

attention. (Sec.1 (b) (2).) But more can and should be done to give content to these words.

OIRA has traditionally focused virtually all of its time and resources on the review of individual regulatory actions developed by the agencies – one at a time (except where two or three arrive in close proximity to one another). While this review is critical not only in providing a dispassionate and analytical “second opinion” on an agency’s significant regulatory actions and in ensuring that each new significant regulatory action is consistent with the President’s policies and priorities (as well as coordinating regulatory policy within the Executive Branch through the inter-agency process over which it presides), I think OIRA should do more than just one-by-one reviews. The issues plaguing our country are not likely to be solved by a single regulatory action, nor do they always fit neatly in one agency. Whether it be clean air, worker safety, food purity, energy efficiency, or a host of other issues that are of concern, it is often essential to look beyond the specific proposal du jour and consider the broader picture – in effect, construct a framework for addressing the problem, allocating resources, and ensuring a coherent and comprehensive regulatory solution.

The mechanism for embarking on and developing such an approach is already in place – Section 4 of Executive Order 12866, “Planning Mechanism.” Under sub-section (c), “The Regulatory Plan,” both Executive Branch agencies and IRCs must send to OIRA (for OIRA review and circulation to other interested agencies) a document that includes a statement of the agency’s regulatory objectives and priorities as well as a summary of “the most important significant regulatory actions that the agency expects to issue in proposed or final form in that fiscal year or thereafter.” These materials are published in the semi-annual *Unified Regulatory Agenda*, but the process itself has become more of a paper exercise than an analytical tool. This is not new; before, during and after my tenure at OIRA, the focus was on the transactions. But it does not have to be that way. Professor Peter Strauss of Columbia law School and others have called for OIRA to put meat on the bones of this planning process. I concur.

This initiative and extending OIRA review to the IRCs are, in my view, definitely worth pursuing. But OIRA cannot take on these tasks with its existing resources. When President Reagan signed EO 12291, there were over 80 professionals at OIRA; the current number is roughly half of that. I understand the widespread appeal for smaller government as an abstract concept. But it would, in my opinion, be penny-wise and pound foolish to seek to apply that concept indiscriminatorily across all programs and agencies. As the President’s Council on Jobs and Competitiveness stated in its final report: “Thorough review by OIRA improves the quality of regulatory analysis and decisions. . . . Even modest improvements in regulations can yield billions of dollars in benefits to the public.” Having had the privilege of serving as Administrator of OIRA, I am convinced that the staff of OIRA is one of the best investments we can make to continue progress in the regulatory arena. For that reason, I agree with the Council’s recommendation that “OIRA’s staff be increased to a level that will permit it to conduct meaningful review of both executive branch and independent agency regulations.”

Thank you again for inviting me to participate in this hearing, and I look forward to answering any questions you may have.

