Statement of Sally Katzen
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before the
Subcommittee on Commercial and Administrative Law
of the
House Committee on the Judiciary

on
"Federal Rulemaking and the Regulatory Process"

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Chairman Cohen, Members of the Subcommittee. Thank you for inviting me to testify today on a subject that affects virtually every man, woman and child in this country. Congress makes the law, but it cannot possibly fill in all the details, and therefore it delegates to the regulatory agencies the authority to develop implementing regulations, which then have the force and effect of law. I commend this Committee for convening this hearing to explore the federal rulemaking process, including the role of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB).

As you know, I served as the Administrator of OIRA 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. I am a proponent of centralized review of agency rulemaking, and I was personally involved in the drafting and implementation of Executive Order 12866 which is discussed below. I have remained active in the area of administrative law generally and rulemaking in particular. After leaving government service in January 2001, I taught Administrative Law and related subjects at the University of Michigan Law School, George Washington University Law School, George Mason University Law School, and the University of Pennsylvania Law School, and I also taught American Government seminars to undergraduates at Smith College, Johns Hopkins University, and the University of Michigan in Washington Program. I have written articles for scholarly publications and have frequently been asked to speak on this

subject. With this background, I hope I will be able to provide some historical perspective for considering some of the issues of current concern.

The federal rulemaking process starts, as it must, with the agencies to which Congress has delegated rulemaking authority. The agencies are the repositories of programmatic expertise and experience, and it is their responsibility to set priorities, develop solutions to demonstrated problems, provide supporting analyses, conduct the notice-and-comment (or other required) proceedings, and build a record that would be sustainable not only in court but in the public arena as well. To evaluate how the agencies in the Obama Administration are doing, it is obviously necessary to have a baseline: where were they 18 months ago?

I had the privilege of working in the Obama-Biden Transition, with responsibility for, among other things, regulatory issues. What I saw was not a pretty picture. During the Bush Administration, regulatory agencies had been required to do more research, more analysis, more consultation, and more review, but they were given less support and fewer resources. In many regulatory agencies, the staff was depleted; in virtually all, the staff was demoralized. It was, overall, a dismal state of affairs.

The Obama Administration took office with a dedication to the regulatory agencies' missions, a commitment to carrying out the new President's agenda, and a respect for rulewriters, but very few new resources and virtually no new leaders. The state of the economy did not allow the new Administration to make up for the shortfalls in agencies' budgets over the preceding eight years, and the nomination/confirmation process was seemingly interminable; even today, there are some regulatory agencies that do not have confirmed appointees in important leadership positions.

That said, I believe that the regulatory agencies have done quite well in this Administration. They undertook analysis of the so-called "midnight regs" – the rules put in place in the last days of the Bush Administration – and took what they perceived to be appropriate remedial action (stopping the regulations that were in the pipeline until an Obama appointee could review; determining whether to extend the effective date for those regulations that were final but not yet in effect; and initiating a new rulemaking

proceeding to modify or rescind those regulations that were already in effect). At the same time, the agencies began to tackle the backlogs in developing new rules that Congress had authorized (or required) to be issued. That was a daunting task, but by all accounts most have made considerable progress in addressing outstanding issues and advancing the agencies' missions.

In talking about the federal rulemaking process, the focus inevitably eventually turns from the regulatory agencies to OIRA because, for the last three decades, OIRA has been charged by both Republican and Democratic Presidents to review the regulatory activities of Executive Branch agencies. A little history here may be helpful.

The first steps towards centralized review of rulemaking were taken in the 1970's by Presidents Nixon, Ford and Carter, each of whom had an ad hoc process for selectively reviewing Executive Branch agency rulemakings: President Nixon's was called the Quality of Life Review; President Ford's was focused on the agency's Inflationary Impact Analysis that accompanied the proposed regulations; and President Carter's was through the Regulatory Analysis Review Group whereby proposed rules that were substantial or otherwise important were reviewed by an inter-agency group, which then submitted its critiques (often strongly influenced by economists) on the record to the issuing agency.

In 1981, President Reagan took a significant additional step in issuing Executive Order 12291. That Order formalized a process that called for the review of all Executive Branch agency rulemakings -- both the notice/proposal and the final rule – under specified standards for approval. To conduct that review, President Reagan turned to OIRA, which had been established by Congress for other purposes under the Paperwork Reduction Act of 1980, 45 U.S.C. 3501. Unless OIRA approved the draft notice of proposed rulemaking and the draft final rule, the agency could not proceed. As Jim Miller, the OIRA Administrator under President Reagan, has said, "Under 12,291 OMB did have the power to say 'no,' to say 'stop.' And we did." And he proudly described himself as OIRA Administrator as: "I'm mean as a junk-yard dog."

Executive Order 12291 proved to be highly controversial, with its critics citing three principal concerns. First, the Executive Order was explicitly intended to bring about regulatory "relief," as in rolling back regulations that the business community found costly or burdensome. Second, the Order relied on (and reflected unequivocal faith in) cost/benefit analysis, with an emphasis on the cost side of the equation. Third, the review process was, by design, not transparent; indeed, the mantra was "leave no fingerprints," with the result that disfavored regulations were sent to OMB and disappeared into a big black hole. Executive Order 12291 remained in effect throughout the Reagan/Bush years and into the Clinton Administration.

Eight months into his first term, on September 30, 1993, President Clinton signed Executive Order 12866, changing the charter for OIRA in significant ways. The preface reaffirmed the importance of centralized review and oversight, but it also spoke of the primacy of the regulatory agencies to which Congress had delegated discretion. The new Order limited OIRA review to "significant regulations" – those with a likely substantial effect on the economy, the environment, or on public health or safety, or those raising novel policy issues – leaving to the agencies the responsibility for carrying out the principles of the Executive Order on the vast majority (roughly 85%) of their regulatory actions.

Executive Order 12866 continued to require Executive Branch regulatory agencies to assess the consequences of their proposals and to quantify and monetize both the costs and the benefits to the extent feasible. At the same time, however, the Order explicitly recognized that some costs and some benefits cannot be quantified or monetized but are "nevertheless essential to consider." (Section 1(a)) I believe it was Einstein who had a sign in his office at Princeton to the effect that "not everything that can be counted counts, and not everything that counts can be counted." The process of review of agency proposals remained essentially the same as in the Reagan Order, but time limits were imposed on OIRA review, and Executive Order 12866 included several important provisions to promote transparency and accountability.

Based on the experience of the first two decades of OIRA review, it would be reasonable to assume that Executive Orders do make a difference. The two documents

(President Reagan's Executive Order 12291 and President Clinton's Executive Order 12866) are quite different from each other, and the tone of each clearly carried through to how centralized review was conducted by the Reagan/Bush Administrations on the one hand and the Clinton Administration on the other. They were decidedly different variations on the theme.

President George W. Bush did not, at first, issue a new Executive Order; in fact, Executive Order 12866 remained in effect virtually unchanged for the first five years of his Presidency. (The only changes came two years into President Bush's first term, and they were limited to transferring the roles assigned to the Vice President to the Chief of Staff or the OMB Director.) Nonetheless, centralized review during the Bush Administration was not the same as during the Clinton years. GAO did a very thorough study (GAO-03-929), and numerous articles have been written, confirming that there was a dramatic change in the relationship between the regulatory agencies and OIRA with the change of Administrations. Whereas OIRA functioned more as a colleague or collaborator under the Clinton Administration, Bush's OIRA Administrator characterized himself as a "gatekeeper." And he was true to his word, returning an unprecedented number of proposals to the agencies for revisions before they could be issued.

Perhaps more significantly, during the Bush Administration, OMB and/or OIRA issued a series of guidelines, circulars, or bulletins that modified the regulatory process (and the relationship between the agencies and OIRA) in minor and major ways. On February 22, 2002, OMB issued Information Quality Act (IQA) Guidelines. (67 Fed. Reg. 8452). The IQA itself was three paragraphs attached to a more than 700-page Treasury and General Government Appropriations Act for Fiscal Year 2001, with no hearings, no floor debate and no committee reports. Its objective was "to ensure the quality, objectivity, utility and integrity of information disseminated to the public." OMB's government-wide guidelines created a new construct: now, there would be "information" and "influential information" and different (more stringent standards) would apply to the higher tiers. OMB also required the agencies to issue their own guidelines (subject to OMB approval); establish administrative mechanisms allowing people or entities to seek the correction of information they believe does not comply with

these guidelines; and report periodically to OMB on the number and nature of these complaints. The U.S. Chamber of Commerce thought this "would have a revolutionary impact on the regulatory process" – keeping the agencies from relying on data that industry thought was questionable.

On August 29, 2003, OMB proposed Peer Review Standards for Regulatory Science, which attempted to establish uniform government-wide standards for peer review of scientific information used in the regulatory process. Peer review is generally considered the gold standard for scientists. Yet leading scientific organizations, joined by citizen advocacy groups and former government officials, argued that OIRA's proposal was unduly prescriptive, unbalanced (in favor of industry), and introduced a new layer of OMB review of scientific or technical studies used in developing regulations. The reaction was so strong and so adverse that OMB substantially revised its draft Bulletin to make it appreciably less prescriptive and restrictive.

On September 17, 2003, OIRA replaced a 1996 "best practices" (i.e., informational) memorandum on how to do cost/benefit analysis with OMB Circular A-4. The Circular, almost 50-pages single spaced, was a detailed discussion of the dos and don'ts of virtually every aspect of the documentation that is needed to justify a regulatory proposal. While the term "guidance" was used, agencies that departed from the terms of the Circular did so at their peril (or more precisely, at the peril of their regulatory proposal).

OIRA also proposed a Risk Assessment Bulletin (January 9, 2006) to govern risk assessments produced by the federal government. There were six standards specified for all risk assessments and a seventh standard, consisting of five parts, for risk assessments related to regulatory analysis (i.e., to be used in rulemaking). In addition, using the terminology from the IQA Guidance, OIRA laid out special standards for "Influential Risk Assessments" relating to reproducibility, comparisons with other results, presentation of numerical estimates, characterizing uncertainty, characterizing results, characterizing variability, characterizing human health effects, discussing scientific literature and addressing significant comments. Again the reaction from the agencies and the public was so negative that OMB decided to ask the National Academies of Scientists

(NAS) to comment on the proposed Bulletin. The NAS panel (on which I served) found the Bulletin "fundamentally flawed" and recommended that it be withdrawn. OIRA ultimately issued a revised, greatly toned-down memorandum on the subject.

This was quite a record, and it had a real effect on the agencies, consolidating and strengthening authority in OIRA vis-à-vis the agencies. For present purposes, however, the significant thing is that these changes were made without any changes to the operative Executive Order. And when President Bush ultimately did amend Executive Order 12866 with Executive Odder 13422, it was for other reasons and he still did not codify any of the changes discussed above. OMB memorandum, guidelines, circulars and bulletins do not have the same status as an Executive Order, but they are treated as if they did by the federal agencies. Stated another way, changes to the federal regulatory process are not solely dependent on changes to the applicable Executive Order.

I raise this because there has been discussion over the last year about the status of President Obama's executive order on the regulatory process and considerable speculation as to why it is taking so long and what it will ultimately include (or exclude). The origins of this trace back to shortly after President Obama's inauguration, when he revoked the Bush Executive Orders modifying Executive Order 12866 -- returning the Clinton Order to its original text. (Executive Order 13497) – and the same day, January 30, 2009, issued a Memorandum directing OMB, in consultation with Executive Branch regulatory agencies, to produce "a set of recommendations for a new Executive Order on Federal regulatory review." He listed eight areas of interest: the relationship between OIRA and the agencies; disclosure and transparency; public participation; the role of cost/benefit analysis; distributional, fairness and inter-generational considerations; undue delay in the review process; the role of behavioral sciences; and best tools for achieving public goals through the regulatory process.

Thereafter, OMB solicited feedback from the public, posting a Notice in the Federal Register (74 Fed.Reg. 8819) and on the Internet. It received over 180 comments from regulated entities, public interest groups, academicians, and other interested individuals. It is now well over a year, and there is no new executive order. On the

other hand, as I noted earlier, there can be changes in the regulatory process and in the relationship between OIRA and the agencies without changes in the executive order.

So it is worth looking not only at the words on a piece of paper (albeit the words of the President), but also at OIRA's actions during the past year and a half. Based on the material in the testimony for this hearing of President Obama's OIRA Administrator, Cass Sunstein, as well as several of his speeches and memoranda, it appears that OIRA is doing very well on many of the subjects/issues listed by President Obama in his January 30, 2009, Memorandum. Most significantly, there have been remarkably few stories of any tensions between the regulatory agencies and OIRA; the few that have appear to be based on genuine policy differences rather than disaffection with the process of centralized review.

Notwithstanding the high marks I would give the current OIRA, there are a few areas where changes could be made to make a good program even better. First, as noted above, ORIA reviews the rulemakings of Executive Branch agencies. I now believe that centralized review should be extended to the independent regulatory commissions (IRCs). Several commenters who responded to OMB's Notice regarding a new executive order addressed this issue, with comments both in support and in opposition. Some background here may be helpful. The rules proposed by 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 –were not subject to review by OIRA under the Reagan Executive Order, nor under the Clinton Executive Order. In both cases, the legal advisors to the draftsmen concluded that the President had authority to review the rules of IRCs, and the decision not to do so was essentially for political reasons.

With the benefit of hindsight, I would rethink that decision. The problems that plague our nation do not fit neatly into one agency. Consider the recent financial meltdown, which implicated multiple agencies, including both Executive Branch agencies (e.g., Treasury) and IRCs (e.g., Federal Reserve, SEC); indeed, one of the measures included in the recent legislation was to combine two Executive Branch agencies and create a new one (the Consumer Financial Protection Agency) as a Bureau

within the Federal Reserve. While the way Executive Branch agencies and IRCs conduct rulemaking is for all practical purposes the same, the differences between Executive Branch agencies and IRCs in terms of their structure and their relationship to the President would suggest that the process of review need not – possibly, cannot -- be the same. Congress confronted this very problem 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 elegant solution it 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 in writing to the IRC, which would then be subject to a vote by the full Commission or Board (again, presumably in a public meeting) before final approval of the regulatory action. This is only one of several plausible ways to reconcile the competing interests involved. While some may see this as a power play for OIRA, I firmly believe that the end result would be better coordinated and coherent regulatory actions, and ultimately better decision making. In this regard, it is instructive to note that IRCs do not typically engage in the rigorous analysis that has come to be expected (and generally accepted) for Executive Branch agencies; indeed, in the 2010 OMB draft report to Congress (Appendix C), 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 or costs. Such analysis is critical, I believe, for developing and evaluating regulatory actions.

Another topic for consideration relates to the orientation of OIRA, which traditionally has 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). A few critics of OIRA have suggested that OIRA cease and desist from this function. I strongly disagree. I think such reviews are essential for all the reasons that proponents of centralized review traditionally assert – namely, it is the last step to ensure consistency with the President's policies and

priorities; to coordinate regulatory policy within the Executive Branch (conducting the inter-agency review is one of the most important – and least acknowledged --aspects of centralized review); and to offer a dispassionate and analytical "second opinion" on an agency's regulatory actions.

At the same time, I think OIRA should do more than just one-by-one reviews. As noted above, the issues plaguing our country do not fit neatly in one agency; nor are they likely to be solved by one regulatory action. 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 Oder 12866, "Planning Mechanism." Under sub-section (c), "The Regulatory Plan," both Executive Branch agencies and IRCs are to send to OIRA (for OIRA review and circulation to other affected 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 and others have called for OIRA to put meat on the bones of this planning process. I encourage those who are interested in improving the federal regulatory process to join this effort.

Another area where there is a divergence between the intent underlying the text of Executive Order 12866 and the practices that have developed over time relates to the provisions regarding meetings with outsiders (Section 6(b)(4)). Again, some history may be helpful. Under President Regan's Executive Order 12291, there were no provisions for promoting openness, accessibility and accountability. Time and again, complaints were lodged with Members of Congress (and in the press) that the OIRA process was

totally opaque, and there was considerable suspicion that OIRA staff were meeting with outsiders (presumably representatives of industry) and then acting as conduits to accomplish at OMB what could not be accomplished at the agencies.

Executive Order 12866 sought to rectify the situation by spelling out the disclosure requirements that would govern OIRA review, including, among other things: that representatives from the issuing agency would be invited to any meeting that OIRA personnel had with persons outside the government; that information about such meetings would be publically disclosed; and that all written communications between OIRA and such persons would be forwarded to the issuing agency. Importantly, the very first provision of this section of the Executive Order specified: "Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review." (Section 6(b)(4)(A))

The intent of this provision was straightforward – namely, except in unusual circumstances (such as recusal, etc.), the OIRA Administrator (a presidentially appointed, Senate confirmed individual) would participate in these meetings. That was the practice during the Clinton Administration, and OIRA staff were virtually never authorized to meet with outsiders without the Administrator. This began to change when President George W. Bush's OIRA Administrator was sworn in, and the practice of staff-only meetings has accelerated over time so that now it appears that the presence of the OIRA Administrator at such meetings is a rarity rather than the norm. I have heard that this has resulted in a significant diminution of requests for meetings from the public interest community. Gary Bass, Executive Director of OMB Watch, appearing on the panel today, has more direct knowledge of this issue, and I understand he will be addressing it in his testimony. For my part, I recognize that the concerns that existed in 1993 may have been ameliorated or changed in nature; that the mechanism selected in 1993 to address those concerns may have had unintended consequences that undercut its practicality or desirability; and that, in any event, the regulatory review process is not, and should not be, frozen in time. Nonetheless, I hope that OIRA leadership will reexamine current practices with all these considerations in mind.

There is one other area of OIRA activities that I would like to mention -- e-Rulemaking. The Obama Administration (and OIRA in particular) has devoted considerable energy to its Open Government Initiative and has talked about the use of data for decision-making, the value of public participation, and the potential for harnessing technology to produce a more efficient and effective government; the single, most obvious manifestation of the congruence of these objectives in the federal regulatory process is e-Rulemaking. I will admit to a certain bias here, because I was honored to chair a blue-ribbon Committee on the Status and Future of Federal e-Rulemaking, convened under the auspices of the American Bar Association. We produced a series of recommendations (for both the Administration and the Congress) which were endorsed by a wide range of organizations.

I believe that OIRA should be taking the lead in implementing some/most of these recommendations. While it has taken some steps, those who worked on the Committee's report are, frankly, disappointed that OIRA has not been as aggressive as we think it should be. This may be a topic for another (different) hearing, for e-Rulemaking has the potential not only to transform the rulemaking process but also to enable Congress to more effectively carry out its oversight responsibilities.

This Subcommittee has been ever vigilant in promoting the integrity and legitimacy of the federal regulatory process. I thank you for that effort and for your kind attention to my statement. I look forward to answering any questions you may have.