



TESTIMONY

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before the

**Committee on Oversight and Government Reform
Subcommittee on Government Operations and Subcommittee on Health Care, Benefits,
and Administrative Rules
U.S. House of Representatives**

**Joint Hearing on
Regulatory Reform Task Forces Check-In**

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Chairman Meadows, chairman Jordan, ranking member Connolly, ranking member Krishnamoorthi, and members of the subcommittees, I appreciate the opportunity to testify today on the Trump administration's ill-conceived Regulatory Reform Task Forces, their lack of adequate transparency and meaningful public participation, and indeed whether their efforts to undermine the regulatory safeguards we all depend on should be taking place at all.

I am a Senior Policy Analyst at the Center for Progressive Reform (CPR). CPR is a network of more than 50 acclaimed legal scholars from across the United States who work with a professional staff of policy analysts and communications experts to advocate for robust public protections. I have had the privilege of working as a member of this staff since 2008, during which time my portfolio has included regulatory policy and process, scientific integrity in government decision-making, and citizen access to the courts.

In my testimony today, I will make three points related to the hearing topic:

1. Regulations are essential for safeguarding the public.
2. The Trump administration's Regulatory Reform Task Forces and the regulatory review process they were created to carry out are fundamentally flawed, as both a theoretical and practical matter. Their work threatens to do much more harm than good, and this "experiment" in regulatory reform should be abandoned.
3. Given that the Trump administration is unlikely to abandon the pillars of his assault on public safeguards, Congress must conduct vigilant and through oversight of the Task

Forces and the work they undertake. I conclude by offering some recommendations on what this oversight should entail.

Regulations are Essential for Protecting the Public

Over the past four decades, U.S. regulatory agencies have achieved remarkable success in establishing safeguards that protect people and the environment against unreasonable risks. During the 1960s and 1970s, rivers caught fire, cars exploded on rear impact, workers breathing benzene contracted liver cancer, and chemical haze settled over the industrial zones of the nation's cities and towns. But today, the most visible manifestations of these threats are under control, millions of people have been protected from death and debilitating injury, and environmental degradation has been slowed and even reversed in some cases. In short, the United States is much better off because of the regulations adopted over the past 40 years. But serious hazards remain, and indeed new ones continue to emerge as new technologies develop and the U.S. economy evolves. Americans would be even better protected if the gaps that leave them and their environment vulnerable to unnecessary risks were closed.

To gauge the positive impact of regulation on Americans' lives, consider:

- In its most recent report to Congress, the Office of Management and Budget (OMB) estimates that the total benefits of significant regulations for the past ten years exceeded their costs by a ratio as high as 14 to 1.¹
- The Environmental Protection Agency (EPA) estimates that the regulatory benefits of the Clean Air Act exceeds its costs by a 25-to-1 ratio.² The agency estimates Clean Air Act rules saved 164,300 adult lives in 2010 and will save 237,000 lives annually by 2020.
- The National Highway Traffic Safety Administration's vehicle safety standards have [reduced the traffic fatality rate](#) from nearly 3.5 fatalities per 100 million vehicle miles traveled in 1980 to 1.41 fatalities per 100 million vehicle miles traveled in 2006.³
- An Endangered Species Act recovery program implemented by the U.S. Fish and Wildlife Service helped [increase the bald eagle population](#) from just 400 nesting pairs in 1963 to 10,000 nesting pairs in 2007, enabling the Service agency to remove the bird from the Endangered Species List.⁴

¹ OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 1-2, available at https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf.

² ENVTL. PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020, 7-9 (Mar. 2011), available at <http://www.epa.gov/oar/sect812/feb11/fullreport.pdf>.

³ RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT 12 (2010).

⁴ Press Release, Fish & Wildlife Serv., U.S. Dept. of the Interior, Bald Eagle Soars Off Endangered Species List Secretary Kempthorne: The Eagle has Returned (June 28, 2007), available at https://www.doi.gov/sites/doi.gov/files/archive/news/archive/07_News_Releases/070628.html. The successful conservation of the Bald Eagle is due in part to regulations issued by the Fish and Wildlife Service under the Endangered Species Act and the Bald and Golden Eagle Protection Act, as well as to regulations issued by the EPA to ban DDT, a harmful pesticide that impaired eagle's ability to reproduce.

- The failure to regulate some hazards related to the workplace, the environment, product safety, food safety, and more, and the failure to enforce existing regulations on such hazards results in thousands of deaths, tens of thousands of injuries, and billions of dollars in economic damages every year. Sometimes, the damages are spectacular on a world-wide scale. The BP Oil Spill caused tens of billions of dollars in damages.⁵ The Wall Street collapse may have caused trillions. Regulation to prevent catastrophe can be far cheaper, and less painful, than cleaning up damage to lives, property, and the environment later.⁶
- Dozens of retrospective evaluations of regulations by the EPA and Occupational Safety and Health Administration (OSHA) have found that the regulations were still necessary and that they did not produce significant job losses or have adverse economic impacts for affected industries, including small businesses.⁷

The Flaws of the Trump Administration’s Regulatory Reform Task Forces

Background

Among Trump’s first acts in office was to issue Executive Order 13771 on “Reducing Regulation and Controlling Regulatory Costs.” The so-called “2-out, 1-in” Order, this directive imposes two kinds of regulatory “caps”: one on the total number of federal regulations and one on the total amount of regulatory costs. If implemented strictly, Executive Order 13771 would introduce some of the biggest roadblocks to new public safeguards in the last several decades.

First, Executive Order 13771 creates a regulatory “pay-go” system under which an agency must commit to repealing at least two existing regulations for each new “significant” regulation it wishes to issue. Second, it establishes a regulatory “budget” system that caps the total amount of additional regulatory costs an agency can impose in any given fiscal year by issuing new regulations. For fiscal year 2017, the Order set a regulatory budget of \$0 in new incremental regulatory costs. In other words, through September 2017, the costs imposed by any

⁵ See Aaron Smith, *BP: We’ve Spent \$2 Billion on Clean-Up*, CNNMONEY, June 21, 2010, available at http://money.cnn.com/2010/06/21/news/companies/bp_oil_spill/index.htm. In June of 2010, Credit Suisse predicted that the total costs would be around \$37 billion, with \$23 billion in clean-up costs and \$14 billion in settlement claims. Linda Stern, *Gulf Oil Spill Could Cost BP as Much as \$37 Billion*, MONEYWATCH.COM, June 8, 2010, available at <http://moneywatch.bnet.com/economic-news/blog/daily-money/gulfoil-spill-could-cost-bp-as-much-as-37-billion/728/>.

⁶ OFFICE OF MGMT & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, FISCAL YEAR 2012: ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT 47 (2011), available at www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/spec.pdf. The Congressional Budget Office (CBO), which employs a different methodology for calculating costs than does the OMB, estimates the costs of TARP to be \$19 billion. CONG. BUDGET OFFICE, REPORT ON THE TROUBLED ASSET RELIEF PROGRAM—MARCH 2011, 1 (2011), available at <http://www.cbo.gov/ftpdocs/121xx/doc12118/03-29-TARP.pdf>. See also BARBARA BUTRICA, KAREN E. SMITH, & ERIC TODER, HOW WILL THE STOCK MARKET COLLAPSE AFFECT RETIREMENT INCOMES? 1 (The Urban Institute, Older Americans’ Economic Security Report No. 20, 2009), available at http://www.urban.org/uploadedpdf/411914_retirement_incomes.pdf.

⁷ Sid Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* 10, 20-30 (Ctr. for Progressive Reform, White Paper 1109, 2011), available at http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

new significant rules that an agency issued were to be fully offset by the cost savings that were achieved through the elimination of the existing regulations under the order's regulatory pay-go system.

It is unclear, however, what the regulatory "budget" is for fiscal year 2018. In September, the Administrator of the White House Office of Information and Regulatory Affairs (OIRA) Neomi Rao issued a memo to agencies announcing an "expectation" that "each agency will propose a net reduction in total incremental regulatory costs." My reading is that this requires agencies to meet a regulatory budget that is less than \$0 or negative. Others I have talked to are not so sure. One thing we all agree on is that those words in that order are very difficult to decipher.

In addition to Executive Order 13771, Trump has issued a second executive order on the subject of "Enforcing the Regulatory Reform Agenda." The stated purpose of Executive Order 13777 is to ensure that agencies fully implement several previous executive orders related to regulatory policy, including most notably Executive Order 13771. Among other things, this second Order directs each agency to appoint a Regulatory Reform Officer who will coordinate efforts to roll back the protections that American communities and families rely upon. Executive Order 13777 further directs the Regulatory Reform Officer to assemble a Regulatory Reform Task Force and review that agency's existing regulations to find those that should be weakened or eliminated in part to satisfy the two regulatory caps imposed by Executive Order 13771.

Below, I highlight four ways in which the Trump administration's Regulatory Reform Task Forces and their work are fundamentally flawed, including (1) the public harms they will create; (2) their lack of a rational policy basis; (3) their continuing disregard of fundamental norms of administrative law; and (4) their intractable implementation problems.

In light of these flaws, I am left with no other choice than to recommend the Regulatory Reform Task Forces be abandoned and that Executive Orders 13771 and 13777, which direct the activities of those Task Forces, be repealed.

Moreover, these flaws should especially serve to discourage any legislative efforts to codify all or parts of Executive Orders 13771 and 13777. In fact, if these Executive Orders have any saving grace, it is that they do not carry the force of law.

In addition to these general flaws with Executive Orders 13771 and 13777, I have two concerns in particular with efforts to codify their provisions. First, as explained below, one of the consequences of these Orders is that they elevate considerations of regulatory costs to the exclusion of consideration of regulatory benefits in regulatory decision-making. This is a dramatic departure from decades of administrative law, and directly contradicts the clear language and intent of decades' worth of public interest lawmaking. Codification of these Executive Orders would therefore result in a substantive "supermandate" that literally rewrites dozens or possibly more than a hundred laws, subverting or erasing their guarantees of public protections.

Second, also as explained below, implementation of Executive Orders 13771 and 13777 has been and will continue to be plagued with a host of practical problems. In fact, it appears that compliance with the Orders' requirements is proving to be impossible for this administration. Because these Orders' provisions are not judicially enforceable, the failure to strictly comply with their requirements has not been fatal to the task of promulgating new rules. Codification risks changing that, however. At best, making these Orders' impracticable requirements judicially enforceable would lead to resource-intensive and wasteful litigation. At worst, such legislation would hand interested stakeholders – particularly well-resourced ones – a powerful lever for blocking any pending rulemaking they oppose. The prospect of these requirements being used to thwart agency efforts at fulfilling their statutory missions – not just in this administration but in future administrations as well – should be of grave concern to Members of Congress.

An Assault on Public Safeguards That Will Cause Real Harms to Real Americans

The most obvious and most directly objectionable problem with the Regulatory Reform Task Forces is that their work is serving to defeat the implementation of public safeguards, leaving people and the environment inadequately protected against unacceptable risks of harm. In the absence of such protections, too many Americans will continue to breathe unhealthy air, drink contaminated water, eat adulterated food, labor under dangerous work conditions, get cheated out of their hard-earned money to fraudulent schemes, become injured or worse by dangerous products, or be deprived of the natural landscapes that they value for themselves and wish to preserve for future generations. By definition, all of these harms are avoidable.

Yet, such harms are the inevitable consequence of the Orders' myopic focus on regulatory costs, which effectively excludes consideration of regulatory benefits from the equation in agency regulatory decision-making. This aspect of the Orders runs directly counter to the entire history of U.S. regulation, stretching all the way back to the Founding era. Indeed, among the first laws to be enacted by Congress in 1789 were several that were essentially regulatory in nature. Critically, the regulatory functions established in those early laws were defined in terms of advancing some conception of the public good – that is, in the achievement of regulatory benefits. In the centuries since, the pursuit of certain defined regulatory benefits has been inextricably intertwined with the notion of rational policymaking via regulation.⁸

Executive Order 13771 in particular will serve as a formidable barrier to agencies in carrying out their statutory missions of promoting the public welfare. Complying with the Order's two regulatory caps will be enormously time-consuming and resource intensive. Their practical effect is to transform every rulemaking into three (one for the new rule, and two more for the existing rules that are to be weakened or eliminated). Administrative law scholars have thoroughly documented the problem of regulatory ossification, which already makes it nearly impossible for agencies to issue complex rulemakings in a timely fashion.⁹ Executive Order 13771 will triple that morass. With each rulemaking consuming more and more of the agency's

⁸ Joseph P. Tomain, *The Twin Demons of the Trump-Bannon Assault on Democracy* (Ctr. for Progressive Reform, CPR Paper 1704, 2017), available at http://www.progressivereform.org/articles/Twin_Demons_0617.pdf.

⁹ See, e.g., Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

scarce resources (which are set to be even scarcer under future budgets), the inevitable result will be that fewer rulemakings will be initiated. In particular, agencies may see nearly any discretionary rule (and perhaps some non-discretionary ones) as not worth the trouble and forego pursuing it altogether.

Executive Order 13777 would only reinforce this dynamic by redirecting already scarce agency resources to the labor-intensive task of reviewing agencies' existing rules. In effect, the goal of looking back would come at the expense of the goal of moving forward, especially considering the Trump administration's plans to significantly cut agency budgets rather than expand them to undertake this additional work.

In addition to preventing the implementation of new regulatory safeguards, the Regulatory Reform Task Forces also risk harm to the public by supporting agency actions that would result in the elimination of vital existing protections. Though regulated corporations may see many existing safeguards as inconvenient to the bottom lines, these measures are nonetheless essential to assuring that our air is healthy to breathe, our food and drinking water is safe to consume, our workplaces are free of unacceptable hazards, and our finances are secured against scams and other fraudulent activities. The lack of adequate controls on the Regulatory Reform Task Forces' activities combined with the apparent indifference toward – or even contempt for – the public welfare displayed by Executive Orders 13771 and 13777 affords little confidence that the Trump administration's efforts to roll back regulatory safeguards will not come at an unacceptable cost to public health, safety, environmental protection, and financial security.

Several early examples already demonstrate the potential public harms that are likely to accrue as a result of the work of the Regulatory Reform Task Forces in implementing the provisions of Executive Orders 13771 and 13777. Here I will highlight three.

One of the more high profile actions that the Trump administration has taken as part of its broader assault on public safeguards has been to block the EPA from implementing an update to its Risk Management Plan (RMP) program. Finalized late in the Obama administration, this rulemaking had been prompted by the catastrophic fertilizer storage facility explosion that occurred in West, Texas, in 2013, which leveled an entire town and left 15 people dead and at least another 160 more people wounded. The catastrophe revealed serious deficiencies in the existing RMP program, such as inadequate sharing of risk information with local first responders and the failure to mandate that facilities take adequate response actions following actual or near-miss incidents that result in large-scale releases of harmful chemicals.¹⁰

Soon after the Trump administration took office, the EPA began instituting a series of actions aimed at delaying the implementation of the RMP program update, which was set to begin in June 2017. The folly of these actions was soon exposed by the catastrophic explosions at the Arkema chemical plant in Crosby, Texas, following the severe flooding the plant

¹⁰ Leif Reigstad, *EPA Delays Chemical Facility Safety Regulations Inspired by West Fertilizer Plant Explosion*, TEXAS MONTHLY, June 15, 2017, <https://www.texasmonthly.com/energy/epa-delays-chemical-facility-safety-regulations-inspired-west-fertilizer-plant-explosion/> (last visited Oct. 22, 2017).

experienced during Hurricane Harvey.¹¹ To be sure, the RMP program updates would not have prevented that particular incident, but this episode does illustrate why the rulemaking is so important and should be implemented as quickly as possibly rather than needlessly delayed. While the EPA's most recent final rule delaying implementation of the RMP program updates until February 2019 does not explicitly attribute the delay to the requirements of Executive Orders 13771 and 13777, the action does clearly advance the objectives of those Orders. It constitutes a deregulatory action that targets an existing regulation for the purposes of Executive Order 13777. Likewise, the EPA could claim it as a deregulatory action and as a source of regulatory cost savings for the purposes of the two regulatory caps established under Executive Order 13771.

A second example of a regulatory rollback that appears to have been inspired by Executive Orders 13771 and 13777 is the decision by the Department of Transportation to abandon a pending rulemaking that would have mandated testing for sleep apnea in truck drivers and train operators. The rule had been proposed in March 2016 by two of the Department's sub-agencies: The Federal Railroad Administration (FRA) and the Federal Motor Carrier Safety Administration (FMCSA). At the time, the agencies had found that sleep apnea was prevalent among truck drivers and train operators. Moreover, many instances of truck crashes and train derailments – including several involving fatalities and multiple injuries – were likely attributable to truck drivers or train operators who had fallen asleep or were otherwise impaired while on duty as a result of suffering from sleep apnea.¹²

Again, the *Federal Register* notice announcing the agencies' decision to abandon the rulemaking does not cite either of the Executive Orders as a basis for that decision. It is clear, however, that Executive Order 13771's requirements created strong incentives for the agencies not to pursue the rulemakings to their conclusion. In particular, they would have had to identify two existing rules to repeal or weaken and to ensure that those resulting cost savings at least offset the costs of their new sleep apnea rules. Given their limited resources, it is easy to see why the FRA and the FMCSA would have followed the path of least resistance by not completing the rulemakings.

A third example of a potentially harmful regulatory rollback is a proposal by the Food and Drug Administration (FDA) to delay by several years certain compliance dates for requirements imposed by its 2015 Produce Safety Rule. The Produce Safety Rule was one of the major rulemakings that the FDA completed as part of implementing the 2011 Food Safety Modernization Act, which drastically overhauled how the agency safeguarded our food supply. The regulations related to produce were especially critical since this category of food is the single largest source of foodborne illness in the United States. By the FDA's own estimate, the delays would result in nearly \$109 million in forgone benefits – that is, in preventable foodborne illnesses that will not be prevented.

¹¹Emily Atkin, *As the Arkema Crisis is Unfolding, an EPA Chemical Plant Safety Rule is on Hold*, NEW REPUBLIC, Aug. 31, 2017, <https://newrepublic.com/minutes/144655/arkema-crisis-unfolding-epa-chemical-plant-safety-rule-hold> (last visited Oct. 22, 2017).

¹²Bill Chappell, *Regulators Pull Plan To Test Truckers, Train Operators For Sleep Apnea*, NPR, Aug. 8, 2017 <http://www.npr.org/sections/thetwo-way/2017/08/08/542230369/regulators-pull-plan-to-test-truckers-train-operators-for-apnea> (last visited Oct. 22, 2017).

In this case, the role of Executive Orders 13771 and 13777 was clear. The FDA specifically cites their requirements as a contributing factor in its decision to delay the compliance dates. The agency explains that it expects to treat the action as a deregulatory one for the purposes of Executive Order 13771's requirement that the agency take two deregulatory actions for each affirmative regulatory action it plans to undertake. In addition, the agency notes that the cost savings achieved will contribute to its efforts to meet its \$0 regulatory budget for Fiscal Year 2017, also as mandated by Executive Order 13771.

That the implementation of Executive Orders 13771 and 13777 would result in these kinds of potentially harmful actions should not come as a surprise. This past summer, we all witnessed a dramatic example of the intolerably high costs of arbitrary campaigns to rollback regulatory safeguards when the Grenfell Tower in London, England, burned to the ground, killing at least 79 people and injuring as many as 70 more. A major contributing cause of the fire's destructive power was the flammable layer of cladding that had been installed on the exterior of the building just months before the disaster took place. For well over a decade, the United Kingdom has operated under a series of regulatory reform programs requiring its agencies to eliminate existing protective safeguards before they can institute new ones. Among the safeguards that were repealed under these programs was one establishing uniform fire codes in public buildings. According to experts investigating the disaster, the flammable cladding used in the Grenfell Tower would not have been permitted under these fire codes.¹³ In short, it is possible to draw a straight line from the United Kingdom's own experiment with regulatory budgets – similar to the one imposed by Executive Order 13771 – to one of the deadliest fire-related tragedies in U.K. history.

A Lack of Plausible Policy Rationales

The three apparent policy rationales for the Regulatory Reform Task Forces are: (1) we face excessive regulation; (2) regulated industry lacks adequate opportunity to influence regulatory policy; and (3) no adequate regulatory review process currently exists. All three are without merit.

First, no reliable evidence exists to support the proposition that we face excessive regulation. One of the most commonly cited statistics offered by opponents of regulatory safeguards is the number of pages in the *Federal Register*. As a metric of regulatory activity these numbers are fundamentally misleading and meaningless. It ignores the fact that a highly costly rule can take up a few pages, while a less costly rule may take up dozens or even hundreds of pages. Indeed, the Trump administration's actions to roll back existing protective safeguards are already filling up several pages of the *Federal Register*. In reality, the growing number of pages in the *Federal Register* has more to do with the rigorous analysis agencies carry out in support of the rules, including assessments of the rule's impacts on the economy, trade, small businesses, energy costs, small businesses, and so on. It is also a reflection of agency efforts to build flexibility into regulatory design to minimize burdens on regulated corporations. After all,

¹³ David D. Kirkpatrick, Danny Hakim, & James Glanz, *Why Grenfell Tower Burned: Regulators Put Cost Before Safety*, N.Y. TIMES, June 25, 2017, at A1, available at <https://www.nytimes.com/2017/06/24/world/europe/grenfell-tower-london-fire.html>.

the “one-size-fits-all” rule bogeyman we often hear about would take up relatively little space in the *Federal Register*; but a rule with nuances, flexibilities, and exceptions would. If anything, opponents of regulatory safeguards ought to celebrate the large number of pages in the *Federal Register*, not deride them.

A related statistic that is increasingly cited is the number of so-called “restriction” words – such as “shall” or “must” – that appear in the Code of Federal Regulations. As with pages in the *Federal Register*, though, not all “shalls” and “musts” are created equal. One might impose a low cost paperwork requirement, while another might mandate an expensive piece of pollution control equipment. Because most restrictions are of the former variety rather than the latter, this will lead to a misleading overestimate in regulatory activity. Moreover, many restrictions in a rule might be conditional (Company A shall do X, but only if . . .) or might be presented as a choice (to comply, Company A shall do X, shall do Y, or shall do Z). Counting all of these restriction words would similarly lead to a massive overestimate of regulatory activity.

The last form of evidence frequently cited by opponents of regulatory safeguards are the myriad studies that purport to measure the total costs or burdens of federal regulations. When these studies are subjected to closer inspections, invariably, their methodologies are revealed to be fundamentally flawed, making it impossible to take seriously the studies’ findings and conclusions. The primary flaw with each of these studies is that they fail to provide an accounting of regulatory benefits against which to measure their findings on regulatory costs. A discussion of regulation is inherently incomplete – and distorted – if it focuses on costs without also considering benefits. Using this methodology, practically any economic transaction – from the purchase of a loaf of bread to the construction of a manufacturing plant – would be counted as a drain on the economy, because they only include the costs not the benefits. Things get even worse when the studies attempt to generate their estimates of total regulatory costs. Often the approach involves deriving some baroque econometric model that purports to describe the relationship between some proxy for regulatory volume and its resulting impact on some macroeconomic indicator, such as GDP. Invariably, the proxies for regulatory volume are farfetched and the assumptions and other inputs used to construct the models seem to be selected for their capacity to generate large estimates of costs rather than their ability to accurately reality.

Second, the regulatory system currently offers numerous opportunities for public participation by regulated corporations. These corporations not only take full advantage of the many existing participatory opportunities; all of the available evidence demonstrates that corporate entities dominate the rulemaking process in doing so. For example, when Professor Wendy Wagner and her coauthors examined 39 hazardous air pollutant rulemakings at the Environmental Protection Agency, they found that corporate interests had an average of 84 contacts per rule, while public interest groups averaged 0.7 contacts per rule. These contacts included meetings, phone calls, and letters.¹⁴ Similarly, a 2011 study I coauthored on lobbying at the White House Office of Information and Regulatory Affairs (OIRA) found a similar pattern of industry dominance. In the roughly 10 years studied in the white paper, OIRA hosted 1,080 meetings, with 5,759 appearances by outside participants. Sixty-five percent of the participants

¹⁴ Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA’s Toxic Air Regulations*, 63 ADMIN. L. REV. 99, 225 (2011).

represented regulated industry interests; 12 percent of participants appeared on behalf of public interest groups.¹⁵

Third, several effective process for reviewing existing agency regulations already exist, rendering the Trump Administration’s Task Forces redundant and wasteful at best. The Regulatory Flexibility Act requires agencies to review every rule that has “a significant economic impact upon a substantial number of small entities” within 10 years after the final rule is published. President Bill Clinton’s Executive Order 12866 requires agencies to develop a program “under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated.” President Barack Obama’s Executive Order 13563 builds upon the Executive Order 12866 periodic review program by adding, among other things, time-consuming and resource-intensive procedures for carrying out the regulatory reviews on an ongoing basis. Some regulatory review programs are baked right into the statutes that authorize the regulations. For example, the Clean Air Act directs the EPA to “complete a thorough review” of the agency’s existing National Ambient Air Quality Standards (NAAQSs) and “to make such revisions . . . as may be appropriate” at least once every five years.

In many cases, agencies review their existing regulations even when it is not mandated by a particular program – that is, because they independently recognize that such a review is a good idea under the circumstances. As Michelle Sager, the Director of Strategic Issues at the U.S. Government Accountability Office (GAO), testified before the U.S. Senate Committee on Homeland Security and Governmental Affairs, “Reviews mandated by requirements in statutes or executive orders and related OMB memorandums were sometimes the impetus for reviews, but agencies more often exercised their own discretionary authorities to review regulations.” Significantly, according to Ms. Sager’s testimony, the GAO found that “[a]gencies noted that discretionary reviews generated additional action more often than mandatory reviews, which most often resulted in no changes.”¹⁶ In other words, these discretionary reviews tended to be have meaningful effect than the mandatory ones.

These agency-driven regulatory review programs do not even include the numerous reviews conducted by independent third parties. Federal law establishes a network of independent Inspectors General for every major executive and independent agency, which, among other things, audits and evaluates the effectiveness of agencies’ regulatory programs. In addition, Congress created the GAO, an independent agency that works to aid Congress’s oversight of the federal government. A key component of the GAO’s work is to audit and evaluate specific regulatory programs in response to requests from members of Congress. As part of this effort, the GAO maintains a “High Risk List,” which it updates at the start of each new

¹⁵ Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 2011), available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

¹⁶ *A More Efficient and Effective Government: Improving the Regulatory Framework*, Hearing Before the Subcomm. on Efficiency and Effectiveness of Fed. Programs and Fed. Workforce of the S. Comm. on Homeland Security and Gov. Aff, 113th Cong. 3 (2014) (statement of Michelle Sager, Director, Strategic Issues, U.S. Gov. Accountability Off.), available at <http://www.hsgac.senate.gov/subcommittees/fpfw/hearings/a-more-efficient-and-effectivegovernment-improving-the-regulatory-framework> [follow hyperlink text “Download Testimony (217.7 KB)”].

Congress in order to bring “attention to agencies and program areas that are high risk due to their vulnerabilities to fraud, waste, abuse, and mismanagement, or are most in need of transformation.”

No one, of course, objects to the concept of reviewing existing regulations. When done well, it is an essential part of an agency’s work. Two key elements are necessary for a successful regulatory review program, however. First, an agency must be afforded the requisite resources to execute these reviews, which can be deceptively complex and labor intensive to carry out. To the extent that the myriad existing regulatory review programs have fallen short of their promise it is that presidential administrations have never sought and Congress has never provided agencies with adequate resources for carrying them out. Second, the regulatory review process cannot be “one sided” in approach. In other words, the regulatory review must not focus solely on eliminating or weakening existing regulations; it must also identify opportunities in which the agency’s mission would be advanced if an existing regulation was strengthened, expanded, or made even more protective of the public interest. Unlike the Trump administration’s Regulatory Reform Task Forces, all of the existing regulatory review programs described above have been broad enough to permit the identification of existing regulations that could be improved by strengthening their requirements. In this regard, the Trump administration’s Regulatory Reform Task Forces are not merely duplicative of existing regulatory review programs; their design renders them substandard outliers by comparison.

A Troubling Track Record on Transparency and Public Participation

As William Funk, a leading scholar on the subject, has noted, transparency and public participation are two of the essential hallmarks of U.S. administrative law.¹⁷ Agency implementation of regulatory safeguards derives much of its legitimacy from the fact that these actions must be undertaken in an open manner and their substantive outcomes must plainly reflect the public input agencies receive.

Fidelity to these principles is also essential to ensuring that agencies are dutifully fulfilling the missions that Congress has set out for them in their authorizing statutes. Transparency assists Congress in performing its oversight activities more effectively, while public participation serves as a mechanism for connecting the abstract goals that Congress has articulated in statutes to the practical realities of the world in which their implementing regulations will give life to those goals. Therefore, Congress in particular has an especially strong interest in ensuring that regulatory actors comport with the principles of transparency and public participation. And Congress in particular should be especially outraged when regulatory actors defy those principles.

Importantly, though, transparency and public participation in the regulatory system are extremely fragile. For instance, it might be useful to think of them as chains that run through the entire rulemaking process. As the old cliché puts it, a chain is only as strong as its weakest link, and that is precisely the case with transparency and public participation in the rulemaking process. The rulemaking process could contain dozens of mechanisms for promoting

¹⁷ William Funk, *Public Participation and Transparency in Administrative Law: Three Examples as an Object Lesson*, 61 AM. L. REV. 171, 171 (2009).

transparency and public participation, but those mechanisms would be rendered meaningless if just one step in the process lacks any effective measures for assuring those principles. After all, interest groups – especially those with significant resources – will face strong incentives to focus their attention on any step that they perceive to have weak controls on transparency and public participation. Such steps would offer these interest groups a critical opportunity for exercising undue influence on the substance of regulatory safeguards that are relevant to their unique and narrow interests.

To this point, the operation of the Trump administration’s Regulatory Reform Task Forces has been marked by a distinct lack of transparency and balanced public participation, rendering them susceptible to abuse by narrow interests. In fact, the operations of these Task Forces are perhaps the least transparent and involve the least meaningful public participation of any component of the U.S. regulatory system. They are, in other words, the weakest link. And not surprisingly well resourced corporate interests appear to be taking full advantage of the Regulatory Reform Task Forces to seek the rollback of public safeguards that may be inconvenient to the bottom lines but which are delivering critical health, safety, environmental, or financial security benefits for ordinary Americans, their families, and their communities.

With regard to transparency, Executive Order 13777 imposes no real mandates on agency Regulatory Reform Task Forces to operate in an open manner that would allow for meaningful public accountability or congressional oversight. Notably, the Order does not mandate that agencies disclose the identities of the Task Force members. The Task Forces are not subject to any open meeting requirements, such as those that apply to Federal Advisory Committees. The Task Forces never need to explain the basis for their recommendations for which existing rules should be weakened or eliminated. Indeed, their recommendations never need to be disclosed at all. While the Executive Order directs the Task Forces to submit an initial report containing their recommendations for regulatory rollbacks to their agency head by May 25 of this year and subsequent reports on a periodic basis thereafter, nowhere does it require that these reports ever be publicly disclosed.

Given the lack of transparency requirements, it is not surprising then that the work of these Task Forces has largely taken place behind closed doors. For many agencies, we do not know who the members of the Regulatory Reform Task Forces are. We do not whether they have met with any outside interest groups, and, if such meetings have taken place, what matters were discussed. We do not know what recommendations the Task Forces have provided or what the policy rationale is for those recommendations. And to the extent agencies are undertaking actions to weaken or eliminate their existing regulations, we do not know if those actions reflect any recommendations that were provided by the relevant Regulatory Reform Task Force.

Over the last several months I have talked to several members of the press and the public interest community who are working diligently to uncover any information they can about various Regulatory Reform Task Forces and the work they are carrying out to implement Executive Orders 13771 and 13777. All have uncovered precious little information. They have submitted numerous Freedom of Information Act (FOIA) requests, many of which have been denied or are being slow-walked. The few responses they have received have been heavily redacted, yielding little useful information.

What little we do know about the Regulatory Reform Task Forces has been uncovered through a few reluctant responses to FOIA requests or through disclosures to the press from courageous whistleblowers within the agencies themselves. The picture that is slowly emerging from these disclosures hardly casts the Regulatory Reform Task Forces in a flattering light. Instead, we are gradually finding that these Task Forces are dominated by individuals with close ties to the industries that their agency is charged with regulating. Many of these individuals formerly worked in these industries as attorneys or lobbyists or otherwise have a personal financial stake in their success, creating the appearance, if not the reality, of a conflict of interest for their work on behalf of the Regulatory Reform Task Forces.

This past July, the *New York Times* and *Pro Publica* jointly published an investigative article on the Trump administration's Regulatory Reform Task Forces that provides some of the most damning accounts yet about the work they are doing on behalf of politically powerful corporate interests. It details the conflicts of interest that exist among the members of Task Forces at such agencies as the EPA, the Department of the Interior, and the Department of Education. It also highlights how several of the existing rules the Task Forces are working to weaken or eliminate have long been targeted by corporate interests with close ties to the Task Force members. As the article puts it, "Some appointees are reviewing rules their previous employers sought to weaken or kill, and at least two may be positioned to profit if certain regulations are undone."¹⁸

With regard to public participation, Executive Order 13777 directs agency Regulatory Reform Task Forces to "seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations." Yet, individual agency Task Forces have taken wildly divergent approaches to seeking public input, suggesting that this process is at best a low priority and at worse window dressing. Some agencies, such as the EPA, held in-person public listening sessions and solicited public comment through official notice in the *Federal Register*. Other agencies, such as the Small Business Administration's Office of Advocacy, created an electronic form on their website, through which members of the public could submit input. Other agencies, such as the Department of Homeland Security, appear not to have taken any formal steps at all to gather public input.

When agencies did solicit public input, it was at best debatable whether these opportunities truly offered members of the public a viable avenue for impacting the Task Force's recommendations. The deadlines for submitting comments were often too short to allow members of the public to respond effectively. This was the case with the EPA's comment period, which lasted only 30 days. In many cases, the public comment period ended just days before the Regulatory Reform Task Force was required to submit its initial report of recommendations, as mandated by Executive Order 13777. For example, the EPA's comment period ended on May 15, just 10 days before the initial report was due. In some cases, the relevant comment period even ended after the May 25 deadline. These cases raise serious questions about whether and to what extent Regulatory Reform Task Forces would be able to incorporate the public input they

¹⁸ Danielle Ivory & Robert Faturechi, *The Deep Industry Ties of Trump's Deregulation Teams*, N.Y. TIMES, July 12, 2017, at A1, available at https://www.nytimes.com/2017/07/11/business/the-deep-industry-ties-of-trumps-deregulation-teams.html?_r=1.

received into their initial reports, assuming their intention was to make a good faith effort to do so.

In general, it is impossible to determine whether public input has had any impact whatsoever on the Regulatory Reform Task Forces' recommendations. As noted above, the Task Forces have not disclosed their recommendations to the public, nor do they appear to be required to do so. What's more, it does not appear that the Task Forces ever have to explain the basis for their recommendations, including whether and how they took into account the public input they received. Without such basic transparency requirements, it is not inconceivable that the public input many agencies received remains on a shelf somewhere, unread and gathering dust.

In contrast, the whistleblower accounts noted above suggest that the only real public input the Regulatory Reform Task Forces were interested in gathering was the input they received from powerful corporate interests during closed door meetings. The comments that agency Task Forces received at these meetings appear to be the real drivers of the Task Forces' recommendations. If so, any efforts to gather public comments through in-person meetings or an official notice-and-comment process would have been little more than a "check the box" exercise, meant to create the illusion of meaningful public participation, rather than a legitimate attempt to inform the Task Forces' recommendations.

A Litany of Implementation Problems

From the beginning, implementation of Executive Orders 13771 and 13777 have been beset with myriad implementation problems. Some of these implementation problems appear to be so intractable that it may prove to be impossible for the Regulatory Reform Task Forces to achieve literal compliance with many of the Orders' provisions.

The first implementation problem, as noted above, is that the goals that Executive Order 13771 and 13777 seek to advance are categorically incompatible with the statutory mandates under which agencies operate. As such, agencies may not be able to adjust their regulatory decision-making to account for these Orders without running afoul of their authorizing statutes. Or, put differently, accounting for the Orders' may necessarily put in agencies the position of contravening their statutory authority.

For example, Executive Order 13771 essentially makes the question of whether or not an agency has sufficient "space" under its regulatory budget a prominent new criterion in the agency's decision-making for all new rulemakings. I am unaware of any existing laws that requires or permits to consider such a factor when deciding whether and how to regulate. Similarly, under the "two-out, one-in" requirement of Executive Order 13771, the decision of whether to weaken or eliminate an existing rule would primarily be driven by an agency's desire to issue a new regulation. Again, I am unaware of any statute that permits an agency to alter or repeal an otherwise required or authorized rule simply because that agency must meet some arbitrary quota on the number of rules it can implement at any given time.

A second big implementation problem arises from the requirement that any deregulatory actions that agencies take pursuant to Executive Orders 13771 and 13777 must pass a strict

“cost-benefit analysis test.” Thus, when an agency proposes to weaken or eliminate one of its existing rules, it must demonstrate that this action would produce sufficient benefits to justify the costs. Another Executive Order, Executive Order 12866, has long mandated such a test for affirmative regulatory actions to institute new protective safeguards, to assure that these actions will make society better off on balance. Trump administration White House officials charged with overseeing agency compliance with Executive Orders 13771 and 13777 have determined that this logic should similarly apply to deregulatory actions well.

Among the first deregulatory actions undertaken by the Trump administration have been those aimed at repealing recently finalized rules from the Obama administration. In these situations, the cost-benefit analysis for the deregulatory action simply involves flipping the ledger: The benefits of the original regulation become the costs of the deregulatory action (referred to as “forgone benefits”) while the costs of the original regulation become the benefits of the deregulatory action (referred to as “costs avoided”). The problem this poses for the Trump administration’s agencies is that all of the original regulations they are seeking to repeal have passed a cost-benefit analysis test. So, by definition, their deregulatory action to repeal that regulation would not pass such a test, since the ledger has simply been flipped (*i.e.*, the net benefits of the original regulation would become net costs in the deregulatory action to repeal).

So far, Trump administration agencies have responded to this problem by cooking the books on their deregulatory actions to create the appearance that they pass a cost-benefit analysis test. As illustrated by the cost-benefit analyses for actions to repeal the EPA’s Waters of the United States rule or its Clean Power Plan, agencies will resort to questionable logic and deceitful accounting tricks to significantly increase the costs of the original rule, significantly decrease the benefits, or both.¹⁹

A third problem, which is related to the second, arises from calculating the cost savings achieved when an older regulation is eliminated or weakened. The nature of most regulations is that the vast majority of the compliance costs are incurred at the beginning, such as through the upfront investments in new pollution control equipment. Afterwards, the ongoing compliance costs tend to be very modest, involving relatively inexpensive reporting and monitoring costs, for example. Accordingly, repealing or weakening older rules would not generate much in the way of cost savings, since much of the compliance costs have already become “sunk” and are therefore unrecoverable. This economic reality means that it will likely be exceedingly difficult for agencies to meet the regulatory “budget” requirements imposed by Executive Order 13771. Simply repealing or weakening two existing rules is unlikely to generate enough cost savings to fully offset the costs of one new regulation, which could be relatively large by comparison if the particular regulation involves significant one-time upfront compliance costs.

¹⁹ James Goodwin, *Practitioner Insight: Fuzzy Math to Assault Environmental Rules*, BLOOMBERG BNA: DAILY ENVIRONMENT REPORT, Sept. 28, 2017, available at http://progressivereform.org/articles/Goodwin_BloombergBNA-DailyEnvironment_Fuzzy_Math_092817.pdf (critiquing the cost-benefit analysis for the Waters of the United States rule); Kevin Steinberger & Starla Yeh, *Pruitt Cooks the Books to Inflate Clean Power Plan’s Cost*, NRDC BLOG, Oct. 10, 2017, <https://www.nrdc.org/experts/kevin-steinberger/pruitt-cooks-books-inflate-clean-power-plans-cost> (last visited Oct. 23, 2017) (Clean Power Plan rule); Kevin Steinberger & Starla Yeh, *Pruitt Cooks the Books to Hide Clean Power Plan Benefits*, NRDC BLOG, Oct. 10, 2017, <https://www.nrdc.org/experts/kevin-steinberger/pruitt-cooks-books-hide-clean-power-plan-benefits> (last visited Oct. 23, 2017) (Clean Power Plan rule).

A fourth problem, as noted above, is that compliance with Executive Order 13771's "two-out, one-in" requirement will essentially triple the workload for agencies. An agency will need to carry out the standard rulemaking process for its new rulemaking, and then two more for each of the accompanying two deregulatory actions it must undertake. At a time when agency budgets continue to drop or remain stagnant in real dollar terms, they may simply lack the resources to implement new regulations. The burdens involved may be too great to overcome, and agencies will simply abandon most pending rulemakings. Given the Trump administration's professed antipathy toward regulatory safeguards, this consequence of Executive Order 13771 would appear to be a feature and not a bug.

Congress Must Subject the Regulatory Reform Task Forces to Vigilant Oversight

Given the many flaws with the Trump administration's Regulatory Reform Task Forces and the work they are charged with undertaking, the best course of action would be to simply repeal Executive Orders 13771 and 13777 and disband the Task Forces. As President Trump is unlikely to adopt this course of action, the onus will be on Congress to carefully supervise the Regulatory Reform Task Forces to ensure that their activities are not preventing agencies from faithfully executing the statutory obligations as Congress has set out for them.

The first step this and other committees should take is to make full use of their oversight and information gathering authorities to learn more about the individual Regulatory Reform Task Forces and the work they are doing. This hearing presents a critical initial opportunity for advancing these oversight objectives.

The second step Congress should take is to monitor the deregulatory actions the Trump administration is carrying out – whether or not such actions are being undertaken explicitly in accordance with the requirements of Executive Orders 13771 and 13777 – to ensure they are complying with the applicable procedural safeguards that serve to guide administrative action. In particular, this committee may wish to evaluate these actions according to the following criteria, as relevant:

- Did the agency afford the public an adequate opportunity to participate in the development of the action, including through the Administrative Procedure Act's (APA) notice-and-comment procedures?
- Did the agency properly revise its rule to account for the public input it received during the APA notice-and-comment procedures? If not, in what ways did the agency fall short in fulfilling this obligation?
- Did the agency abide by the letter and spirit of various ancillary rulemaking requirements, including those established under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act?
- Does it appear that the deregulatory action was primarily motivated by decision-making factors that the agency is not legally permitted to consider, even if the agency was able to supply a plausible policy rationale for the action that is arguably within its legal authority? If so, what were those improper decision-making factors?

- In general, does it appear that OIRA's centralized regulatory review process is being deployed in a less rigorous manner for deregulatory actions as opposed to affirmative regulatory actions?
- In general, does it appear that agency compliance with all applicable rulemaking requirements is less rigorous for deregulatory actions as opposed to affirmative regulatory actions?

This and other relevant committees should commit to taking appropriate and effective responses whenever, on the basis of the evaluations outlined above, they identify potential instances of agencies failing to abide by their administrative law responsibilities when undertaking deregulatory actions. In particular, this committee may wish to hold the agency accountable for such failings through the use of targeted agency letters, GAO or Inspector General investigations, hearings, or other appropriate oversight tools. To be sure, the courts are available to police agency compliance with many of these requirements. Congress, however, is uniquely positioned and has a constitutional obligation to probe earlier and more deeply into these matters before they ever reach the judicial review stage.

Similarly, this committee may wish to investigate on an ongoing basis other matters of critical importance that are relevant to the work of the Trump administration's Regulatory Reform Task Forces. For example, such matters might include the degree to which this work comports with basic administrative law principles of transparency and meaningful public participation, as described above.

Conclusion

Thank you for the opportunity to share my views on this topic. I would be pleased to answer any questions you might have.