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CHALLENGES FACING OIRA IN ENSURING
TRANSPARENCY AND EFFECTIVE RULEMAKING
Tuesday, March 3, 2015,
House of Representatives,
Subcommittee on Health Care,
Benefits and Administrative Rules,
Joint with the
Subcommittee on Government Operations,
Committee on Oversight and
Government Reform,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:35 a.m., in Room 2154, Rayburn House Office Building, Hon. Mark Meadows [chairman of the Subcommittee on Government Operations] presiding.

Present from Subcommittee on Health Care, Benefits and Administrative Rules: Representatives Jordan, DesJarlais, Walker, Hice, Carter, Cartwright, DeSaulnier, and Lujan Grisham

Present from Subcommittee on Government Operations: Representatives Meadows, Jordan, Massie, Buck, Carter, Grothman, Connolly, Lynch, and Plaskett.

*Mr. Meadows. The Subcommittee on Government Operations and the Subcommittee on Health Care, Benefits and Administrative Rules will come to order.

Without objection, the chair is authorized to declare a recess at any time.

We believe that the ranking member is on his way here, so I am going to go ahead and start with my opening statement.

Mr. Shelanski, thank you so much for coming today to testify. Obviously, as you know, Federal agencies draft proposed and final rules on a regular basis as part of their regulatory analysis that is supported by the underlying rule. That incorporates comments received from the public on those rules. Certainly, created by this committee under the Paperwork Reduction Act of 1980, the Office of Information and Regulatory Affairs, also known as OIRA, which is a mouthful, is charged with reviewing draft proposals and final regulations from the Federal agencies.

This regulatory review role is currently defined by an executive order, which is 12866, issued by President Clinton, and Executive Order 13563 issued by President Obama, which reaffirms that Clinton executive order. OIRA is the gatekeeper over poor regulatory analysis, so it is your agency's charge to certainly look at that; and you are responsible for making sure that those agencies, the regulatory analysis that gets done are sound and that the agencies respond to the public in the rulemaking.

Obviously, we have seen unprecedented rulemaking in the last few years, and certainly with that your workload, I would imagine, has increased. So we look forward to hearing from you on that today.

Additionally, as we start to look at this particular agency's role in looking at the analysis and how we go, what I want to hear from you today is truly how we can streamline the process, make sure that the American public has a voice and that they are heard. I have looked over your testimony, read much of the background information last night as we were looking at this, so I want to hear specifically from you, too, in terms of our 90-day time limit, because that has been consistently invaded through either procedural motions, is what I would call it, in asking for the agency for extensions. But this committee truly needs to make sure that we have an open and transparent regulatory rulemaking process.

This is the first hearing of this committee on this particular issue since 2011, so I know that as I am being joined with the ranking member here to my right, he and I both agree unanimously that transparency and making sure that the American people have their voice in it is certainly one of those things

that we both hold very dear and will vigorously defend. So I would share all of that as we look forward to your testimony here in just a few minutes.

Before I go any further, I will say there has been a series of votes on the floor that we had not planned for. The chairman of the other subcommittee, Mr. Jordan, is actually on the floor. He will be joining us shortly. But in his stead as chairman, I would like to just take a moment to announce the newest member of the Subcommittee on Health Care, Benefits and Administrative Rules. I am pleased to welcome the gentlelady from New Mexico, Ms. Lujan Grisham.

I am confident that you not only will be an asset to this subcommittee, but I personally am looking forward to working with you, so welcome.

With that, I now recognize Mr. Connolly, the ranking member of the Subcommittee on Government Operations, for his opening statement.

[Prepared statement of Mr. Meadows follows:]

********** COMMITTEE INSERT **********

*Mr. Connolly. I thank my friend, the chair. Sorry I am a little late. We were a little worried on the floor that there could be a motion to adjourn, so they asked some of us to stay behind just a little bit.

The Office of Information and Regulatory Affairs is the most important, influential, and consequential Federal agency most Americans have never heard of. No agency comes near OIRA with respect to the far-reaching authority this relatively small and anonymous office wields over vital Federal rules that have an impact on our Nation's economy, environment, and public health and safety.

OIRA plays a key role in shaping hundreds of important rules, such as those that enhance the safety of our drinking water, protect food supply, guaranty buildings are accessible to the disabled, and protect the homeland, to name just a few important topics. Yet, despite the powerful impact this agency has in the lives of all Americans, OIRA operates mostly in the shadows and, from a good government point of view, greater transparency is called for.

There is a documented lack of transparency with this small statutory office housed within OMB. Over the years, the U.S. GAO, Government Accountability Office, has repeatedly found that OIRA, under multiple administrations, failed to meet the laudable transparency requirements contained in the relevant executive orders that prescribe the principles and procedures that ought to be followed when conducting regulatory review.

Worse, despite GAO issuing a comprehensive set of recommendations in 2003 to address these deficiencies, to date, OIRA appears to have only implemented one of the nine recommendations made 12 years ago. Thus, when a Federal agency promulgates a rule, or fails to promulgate a rule, it is entirely possible that the public, the Congress, which wrote the underlying statute, will have no idea what entity or individual is ultimately responsible for the final regulation, if any at all.

To be fair, enhancing transparency has been a stated goal of the last few OIRA administrators. Indeed, our witness today, Administrator Shelanski, has made progress in this area. But I think he would agree more work needs to be done. There should be broad bipartisan consensus that the public has a right to know why OIRA classifies certain rules as major rules; that the public has a right to know why some rules sit under OIRA review for two years, when the review was supposed to take only 90 days. Finally, the public also has a right to know who is weighing in on these regulations and the nature of the deliberations with respect to them.

Often, the modifications and revisions that result from the

machinations of a rapidly growing cottage industry, known as shadow lobbying, have as great an impact on an agency's action as the actual letter of the law we wrote.

In closing, I want to recognize that OIRA boasts an incredibly hard-working and dedicated corps of career staff. It is first-rate when it comes to conducting quantitative analysis that weighs complex economic costs against potential benefits, and that is a lot of bulwark. As the 2014 draft report to Congress on the benefits and costs of Federal regulations demonstrates, OIRA's reviews ensured that in 2014 the annual benefits of major rules dramatically outweighed the monetary costs. OIRA should be commended for conducting retroactive analyses of existing rules that may be outdated or unnecessarily burdensome and in need of more effective and innovative solutions.

I want to thank Administrator Shelanski for testifying, and I look forward to hearing how OIRA will continue promulgating cost-effective rules and examining what further steps Congress can take to ensure that regulatory review transparency is improved in the coming years.

With that, I yield back, Mr. Chairman.

[Prepared statement of Mr. Connolly follows:]

********** COMMITTEE INSERT **********

*Mr. Meadows. I thank the ranking member.

Just so I can advise the members on my side of the dais, I will be coming to you for questions before we go on any further. We probably are going to be interrupted for votes around 2:45, so we will take a slight recess at that particular time. We will try to keep it going with two different chairs and two different ranking members, where we can keep you with limited time there.

With that, I now recognize Mr. Cartwright, the ranking member of the Subcommittee on Health Care, Benefits and Administrative Rules, for his opening statement.

*Mr. Cartwright. Thank you, Chairman Meadows, for calling today's hearing.

I also want to thank our witness, Administrator Shelanski, for testifying today.

OIRA plays a critical role in the Federal regulatory process, completing the review of about 500 agency draft rules at both the proposed and final stages of rulemaking every year. OIRA is also responsible for ensuring adequate interagency coordination of draft rules to reduce unnecessary burdens and costs, safeguarding against the issuance of redundant or inconsistent regulations.

OIRA's regulatory review functions aim to improve the daily lives of Americans across our Country in a multitude of ways. Its crucial oversight of agency rulemaking leads to the issuance of rules that aim strengthen worker safety standards, increase access to clean water, lower energy costs, reduce pollutants, and improve public health protections.

Despite OIRA's key role in helping to address our Nation's environmental, health, and public safety challenges, some of my colleagues on the other side of the aisle have referred to the Federal rulemaking process as a highly flawed system that punishes job creators and stifles economic growth, so we need to talk about that. But according to OMB's 2014 draft report to Congress on the benefits and costs of Federal regulations, the estimated annual benefits of major rules reviewed by OMB from October of 2003 to September 2013 ranged from $217 billion to $863 billion in savings, significantly exceeding estimated annual costs, which were between 57 and $84 billion.

That said, there has been longstanding criticism against OIRA for not being transparent enough in its review process, certainly, and concerns have also been raised by both Republicans and Democrats about OIRA holding regulations for long periods of time without offering any reasonable explanation for the delay.

I share my colleagues' concerns about these lengthy delays in OIRA's review of regulations and I would like to hear from

you, Administrator Shelanski, today about steps OIRA is taking to eliminate its backlog and increase transparency, including whether a lack of adequate resources has contributed to this problem.

I am also interested in hearing about OIRA's efforts to engage the average citizen in its rulemaking process. OIRA enjoys enormous oversight over regulations that touch on nearly every aspect of our American lives, and I want to ensure that OIRA provides consumer and environmental protection groups the same amount of time as it does for lobbyists for industry that is being regulated.

In January 2011, the President issued Executive Order 13563. Now, this Executive Order directed agencies to give the public a meaningful opportunity to comment on proposed rules through the Internet to allow for a minimum 60 day comment period and to provide online access to the rulemaking docket in an easily searchable and downloadable format.

I think these are all positive actions by the current administration to improve transparency and public confidence in the openness of our regulatory system, but I also believe that more can be done.

I do thank the chairman again and look forward to hearing more from Administrator Shelanski about how we can make the existing regulatory process even more efficient and even more transparent. Thank you, Mr. Chairman.

[Prepared statement of Mr. Cartwright follows:]

********** COMMITTEE INSERT **********

*Mr. Meadows. I thank the gentleman.

Before we go further, I want to just thank the committee staff for their work on this particular issue. Obviously, it is something that is not a household acronym, so it has been very illuminating. So I want to thank those who have worked on it, as well as our personal staff.

I will hold open the record for five legislative days for any member who would like to submit a written statement.

We will now recognize our witness. I am pleased to welcome the Honorable Howard Shelanski, Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget. Welcome.

Pursuant to committee rules, all witnesses are sworn in to testify, so I would ask you if you would rise, please.

If you would raise your right. Do you solemnly swear or affirm that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth?

[Witness responds in the affirmative.]

*Mr. Meadows. Let the record reflect that the witness has answered in the affirmative.

Thank you. You may take your seat.

In order to allow time for the discussion, Mr. Shelanski, if you would please limit your testimony to five minutes. Your entire written statement will be made part of the record. You are now recognized.

STATEMENT OF THE HONORABLE HOWARD SHELANSKI, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

*Mr. Shelanski. Thank you very much, Chairman Meadows, Chairman Jordan, Ranking Members Connolly and Cartwright, and members of the subcommittees. Thank you for the invitation to appear before you today. I am pleased to have this opportunity to discuss the activities and priorities of the Office of Information and Regulatory Affairs, OIRA.

As the administrator of OIRA, it is my privilege to work with a great team, both within the Office of Management and Budget and across the Federal Government. We are all working to continue our Nation's economic recovery and employment growth while protecting the health, safety, and welfare of Americans now and into the future.

OIRA has a broad portfolio that ranges from coordination of government-wide information and statistical policy to review of executive branch regulations to international regulatory cooperation. The Office reviews collections of information by the Federal Government to ensure that they are not unnecessarily burdensome; develops and oversees the implementation of government-wide statistical standards and policies; and provides guidance on privacy and confidentiality policy to Federal agencies.

The largest area of OIRA's work is the review of regulations promulgated by executive branch departments and agencies. A set of executive orders provides the principles and procedures for OIRA's regulatory reviews. Executive Order 12866, implemented across several administrations of both parties, sets forth standards and analytic requirements for rulemaking by departments and agencies. To the extent permitted by law, it calls for agencies to regulate only when the benefits of a rule justify its costs.

My priorities as OIRA administrator are directly rooted in the relevant executive orders. One such priority has been to increase the predictability and transparency of the regulatory review process. In that regard, during my tenure, we have ensured timely publication of the Unified Agenda and Regulatory Plan for agency rulemaking activity each spring and fall.

Of similar importance to clarity and certainty in our regulatory environment is that rules that come to OIRA receive an efficient, as well as thorough, review. OIRA must first and foremost uphold the standards of review that the executive orders establish. But we have also worked to minimize unnecessary delays in review. Such delays are harmful across the board: to those wishing to comment on proposed rules, to

those who must make plans to comply with rules, and to those denied the benefits of regulation.

Another important OIRA objective is ensuring appropriate flexibility in and removing unnecessary burdens from Federal rules. For example, we have worked successfully with the Small Business Administration and agencies across the executive branch to minimize the particular burdens that new regulations might disproportionately impose on small and new businesses, especially in areas where emerging technologies have the potential to greatly enhance public welfare.

Existing rules, too, warrant scrutiny to ensure that they achieve their benefits and goals without imposing unnecessary costs. Retrospective review is a crucial way to ensure that our regulatory system is modern, streamlined, and does not impose unnecessary burdens on the American public.

The Administration's retrospective review efforts to date will yield savings of over $20 billion over the next five years, but, as President Obama made clear in remarks at the Business Roundtable this past December, it is critical part of this Administration's regulatory agenda to do an even better job of finding and reforming regulations that are unduly burdensome or missing their mark.

To that end, OMB has convened a series of meetings with various stakeholders, including State and local government officials, community groups, and representatives from numerous industries to better understand what approaches, themes, and particular areas of regulation could most usefully factor into agencies' retrospective review efforts.

Agencies filed their most recent retrospective review plans with OIRA last week. OIRA intends to complete its review of those plans within the next month, after which time they will be publicly released. OIRA will continue to work closely with agencies to make additional progress in the review plans the agencies will file this coming July and through the next two years.

Finally, OIRA has important responsibilities related to international regulatory cooperation. We have made progress in a number of areas with our international partners through our Regulatory Cooperation Councils with Canada and Mexico. OIRA has also furthered its international regulatory mission through coordination with the Department of State and through support of the U.S. Trade Representative's trade negotiations.

In conclusion, government activities can bring great benefits to Americans, but it is critical to ensure that regulations and paperwork do not impose undue burdens; that Federal agencies ensure privacy and base their decisions on high-quality evidence; and that beneficial regulation remains

consistent with the overarching goals of job creation, economic growth, and public safety. These are the central objectives of this Administration and we look forward to continuing our efforts to meet these challenges.

Thank you for your time and attention, and I would be happy to answer any questions you may have.

[Prepared statement of Mr. Shelanski follows:]

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*Mr. Meadows. I thank the gentleman for his testimony and his timeliness. You know, plus or minus two or three seconds, that is very good, Mr. Shelanski.

I am going to recognize the gentleman from Tennessee, Mr. DesJarlais.

*Mr. DesJarlais. Appreciate that. Thank you, Mr. Chairman.

And thank you, Mr. Shelanski, for joining us today. I wanted to talk to you today about the issue of agencies taking steps in order to circumvent the rule review process. I recently sat down with a group of farmers and leadership from the Tennessee Farm Bureau in my office here a week or so ago and they were wanting to discuss the impact of EPA's proposed Waters of the United States rule.

Like many of my constituents, the farmers in my district are concerned about the burdensome requirements that this rule would impose on agriculture providers and businesses. This regulation would expand Federal authority beyond the limits approved by Congress. This sweeping new authority granted by this proposed rule has so far only created confusion and uncertainty among farmers, ranchers, landowners in my district, and also a lot of uncertainty, according to the Office of Advocacy and also the NFIB.

In fact, the NFIB, last year, sent a FOIA request to the EPA and the Army Corps regarding the Regulatory Flexibility Act, and wanted a better explanation, and the EPA's response to the NFIB was that they had no records related to RFA compliance.

Mr. Chairman, can I ask unanimous consent to introduce these documents into the record?

*Mr. Meadows. Without objection, so ordered.

[The information follows:]

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*Mr. DesJarlais. So my question today would be can you explain how such a costly and sweeping rule has also been designated as non-significant?

*Mr. Shelanski. Thank you very much, sir.

So the Waters of the U.S. rule, which is a proposed rule that was out for public comment and is now back at the agency for development into a final rule, was reviewed by OIRA. We review rules that are significant regulations, so it did receive a full OIRA review. It will similarly receive such review when the EPA submits the rule back to our office for final determination.

One of the reasons for the American system under the Administrative Procedure Act of having a proposed rule that goes out for public comment is that we learn a lot during that period, and I think one of the valuable things about the notice and comment period on the Waters of the United States rule is the very concerns that you articulated will have the chance to become part of the record and to be taken into account by EPA in their development of a final rule.

And part of what OIRA does when it reviews final rules is looks to see how the agency has reacted to and addressed important public commentary. So we look forward to doing so when that rule comes back to us for final review.

*Mr. DesJarlais. I am glad that you are getting that feedback; that will be very helpful.

Can you provide this committee with documentation relating to OIRA's oversight of this rule, including the rule's designation as significant and certification under the Regulatory Flexibility Act?

*Mr. Shelanski. So all of the documentation related to a rule is actually on our Web site and through the Web site RegInfo.gov. So when a rule comes in, it becomes public that it is with OIRA; its designation at that point similarly becomes public. So when the final rule comes in, that will be publicly visible, both the timing of the arrival and the designation that it receives.

*Mr. DesJarlais. Okay. Can you explain how rules exceeding the $100 million threshold end up designated as non-major and avoiding statutory mandated review by Congress?

*Mr. Shelanski. Well, when an agency makes a determination that a rule is economically significant or not significant, we do typically review that determination if we think that it is close to the line. In cases where we are actually reviewing the regulation, as in Waters of the United States, it may be very unclear what the costs of a rule may be. We may review the rule anyway because we think it raises important or novel issues, even if it is not formally designated as economic significance.

So I would just note that we actually have several forms of significance at OIRA. Economic significance, but a rule, even one that may not reach the $100 million threshold, we can deem significant and call in for review, and that is indeed what we did with the Waters of the United States rule.

*Mr. DesJarlais. Okay. Well, we will certainly be interested in seeing your results as you get the feedback, because there is no question in my mind and certainly no question in the mind of our farmers and farm bureaus and small businesses that this should be designated as significant. So we look forward to seeing your review.

*Mr. Shelanski. Yes, sir.

*Mr. DesJarlais. And thank you for your time.

I yield back.

*Mr. Meadows. Let me ask a clarifying point before I recognize the ranking member, because your testimony right now says that all those documents and all of that as it relates to your review of that is online. I don't believe that that is correct; and that is what the gentleman was asking. So maybe your answer didn't match his question.

*Mr. Shelanski. No, what I meant to say is the fact that a rule is with us under review and the designation --

*Mr. Meadows. So what about in the interim process? You have been involved in the interim process with the Waters of the U.S., have you not?

*Mr. Shelanski. Right.

*Mr. Meadows. So where is that documentation?

*Mr. Shelanski. So what we do at the end of a review process is the agency, and the EPA does this, makes available both the rule as it came in and the rule as changed after it finished the review process.

*Mr. Meadows. I will wait to my line of questioning. That doesn't answer the question, because when you have the initial rule and the final rule, there is a whole lot of the story that happens in between that we are not privy to your involvement there. Where is that documentation? Where is the transparency, I guess?

*Mr. Shelanski. So there is a deliberative process that is undertaken, discussions not just between OIRA and the agency, but there is an interagency review process in which agencies are --

*Mr. Meadows. Right. We are well aware of that. I guess what I am saying is his question was specifically with regards to the information, the audit trail, so to speak, of your involvement. Where are those documents?

*Mr. Shelanski. There is not a set of documents.

*Mr. Meadows. So you don't document it.

*Mr. Shelanski. No, we do not.

*Mr. Meadows. You just get involved and have verbal conversations?

*Mr. Shelanski. There is a lot of verbal conversation, there is a lot of discussion, and then there is a written pass-back, back and forth that goes on between the agencies.

*Mr. Meadows. All right, so let's say the emails. Where are those emails? Can you provide those specifically with regards to that particular, your analysis and your interrogatory with them? Can you provide that to the committee?

*Mr. Shelanski. We do not make public --

*Mr. Meadows. We are not public. You want to make that to us?

*Mr. Shelanski. With all respect, sir, with respect to the rulemaking process, we do not divulge parts of the deliberative process outside the office.

*Mr. Meadows. But you are not part of the deliberative process; you are part of the analysis, according to the statute.

*Mr. Shelanski. But what you are asking for is the deliberative process that we engage in.

*Mr. Meadows. Well, we will come back. The ranking member has been very gracious, so I will be glad to recognize the ranking member, Mr. Connolly.

*Mr. Connolly. Thank you, Mr. Chairman.

There is a clear definition of economically significant rule, but classifying major rules that are significant for other reasons, health, safety, environment, are not as well defined. GAO, last September, released a report that discussed this very issue. The report found that for the majority of the 109 significant rules that it reviewed, 72 percent included no explanation of why the rule was designated as significant. What, if anything, are you doing to try to respond to that critique?

*Mr. Shelanski. Typically, the reason that we would designate a rule as significant: it raises a novel issue or because another agency other than the agency that has promulgated the rule has asked us to convene an interagency rule.

*Mr. Connolly. Yes, but GAO found that 72 percent of the 109 it reviewed had no explanation. You are telling us now there may be lots of reasons, and I agree with you, but isn't the public entitled to know why you deemed it significant?

*Mr. Shelanski. I mean, we really often, if an agency, for example, says we would like to comment on another agency's rules, I don't know what reason we would give other than interagency review. But we could certainly look into ways to provide that explanation, but as a general matter we --

*Mr. Connolly. Well, maybe I am misreading you, Mr. Shelanski, but you are acting as if what I just read to you was news to you. Were you not aware of the GAO report last September?

*Mr. Shelanski. Yes, I am aware of the --

*Mr. Connolly. And do you agree with its findings or do you disagree with it?

*Mr. Shelanski. You know, we are in the process of discussing the GAO's report, and I don't have any further comment on that right now.

*Mr. Connolly. Okay. Well, our committee may have some comments about it.

There have been calls for more transparency and all of us have alluded to that, and I assume you agree, looking at your own agency's history, more transparency might be in order?

*Mr. Shelanski. Well, so we have taken certain steps to try to make aspects of our process more transparent. Discussions between staff members in my office and agencies clarifying questions, trying to understand what the rule is, trying to understand why an analysis was done a certain way are part of a deliberative process that I think has to be able to occur with the staff not knowing that every email, every discussion is going to be under the glare of the microscope. On the other hand, we have done a number of things and we are going to continue to take steps to make our process more transparent.

You alluded in your opening remarks, sir, to knowing who is coming to OIRA to meet. Well, we do post every party that comes in to meet with our office on a rule that is under review. Under Executive Order 12866, we do not initiate such meetings, but we are required to take all-comers; it can be an individual, a corporation, an advocacy group, an environmental group; and, indeed --

*Mr. Connolly. Even members of Congress?

*Mr. Shelanski. Even members of Congress.

*Mr. Connolly. Well, Lord almighty. Look at that.

*Mr. Shelanski. You guys are some of my best customers.

[Laughter.]

*Mr. Shelanski. So we are required to take all comers in this regard; and we post not only who has come to see us, but any paper that they submit to us. In fact, you mentioned the openness of this process to environmental groups, advocacy groups, in addition to industry and the lobbyists you referred to. We welcome absolutely everybody and the door is there to be knocked on; we turn down no meeting requests

*Mr. Connolly. Well, I guess the point is in my opening statement I referred to you are one of the most powerful agencies nobody has ever heard of. Assuming that

characterization is fair, that puts maybe more burden on you to be a little bit more accountable and transparent than, historically, the agency has been. I am glad we are posting who asks to meet with you and who does meet with you. I do think, however, when something has been deemed significant, and 72 percent of those reviewed by GAO there is no explanation, I think we can do better in terms of responding to the public.

My time is running out, but let me ask one more question in this regard. There currently, if we are right, 34 regulatory actions that have been in OIRA review for more than 90 days. That is your goal, to do it within 90 days. You can go on the Web site and see the length of time the rule has been at OIRA, which is good, but there is no information about why that rule has been under review well beyond the deadline; there is no explanation for why the delay. Why not, and are you working on that?

*Mr. Shelanski. So there are a number of things when a rule comes in to review for OIRA. So the one thing I would note is that there isn't a really one-size-fits-all review process, and 90 days is sometimes inadequate. But one of the things that happens very early in the review process is that the rule goes out for interagency comment. And we, unfortunately, do not have the authority to compel that commentary on as fast a timeline as we would often like, and when you have a lot of agencies commenting on a particular rule, it can take some time to get that feedback.

Moreover, once we incorporate that feedback and retransmit it to the agency, the rulemaking agency, we have no control over the amount of time that that agency takes to bring the rule back to us. So, to be perfectly frank, long periods of time can go by where the rule is not in fact at OIRA; it is under review, but it has been passed back for further work, consideration, analysis by the agency.

*Mr. Connolly. Mr. Shelanski, let me just end on this note. That is a perfectly rational explanation, so post it. And oh, by the way, by posting it, saying, you know, agency X is still reviewing it after our review, you put a little pressure on them to maybe accelerate their review, because they are now under scrutiny.

When I was chairman of my county, I started a multi-year transportation plan for spot improvements, and I put up every project we were going to fund; I put up how much it was going to cost; I put up when we were proposing to have it done; and if there was a delay, we posted why to make myself accountable. And you know what? You would be amazed at how quickly the bureaucracy moved knowing that there was that public accountability.

Thank you, Mr. Chairman.

*Mr. Meadows. I thank the gentleman.

Votes have been called, but we are going to try to go ahead and hit very quickly. I am going to go ahead and recognize the gentleman from North Carolina, Mr. Walker.

*Mr. Walker. Thank you, Mr. Chairman. We will try to do this efficiency as possible.

If I have time, I want to get to talk a little bit about the inability, it seems, of the department to return the deficient draft regulations. It seems to a vital part of that and there seems to be very long delays following that.

But I first want to hear an area that, in doing my reading, is concerning me. Evidence suggests that leading up to the 2012 election, Mr. Shelanski, the White House instructed OIRA not to complete reviews and finalize rules before the new year. My question would be how many times has your office delayed, reviewed, modified a rule, altered your review, or have taken any other action steps in response to directions from the White House?

*Mr. Shelanski. So part of the interagency review process would incorporate other components within the executive office of the President; the policy councils, they get to weigh in. But in terms of instruction of that sort, I was not administrator in 2012, but my observation is that a lot of big rules happened right through the election cycle in 2012; the mercury standard, the CAFE standard for vehicle. So I am not aware of any slow-down and certainly have not been instructed myself to slow down rulemaking.

*Mr. Walker. Well, then let's talk about specifically, let's use your words, slow-down here. In 2012, OIRA review averaged about 80 days. But it has now jumped to an incredible 140 days. What do you account for that?

*Mr. Shelanski. Actually, our average review time is quite a bit shorter than that. Rules submitted in the last six months were well down under our normative time. I would also note that the number of rules under extended review has dropped dramatically since the beginning of 2013, and during my tenure over the last 18 months has continued to drop substantially. There are many fewer rules that have been under review for 200 days and over fewer over 90 days.

*Mr. Walker. Can you talk about the action steps that have led to what sounds like you are sharing has been successful? Can you tell me a little bit about that? What steps have you taken to cause the low amount of time?

*Mr. Shelanski. Well, one thing that we have tried to do is to push agencies to work with us and to move quickly. We have devoted substantial resources to trying to move things

along more quickly. It has been a priority on my part to focus on sort of first-order concerns with the rules. And I think also that we have just had very good cooperation from the Federal departments and agencies in the executive branch in working with us to move things forward.

*Mr. Walker. Okay, then answer this question for me, if that is the case. OIRA has only issued one letter of return, a return letter during the entire six-plus years of the Obama Administration. How do you account for that?

*Mr. Shelanski. Well, I have issued no return letters. I can explain why I have not issued any return letters. First of all, a return letter is a fairly strong-arm tactic, and I would only do that if negotiation with the agency over the substance of the rule or an alternative to a return letter failed.

We have actually been very successful in getting agencies, on numerous occasions, to withdraw rules that simply were not workable. That has happened several times in the time that I have been in office. That is a negotiation over something that is not going well with a rule and the agency's determination that they want to take it back for further work on their own clock.

In addition, we have been able to break through a lot of differences and find lots of compromises amongst different agencies that were disagreeing on a rule, and I have not had a need to issue a return letter.

*Mr. Walker. So when was your start date?

*Mr. Shelanski. My start date was July of 2013.

*Mr. Walker. And in that 19, 20 months, there is not a single time that you feel like that you have needed to issue a return letter?

*Mr. Shelanski. There hasn't been one occasion where either the agency has decided not to take the rule back on its own or we haven't been successful in finding a solution.

*Mr. Walker. Okay. Thank you.

I yield back, Mr. Chairman.

*Mr. Meadows. Mr. Shelanski, to follow up on Mr. Walker's question, how does that increase transparency if you are making these interagency deals in terms of you are basically going back and forth and getting them to withdraw a rule? Is that what you are saying?

*Mr. Shelanski. So the way a rule --

*Mr. Meadows. Yes or no? Is that what you are saying?

*Mr. Shelanski. No.

*Mr. Meadows. All right.

I will recognize Mr. Cartwright.

*Mr. Cartwright. Thank you, Mr. Chairman.

Well, Administrator Shelanski, we are talking about Federal

rules and the making of Federal rules, and I don't think I go too far when I say most Americans are frustrated by that, because we are talking about rules that govern their conduct, rules that govern their places of employment, rules that apply to everybody and rules that have to be followed or else they are breaking the law, and rules that aren't made by the United States Congress, rules that are made by people whose votes don't appear in our local newspapers. So questions of transparency are important to people, and I want to ask you about that.

During its review process, OIRA meets with all kinds of stakeholders, allowing many opportunities for public participation, and you have made that clear; everybody is invited and your door is open to all the stakeholders. But I have some concerns, and I said this before in my opening, about industry domination of those meetings. You know, there is a sense in America that the fox is guarding the hen house in a lot of this rulemaking.

Administrator Shelanski, are you aware of a November 2011 white paper from the Center for Progressive Reform entitled, Behind Closed Doors at The White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment? Are you familiar with that white paper?

*Mr. Shelanski. I have heard the criticism of the Center.

*Mr. Cartwright. Well, the authors of the report examined the records of 1,080 meetings held at OIRA from October 16, 2001 all the way to June 1, 2011. These meetings consisted of 5,759 appearances by outside individuals. The report found that industry representatives outnumbered public health and safety advocates by almost four to one.

Among the 30 organizations they found that met with OIRA most frequently, 5 were national environmental groups, NRDC, Environmental Defense Fund, Sierra Club, Earth Justice, and Consumer Federation, 17 were well-run and well-funded industries and trade associations such as ExxonMobil, the American Petroleum Institute, and the National Association of Manufacturers; and another 8 of them were lobbying firms.

Administrator Shelanski, are these findings consistent with what you have seen during your tenure at OIRA?

*Mr. Shelanski. Thank you, Mr. Cartwright, for your question. I think the Center for Progressive Reform has made the classic error of confusing correlation with some form of causation. We at OIRA do not have discretion to turn down meetings. Our door is open; anyone who knocks we let in. We cannot control the fact that more industry groups choose to come and meet with us than other kinds of organizations.

I will tell you that we have made every effort to encourage organizations, indeed, the Center for Progressive Reform itself

and many others, to please come see us on any rule --

*Mr. Cartwright. That is my next question. You have said the doors are open, but the doors are open is different from inviting people, being active and inviting people in. Here is the question: What, if anything, is being done during the current administration and in your tenure to promote a more balanced public engagement approach to OIRA's review process?

*Mr. Shelanski. With respect, I think it would be inappropriate for OIRA to try to tip the scales in any direction for who comes to see us and who comes to weigh in on rules. What I have tried to do is to make clear to everybody that they are welcome and that we want to hear from them; and it is for that reason that I have met with and, indeed, addressed, groups like Public Citizen, Center for Progressive Reform, labor unions, to make clear that the door is just as open to them.

Indeed, when Director Donovan and I held our stakeholder meetings on retrospective review, we specifically invited such organizations to their own meeting so that we could hear their viewpoint. Not only is the door open, but, to the extent appropriate, we have encouraged and made clear that it is open.

*Mr. Cartwright. Well, thank you for that.

With that, I yield back, Mr. Chairman.

*Mr. Meadows. I thank the gentleman from Pennsylvania.

We are going to recess for 10 minutes. So the committee stands in recess.

[Recess.]

*Mr. Meadows. We are going to try to be sensitive to your time. I understand that we have one of the ranking members on their way over here huffing and puffing, so the committee will reconvene, and I thank the witness for his patience.

I am going to go ahead and recognize the gentleman from Georgia, Mr. Hice, for five minutes.

*Mr. Hice. Thank you, Mr. Chairman.

And thank you for joining us today. I have a few questions. I know you have already commented somewhat on this, but relating to the Waters of the U.S. rule. I am just curious. My understanding is that this was supposed to be out by April of 2014. Is that correct? We have heard that.

*Mr. Shelanski. So I don't recall what the exact agenda dates were for the Waters of the U.S. rule, sir.

*Mr. Hice. Okay, well, it is my understanding and what we have been told is that that was supposed to come out last year, and, of course, it didn't, so that raises a lot of questions as to where all of this stands; and, of course, the public comment period of time is over. So can you assure us that there will be a full review and that the issues that are of interest, the comments to the public, will be addressed in their entirety?

*Mr. Shelanski. Yes, Mr. Hice, I can give you that assurance. The rule is with the Environmental Protection Agency for development right now into a final regulation. That rule will come to my office for review and the rule will receive full review under the executive orders.

*Mr. Hice. It will have a full review?

*Mr. Shelanski. Yes.

*Mr. Hice. And you can assure us that the comments will be addressed?

*Mr. Shelanski. One of the things that OIRA does when it is reviewing a final regulation that has been out for notice and comment is to look at how the agency has taken into account the public comment; and we will do that on the Waters rule as we do with every rule.

*Mr. Hice. Okay, thank you. The President evidently has come out stating that as far as having a review of the guidance documents, he is in favor of that. The Center for Progressive Reform, on the other hand, opposes the review from the guidance documents. I am curious to know from you if you think the review of the guidance document is a worthwhile endeavor.

*Mr. Shelanski. So we at OIRA are interested in reviewing anything that an agency does that has regulatory effect, and whether they call that vehicle a regulation, a guidance, a notice, if it creates new regulatory burden and effect on businesses or farmers or any stakeholders, we want to review it.

So we at OIRA do review guidance documents, sometimes at the request of agencies just because they want to have interagency review of the guidance document; other times because they submit it to us and we find that there is some regulatory impact that warrants our analysis and review. So I side with looking at guidance documents where they do create such obligations on stakeholders and the public.

*Mr. Hice. Okay, so you would conclude, then, that it is a valuable use of your time and OIRA to review the guidance documents.

*Mr. Shelanski. We don't review all guidance documents; there are many, many guidance documents that many different parts of government issue. Typically, when agencies are issuing a guidance document that is going to have an effect on industry or folks out there in the public, they will submit it to us and we will review it.

*Mr. Hice. What is the guideline that you determine whether or not you look at guidance documents or not, is it the request of various committees or what have you, or how do you make that determination?

*Mr. Shelanski. Usually it is the agency that will ask us to look at a guidance document. Other times we will know that

an agency is planning to issue a guidance and we will say, you know, that relates to a regulation that we reviewed, we would like to have a look at it.

*Mr. Hice. So there is no official policy determining whether or not you will look at guidance documents.

*Mr. Shelanski. We have a significance standard for guidances, just as we do for rules. Every little administrative guidance document we may not even be aware of, but we certainly wouldn't have the time or resources or, frankly, would not be worth the time or resources, to review. But if we know of a significant document and it is one that the agency wants us to review, we will typically review it.

*Mr. Hice. Is there a possibility that some significant, potentially significant guidance documents are not looked at and slip through the crack, so to speak?

*Mr. Shelanski. Well, there are some guidances that it wouldn't be within our purview to review.

*Mr. Hice. Such as?

*Mr. Shelanski. You know, there are agencies whose guidances we don't review or guidances that are really for internal functioning of an agency or government entity. We very often don't review those because those aren't having impact on stakeholders and the public.

*Mr. Hice. But the guidances that, in effect, impact the public in whatever different ways that in essence become laws, regulations, can you assure us that all of those are looked at?

*Mr. Shelanski. We certainly try to look at guidances that are in themselves creating new regulatory effect. Many guidances articulate an intent to do future rulemakings, and we may not review them because we know we will review the rules.

*Mr. Hice. Okay, sir. Thank you.

I yield back. Thank you.

*Mr. Meadows. I thank the gentleman from Georgia.

Let me follow up, Mr. Shelanski. What agencies? You said there are some agencies you don't review their guidance. What are those agencies?

*Mr. Shelanski. We don't typically review guidance, interpretive guidance documents, for example, of the Internal Revenue Service. We don't review, typically, guidance documents of independent agencies.

*Mr. Meadows. So no independent agencies.

*Mr. Shelanski. We do not review independent agencies.

*Mr. Meadows. All right. So Department of Commerce?

*Mr. Shelanski. Department of Commerce is an executive branch agency.

*Mr. Meadows. So do you review any rulemaking that comes from them?

*Mr. Shelanski. Yes, we do. We review many rulemakings that come out of the Department of Commerce.

*Mr. Meadows. Guidance?

*Mr. Shelanski. If there is a guidance document that we are aware of that has regulatory effect, we --

*Mr. Meadows. I guess what I am trying to get at, without me guessing which ones, which agencies do you exclude from reviewing guidance other than the IRS?

*Mr. Shelanski. Independent agencies.

*Mr. Meadows. And no others?

*Mr. Shelanski. No others that I can think of off the top of my head.

*Mr. Meadows. All right, so part of your process is really to look at guidance with the EPA, for example.

*Mr. Shelanski. The answer is yes, but not every guidance that the EPA might issue.

*Mr. Meadows. So internal guidances you don't; external guidances you do. So if they are giving a guidance, because what is happening, as you well know, is that there are rules, there are guidances, but depending on who you are talking to, they treat the guidance as a rule. Would you agree with that, in practice?

*Mr. Shelanski. What we try to do is --

*Mr. Meadows. Yes or no, do you agree with that or not?

*Mr. Shelanski. I agree that there are sometimes guidances that have regulatory --

*Mr. Meadows. That get treated as rules.

*Mr. Shelanski. Yes. And we try to review those.

*Mr. Meadows. All right. How do you make sure that you review all of those if they are being used as a rule? Because what I found is with guidances, the agency many times will use it as a rule if it is to their advantage, and if it is not being implemented, then they say, oh, well, that is just guidance, it is not a rule. How do you deal with that?

*Mr. Shelanski. Well, we deal with the situation where an agency is issuing a guidance that purports to interpret a rule, and we look to see whether it is extending the rule, whether it was adding burdens that had not been commented on, that were not part of the rulemaking process.

*Mr. Meadows. All right. So tell me how you use the Unified Agenda to promote transparency, or does it?

*Mr. Shelanski. Well, the objective of the Unified Agenda and Plan -- there are two different documents.

*Mr. Meadows. Right.

*Mr. Shelanski. The Agenda is a broad document that will contain things that are a little more far-reaching into the future; the Plan is really the more focused document on what

the agency intends to do over the next year. What we try to do is make sure that all rules and significant guidances are listed there so that the public --

*Mr. Meadows. So when they will be coming up so the public will know about them.

*Mr. Shelanski. Exactly.

*Mr. Meadows. All right. So it is important that you make that as transparent as possible so that the general public can know about it.

*Mr. Shelanski. That is why we have worked very hard over the past couple of years to get that on track for its publication both in the fall and the spring.

*Mr. Meadows. Well, it is curious you say that.

If you will go ahead and put up the slide.

[Slide.]

*Mr. Meadows. Because if that is truly the agenda and that is truly your responsibility, let me show you this particular chart. What we have gone back to is the spring of 2012, when it wasn't even issued, the Unified Agenda wasn't. So you can say, well, that was not really your responsibility at that particular point. But let me tell you the concern that I have is each time that you publish it, it is the Friday before Christmas, the day before the July 4th, the day before Thanksgiving, the Friday before Memorial Day, and the Friday before Thanksgiving.

And if you truly want transparency, why are you rolling this out at a time when people wouldn't really be focusing on it? That is what we call the Friday afternoon data dump. But it is really what you are doing with regards to the Unified Agenda. Why would you do that?

*Mr. Shelanski. Well, with all respect, sir, the Agenda remains posted.

*Mr. Meadows. I understand. But when it comes out, it is newsworthy. Maybe you can help me a little bit further, then, with all due respect. Why do we have question marks under the spring of 2014 and the fall of 2014 in terms of those other, the Plans, as you talked about? That is under your watch.

*Mr. Shelanski. So I am sorry, both of those were issued. I don't understand. The Plan and Agenda were both issued in the fall and the spring. I don't see what you are referring to.

*Mr. Meadows. Okay, from what I understand from counsel, that is a memo that is basically saying on how to respond, not that you put it out.

*Mr. Shelanski. Oh, the memo to the agencies and the deadline for agency plans? Those were issued in each of those times, so I do not have any knowledge of why your slide has question marks.

*Mr. Meadows. Okay. Well, Mr. Shelanski, I guess the

concern that I have is we have asked you for those, the committee has, and you haven't responded.

*Mr. Shelanski. I am sorry, you have asked me for what, sir?

*Mr. Meadows. For those documents. And you say you have published them. But we have asked for them and you haven't --

*Mr. Shelanski. The memo to the agencies for the Plan and Agenda were duly issued. We received responses and we posted those Plans and Agenda. It may be that it happened before holiday weekends or near holidays, but they were in the fall, they were in the spring. Everyone knew they were coming; they were well covered and they remain posted.

*Mr. Meadows. I guess my question, and I see the ranking member has come back, so we will go to another line of questioning here, you mentioned earlier with regards to the emails, and when I was asking all of that you said that we are not entitled to that. Under what statute or are you claiming executive privilege on why we would not have those?

*Mr. Shelanski. Sir, let me clarify. I am not claiming executive privilege at all. We at OIRA are part of a review process prior to publication of a rule Prior to the point where the proposed rule, where it goes out for public comment, we are part of a deliberative process where the integrity of this process, the honest discussion and deliberation between staff at OMB and OIRA, staff and the agencies has to be able to occur.

We do post, just to be clear. Everyone can know what the rule looked like when it came into OIRA. That is not hidden from view. Everyone knows what the rule looks like when it goes out. There is docketing on everything that goes back and forth on Clean Air Act rules under the statute, so that is quite clear. And in terms of staff emails and things like that, we don't discuss those because they are part of a deliberative process and they encourage honesty and integrity in the discussions between staffs of agencies and OIRA.

*Mr. Meadows. So your testimony here today is that keeping that information from the public encourages honesty and transparency. Is that your testimony today?

*Mr. Shelanski. It encourages staff to talk honestly with each other, to ask hard questions of each other, to discuss what might be problems or incompleteness in a rule. It is worth making clear again that we are OIRA are just part of the review process.

*Mr. Meadows. All right, so let me close with this, then. Can you send us a list of either pre-proposed rules or other rules that are undergoing the informal review process? Can you send us a list of those rules?

*Mr. Shelanski. I don't know what you are referring to

when you talk about the informal review process.

*Mr. Meadows. Just all of them. Can you send us a list of those that are in the informal rulemaking process or those that are about to be proposed that they are asking you to weigh in on? Because you get comment in that deliberative process.

*Mr. Shelanski. No, those are rules that are formally under review, sir.

*Mr. Meadows. So your testimony here today is that you never engage in dialogue back and forth on an informal rulemaking process?

*Mr. Shelanski. Sir, we don't have an informal rulemaking process. Agencies make rules.

*Mr. Meadows. Do you engage on informal rules-making? Yes or no?

*Mr. Shelanski. Again, I don't know what you are referring to when you refer to informal rulemaking.

*Mr. Meadows. So there is never an informal process in the deliberative process?

*Mr. Shelanski. There are times when agencies will come to brief us on a rule that is under development.

*Mr. Meadows. That is informal.

*Mr. Shelanski. Well, the rule is being developed by the agency. I assume it is part of a formal rulemaking process, so that is why I am not quite sure what you mean by informal. They will, on occasion, come and brief us and say --

*Mr. Meadows. Okay, what I am talking about is before the rule is proposed, do they have discussions with you, Mr. Shelanski? It is very clear. Yes or no?

*Mr. Shelanski. Sir, before it is submitted to us for review or before the agency publishes it as a proposed rule?

*Mr. Meadows. Before they publish it as a proposed rule. Do they have discussions with you?

*Mr. Shelanski. Of course they do, because then it is a formal review process. It has been submitted to OIRA for review.

*Mr. Meadows. So there is a formal review before they propose the rule.

*Mr. Shelanski. Correct. Proposed rules, NPRMs, are reviewed formally by OIRA.

*Mr. Meadows. So can we get those documents?

*Mr. Shelanski. Excuse me?

*Mr. Meadows. I said can we get those documents.

*Mr. Shelanski. The documents you can have are the rule that they submitted to us and then the rule that they published so you can see what changed in that process. In terms of emails and interim discussions amongst staff, we do not disclose those.

*Mr. Meadows. All right, thank you.

I will recognize the gentleman from Pennsylvania for a second round of questions.

*Mr. Cartwright. Thank you, Chairman Meadows.

Again, Administrator Shelanski, thank you for being here. I want to talk about delays, and you have touched on it a little bit, but delays in OIRA's regulatory review process.

OIRA has been criticized by members of Congress on both sides of the aisle because certain rules have been under OIRA review for longer than 90 days. The 90-day deadline for OIRA to complete its review of final rules was set by executive order in 1993 and reaffirmed by President Obama in 2011.

In June of 2013, several Senate and House members, Democrats, wrote to the then director of OMB, Sylvia Burwell, expressing concern about a number of rules that had been under OIRA review for well beyond that 90-day limit, and, Administrator Shelanski, I too am concerned about lengthy delays in OIRA's regulatory review process.

You have touched on a little bit already, but I want you to elaborate on what the factors are that cause OIRA's review process to go beyond the 90-day period. Will you do that?

*Mr. Shelanski. Yes. Thank you very much, Mr. Cartwright. So let me begin by just framing the issue.

I think that the reduction of extended review periods has been one of the success stories of OIRA over the past couple of years. We have very few rules, and especially compared to what the situation was when the letter was written to then Director Burwell, that are under extended review and, on average, we are meeting our normative time. In fact, we are getting a lot of rules reviewed, I think, very effectively. And it has been part of my objective to move rules as quickly as we can.

As to the factors that can lead that not to happen on some occasions, there are several. One of them is simply this: some rules, as you no doubt know, are extremely complex. This doesn't necessarily correlate with the length of a rule or the number of pages of a rule; but some rules, just the underlying analysis and what the rule is trying to do, and our ability to evaluate whether the rule is going to achieve its objectives in a cost-effective way, can be a very difficult process. So the 90-day time period is just simply not possible for some rules.

*Mr. Cartwright. Because of complexity.

*Mr. Shelanski. Because of complexity and the difficulty of working through the rules.

I would also note that the review process is really a very collaborative process. It is not a case where a rule necessarily comes in and then, in one whole big piece, gets sent back to the agency and then we wait for it to come back; there is ongoing discussion, there are pieces of the rules that are

worked on. Sometimes the agency itself will discover that there are issues with the data or the analysis it has used. So that factor of just working out difficult problems is probably the one that most centrally contributes to longer rulemaking periods, but there can be other ones.

Agencies will often have their priorities jumbled by intervening events. They may decide to de-emphasize a rule as a priority for a period of time, so a rule may take a back seat at the agency for three or four months. Or the agency may say, hey, OIRA, can you wait on that rule that we already sent you and jump this other one in line? So we have the rule for that period of time. So there are a number of factors that really can figure in.

And then other times, as I think I alluded to before, there are rules that really affect multiple agencies, and sometimes it can be very hard to find exactly how the puzzle piece fits with different agencies' statutes and regulations, so that can add complexity and time to the rulemaking process.

There can be a trade issue under the WTO that requires significant analysis by counsel. That can take a long period of time.

What I can assure you is that the OIRA staff are really highly efficient and work as quickly as they can. We don't want rules on our desks for longer than the normative time, and we work very hard, and I think it shows in the success we have had over the past couple of years, success that started in the months prior to my arrival at OIRA and that I have been glad to be able to maintain and continue in getting the extended review periods down.

*Mr. Cartwright. May I ask you to share some of your benchmarks with us? You may not have them with you today, but will you send us some of your benchmarks that you have been hitting, as far as measurable goals in reducing the number of rules under review past the 90-day period?

*Mr. Shelanski. I would be happy to follow up with you, sir.

*Mr. Cartwright. Finally, you talked about complexity as one of the factors. Administrator Shelanski, does OIRA have adequate resources to perform its regulatory reviews? In other words, where complexity is slowing you down, would additional resources help?

*Mr. Shelanski. You know, when it is a question of complexity, it is really just working through hard issues. I don't think that that is a case where I would point to the need for additional resources. We have been able to do a pretty good job. We have a really hardworking staff. We have been able to retain really excellent people at OIRA.

I think, look, all of OMB, we are a small office overall, has been, I think, straining against resource constraints to do the jobs that it does, so we at OIRA I think are no different from other components within the Office of Management and Budget, but I think we have the tools we need and we have been able to do pretty good job. That is why we have been able to reduce the number of rules under extended reviews, just getting our processes working well and having people work very hard.

*Mr. Cartwright. Well, thank you for that.

Mr. Chairman, I yield back.

*Mr. Meadows. I thank the gentleman from Pennsylvania.

The chair recognizes the chairman of the Committee on Health Care and Government Relations Subcommittee, Mr. Jordan.

*Mr. Jordan. I thank the chairman.

Mr. Shelanski, Government should be as transparent as possible. Would you agree with that?

*Mr. Shelanski. Yes, sir.

*Mr. Jordan. I mean, when we make laws, that is why we have debate; that is why we have a Congress; that is why we have elections. We want it to be as transparent as it possibly can be. And that is what OIRA is all about, right? The agencies have certain rules that they put together. You don't necessarily look at the rule itself so much; you look to make sure they did the process right, the transparency process, and they followed what they are supposed to do when they arrived at the rule they arrived at, is that right?

*Mr. Shelanski. We look very closely at the substance.

*Mr. Jordan. You look closely at the substance as well. But mostly the process, right?

*Mr. Shelanski. No.

*Mr. Jordan. Both of them? Even better.

*Mr. Shelanski. Both of them --

*Mr. Jordan. Even better. All right. So the General Accounting Office just issued a report where they talked about the number of agencies who issue rules without public notice and without public comment. The report is entitled Agencies Often Publish Final Actions Without Proposed Rules, dated just last month, February 26, 2015. And in that report they say that the OIRA staff have regularly questioned agencies' use of the good cause exception.

So I just want to make sure I understand this completely. Transparency is the norm; that is what we want. When agencies make rules, they are supposed to have a public notice, public comment period, correct?

*Mr. Shelanski. Correct.

*Mr. Jordan. All right. But there are exceptions to the Administrative Procedure Act where you don't have to necessarily

do public notice and public comment. Is that all accurate?

*Mr. Shelanski. There are some exceptions, correct.

*Mr. Jordan. Some exceptions. Right. And the GAO is saying we have too many of those, too many times that is happening. This is their report. But they said when it does, your staff has assured GAO, and I am quoting directly from their report, "OIRA staff have regularly questioned agencies when they use the good cause exception." Is that accurate?

*Mr. Shelanski. So let me -- the answer is yes, it is accurate.

*Mr. Jordan. Okay, so I just want to be clear. When agencies say we are not going to do the most transparent way, we are going to deviate around the normal process. There is an exception for not having public notice, public comment. But you look at that when they do those exceptions, correct?

*Mr. Shelanski. So let me tell you what we do.

*Mr. Jordan. I want to know if that is a yes or no, though, if you could.

*Mr. Shelanski. There are times when we have a basis for questioning that; there are times when we do not. There are statutes that authorize the use of what are called interim final rules or direct final rules --

*Mr. Jordan. The report says you regularly question agencies' use of good cause exception. So when they deviate from the process, you regularly ask them questions. What I want to know is, in those situations where you don't, is that just a handful of times, is it 10 percent of the time? What is the time?

*Mr. Shelanski. So the times when agencies seek to get around public comment and not to issue a notice of proposed rulemaking, but to go directly to some kind of final rule, are very rare.

*Mr. Jordan. Okay, very rare.

*Mr. Shelanski. All right, now, I want to get to the specific example that has just been in the news just this past month. The Bureau of Alcohol, Tobacco and Firearms has a recent proposal to ban certain type of ammunition. Are you familiar with this?

*Mr. Shelanski. No, sir, I am not.

*Mr. Jordan. Okay. And they have said they are not going to follow the normal process, the most transparent process; they are going to deviate from that and they are not going to have public notice and public comment. And they are citing for good cause, that notice and public procedure are impractical, unnecessary or contrary to public interest. What I want to know is has OIRA given the ATF the thumbs up to follow the exception and not do the norm, the most transparent thing, and have public

notice, public comment.

*Mr. Shelanski. So the first thing I would notice is OIRA does not review all Federal rules, all executive branch rules. There are thousands of such rules. We review about 500 a year.

*Mr. Jordan. That is fine.

*Mr. Shelanski. It is very possible --

*Mr. Jordan. But I am asking about one in particular. I am asking did you review this. Did you say to ATF, it is okay if you don't follow the normal public notice, public comment?

*Mr. Shelanski. So it would not be our place to say that to ATF if that rule was even ever submitted to OIRA. I should make clear when an agency does submit a rule to us that it seeks to do by a means other than the standard APA process, that is when we have occasion to question that agency.

*Mr. Jordan. So you have had no influence, no say on ATF's decision not to follow public notice and public comment. Do you expect to have any say in their decision not to follow public notice, public comment?

*Mr. Shelanski. As I say, I am not familiar with this particular regulation, so I cannot comment.

*Mr. Jordan. Well, lots of Americans are familiar with it, Mr. Shelanski.

*Mr. Shelanski. But what I will tell you is that any such determination by an agency is judicially reviewable under the Administrative Procedure Act, and lots of Americans, as you put it, would have recourse to the course to challenge that determination.

*Mr. Jordan. That is after the fact. What you are supposed to be is on the front end. I know that; everybody knows after the fact we can take action, but that is costly, that takes more time. The whole idea is that on the front end we are supposed to get it right. That is why I am asking you. Do you plan to check out this rule?

*Mr. Shelanski. It is not either the role or the scope of OIRA to go to every agency for every rule in the Federal Government and to second-guess their process.

*Mr. Jordan. If I could, Mr. Chairman, then I will stop.

But I am reading from the GAO report which says your staff regularly questions agencies' use of the good cause exception. Here is an agency using the good cause exception and you are telling me we have not questioned them and we never plan to question them, and oh, by the way, if you don't like it, Americans, take them to court.

*Mr. Shelanski. What I told you was I would look at that very closely if the rule were submitted to OIRA. I don't know if this rule was ever submitted to OIRA. I can't question a rule that has not been submitted to my office.

*Mr. Jordan. We are running in circles here, Mr. Shelanski, and that is the problem.

*Mr. Shelanski. There is no circle here, sir.

*Mr. Jordan. If the agency says we are not going to submit it to you, then you say, well, we don't have to review it even though they are not being transparent and not following public notice, public comment.

*Mr. Shelanski. So as I think I made clear, we don't review all Federal rules. What the GAO report is referring to is when we question agencies that have submitted the rule for us to review or where it is a rule worthy of review.

*Mr. Jordan. Well, that is great. That is great. I would love not to have, so they don't even have to give it to the authority who is going to tell them what, and you said in your opening comments we are going to look at the procedure they use and the substance. I disagree with both what the ATF did here, both the procedure and the substantive change. This has been a rule that has been in place since 1986, and they suddenly are just going to change it and there is no review process.

*Mr. Shelanski. There is a review process. First of all, the agency is responsible for that policy.

*Mr. Jordan. They have already told us what they are doing.

*Mr. Shelanski. If it is an interim final rule, an interim final rule goes out for public comment after it is enacted, so there is a chance for public comment, and there is judicial review.

*Mr. Jordan. Mr. Chairman, I apologize. Thank you for your indulgence on the time, but we have been running circles around this and this is just not the way it is supposed to work for the American people.

*Mr. Meadows. I thank the gentleman from Ohio.

We go to the gentlewoman from the Virgin Islands, Ms. Plaskett.

*Ms. Plaskett. Thank you very much, Mr. Chairman, Mr. Chairman, and both Mr. Ranking Members for this hearing.

Good afternoon, sir. I had a question and wanted to get some indication from you about international regulatory cooperation. If you could just speak a little bit about that and its benefits and how that has worked thus far.

*Mr. Shelanski. Sure. Thank you very much for your question. I appreciate that.

We have an executive order, Executive Order 13609, that the President issued which gives OIRA a role in international regulatory cooperation. We currently have what I would describe as both formal and informal roles in regulatory cooperation. We have two formal regulatory cooperation councils, one with Mexico

and one with Canada, and the objective of that council is to get our agencies working directly with the agencies of our international partners, agency-to-agency, to try to make sure that there are not unnecessary regulatory impediments to trade, commerce, competitiveness, those kinds of things.

So we have a very productive set of working relationships with both of those.

*Ms. Plaskett. And can you cite examples where that has been productive to date?

*Mr. Shelanski. Sure. With Mexico, for example, there were some very interesting questions about the regulation of nano materials in various kinds of products, including agricultural products, and there were very different approaches in both countries, and through the RRC we have been able to reach, I think, some productive results.

We are also working with Canada currently on a number of issues to ensure that regulations that are pending in agencies here don't get cross-wise with or create difficulties for entities doing business across our border with Canada.

*Ms. Plaskett. So I wanted to bring it a little closer to home, then, to my own waters in the Virgin Islands and wanted to know if the benefit of OIRA being involved in some issues that we have, and that is duplication of agencies in permitting processes. So we have a lot of projects that revolve around our waters, dredging projects, development projects that involve the Army Corps of Engineers, NOAA, EPA, subdivisions in each of those. That duplication and need for everyone to go through these processes costs us hundreds of thousands of dollars a year and the impact economically is enormous when we are not able to meet deadlines for dredging projects, which means that cruise ships can't come in, puts us at competitive disadvantage.

Even now we have a project where the Army Corps of Engineers were needing a permit so that we can move from fossil fuel to being one of the first areas in the Caribbean using LPG, liquid petroleum gas, in the area -- I am sorry, propane gas. And the need of duplication between these agencies in coordination is having a horrendous effect on the economy.

Does OIRA become involved in that, and if not, why not, and how could you?

*Mr. Shelanski. Thank you for that question because you have raised a critical issue and I think an issue that is a very high priority for President Obama's Administration. Permitting reform is a very active process that the Office of Management and Budget is deeply engaged in, and OMB, particularly my colleagues on the management side, are running a significant interagency process to streamline and reform permitting.

OIRA is available to work on that; it is not really central

to the work we do, but we are involved with and certainly encourage that general reform effort. What OIRA does do is when we review regulations that have permitting requirements in them, we look to see whether or not those are unnecessarily burdensome or duplicative. So in the context of reviewing rules, we most certainly do take into account exactly the kind of duplication that you look at and, indeed, part of the retrospective review efforts that we are engaged in with every Federal, every executive branch agency right now are designed to identify and eliminate exactly the kinds of problems that you look at.

But certainly permitting reform is very high on the Administration's and OMB's agenda, and I think real progress is being made.

*Ms. Plaskett. Thank you. When you talked about the retrospective analysis, has there been a notable one that you could give us as an example of retrospective analysis of outdated or inefficient regulations?

*Mr. Shelanski. Yes. We have a number of such rules. Just to give you an example of a very recent one, the Department of Transportation used to require every truck driver, after every trip, to file an incident report even if there had been no incident. This was costly in terms of systems, paperwork, driver time, and they went back and determined that there was no safety benefit that came from those reports and repealed the report for savings of about $1.7 billion to the trucking industry. And I think if you stay tuned over the next several months you will see numerous additional things.

*Ms. Plaskett. Thank you very much.

Thank you, Mr. Chairman.

*Mr. Meadows. I thank you.

The chair recognizes the ranking member, Mr. Connolly, for a few more questions.

*Mr. Connolly. I thank the chair.

Actually, we may submit some questions for the record, Mr. Shelanski, but one area that bothered me about what you said on how your door is always open and you have to take all-comers, right?

*Mr. Shelanski. Correct.

*Mr. Connolly. Are you open on weekends?

*Mr. Shelanski. I am working most weekends, but the Federal Government is not open on weekends.

*Mr. Connolly. So the hourly wage earner who might have a concern about a pending regulation or a lack thereof, or a view about cost and benefit, he or she has to take time off to avail himself or herself of your door being open. Lawyers get paid for going through your door, but sort of a working man or working woman who might be affected by actions of your office

actually kind of don't have the same access, do they?

*Mr. Shelanski. You know, we have actually had some very interesting meetings where exactly the kinds of people you have described have come in to see us and to tell us their stories. In terms of the access we provide, it may not be as easy to take advantage of for people who live far away or for people who don't have the means. People can call us; we take telephone meetings. We receive letters. But in terms of our door being freely open to those people, and, in fact, some such folks exactly as you have described have taken advantage of it, I would maintain that we do represent as equal access as it is in our power to provide.

*Mr. Connolly. Okay.

Mr. Chairman, rather than continue, given the lateness of the hour, if you don't mind, we would submit some additional questions for the record.

*Mr. Meadows. I look forward to those.

*Mr. Connolly. I thank the chair.

*Mr. Meadows. I thank the ranking member for his insightful questions.

Let me just close out by following up. The gentleman from Kentucky is here and he actually serves on the House Transportation and Infrastructure Committee. We have had a number of hearings in that committee on the Waters of the USA, on the proposed rule, and I believe it is your testimony here today that they have not officially submitted that to you, is that correct?

*Mr. Shelanski. That is correct.

*Mr. Meadows. So you have had no dialogue with them.

*Mr. Shelanski. I have had no dialogue with the EPA --

*Mr. Meadows. Informal or formal.

*Mr. Shelanski. I have had no dialogue whatsoever with the EPA on Waters of the U.S.

*Mr. Meadows. Okay. How about deliberations?

*Mr. Shelanski. No deliberations, no discussion.

*Mr. Meadows. So if we were to ask for all of your records, we would find zero records, emails, nothing with the EPA with regards to that rulemaking or proposed rule.

*Mr. Shelanski. We concluded review on the proposed rule. The EPA took it from there. The next I will hear about it is when they submit the final rule for review.

*Mr. Meadows. All right. So let me go back. It gets back to documents. What documents do you actually keep? Because I think we were using the same terminology, but just in different ways.

*Mr. Shelanski. Okay.

*Mr. Meadows. We were talking about informal rulemaking,

and then I have heard you say that three or four times, but, yet, when I asked the question, you act like you didn't know what it was. So let me be specific, all right?

The GAO has come in and they have found issues with the practice of you reviewing preliminary drafts and doing analysis for agencies before they actually submit it to you, before the time clicks in the for 90 days. Does that sound familiar?

*Mr. Shelanski. No. What you describe --

*Mr. Meadows. So you have never done that?

*Mr. Shelanski. Let me explain.

*Mr. Meadows. Because I will get the GAO in here to sit right beside you, because they believe that you have.

*Mr. Shelanski. Look, I can testify to what has happened since I have been administrator of the office, and I can tell you what does happen and what I haven't seen happen. What does happen is there are times that agencies will come to us in advance of submitting their rulemaking package and say do we have the right components of a regulatory impact analysis? Can you look at the cost-benefit analysis that we are doing and tell us if we are going to need to do more?

*Mr. Meadows. But that is before they have actually proposed the rule, so the answer would be exactly oppose of what you just answered. The answer would be yes to that question.

*Mr. Shelanski. But that is not a review of the rule and a whole package, and sort of a preliminary --

*Mr. Meadows. Well, let me just say your students at school, at Georgetown, if they answered your exam the way that you are answering my questions, I would venture to say you would give them an F.

*Mr. Shelanski. No, I would give them an A for being precise. I am trying to explain to you what it is we do and what we don't do.

*Mr. Meadows. All right. So is your testimony here today that there are no documents, no communication that has taken place between the EPA, either informal or formal, in that rulemaking process? That is your testimony?

*Mr. Shelanski. My testimony, sir, is that since we concluded review on the notice of proposed rulemaking, I have had no communication with the EPA on their final --

*Mr. Meadows. All right, so let me make it clear, then. Will you send us the documents with any aspect that you have been involved with the EPA on that particular rule? Will you send those documents to the committee for their review, yes or no?

Mr. Shelanski. I will not send to the committee documents that were part of the deliberative process where the proposed rule was under review.

*Mr. Meadows. All right. Are you aware that, by statute, you are required to do that?

*Mr. Shelanski. No, sir, I am not aware that by statute I am required --

*Mr. Meadows. OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

*Mr. Shelanski. So that is not a statute, sir, that is the executive order.

*Mr. Meadows. Executive order. So you are only going to comply with part of the executive order.

*Mr. Shelanski. That executive order has been interpreted across all administrations, Republican and Democrat, to embody the deliberative process exception of staff level communications, and we do not disclose those to the public.

*Mr. Meadows. All right.

*Mr. Shelanski. It is to protect the integrity of the process, the --

*Mr. Meadows. I don't see how it does that. I mean, with all due respect, I don't see how. Your particular function is to protect the American people. So how, with you being secretive, does that protect the American people?

*Mr. Shelanski. It protects staff and their ability to do their jobs.

*Mr. Meadows. Is that your primary responsibility? When you were put into place, is that your primary responsibility?

*Mr. Shelanski. My primary responsibility is to ensure good analysis, and, frankly, we wind up with less good analysis and less good work if staff feel that every communication that they have back and forth with an agency is going to be put under the microscope, pulled out of context.

Policy level official communications, policy level communications between me and the head of an agency, those are disclosable. But staff level deliberative process we do not disclose. And I would just emphasize this is across Republican and Democratic administrations that the executive order has been so interpreted.

*Mr. Meadows. All right, we will make one final request, and it is this. Those agencies who have come to you to ask for your input on a proposed rule that they may be in the process of working, in this pre- that the GAO talked about, we would like a list of all of those.

*Mr. Shelanski. I am not sure I have a list, sir, because we only do this when the agency asks to come brief us; and I don't know that I maintain any such list.

*Mr. Meadows. All right. So, then, with the example that Mr. Jordan gave with the ATF --

*Mr. Shelanski. As I told Mr. Jordan --

*Mr. Meadows. So should we have the ATF come back here and testify at how they are taking the good, I guess good common sense exception, should we have them come back to testify, since obviously they have bypassed you?

*Mr. Shelanski. As I thought I made clear to Mr. Jordan, I am not familiar with the rule that he was referring to. We don't see all 3500 rules that the Federal Government passes, so I have no comment or knowledge about what the ATF did --

*Mr. Meadows. So how do you decide which rules to review?

*Mr. Shelanski. Well, when the rules are submitted to us, we make a determination --

*Mr. Meadows. So every agency, they can decide on their own whether to submit them to you?

*Mr. Shelanski. No. If a rule is not significant, then it is up to the agency to do what they want.

*Mr. Meadows. But I will remind you, as you know, the individual and employer mandate, both of those rules were seen as insignificant. Is that your testimony, that you would concur that they are insignificant?

*Mr. Shelanski. Which rules are you referring to?

*Mr. Meadows. The rules that are still outstanding with regards to the employer and individual mandate.

*Mr. Shelanski. Are you talking about the IRS regulation?

*Mr. Meadows. With the Affordable Care Act.

*Mr. Shelanski. Well, if you are referring to the IRS regulations, --

*Mr. Meadows. Yes.

*Mr. Shelanski. -- by longstanding practice, we do not review IRS interpretive regulations.

*Mr. Meadows. So why don't you just say you are not reviewing it, instead of saying it is insignificant?

*Mr. Shelanski. I am not saying that it is insignificant; I am saying we don't review it.

*Mr. Meadows. I thank the gentleman, both ranking members, and each of the committee members who have come today, and, with this, this hearing is adjourned.

[Whereupon, at 4:11 p.m., the subcommittee was adjourned.]