

U.S. House of Representatives

Committee on Oversight and Accountability

**Hearing: Death by a Thousand Regulations: The Biden Administration's Campaign to
Bury America in Red Tape**

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Chairman Comer, Ranking Member Raskin, and distinguished members of this Committee, it is an honor to be with you today. Thank you very much for the invitation to be here. I would like to note at the outset that I am here in my personal capacity to speak with you about my time in government and several recommendations related to that experience, not on behalf of my firm or any client. My aim is not to wade into any particular rule or area of policy, but to talk with you generally about a range of widely accepted good regulatory practices and some common-sense regulatory process reforms.

While serving as chief of staff and counselor for the Office of Information and Regulatory Affairs (“OIRA”) within the U.S. Office of Management and Budget (“OMB”), I had the opportunity to work with a wide range of talented career and political officials across the U.S. Federal Government on the implementation of good regulatory practices and some important regulatory process reforms. To be clear, those measures were *not* political. The process reforms I am about to discuss were anchored in experience and good regulatory practices that, frankly, are agnostic to one’s policy preferences. We built on keen insights of the Carter, Reagan, Bush, Clinton, and Obama Administrations. We rooted our reforms in the longstanding good government recommendations of bodies like the Administrative Conference of the United States, the American Bar Association, the Organization for Economic Development and Cooperation, and the World Bank. Our federal government regularly champions these values around the world, and you will find many of them reflected in things like the “Good Regulatory Practices” chapter of the new United States-Mexico-Canada Agreement.

With that said, I would like to start by: (I) Describing the world before we entered government; then (II) explain the reforms we implemented and why I think they were so beneficial for the public; and then (III) cover recent developments and what I think this Committee can do to help move us forward.

I. The Regulatory State Prior 2017

Prior to 2017, new regulations were issuing at an extraordinary rate. According to a 2019 report from the White House’s Council of Economic of Advisors, “From 2000 through 2016, the annual trend was for regulatory costs to grow by \$8.2 billion each year.”¹ Others determined that the cumulative cost of regulations in 2016 should be measured in the *trillions* of dollars, even exceeding the total amount of tax revenues collected that year.² Still others found, “The slower economic growth associated with regulatory accumulation resulted in an economy that was \$4 trillion smaller in 2012 than it could have been without such regulatory accumulation.”³ One

¹ ECON. REP. OF THE PRESIDENT; TOGETHER WITH THE ANN. REPORT OF THE COUNCIL OF ECON. ADVISORS (2019). Washington, D.C.: U.S. Govt. Printing Office, PR 45.9, <https://www.govinfo.gov/content/pkg/ERP-2019/pdf/ERP-2019.pdf>.

² See, e.g., Clyde W. Crews, *Ten Thousand Commandments: An Ann. Snapshot of the Fed. Regulatory State* (2017 Edition), Competitive Enterprise Institute, May 25, 2017, https://cei.org/news_releases/costs-and-burden-of-federal-regulations-reach-1-9-trillion/.

³ Patrick McLaughlin et al, *Regulatory Accumulation and Its Costs*, Mercatus Center, May 4, 2016, <https://www.mercatus.org/research/policy-briefs/regulatory-accumulation-and-its-costs>.

study in the *Journal of Economic Growth* determined that between 1949 and 2005, the accumulation of federal regulatory costs had slowed our nation's gross domestic product ("GDP") by about 2 percent per year.⁴ To be sure, the nature of regulatory impact assessments makes it difficult to determine the precise total costs and benefits of regulations. Whatever those precise figures may be, however, we know that between 2012 and the election in 2016, small businesses regularly reported that the issue of cumulative regulatory burdens was their top business concern.⁵

What's more, beneath those numbers was a set of regulatory habits and practices that needed reform. As will be explored in more detail shortly, there were missed opportunities to increase transparency and public engagement. There was no regulatory budget to guide decision-making. Retrospective review was underway, but it could have been far more robust. The role of benefit-cost analysis could have been strengthened and extended, and further efforts could have been made to anchor policy choices in the best reasonably available, public-facing information.

Then, starting in 2017, there was a dramatic change. The U.S. Federal Government implemented a robust set of regulatory process reforms that significantly improved the overall regulatory environment, allowing the government to continue protecting health and safety while also providing more room for innovation, public engagement, personal freedom, consumer choice, and economic growth.⁶ For the first time in my former office's records, something astounding happened: Rather than continuing to climb higher and higher each year, the total cost of new regulations across the federal government actually went down through the X-axis, into negative territory. By the end of just our second fiscal year, the federal government saved, on net, \$33 billion in regulatory costs. During that same period in the Obama Administration, by contrast, the government imposed, on net, \$245 billion. That's a \$278 billion difference in approach.

What made possible that dramatic turn around? We implemented a set of regulatory process reforms designed to respect the public and ensure the government took a humbler approach to regulating.

⁴ John W. Dawson and John J. Seater, *Federal Reg. and Aggregate Econ. Growth*, *Journal of Econ. Growth*, Mar. 21, 2013, <https://link.springer.com/article/10.1007/s10887-013-9088-y>.

⁵ ECON. REP. OF THE PRESIDENT; TOGETHER WITH THE ANN. REPORT OF THE COUNCIL OF ECON. ADVISORS (2019). Washington, D.C.: U.S. Govt. Printing Office, PR 45.9, <https://www.govinfo.gov/content/pkg/ERP-2019/pdf/ERP-2019.pdf>.

⁶ *See, e.g.*, Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017); Exec. Order No. 13,777, 82 Fed. Reg. 12285 (March 31, 2017); Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 9, 2019); Exec. Order No. 13,892, 84 Fed. Reg. 55239 (Oct. 15, 2019); Exec. Order No. 13,893, 84 Fed. Reg. 55,487 (Oct. 16, 2019); Exec. Order No. 13,924, 85 Fed. Reg. 31,353 (May 19, 2020); Exec. Order No. 13,979, 86 Fed. Reg. 6,813 (Jan. 22, 2021); and Exec. Order No. 13,980, 86 Fed. Reg. 6817 (Jan. 22, 2021).

II. Key Regulatory Process Reforms

Starting in 2017, the U.S. Federal Government introduced a number of regulatory process reforms that played a very productive role in improving the overall regulatory environment. Perhaps the most well-known of those reforms was the regulatory budget, which had already been deployed and proven around the world and in many U.S. States.⁷ Many of the other reforms reflected the longstanding recommendations of leading bodies such as the Administrative Conference of the United States, the American Bar Association, the Organization for Economic Development and Cooperation, and the World Bank.⁸ They also built on the experience and keen insights of prior administrations, from the Carter Administration through the Obama Administration.

Those measures included: (A) providing more public transparency on regulations under development; (B) improving agency guidance practices, including by making it easier to find guidance; (C) providing more opportunities for public engagement in the rulemaking and guidance processes; (D) developing and sticking to a regulatory budget; (E) conducting a retrospective review of older standards; (F) encouraging the use of rigorous benefit-cost analysis in an ever larger universe of actions; and (G) ensuring regulatory policy was anchored in the best reasonably available, public-facing information. These remarks now take those measures in turn.

A. More Transparency on Rules Under Development

One terrific feature of the federal regulatory development process is the Unified Agenda of Regulatory and Deregulatory Actions, which operates pursuant to an Executive Order of President Bill Clinton and the Regulatory Flexibility Act.⁹ The Agenda, as we call it, provides the public with a semi-annual snapshot of all regulatory actions under development across the

⁷ See, e.g., James Broughel, *The Regulatory Budget In Theory And Practice: Lessons From The U.S. States*, 45.1 HARV. J LAW & PUB. POL'Y 1, 11 (2022); and Andrea Renda, *Regulatory Budgeting: Inhibiting or Promoting Better Policies?*, 45.1 HARV. J LAW & PUB. POL'Y 1, 72 (2022).

⁸ See generally The United States-Mexico-Canada Agreement, U.S.-Mex.-Can., art. 20, agreed to Oct. 1, 2018, at Ch. 28, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/28_Good_Regulatory_Practices.pdf; OECD (2014), *The Governance of Regulators*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, <https://doi.org/10.1787/9789264209015-en>; ADMIN. CONF. OF THE U.S., RECOMMENDATION 88-9, PRESIDENTIAL REVIEW OF AGENCY RULEMAKING 4 (adopted Dec. 8, 1988), <https://www.acus.gov/sites/default/files/documents/88-9.pdf>; ADMIN. CONF. OF THE U.S., RECOMMENDATION 2015-1, PROMOTING ACCURACY AND TRANSPARENCY IN THE UNIFIED AGENDA (adopted June 4, 2015), <https://www.acus.gov/recommendation/promoting-accuracy-and-transparency-unified-agenda>; Letter from the ABA's Section on Admin. Law and Regul. Practice to the Off. Info. & Regul. Affs. (2009); and *Improving the Administrative Process: A Report to the President-Elect of the United States* (2016), 69 ADMIN. L. REV. 205 (2017); Joseph Lemoine, *Global Indicators of Regulatory Governance: Worldwide Practices of Regulatory Impact Assessments*, World Bank Group, <https://documents1.worldbank.org/curated/en/905611520284525814/Global-Indicators-of-Regulatory-Governance-Worldwide-Practices-of-Regulatory-Impact-Assessments.pdf>; The World Bank, *Global Indicators of Regulatory Governance*, <https://rulemaking.worldbank.org/en/key-findings#4>.

⁹ Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006); 5 U.S.C. § 602.

entire federal government. Scholars from across the philosophical spectrum agree this mechanism is important and have called on OIRA to make more robust use of it.¹⁰ I concur with that recommendation. Alas, when we arrived, we discovered that there was in fact a substantial list of pending rules that was not on the public-facing Agenda. The Administrative Conference of the United States (“ACUS”) recommended that we eliminate that “pending list” and make all actions thereon public.¹¹ We followed their suggestion, making all rules under development public once again.

By making all regulatory actions in the pipeline transparent, we were able to make the Agenda more useful for the public and for the government. The public benefited because there was less mystery and surprise about what was coming. Whatever a particular person or group’s views may have been on any given issue, they had the benefit of seeing in advance at least some information about the timing, substance, and anticipated direction of the rulemaking.

With respect to the direction and substance, for example, we noted whether rules were expected to be regulatory or deregulatory. As with many of the recommendations discussed in these remarks, that seemingly small measure provided multiple layers of value to the regulatory process. First, as indicated, it provided the public with visibility into what we were thinking. We did not believe it was appropriate to surprise people with new actions, whether regulatory or deregulatory, so we sought to make sure everyone could see what we were working on and what we intended to do well in advance of the full action being released. Next, it forced analysis to an earlier stage of the regulatory development process. In order to say whether rules were likely to be regulatory or deregulatory in nature, agencies had to perform at least some measure of early analysis. They then had to convince the career OIRA staff of their view, which means there was a very healthy early inter-agency exchange on the analytical underpinnings of policy. Regardless of the policy objectives of the authoring agency, early analysis and engagement like that are extremely good regulatory practices.

The added transparency also helped us to manage the proper implementation of the regulatory budget. We first realized it was necessary to implement this reform as we were attempting to finalize and publish the first Unified Agenda in 2017. In their efforts to comply

¹⁰ See, e.g., ADMIN. CONF. OF THE U.S., RECOMMENDATION 88-9, PRESIDENTIAL REVIEW OF AGENCY RULEMAKING 4 (adopted Dec. 8, 1988); ADMIN. CONF. OF THE U.S., RECOMMENDATION 8 2013-2, BENEFIT-COST ANALYSIS AT INDEPENDENT REGULATORY AGENCIES (adopted June 13, 2013); Letter from the ABA’s Section on Admin. Law and Regul. Practice to the Off. Info. & Regul. Affs. (2009); *Improving the Administrative Process: A Report to the President-Elect of the United States* (2016), 69 ADMIN. L. REV. 205 (2017).

¹¹ Curtis W. Copeland, ADMIN. CONF. OF THE U.S. BLOG, *The Unified Agenda: Proposals for Reform* (March 10, 2015), <https://www.acus.gov/sites/default/files/documents/Unified%20Agenda%20Report%20031015.pdf> [<https://perma.cc/Q97CHXS3>]; ADMIN. CONF. OF THE U.S., RECOMMENDATION 2015-1, PROMOTING ACCURACY AND TRANSPARENCY IN THE UNIFIED AGENDA (adopted June 4, 2015), <https://www.acus.gov/recommendation/promoting-accuracy-and-transparency-unified-agenda> [<https://perma.cc/8MPF-4JJZ>]; Todd Rubin, ADMIN. CONF. OF THE U.S. BLOG, *Unified Regulatory Agenda Change Accords with ACUS Recommendation* (Sept. 8, 2017), <https://www.acus.gov/newsroom/administrative-fix-blog/unified-regulatory-agenda-change-accords-acusrecommendation> [<https://perma.cc/YMP5-2AE6>].

with the regulatory budget, many agencies were developing Agenda entries that superficially complied with the budget but in fact placed many of the rules that were difficult calls or open questions on the non-public pending list. That meant that even more potential regulatory activity was sliding beyond the public's visibility. Consistent with ACUS's recommendation, OMB Director Mick Mulvaney approved putting an end to the pending list. Within a few days, the Agenda underwent a massive transformation as agencies made tough decisions about which rules to keep, which to remove, and which to modify. By converting the Agenda into something that more closely represented the actual regulatory and deregulatory agendas of federal agencies, we were able to provide more effective coordination and management of the regulatory budget.

One other very important improvement we made to the Unified Agenda was to say that an agency could not issue any regulatory or deregulatory action unless they had previously included that action in the public-facing Agenda or obtained a written waiver from the Administrator of OIRA.¹² That adjustment provided flexibility to accommodate things like emergency rulemakings, such as might satisfy the good-cause exception to the Administrative Procedure Act's ordinary notice-and-comment requirements, but it tended to reduce the instance of surprise rulemakings. In our view, if regulatory or deregulatory actions were being planned, the public deserved to know about them well in advance. That standard has been rolled back, but some permutation of it could easily be reintroduced in the future.

The general academic consensus and my own experience suggest that the Agenda is an enormously important component of the regulatory development process. Further efforts should be made to improve the timing, accuracy, substance, and accessibility of the Agenda.

B. Improving Agency Guidance Practices

One issue we – and I suspect many of you – heard often is that people sometimes are not even sure which rules apply to them. That challenge can be especially acute when it comes to guidance documents that may not have the force and effect of law but can still be important. To help provide much-needed clarity, the prior administration took several important steps, anchored in longstanding best practices.¹³ First, each agency had to create a single, searchable website where you could find all the agency's guidance.¹⁴ Agencies also had to publish rules that clarified when and how they would issue guidance and how the public should weigh those documents relative to other agency promulgations.¹⁵ They were also required to take public comment on guidance that OIRA determined to be significant under the longstanding thresholds established by Executive Order 12866.¹⁶ Further, especially during the pandemic, agencies were

¹² Exec. Order. No. 13,777, 82 Fed. Reg. 12285 § 2 (March 31, 2017).

¹³ See, e.g., ADMIN. CONF. OF THE U.S., RECOMMENDATION 2014-3, GUIDANCE IN THE RULEMAKING PROCESS (adopted June 6, 2014),

[Guidance in the Rulemaking Process | Administrative Conference of the United States \(acus.gov\)](https://www.acus.gov/guidance-in-the-rulemaking-process).

¹⁴ Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 9, 2019).

¹⁵ *Id.*

¹⁶ *Id.*

prohibited from bringing civil enforcement proceedings against someone for failing to follow a non-binding guidance document, and they were required to follow other basic fairness principles in agency enforcement and adjudication proceedings.¹⁷

Even before those requirements were formalized, extensive efforts were made to reduce the practice of regulating through guidance. Some guidance documents that would have been published separate from their related regulations were incorporated directly into the rules. Other guidance documents were forced into the ordinary regulatory review process, which meant they were subjected to centralized review, analysis, coordination, and public comment and engagement. Guidance was often marked as non-binding guidance. Many of these efforts were intended to implement and build on the work of OMB's longstanding Good Guidance Bulletin.¹⁸ That Bulletin remains in effect, but many of these other requirements have been rolled back. In my view, it is worth considering whether some permutation of them might be reintroduced.

C. Providing More Opportunities for Public Engagement

Relatedly, consistent with longstanding good regulatory practices and the recommendations of leading independent bodies, we also endeavored to provide earlier and more robust opportunities for public engagement in the rulemaking and guidance processes.¹⁹ You might think of this as attempting to inject a little more democracy in a domain of policymaking that can otherwise be somewhat less democratic, walled off as it often is from the types of pressures you face as elected representatives of the people.

One challenge to ensuring more engagement is that many less formal regulatory actions, such as many guidance documents, are not stamped with a Regulatory Identification Number, or RIN, in the underlying database, which often allows them to escape the requirements of centralized review, including economic analysis, public engagement, and basic coordination. As already discussed, we attempted to address this through both formal and informal procedural mechanisms. For example, we required significant guidance to be treated like significant regulations, which among other things meant the public got more opportunities to see and comment on draft versions of guidance documents before they were finalized. We also encouraged agencies to issue requests for information or advanced notices of proposed rulemaking prior to proposing new regulatory and deregulatory standards.

¹⁷ Exec. Order No. 13,892, 84 Fed. Reg. 55239 (Oct. 15, 2019); and Exec. Order No. 13,924, 85 Fed. Reg. 31,353 (May 19, 2020).

¹⁸ Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007), <https://www.federalregister.gov/documents/2007/01/25/E7-1066/final-bulletin-for-agency-good-guidance-practices>.

¹⁹ See, e.g., ADMIN. CONF. OF THE U.S., RECOMMENDATION 2021-3, EARLY INPUT ON REGULATORY ALTERNATIVES (adopted June 6, 2014), <https://www.acus.gov/sites/default/files/documents/Early%20Input%20on%20Regulatory%20Alternatives%20FINAL.pdf>.

Early and robust public engagement is very important, but it can be difficult to enforce in the Executive Branch. Clearer direction from Congress in these regards could be very helpful.

D. Conducting a Retrospective Review

One great step the Obama Administration took was to conduct a review of rules already on the books to see whether improvements could be made or whether, perhaps, it was time to improve or move on from some outdated, contradictory, or otherwise unbeneficial rules.²⁰ We maintained and embedded that standard in our programs and saw several of those rules over the finish line.²¹

Retrospection is widely regarded as a good regulatory practice and should be part of any healthy, long-term regulatory management program.²²

E. Using a Regulatory Budget

Regulatory budgets have been discussed in the academic literature for decades and have been used around the world and here at home in many of our states.²³ Still, the U.S. Federal Government never operated on a regulatory budget until one was first introduced in January 2017, when President Trump signed Executive Order 13,771.²⁴ The budget put in place by that order required agencies to impose, on net, no new regulatory for fiscal year 2017.²⁵ After that, OMB/OIRA worked with agencies to set an appropriate regulatory budget much as OMB works

²⁰ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

²¹ Exec. Order. No. 13,777, 82 Fed. Reg. 12285 (March 31, 2017).

²² See, e.g., ADMIN. CONF. OF THE U.S., RECOMMENDATION 2021-2, PERIODIC RETROSPECTIVE REVIEW (adopted June 17, 2021), [Periodic Retrospective Review | Administrative Conference of the United States \(acus.gov\)](https://www.acus.gov/periodic-retrospective-review); ADMIN. CONF. OF THE U.S., RECOMMENDATION 2017-6, LEARNING FROM REGULATORY EXPERIENCE (adopted Dec. 15, 2017), [Learning from Regulatory Experience | Administrative Conference of the United States \(acus.gov\)](https://www.acus.gov/learning-from-regulatory-experience); ADMIN. CONF. OF THE U.S., RECOMMENDATION 2014-5, RETROSPECTIVE REVIEW OF AGENCY RULES (adopted Dec. 4, 2014), [Retrospective Review of Agency Rules | Administrative Conference of the United States \(acus.gov\)](https://www.acus.gov/retrospective-review-of-agency-rules); and ADMIN. CONF. OF THE U.S., RECOMMENDATION 95-3, REVIEW OF EXISTING AGENCY REGULATIONS (adopted June 15, 1995), [Review of Existing Agency Regulations | Administrative Conference of the United States \(acus.gov\)](https://www.acus.gov/review-of-existing-agency-regulations).

²³ The practical experience and literature on this topic are extensive. See, e.g., James Lankford, *For a Regulatory Budget: Successful Policies Should Be Made Permanent*, 45.1 HARV. J LAW & PUB. POL'Y 1, 2 (2022); Anthony P. Campau, *Regulatory Budgeting in the U.S. Federal Government: A First-Hand Account of the Initial Experience and Recommendations for Future Regulatory Budgets*, 45.1 HARV. J LAW & PUB. POL'Y 1, 101 (2022); James Broughel, *The Regulatory Budget In Theory And Practice: Lessons From The U.S. States*, 45.1 HARV. J LAW & PUB. POL'Y 1, 11 (2022); Andrea Renda, *Regulatory Budgeting: Inhibiting or Promoting Better Policies?*, 45.1 HARV. J LAW & PUB. POL'Y 1, 72 (2022); Laura Jones & Patrick A. McLaughlin, *Measurement Options for Regulatory Budgeting*, 45.1 HARV. J LAW & PUB. POL'Y 1, 45 (2022); Jeff Rosen, *Putting Regulators on a Budget*, NAT'L AFFS., Spring 2016; Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 836, 836-860 (2014); Christopher C. DeMuth, *Constraining Regulatory Costs Part Two: The Regulatory Budget*, 4 AEI J. ON GOV'T & SOC'Y 29, 32 (1980); and Marcus Peacock, *Implementing a Two-for-One Regulatory Requirement in the U.S.*, The G.W. U. Reg. Studies Center, Working Paper (Dec. 7, 2016), <https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/downloads/WorkingPapers/GW%20Reg%20Studies%20-%20Implementing-Two-For-One%20-%20MPeacock.pdf>.

²⁴ Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

²⁵ *Id.*

with the agencies to set fiscal budgets.²⁶ In some cases, agency regulatory budgets were positive, in others negative, and in others they remained at or near \$0.²⁷

The regulatory budget was perhaps best known by the short-hand phrases, “two-for-one” or “one-in-two-out,” but it is important to note that the one-in-two-out feature was in fact an instrument in service of the real regulatory budget, which was the annual regulatory cost allowance for each agency. To better understand that point, notice that that feature is discussed in Section 2 of Executive Order 13771, the heading for which is “Regulatory Cap for Fiscal Year 2017.”²⁸ You will then see that most of Section 2 is focused on the accounting mechanism associated with the budget, not on the tabulation of ins-and-outs, a topic that was left to the discretion of the OMB Director.

The regulatory budget was a helpful orienting mechanism for the federal departments and agencies reporting to the president. It did not prevent them from issuing new regulations when necessary to protect health, safety, and the environment, as can be seen in each of our annual reports.²⁹ It did, however, encourage agencies to be even more thoughtful when regulating. It promoted them to see if there were old, outdated, unnecessary, duplicative, contradictory, or otherwise unbeneficial rules that could be eliminated. Using a budget to help make choices is common for families, businesses, religious and civic organizations, and other institutions in our society, and we thought it was appropriate for federal regulatory bodies to operate on a budget, as well.

In the end, the regulatory budget achieved its central goal: Federal departments and agencies reporting to the president imposed, on net, no new regulatory costs during the entire four-year period they operated on a regulatory budget. According to OIRA, we actually saw a net regulatory cost savings of \$198.6 billion over those four years.³⁰ Many said it could not be done, but we demonstrated that a regulatory budget could work in the U.S. Federal Government.

²⁶ *Id.*

²⁷ See, e.g., OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM: REGULATORY BUDGET FOR FISCAL YEAR 2020, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Regulatory_Budget_for_Fiscal_Year_2020.pdf.

²⁸ Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

²⁹ See, e.g., OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM: TWO-FOR-ONE STATUS REPORT AND REGULATORY COST CAPS, https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf [<https://perma.cc/335L-6HZQ>]

³⁰ OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM: TWO-FOR-ONE STATUS REPORT AND REGULATORY COST CAPS, https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf [<https://perma.cc/335L-6HZQ>]; OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2018, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2018.pdf [<https://perma.cc/7JS6-GN5J>]; OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2019, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2019.pdf

In my view, the savings we achieved were actually much greater than the figure I just mentioned, in part because many of the actions that were revised or rescinded were less-formal quasi-regulatory actions and guidance documents that, themselves, included no economic analysis that might be used to determine likely benefits, costs, and economic transfer effects. Because there was no analysis in the underlying regulatory actions, agencies revising or rescinding those actions often likewise included no public-facing analysis in the relevant deregulatory actions. We awarded “out” credit for those types of actions, but we did not allow agencies to receive any credit for purposes of the real regulatory budget, which was the regulatory cost allowance. There was some public confusion around that issue at the time, which I attempted to clear in a recent article.³¹

I suspect we will see a return of this common-sense regulatory management device, and I have provided resources in these remarks for how to go about developing and using such a budget in the future.³²

F. Expanding the Application of Benefit-Cost Analysis

Regulatory impact assessments (“RIAs”) are almost universally recognized as providing a helpful, rigorous, and consistent mechanism for informing agency regulatory policy choices.³³ We endeavored to strengthen and expand the role of RIAs and analysis in multiple ways. First, we reiterated that benefits, costs, and transfer effects needed to be weighed carefully in each

[<https://perma.cc/N76R-8N2Y>]; and OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2020, https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2020.pdf [<https://perma.cc/6MZ6-BBFY>].

³¹ Anthony P. Campau, *Regulatory Budgeting in the U.S. Federal Government: A First-Hand Account of the Initial Experience and Recommendations for Future Regulatory Budgets*, 45.1 HARV. J LAW & PUB. POL’Y 1, 101 (2022).

³² As mentioned, the literature on this topic is extensive. *See, e.g.*, James Lankford, *For a Regulatory Budget: Successful Policies Should Be Made Permanent*, 45.1 HARV. J LAW & PUB. POL’Y 1, 2 (2022); Anthony P. Campau, *Regulatory Budgeting in the U.S. Federal Government: A First-Hand Account of the Initial Experience and Recommendations for Future Regulatory Budgets*, 45.1 HARV. J LAW & PUB. POL’Y 1, 101 (2022); James Broughel, *The Regulatory Budget In Theory And Practice: Lessons From The U.S. States*, 45.1 HARV. J LAW & PUB. POL’Y 1, 11 (2022); Andrea Renda, *Regulatory Budgeting: Inhibiting or Promoting Better Policies?*, 45.1 HARV. J LAW & PUB. POL’Y 1, 72 (2022); Laura Jones & Patrick A. McLaughlin, *Measurement Options for Regulatory Budgeting*, 45.1 HARV. J LAW & PUB. POL’Y 1, 45 (2022); Jeff Rosen, *Putting Regulators on a Budget*, NAT’L AFFS., Spring 2016;); Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 836, 836-860 (2014); Christopher C. DeMuth, *Constraining Regulatory Costs Part Two: The Regulatory Budget*, 4 AEI J. ON GOV’T & SOC’Y 29, 32 (1980); and Marcus Peacock, *Implementing a Two-for-One Regulatory Requirement in the U.S.*, The G.W. U. Reg. Studies Center, Working Paper (Dec. 7, 2016), <https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/downloads/WorkingPapers/GW%20Reg%20Studies%20-%20Implementing-Two-For-One%20-%20MPeacock.pdf>.

³³ *See, e.g.*, Joseph Lemoine, *Global Indicators of Regulatory Governance: Worldwide Practices of Regulatory Impact Assessments*, World Bank Group, <https://documents1.worldbank.org/curated/en/905611520284525814/Global-Indicators-of-Regulatory-Governance-Worldwide-Practices-of-Regulatory-Impact-Assessments.pdf>; The World Bank, *Global Indicators of Regulatory Governance*, <https://rulemaking.worldbank.org/en/key-findings#4>.

rulemaking, just as has long been required by Executive Order 12,866.³⁴ Next, as already discussed, we endeavored to treat significant guidance like significant regulations, which meant they were subject to the same analytical standards as traditional significant and economically significant regulations.

We also required agencies to provide OIRA with analysis sufficient to determine whether rules were major for purposes of the Congressional Review Act.³⁵ That step was not widely noticed outside of government, but inside government it was very important because, as you know, the Congressional Review Act's requirements apply across the board, including to those agencies historically regarded as independent. By forcing more analysis on more rules at more agencies, we were more deeply embedding this basic good government practice in more regulatory actions across the government.

We also worked with the Treasury Department to introduce analysis and centralized review to tax regulations.³⁶ For many years, Treasury had largely not conducted analysis or participated in centralized regulatory review.³⁷ Congressional leaders,³⁸ the U.S. Government Accountability Office,³⁹ and leading academics called for a reconsideration or elimination of that exemption.⁴⁰

The benefits of analysis, coordination, and transparency are not confined to any one area of policy. These longstanding bipartisan values ought to be defended and extended wherever possible.

³⁴ See, e.g., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED "REDUCING REGULATION AND CONTROLLING REGULATORY COSTS" 2 (2017).

³⁵ [M-19-14 \(whitehouse.gov\)](https://www.whitehouse.gov)

³⁶ See *Treasury, OMB Come to Agreement on Tax Reg Review*, 2018 TAX NOTES TODAY 72-45 (Apr. 11, 2018).

³⁷ See *Treasury Docs Show Agreement Waiving OMB Review for IRS Rulings*, 2016 TAX NOTES TODAY 185-20 (Sept. 23, 2016); see also Bridget C.E. Dooling, *OIRA's Expanded Review of Tax Regulations and Its Surprising Implications*, 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 224, 226-27 (2019).

³⁸ See, e.g., Letter from Senator Ron Johnson, Chairman, U.S. Senate Comm. on Homeland Sec. & Governmental Affairs and Senator James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt. to Neomi Rao, Adm'r, Office of Info. and Regulatory Affairs (Feb. 1, 2018), <https://www.hsgac.senate.gov/imo/media/doc/2018-02-01-RHJ-Lankford-to-Rao-OIRA-DOTAgreement.pdf>; see also Letter from Senator Orrin G. Hatch, Chairman, U.S. Senate Comm. on Fin., to Jacob Lew, Sec'y, U.S. Dep't of Treasury (Oct. 11, 2016), <https://www.finance.senate.gov/imo/media/doc/Hatch%20Demands%20Treasury%20Clarify%20Use%20of%20Secret%20Memo%20Regarding%20Section%20385%20Debt-Equity%20Regulations.pdf>

³⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-720, REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS TO TAX REGULATIONS AND GUIDANCE 1-2, 37 (2016).

⁴⁰ See, e.g., Hickman, Kristin E., An Overlooked Dimension to OIRA Review of Tax Regulatory Actions (April 2, 2021). 105 Minn. L. Rev., <https://ssrn.com/abstract=3818629>.

G. Improving Information Quality

It is well-established that regulatory policy should be anchored in the best reasonably available information, and that information ought to be made available to the public.⁴¹ The United States-Mexico-Canada Agreement (“USMCA”) promotes the use of this standard in its Good Regulatory Practices Chapter.⁴² This basic good regulatory practice ought to be strengthened and institutionalized more fully in our regulatory process.

III. The Biden Administration and Congress

Unfortunately, many of those common-sense reforms have been overturned.⁴³ The U.S. Federal Government is now issuing more rules at a higher price tag and a faster clip than ever before. According to one study, at its halfway point, the current administration had already imposed \$318 billion in total regulatory costs and 218 million hours of annual paperwork burdens, as compared with the \$208.7 billion of regulatory costs and 131 million hours of paperwork the Obama Administration had imposed over that same period.⁴⁴ Further, as discussed earlier, it is important to note that cost estimates like these are generally based only on regulations that include benefit-cost analysis. Most regulations and the vast majority of guidance documents include no such analysis, which means they get left out of the total calculations. What’s more, recent actions have adjusted the relevant thresholds for analysis, making it possible if not likely that even fewer rules will include such analysis in the future.⁴⁵

The basic practices and procedures of the regulatory development process should not seesaw back and forth in this manner. As discussed above, Congress should step in and make the common-sense regulatory process reforms of the Trump Administration permanent.

⁴¹ ADMIN. CONF. OF THE U.S., RECOMMENDATION 2013-3, SCIENCE IN THE ADMINISTRATIVE PROCESS (adopted June 14, 2013), <https://www.acus.gov/recommendation/science-administrative-process>.

⁴² The United States-Mexico-Canada Agreement, U.S.-Mex.-Can., art. 20, agreed to Oct. 1, 2018, at Ch. 28, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/28_Good_Regulatory_Practices.pdf.

⁴³ See, e.g., Exec. Order No. 13992, 86 Fed. Reg. 7049 (Jan. 25, 2021); Exec. Order No. 14,094, 88 Fed. Reg. 21879 (April 11, 2023); and Pres. Memo. of Jan. 20, 2021: Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 26, 2021).

⁴⁴ See Daniel Goldbeck, *Tracking the Regulatory Record of Recent Administrations at the Halfway Point*, American Action Forum Insight (Feb. 7, 2023), <https://www.americanactionforum.org/insight/tracking-the-regulatory-record-of-recent-administrations-at-the-halfway-point/#ixzz84IZdT7pS>.

⁴⁵ Exec. Order No. 14,094, 88 Fed. Reg. 21879 (April 11, 2023).