Testimony of Sally Katzen
Professor of Practice and Distinguished Scholar in Residence at NYU School of Law

before the
House Committee on Oversight and Accountability

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

June 14, 2023

Chairman Comer, Ranking Member Raskin, and Members of the Committee. Thank you for including me on this panel to discuss President Biden's regulatory record to date. The title of the hearing is catchy and clearly sends a message, but, with respect, I do not believe it is either accurate or a constructive frame for considering a very important subject in the lives of Americans.

As you know, I served as the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) for the first five years of the Clinton Administration – with responsibility for developing Executive Order 12866 discussed below, then as the Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council, and then as the Deputy Director for Management of OMB. I have remained active in the area of administrative law generally and rulemaking in particular. After leaving government service in January 2001, I taught Administrative Law and related subjects at the University of Michigan Law School, George Washington University Law School, George Mason University Law School, the University of Pennsylvania Law School, and since 2010 at NYU School of Law. I have written articles for scholarly publications and blogs and have frequently been asked to testify and speak on this subject.

As is apparent from the title for this hearing, regulations do not have a good name in some quarters. Criticizing regulations and calling for their repeal is a popular applause

line, but whenever focus groups are asked to identify which specific regulations should be repealed, they are often stymied. They do not want to repeal regulations that keep their medicines safe and efficacious, their meat inspected and clean, their air clear and their water drinkable, their national parks accessible, their automobiles protective in case of accidents, their workplaces reducing injuries and illnesses, their markets transparent and on a level playing field, and on and on.

While some elected officials accuse the agencies of running amok, no agency is a free agent; they can only do that which Congress has delegated to them. Congress decides the objectives or goals (and sometimes the time frames), but it does not have the bandwidth to specify the details, evaluate the science, stay current on changing technology, or determine the proper processes for applying for or approving grants or loans, among other things necessary to implement the law. So, Congress delegates, but then some officials are quick to condemn the agencies for doing what they are told to do – carrying out the law.

Meanwhile, the agencies operate within well-defined precise procedural and substantive constraints, which involve public participation, responsiveness to comments, analysis of the intended and unintended consequences of their proposals, review by OIRA to ensure that the benefits of the proposals justify the costs, and then challenges in courts where independent judges determine whether an agency has used proper procedures, whether any of its findings and policy determinations are arbitrary or capricious, and whether it has stayed within the statutory limits imposed by Congress. Regulations that survive this process have contributed much to our well-being and success as a Nation.

Nonetheless, some will complain and object to any burden placed on them. And these complaints are seemingly accepted uncritically and indeed amplified by those who are looking for simple soundbites. We hear it now, as we did during the Clinton Administration and the Obama Administration, this time directed at the Biden Administration.

The other witnesses today will likely recite numbers of regulations or numbers of pages in the Federal Register to allegedly substantiate the claim that there are more regulations being issued now than in earlier administrations – as though that would be determinative of the benefits or the costs of the regulatory activity involved. Numbers can be slippery in this context, as in so many other contexts. What are you measuring? What is the baseline? What are the appropriate time periods? People can pick and choose those that favor their pre-determined convictions.

I understand that the Spring *Regulatory Agenda* was issued yesterday and the number of regulatory actions listed are at or slightly below the average number in the *Regulatory Agendas* for the period 2009-2022, and fewer than in President Trump's *Regulatory Agendas* for the Fall of 2019 and the Fall of 2020, and fewer than in the last two years of President George W Bush's *Regulatory Agendas* for the Fall of 2007 and 2008.

The *Regulatory Agenda* speaks to what is being planned. So, another number to consider might be what actually has occurred. Here, too, the Biden Administration is not out of line. The number of significant final rules issued by the Biden Administration in 2022 was 49. That is appreciably less than either of the last two years of the Trump Administration: 59 in 2019 and 128 in 2020.

In any event, I believe it is not the number of regulations, any more than the number of pages in the Federal Register, that is informative, but rather the content of the regulations, how effective they may be, and who will be affected by them. Look at some of the regulations issued by the Biden Administration in the last few years.

In February 2023, the Department of Health and Human Services issued a Medicare Advantage Auditing Requirement (final rule) that focused on measures to reduce overbilling (which constitutes fraud) and thus will reduce the drain on the Medicare Trust Fund to the benefit of all qualifying seniors.

In August 2022, the FDA issued a final rule authorizing the sale of hearing aids over-the-counter rather than solely by prescription, thereby making these products that

are extremely beneficial to older individuals more readily available at dramatically lower costs.

In October 2021, the Environmental Protection Agency issued a final rule phasing down Hydro Fluoro Carbons (HFCs), as directed by the bi-partisan American Innovation and Manufacturing Act. The rule reduces a climate-warming pollutant, while helping American manufacturers that are developing alternatives to HFCs remain competitive.

Are these regulations detrimental to our well-being? Hardly. Are they tying us up in red tape? Certainly not. In my opinion, they are inarguably good rules that enhance our health, safety and prosperity. I would also refer you to two other regulations that may be more controversial but are indicative of what I believe is the salutary effect of regulations. First, The Department of Education issued a Notice of Proposed Rulemaking in May of 2023 that would reinstate President Obama's so-called gainful employment rule, that President Trump rescinded while in office. The proposed Biden rule would eliminate taxpayer funding (in the form of student aid) to subsidize those for-profit institutions that cannot demonstrate that their graduates are finding employment that will compensate them for the cost of their education.

Another example is the Biden Administration's Mercury and Air Toxics Standards (the MATS rule) that was originally issued by President Obama and rescinded by President Trump. This final rule issued in 2023 reinstated the Obama rule that reduces mercury emissions from power plants. Mercury is a neuro-toxin that is particularly pernicious for unborn and young children. It is interesting to note that the power industry did not support President Trump's rescission of the Obama rule because they had already begun implementing it, and it would have been destabilizing to reverse course.

That brings me to my concern that infatuation with de-regulation can have disastrous effects. I can think of several notorious examples: the deep recession in 2008 caused by the de-regulation of the banking industry; the death of workers in plants and in coal mines from lax enforcement of safety regulations; the disproportionate death of

patients in nursing homes during the COVID pandemic; and the recent spate of railroad derailments, to name just a few that come to mind.

Those who call for de-regulation often assert that, whatever benefits might be derived from some regs, regulations (and the enforcement of those regulations) restrain our freedom and our liberty, contrary to the American way. To be sure, the traffic signal at the busy intersection might delay (and thereby restrain your freedom) if you approach a red light and have to come to a stop. But it is a modest delay, and the benefit of not being plowed into by a car coming along on the cross street certainly justifies the burden imposed on you.

In a civilized world, I believe that regulations may restrain certain activities, but nonetheless enhance our liberty to enjoy life and prosper. It may be easier and less expensive to deceive your customers or endanger your employees, but the marketplace we all value works better when there is a level playing field that takes into account the equities of all the participants in the market. We have heard complaints about the number of regulations, but look at the growth of jobs and the strength of the economy during this Administration – we are not "dying from a thousand regulations" or fortunately anything else for the time being. I add the latter, because if this hearing had been scheduled a week ago, we would have to travel through conditions of dangerous air quality for those with heart or lung issues like me.

Lastly, I understand there may be some interest in the recent efforts by the Biden Administration to respond to the President's day one Memorandum to modernize the regulatory process. Executive Order 14094O , signed on April 6th, is relatively straight-forward in reaffirming Executive Order 12866. As someone who was intimately involved in developing Executive Order 12866, I would be happy to answer any questions you may have about updating the threshold for OIRA review or the conduct of OIRA meetings with those outside the Executive Branch. The other subject in the recent Executive Order relates to the updating of OMB Circular A-4, which sets forth best practices for agencies' regulatory impact statements. The proposed revision of A-4 has been published with a request for comments due shortly, and I am aware of a number of people and groups that have filed or are about to file their questions or criticisms, which I

am certain OIRA will carefully consider. I think, therefore, that it may be premature to comment on what is now a work in progress.

Thank you for considering my views and I look forward to any questions you may have.