TESTIMONY OF
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ASSESSING THE OBAMA YEARS:
OIRA AND REGULATORY IMPACTS ON JOBS,
WAGES, AND ECONOMIC RECOVERY

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Chairman Marino, Ranking Member Johnson, and members of the Subcommittee, I appreciate the opportunity to testify today. My name is David Driesen. I am a University Professor at Syracuse University, teaching environmental law and climate disruption law. My publications focus on law and economics and environmental law, including a substantial body of work on cost-benefit analysis (CBA) and OIRA review, some of which I include with this testimony.

A recent trip to Beijing reminded me of how fortunate we are to have environmental standards. On my second day in the Chinese capital a thick haze descended, forcing me to wear a facemask and endure a sore throat for the remainder of my stay while making the surrounding hills vanish. Air pollution has more serious consequences for residents, killing more than a million Chinese citizens annually. China wisely relies on market forces to power its economy, but faces potential social unrest because it has not required market actors to meet adequate environmental standards.

We were well on our way to Beijing-like conditions when Congress passed the Clean Air Act Amendments of 1970 with only one dissenting vote. Those amendments aimed to achieve the goal of protecting public health and the environment. Republican President Richard Nixon, anxious to make sure that ambitious environmental statutes protected Americans from pollution's harms, established an independent EPA. When we have acted vigorously, we fully protected public health, sometimes without any social cost.[1] Even where we have not fully achieved that goal, we have made enormous progress even as economic growth continued.

In spite of significant progress under an independent EPA, beginning in the 1980s, American presidents ended government agency autonomy by issuing executive orders creating White House oversight over government agencies. These executive orders require government agencies to carry out cost-benefit analysis (CBA) of significant proposed new standards, defined primarily as those having an impact of $100 million or more a year on the economy. They direct the Office of Information and Regulatory Affairs in the Office of Management and Budget (OIRA) to oversee implementation of these orders. Congress initially opposed these executive orders, but endorsed CBA in the Unfunded Mandates Reform Act of 1995 with respect to standards costing $100 million or more.

In some ways, we now face greater challenges than we have ever faced. Greenhouse gases have raised global average mean surface temperature. The major scientific reports tell us that this warming triggers larger and more frequent wildfires, increased flooding, drought, more violent weather events, and the spread of infectious diseases.[2] These consequences have begun and scientists tell us that these and other

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[1] *See* OZONE PROTECTION IN THE UNITED STATES: ELEMENTS OF SUCCESS 31, 33 (Elizabeth Cook, ed. 1996); EDWARD A. PARSONS, PROTECTING THE OZONE: SCIENCE AND STRATEGY 4 (2003).

[2] *See* U.S. GLOBAL CLIMATE CHANGE RESEARCH PROGRAM, U.S. NATIONAL CLIMATE ASSESSMENT 20, 38 (2014) [hereinafter, NATIONAL CLIMATE ASSESSMENT].

consequences will become much more extreme absent rapid phase-out of greenhouse gases. At the same time, as the Flint lead crisis illustrates, the infrastructure we built to deliver clean water in the 1970s has begun to crumble and needs replacement. And we face the challenges of combating international terrorism, sometimes through rulemaking. While we have made progress, the need for federal standards has hardly gone away. Tax-paying Americans expect the government they fund to ensure that our citizens have clean water, healthful air quality, a livable climate, and a good measure of safety and security. If we fail to deliver these essentials, Americans may suspect that "the game is rigged" and vote for extremist demagogues.

My testimony today focuses on the question of whether the OIRA process contributes to our ability to sensibly meet the major challenges government standards address. And if not, how might we improve the process, so that our government efficiently carries out its responsibilities.

PHILOSOPHY

President Reagan established OIRA review to reduce the burdens standards impose on regulated firms.[3] Because of this, corporate interests seeking to avoid meeting reasonably stringent standards have long supported strong OIRA review. Unfortunately, almost all measures reducing industries' burdens do so by relaxing standards and increasing the burdens on a public hoping for clean air and water, safety, and a stable financial system. In spite of this, many analysts endorse OIRA review, because they find comprehensive analysis of costs and benefits attractive. They see CBA as a rationalizing reform, ensuring that we do not make huge expenditures to address trivial risks.

CBA has at its heart a very different normative vision than the vision that Congress endorsed in many statutes. The major environmental statutes, for example, see the role of government as securing citizens' rights to breathe clean air and drink clean water. Nevertheless, these statutes do contain balancing elements, mainly in the form of requirements to maximize "feasible" reductions. The feasibility requirement creates a presumption against standards so costly as to cause widespread plant shutdowns. But Congress expected that these statutes would ultimately force technological development as necessary to protect the public from significant environmental harms.

This emphasis on feasibility may explain why environmental law has generated a small net increase in jobs.[4] In 2012, the last year for which we have statistics, environmental regulation accounted for about .2% of mass layoffs, a number consistent with previous Bureau of Labor Standards reports.[5] Financial *deregulation*, by contrast,

[3] *See* Exec. Order No. 12,291 (preamble).
[4] DOES REGULATION KILL JOBS? (Cary Coglianese, Adam M Finkel, and Christopher Carrigan eds., 2013); EBAN GOODSTEIN, THE TRADEOFF MYTH: FACT AND FICTION ABOUT JOBS AND THE ENVIRONMENT (1999).
[5] United States Bureau of Labor Statistics, Extended Mass Layoffs in 2012. (2013) (retrieved March 24, 2015, from www.bls.gov/mls/mlsreport1043.pdf).

was an essential prerequisite to the financial crisis, which produced massive unemployment.[6]

CBA supporters, however, do not view laws as efforts to prevent unacceptable harms, but instead view standard setting as the purchase of a public benefit in the form of an incremental improvement in air, water quality, or safety analogous to purchasing a car, an apple, or a dishwasher. And they want to make sure that the public does not pay more than the benefit is worth. This philosophy leads to an effort to translate the harms standards avoid, such as death and illness, into benefits measured in dollar terms to be compared with the compliance costs. The executive orders recognize this tension in normative philosophy by only requiring that benefits justify cost "to the extent permitted by law."[7] And the Supreme Court has told us that under some standard setting provisions, the law does not permit cost-benefit balancing.[8] Public opinion polls, interestingly enough, show that the vast majority of the public believes we should do "whatever it takes" to protect the environment.[9]

Climate disruption and terrorism should lead to some questions about the normative vision justifying OIRA review. Should we view protection from terrorism, a stable climate, clean water, and healthful air quality as just other goods that we might purchase if they do not cost too much? Or is health a prerequisite for enjoying other the other goods we might purchase? Are a stable climate and safety from terrorist attack prerequisites for a productive economy and a good life?

UNDERSTANDING CBA

Analysts cannot reliably and objectively quantify the costs and benefits of most government standards, because of data gaps and huge uncertainties. Because of these uncertainties, CBA's results depend heavily on the assumptions analysts use in preparing or evaluating the CBA.

Environmental standards' costs, for example, depend on the cost of implementing technological changes to meet environmental standards. While good data usually exist to estimate future costs, we have less data about the actual costs after implementation. The data we have, however, indicate that EPA and OSHA frequently overestimate cost.[10] This

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[6] *See* David M. Driesen, *Legal Theory Lessons from the Financial Crisis,* 40 J. CORP. L. 55, 63-71 (2014).
[7] Exec. Order No. 12,866 §1(b).
[8] *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457, 471 (2001) (forbidding consideration of cost in setting National Ambient Air Quality Standards); American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 510-512 (1981) (OSHA need not consider cost in regulating toxic substances in the workplace); *cf.* Entergy Corp. v. Riverkeeper, 556 U.S. 208, 226 (2009) (allowing use of CBA for water intake standards).
[9] *See, e.g.,* Monica Anderson, For Earthday, How Americans View Environmental Issues (April 22, 2016), http://www.pewresearch.org/fact-tank/2016/04/22/for-earth-day-heres-how-americans-viewenvironmental-issues/.
[10] *See* HART HODGES, ECON. POL'Y INST., FALLING PRICES: COST OF COMPLYING WITH ENVIRONMENTAL REGULATIONS ALMOST ALWAYS LESS THAN ADVERTISED (1997); OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG. OTA-ENV-635, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS ON OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH (1995); RUTH

overestimation occurs because of unanticipated innovation in response to federal standards and because firms use competitive bidding to drive down prices of known technologies once they face a compliance obligation.

Benefits estimates prove much more problematic. Quantification requires two steps, quantitative risk assessment and monetization.

Quantitative risk assessment seeks to estimate the amount of death, illness, and ecosystem destruction a given proposed standard will prevent. As a rule, we lack sufficient data to make these predictions reliably.

Because of the difficulties of benefit estimation, government agencies often cannot provide a dollar estimate of their standards' benefits. For example, when the Office of Homeland Security reported the costs and benefits of its standard requiring the airlines to help the federal government to check passenger lists against terrorism watch lists and respond to the search results, it quantified the costs at about $300 to $400 million a year, but did not quantify the rules' benefits.[11] Instead, it simply stated that assigning the checking of passenger lists to the federal government rather than the airlines would improve the accuracy of these checks and "may" increase "aviation security."[12] The Office of Homeland Security could not quantify the benefits from this very expensive standard, because it could not know how many terrorist attacks this marginally improved passenger checking would thwart (if any) or how many people a prevented terrorist attack would otherwise have killed.[13]

When agencies can provide an estimate of the benefits, that estimate is always very incomplete, because only some of the benefits can be quantified. Often, the benefits that resist reliable quantification are the most important benefits generated by the rule. For example, scientists warn us that various feedback loops have the potential to create rapid warming in a very short amount of time, producing a catastrophe. Integrated assessment models used to estimate the benefits of reducing greenhouse gas emissions fail to adequately take this possibility into account, because the magnitude and probability of such run away warming is unknown. Some prominent economists find this

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RUTTENBERG, NOT TOO COSTLY AFTER ALL: AN EXAMINATION OF INFLATED COST ESTIMATES OF HEALTH, SAFETY, AND ENVIRONMENTAL PROTECTIONS (2004); Winston Harrington et al., *On the Accuracy of Regulatory Cost Estimates,* 19 J. POL'Y ANALYSIS & MGMT. 297 (2000); Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation,* 80 TEX. L. REV 1997, 2042-44 (2002).

[11] Report Under 5 U.S.C. § 801(A)(2)(A) on a Major Rule Issued by the Department Of Homeland Security, Transportation Security Administration Entitled "Secure Flight Program" (Rin: 1652-Aa45).

[12] Id.

[13] *See* TRANSPORTATION SECURITY ADMINISTRATION DEPARTMENT OF HOMELAND SECURITY, REGULATORY FLEXIBILITY ANALYSIS, TRADE IMPACT ASSESSMENT, AND UNFUNDED MANDATES DETERMINATION NOTICE OF PROPOSED RULEMAKING, LARGE AIRCRAFT SECURITY PROGRAM 38 (July 31, 2008).

omission so disturbing that they characterize CBA of climate disruption as nearly useless.[14]

For benefits that can be estimated, the magnitude of a benefit estimate depends heavily on contestable assumptions. For example, often we have data about a carcinogen's effects on a small population of laboratory mice exposed to high doses of a chemical, but no data on that chemical's effects on humans. In order to predict how many human cancer deaths or illnesses low dose exposure of a large human population will produce based on these data, risk assessors must use a model seeking to extrapolate from the animal data. But we do not know enough about cancer to know how to construct a reliable model, so these predictions depend on contestable and uncertain science policy judgments about how to do this extrapolation.[15] Because different extrapolation models usually lead to radically different results, the National Academy of Sciences recommends expressing benefits as a range rather than a point estimate.[16] An honest estimate of the range of potential benefit estimates usually proves quite wide.

The second step, monetization, involves assigning a dollar value to the consequences predicted by the risk assessment. The idea of assigning a dollar value to lost human life and illness raises difficult moral issues and the methodologies used have proven deeply problematic and incomplete.[17]

OIRA'S ROLE

OIRA consists primarily of economists with general training in economic principles but little or no training in the sciences underlying risk assessment. Given its limited expertise, one might expect OIRA to confine itself primarily to making sure that monetization in CBA in economically significant standards conforms to the best economic practices. In fact, it has assumed a far broader role.

OIRA often approves standards it reviews without modification especially outside the environmental area. But when it uses its review authority to press government agencies to change their standards, it almost invariably favors laxer standards or no standard at all.[18] This has been true under all administrations, Democratic or Republican. As a result, many government agencies self-censor, not daring to propose standards that would meet statutory objectives well, because of fear that OIRA will delay or stop the standard setting process.[19]

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[14] Robert Pindyck, *Climate Change Policy: What do the Models Tell Us*?, 51 J. ECON. LIT. 860 (2013); Martin L. Weitzman, *On Modeling and Interpreting the Economics of Catastrophic Climate Change,* 91 REV. OF ECON. & STAT. 1 (2009)

[15] *See* Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation,* 95 COLUM. L. REV. 1613, 1619-1622-27 (1995).

[16] *See id.* at 1637-38.

[17] *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004),

[18] *See* David M. Driesen, *Is Cost-Benefit Analysis Neutral?,* 77 U. COLORADO L. REV. 335, 352-85 (2006).

[19] *See* GENERAL ACCOUNTING OFFICE (GAO), RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 130 (2003).

These interventions rarely have much to do with CBA. OIRA regularly intervenes in rulemaking where data limitations have made CBA impossible.

Even when agencies carry out CBA, CBA's results almost never influence the direction of OIRA's intervention. Even when the CBA shows that the limited set of monetized benefits outweigh the costs and OIRA does not appear to contest this conclusion, OIRA has pressed government agencies to weaken their proposed standards.[20]

OIRA's interventions usually have little to do with sound economics. For example, OIRA pressed EPA to weaken limits on motorcycle air emissions on the ground that the catalytic converter reducing emissions poses a safety threat.[21] It backed off this amateur engineering judgment only after motorcycle manufacturers convinced OIRA that its concerns were baseless.[22] Sometimes, OIRA's idiosyncratic grounds for opposing standards push agencies into making illegal decisions. For example, OIRA urged EPA to interpret a Clean Water Act mandate to use the best available technology to reduce water intake harming fish near power plants to substitute restoration of damaged fish habitat for prevention of harm.[23] The Second Circuit held that EPA's decision to acquiesce to this demand violated the Clean Water Act.[24]

These random pressures coming from general OIRA bureaucrats with much less relevant expertise than the employees of the specialized agencies they oversee add to already formidable pressures that agencies face to inadequately address global climate disruption and other daunting challenges. Most EPA rulemaking, for example, excites significant well-funded opposition from regulated polluters, who are well equipped to raise any valid concerns that might exist. They file voluminous comments, meet with EPA officials often, and then sue EPA in almost all cases, even though the agency regularly makes numerous adjustments to address their concerns.[25] Furthermore, the courts will reverse EPA's decisions if it fails to adequately address industry's thousands of pages of comments and produce a reasonable decision. These combined pressures have slowed standard setting to a crawl even for the most urgent problems and frequently produce timid decisions that fail to adequately address the concerns that motivated the standards. OIRA review changes our system of checks and balances into a veritable obstacle course of checks with precious little balance.

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[20] *See, e.g.,* Driesen, *supra* note 18 at 369-70.

[21] *See* Responses to OMB Questions/Issues Highway Motorcycles Final Rule, item 13 in Docket A-2000-02, IV-H-7 (Oct. 21, 2003).

[22] *See* Memorandum from Karl Simon, OTAG to Air Docket A-2000-02, IV-E-26 (Dec. 1, 2003).

[23] GAO, *supra* note 19, at 195-96.

[24] *See* Riverkeeper, Inc. v. U.S.E.P.A., 358 F.3d 174, 189 (2nd Cir. 2004), *reversed in part on other grounds sub. nom.,* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009).

[25] *See, e.g.,* Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards,* 63 ADMIN. L. REV. 99, 108-09, 123-36 (2011).

OIRA does not confine its review to economically significant standards—those generating $100 million of compliance cost or more. Indeed, OIRA reviews economically insignificant standards much more often than economically significant ones.[26]

OIRA, however, sometimes does base its review on completed CBA and seeks changes that it views as improving the quality of the CBA. Often, however, its disputes with government agencies involve its economists second-guessing agency science policy judgments that OIRA is ill-equipped to evaluate.

I have, however, found no standards where OIRA review performs the function its most thoughtful supporters envision for it: weeding out standards that involve huge expenditures for very little benefit. Rather, OIRA review functions as a one-way ratchet, almost always seeking to weaken standards whenever OIRA seeks changes, regardless of CBA's results.[27]

OIRA review functions as a one-way ratchet in another sense as well. OIRA review always delays standard setting, never speeding it up, thus making the standard setting process extremely inefficient. This problem has grown much worse in recent years. The average review time over the last few years exceeds the default review period provided for in the executive order of 90 days.[28] In recent years, a significant number of OIRA reviews have lasted more than a year.[29] In many contexts, delayed standards translate into more avoidable deaths, injuries and illnesses.[30] Furthermore, agencies withdrew 22 proposed public safeguards in 2013 and 2014 that had been subject to reviews for more than a year. The Obama administration seems to have substituted a non-transparent pocket veto for return letters that might explain why OIRA has not approved a standard.

RECOMMENDATIONS

OIRA review does not perform the rationalizing function that CBA supporters have envisioned for it. Even without passing fresh legislation, we could improve this process' efficiency. Some recommendations along these lines follow:

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[26] *See, e.g.,* GAO, FEDERAL RULEMAKING AGENCIES INCLUDED KEY ELEMENTS OF COST- BENEFIT ANALYSIS, BUT EXPLANATIONS OF REGULATIONS' SIGNIFICANCE COULD BE MORE TRANSPARENT 36 (2014).

[27] *See* Driesen, *supra* note 18, at 352-85.

[28] The executive order allows extension of this default review period, but OIRA has abused this authority and it should be withdrawn.

[29] Historically, about two reviews per year have undergone OIRA review lasting more than a year. The number or reviews lasting more than a year reached a peak of 47 in 2013, declining to 8 in 2015, about four times the historical average. In 2015, 47 additional rules were delays by periods exceeding six months, almost 5 times the historical average.

[30] *See, e.g.,* Nell Greenfieldboyce, *Silica Rule Changes Delayed While Workers Face Health Risks* (February 7, 2013), http://www.npr.org/sections/health-shots/2013/02/07/171182464/silica-rule-changes-delayed-while-workers-face-health-risks.

1. *Exempt Standards Addressing Global Climate Disruption and International Terrorism from OIRA Review.*

Efforts to monetize the value of greenhouse gas reductions are radically incomplete and will remain so. Greenhouse gases accumulate in the atmosphere every year and remain there for decades or even centuries.[31] Avoiding dangerous climate disruption requires a vigorous and rapid response because delay causes irreversible damages and may prove catastrophic.[32] Similarly, we cannot reliably estimate the benefits of antiterrorism measures, which also address potential catastrophes on unpredictable probability and magnitude. In these contexts, OIRA review's costs far outweigh any conceivable benefit.

2. *Confine OIRA Review to Standards Costing $100 Million a Year or More.*

OIRA has a small staff, which struggles to understand the intricacies of many different types of standards. Its anti-regulatory activism has led it to cast a wide net instead of having focused priorities. Since the primary justification for OIRA review stems from anxiety about costly standards, OIRA should focus its efforts on the most costly standards. This focus should help OIRA eliminate the problem of inordinate delay in the review process by reducing OIRA's workload.

3. *End OIRA Review of Risk Assessment.*

OIRA review of CBA should focus on matters within the expertise of economists, such as monetization methods. OIRA's efforts to second-guess agency science/policy determinations in risk assessment are unlikely to add value and can lead to resource intensive disputes. Government needs to be reasonably effective and efficient. If we need review of risk assessment assumptions, objective scientific review panels should provide it from time to time, not ad hoc debates during multiple rule-making proceedings with economists lacking the needed scientific expertise.

4. *Direct OIRA to Seek Stricter Standards when Benefits Significantly Outweigh Costs.*

Economic theory defines optimal environmental regulation as regulation that balances costs and benefits. This means that when benefits clearly outweigh costs, optimization requires making standards stricter in order to maximize net benefits. OIRA has almost never challenged agencies to adopt stricter standards than they have proposed, even when CBA shows that stricter standards would conform better to economic theory. It should do so to the extent permitted by law.

[31] *See* NATIONAL RESEARCH COUNCIL (NRC), INFORMING AN EFFECTIVE RESPONSE TO CLIMATE CHANGE 185 (2010).
[32] *See* NRC, AMERICA'S CLIMATE CHOICES 25 (2011).

5. *Give Non-Quantifiable Benefits Their Due.*

Government agencies should list the benefits its rule provides in order of importance in their regulatory impact analysis, whether they can be quantified or not. When important benefits cannot be quantified, conclusions that monetized costs outweigh monetized benefits should be given little weight.

6. *Direct Agencies to Disregard OIRA Comments When OIRA Review Lasts More than 90 Days and When Necessary to Meet a Statutory Deadline*

OIRA review has contributed to regular violations of statutory deadlines and other unacceptable delays.[33] It has also politicized the administrative process by giving the White House too much control over expert agencies, which should be free to implement statutory directives appropriately regardless of OIRA's political proclivities. A focused OIRA with useful insights should be able to influence the agency appropriately within a 90-day window, without the capacity to delay standards excessively. The current executive order purports to limit review time, but has not succeeded because OIRA's review is not subject to discipline.

Conclusion

OIRA review has not contributed to our efforts to sensibly address critical problems. OIRA needs to narrow its review tasks so as to permit its small staff to review proposed standards in a timely manner in contexts where its economic expertise seems most relevant. Thank you very much for the opportunity to testify. I welcome your questions.

[33] *See generally Stuck in Purgatory,* NEW YORK TIMES (June 30, 2013).