

Congress of the United States

U.S. House of Representatives

Committee on Small Business

2361 Rayburn House Office Building

Washington, DC 20515-6515

To: Members, Committee on Small Business
From: Committee Staff
Date: July 22, 2013
Re: Hearing: "Reducing Red Tape: The New OIRA Administrator's Perspective"

On Wednesday, July 24, 2013 at 1:00 pm in Room 2360 of the Rayburn House Office Building, the Committee on Small Business will meet for the purpose of examining whether agencies' efforts to review their existing regulations, as ordered by President Obama, are resulting in meaningful burden reductions for small businesses. On May 8, 2013, the Committee held a hearing at which representatives from the United States Department of Transportation (DOT), the United States Small Business Administration (SBA) and the United States Department of Agriculture (USDA) testified on their respective agencies' retrospective review initiatives.¹ The testimony established that retrospective review efforts are a work in progress. This hearing will provide the Committee an opportunity to further examine the results of the retrospective review initiative by receiving testimony from the Honorable Howard Shelanski, the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB), the official charged with overseeing agencies' retrospective review initiatives.

I. Introduction

Every President since President Carter has ordered agencies to periodically review their existing regulations.² Since 1980, Congress also directed all federal agencies to conduct a review of each regulation that has or will have a significant economic impact on a substantial number of small entities (which includes small businesses) at least every 10 years after the date of promulgation. 5 U.S.C. § 610. However, a series of Government Accountability Office (GAO) studies have found that agencies infrequently performed certain types of reviews.³ GAO reported that agencies were not conducting the congressionally mandated periodic reviews and enumerated a number of challenges to conducting reviews of existing regulations.⁴

¹ *Retrospective Review: Have Existing Regulatory Burdens on Small Businesses Been Reduced?: Hearing Before the H. Comm. on Small Business, 113th Cong. (2013)* [hereinafter Retrospective Review Hearing].

² A history of Presidentially ordered retrospective reviews can be found in the Committee's September 21, 2011 hearing memorandum, available at http://smallbusiness.house.gov/uploadedfiles/9-21_memo.pdf.

³ GAO, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 11 (GAO-07-791) (2007).

⁴ See *Id.* at 11; GAO, REGULATORY FLEXIBILITY ACT: CONGRESS SHOULD REVISIT AND CLARIFY ELEMENTS OF THE ACT TO IMPROVE ITS EFFECTIVENESS 6 (GAO-06-998T) (2006); GAO, REGULATORY FLEXIBILITY ACT: AGENCIES' INTERPRETATIONS OF REVIEW REQUIREMENTS VARY 2 (GAO/GGD-99-55) (1999).

Despite the difficulties with previous retrospective review efforts, President Obama issued Executive Order (E.O.) 13,563 directing federal agencies to implement plans for retrospectively reviewing all their regulations.⁵ Specifically, the President ordered agencies to focus on rules that were “outmoded, ineffective, insufficient, or excessively burdensome.”⁶ After identification, the agencies were directed “to modify, streamline, expand, or repeal them in accordance with what has been learned.”⁷ Pursuant to the President’s directive, agencies released their final retrospective review plans in August 2011. Compliance with the order, including general oversight of the review plans, was vested with the OIRA.⁸ The President supplemented the retrospective review order with E.O. 13,610,⁹ which emphasized the importance of public participation in the retrospective review process, provided guidance on prioritization of reviews and set a schedule for agencies to report on their retrospective review efforts.

II. The Retrospective Review Process

A. Oversight of the Retrospective Review Process

Following the issuance of the order mandating the review, OIRA issued guidance to the agencies.¹⁰ The guidance required agencies to focus reviews on regulations that maximize burden reduction (be it paperwork or otherwise), especially for small businesses.¹¹ Additional guidance focused on the importance of considering cumulative effects of new and existing rules as part of agencies’ retrospective review efforts.¹² Most significantly, OIRA emphasized that the review process was and is not a one-time effort but an ongoing process.¹³

⁵ 76 Fed. Reg. 3821 (Jan. 21, 2011), *reprinted in* 3 C.F.R. 215 (2012).

⁶ *Id.* at § 6, 76 Fed. Reg. at 3822, 3 C.F.R. at 217.

⁷ *Id.*

⁸ *Id.*

⁹ 77 Fed. Reg. 28,469 (May 14, 2012).

¹⁰ See OFFICE OF MGMT. & BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: IMPLEMENTATION OF RETROSPECTIVE REVIEW PLANS (2011), *available at* <http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/implementation-of-retrospective-review-plans.pdf> [hereinafter Retrospective Review Implementation]; OFFICE OF MGMT. & BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: CUMULATIVE EFFECTS OF REGULATIONS (2012), *available at* <http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/cumulative-effects-guidance.pdf> [hereinafter Cumulative Effects]; OFFICE OF MGMT. & BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: REDUCING REPORTING AND PAPERWORK BURDENS (2012), *available at* <http://www.whitehouse.gov/sites/default/files/omb/inforeg/memos/reducing-reporting-and-paperwork-burdens.pdf> [hereinafter Reducing Burdens].

¹¹ Retrospective Review Implementation, *supra* note 10, at 1.

¹² Cumulative Effects, *supra* note 10, at 1.

¹³ Retrospective Review Implementation, *supra* note 10, at 1.

B. Development of Agency Plans

The final plans for reviewing existing regulations were developed by: 1) soliciting input from the general public;¹⁴ 2) utilizing already established processes to review regulations, including retrospective reviews mandated by Congress; and 3) seeking direct input from stakeholders and agency employees on which regulations should be modified. Plans included criteria for determining how regulatory reviews should be prioritized, as well as an initial list of programs, activities and regulations currently under evaluation or to be evaluated in the near term. In addition, agencies updated their internal regulatory decision-making procedures to reflect the principles of E.O. 13,563.¹⁵

C. Agency Status Reports

The President ordered agencies to submit periodic status reports on their retrospective reviews.¹⁶ In 2012, agencies were required to submit their retrospective review status reports to OIRA detailing planned, active and completed regulatory actions in January, May and September.¹⁷ Thereafter, reports were scheduled for semi-annual submission in January and July.¹⁸

It is unclear if all agencies have submitted the five required reports thus far. The Environmental Protection Agency (EPA) has made four reports available on its website,¹⁹ but the Department of Labor (DOL) has only posted three reports.²⁰ The retrospective review status reports, like the final plans, vary in length and amount of detail, which may indicate the level of importance, or lack thereof that an agency has assigned to the retrospective review process.

III. Results of Retrospective Review²¹

A. Status Reports

Some agencies appear to have done little more than incorporate their current rulemaking activities into their status reports. For example, the SBA has included 11 small business size

¹⁴ Some agencies limited their efforts to seek public input to publishing a request for information and notice of the availability of their preliminary plan in the Federal Register and on their website. UNITED STATES DEPARTMENT OF THE TREASURY, FINAL PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES 3 (2011). Other agency public outreach efforts were more elaborate and included: posting notices in the Federal Register; holding public meetings; using IdeaScale to create a website to solicit input; issuing press alerts; sending emails to stakeholder groups; and posting information prominently and on multiple pages of the agency's website. UNITED STATES DEPARTMENT OF TRANSPORTATION, PLAN FOR IMPLEMENTATION OF EXECUTIVE ORDER 13563: RETROSPECTIVE REVIEW AND ANALYSIS OF EXISTING RULES 4-5 (2011).

¹⁵ Agency final plans are available for review at <http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system>.

¹⁶ Exec. Order No. 13,610, § 4, 77 Fed. Reg. at 28,470.

¹⁷ Retrospective Review Implementation, *supra* note 10, at 2.

¹⁸ *Id.* January and May 2012 reports are available on The White House website at <http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system>. September 2012 and January 2013 reports can be found on the individual agency websites.

¹⁹ <http://yosemite.epa.gov/opei/RuleGate.nsf/>.

²⁰ <http://www.dol.gov/regulations/>.

²¹ This section of the memo only represents a brief overview of the results.

standards regulations for various industries that it has recently reviewed or is in the process of reviewing in their January 2013 report.²² Rather than follow the intent of the retrospective review process as an additional requirement in the agency rulemaking process, the SBA simply incorporated an already congressionally mandated review of its size standards.²³

Other agencies appear to be engaged in more comprehensive review efforts to identify outmoded, ineffective, insufficient, or excessively burdensome existing regulations for review that may be ripe for revision or excision. DOT's January 2013 report is 65 pages long and details a wide variety of actions including: removing obsolete regulations; streamlining and clarifying regulations; consolidating duplicative requirements; updating regulations; and reducing the number of entities subject to certain regulations.²⁴

Given the scope of regulations subject to the retrospective review, only a limited number of actions have been finalized for which cost or paperwork burden reductions have been quantified. Some actions will provide meaningful burden reductions for small businesses; others, however, are less significant, make questionable burden reduction estimates or do not result in any quantifiable burden reductions.

One action that will reduce burdens for taxpayers that operate small businesses out of their homes is the simplified home office deduction. On January 15, 2013, the Internal Revenue Service (IRS) issued Revenue Procedure 2013-13, which permits taxpayers to elect a simpler method for determining the home office deduction beginning with their 2013 tax returns.²⁵ According to the Department of the Treasury (Treasury), many taxpayers, including small businesses, were not taking advantage of this deduction due to the complexity of the provisions and difficulty calculating the deduction.²⁶ Treasury estimates that this change will eliminate 1.6 million hours of paperwork reporting if taxpayers choose the optional simplified formula.²⁷

Another action that will reduce existing burdens on small businesses is an EPA final rule that waives the regulatory requirements requiring the use of redundant technology to capture fuel

²² UNITED STATES SMALL BUSINESS ADMINISTRATION, FOURTH REPORT OF RETROSPECTIVE REVIEW EFFORTS (2013), available at <http://www.sba.gov/sites/default/files/Fourth2012RetrospectiveReviewReport.pdf>. Small business size standards establish eligibility for federal financial assistance and government contracting activities and are used by agencies during the rulemaking process to assess the impacts of rules on small businesses.

²³ Small Business Jobs Act, Pub. L. No. 111-240, § 1344, 124 Stat. 2504, 2545 (2010).

²⁴ UNITED STATES DEPARTMENT OF TRANSPORTATION, E.O. 13563 RETROSPECTIVE REVIEW REPORT FOR DOT (2013), available at <http://www.dot.gov/sites/dot.dev/files/docs/january-2013-dot-rrr-report-final.pdf>.

²⁵ Rev. Proc. 2013-13, 2013-6 I.R.B. 478, available at <http://www.irs.gov/pub/irs-drop/rp-13-13.pdf>. Individuals previously had to file a 43-line form (8829). Now taxpayers will be able to deduct \$5 per square foot for up to 300 square feet of office space, not to exceed \$1,500. Kathleen Pender, *IRS Simplifies the Home-Office Deduction, for 2013*, SAN FRANCISCO CHRONICLE, Jan. 15, 2013, available at <http://blog.sfgate.com/pender/2013/01/15/irs-simplifies-the-home-office-deduction-for-2013/>.

²⁶ <http://www.treasury.gov/connect/blog/Pages/Helping-Small-Business-Owners-and-Home-Based-Employees-Claim-the-Home-Office-Tax-Deduction.aspx>.

²⁷ UNITED STATES DEPARTMENT OF THE TREASURY, IMPLEMENTATION OF RETROSPECTIVE REVIEW PLANS STATUS REPORT 13 (2013), available at <http://www.treasury.gov/open/Documents/Revised%20Treasury%20lookback%20plan%20status%20repor%20January%202013%20AND%20burden%20reduction%20appendix%202%2028.pdf>.

vapors that escape when drivers fill their gas tanks.²⁸ EPA estimates long-term cost savings of \$91 million a year;²⁹ however, the \$91 million spread over tens of thousands of retailers that sell gasoline does not represent a significant savings for an individual gas station.³⁰

EPA also finalized a rule to ensure that milk producers are exempted from regulations designed to protect against oil spills.³¹ The agency estimates that this change will save the dairy industry \$146 million annually³² and the revision was welcomed by dairy farmers. However, EPA had never actually interpreted the rules to apply to milk spills so some question the assertion that existing burdens are being reduced.³³

Finally, other reviews that may reduce burdens on small businesses seem to be under a never-ending review with no results in sight. For example, OSHA listed a review of its bloodborne pathogen standard in its final retrospective review plan³⁴ and on every subsequent progress report. The review had actually been suggested by a small business owner in 2008.³⁵ OSHA published the notice of the review in the Federal Register in 2010, pursuant to an already extant statutory requirement for reviewing regulations, not Executive Order 13,563.³⁶ The DOL progress reports show that the date by which OSHA expects to complete its review report has been pushed back several times. It remains to be seen whether the review of the standard will be completed this year.

B. May 8, 2013 Hearing Testimony

As previously noted, the Committee on Small Business received testimony from representatives of DOT, SBA and USDA on May 8, 2013 regarding their respective agencies' progress implementing E.O.'s 13,563 and 13,610. DOT Under Secretary Polly Trottenberg discussed a proposal under development to rescind a trucking reporting requirement that is under development, as well as a few other actions the DOT is considering that will have a positive

²⁸ Air Quality: Widespread Use for Onboard Refueling Vapor Recovery and Stage II Waiver, 77 Fed. Reg. 28,772 (May 16, 2012).

²⁹ *Id.* at 28,772.

³⁰ EPA estimates that there are 30,600 gas stations that will benefit if 19 states and the District of Columbia remove the Stage II gasoline vapor recovery systems for gas stations from their State Implementation Plans. *Id.*

³¹ Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure (SPCC) Rule—Amendments for Milk and Milk Product Containers, 76 Fed. Reg. 21,652 (Apr. 18, 2011).

³² *Id.* at 21,653.

³³ Ike Brannon and Sam Batkins, *First-Year Grades on Obama Regulatory Reform*, REGULATION, Spring 2012, at 5, available at <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2012/4/v35n1-7.pdf#page=2>.

³⁴ UNITED STATES DEPARTMENT OF LABOR, PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES 15 (2011), available at <http://www.whitehouse.gov/sites/default/files/other/2011-regulatory-action-plans/departmentoflaborregulatoryreformplanaugust2011.pdf>.

³⁵ Scott George of Mid-America Dental and Hearing Center nominated the standard for review as part of the SBA Office of Advocacy's Regulatory Review and Reform Initiative on February 28, 2008. http://archive.sba.gov/advo/r3/r3_medical08.html#med. It is unclear if Mr. George's nomination prompted OSHA's review; however, a letter shows that OSHA was considering a review of the bloodborne pathogen standard in 2008. Letter from Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, DOL, to Rep. Charles A. Gonzalez, Chairman, Subcommittee on Regulations, Healthcare, and Trade, House Committee on Small Business (Oct. 22, 2008), available at http://archive.sba.gov/advo/r3/resgonzalez08_1022.pdf.

³⁶ Regulatory Flexibility Act Review of the Bloodborne Pathogens Standard, 75 Fed. Reg. 27,237 (May 14, 2010).

effect on small businesses.³⁷ The examples provided would primarily reduce paperwork, reporting and recordkeeping requirements, which while beneficial, may not provide a significant burden reduction to an individual small business. SBA Associate Administrator Jeanne Hult discussed changes that SBA is making to streamline some of the requirements for its SBA loan programs.³⁸ These changes are technical in nature and will not change the number and size of loans that the SBA makes. USDA Chief Information Officer Cheryl Cook provided examples of several initiatives that USDA is in the process of implementing that reduce paperwork and streamline grant requirements.³⁹ These initiatives, while positive, are not reviews of existing significant regulations, and while the agencies claim that some of the changes will significantly reduce burdens on small business, it is unclear if these assertions are accurate.

IV. Conclusion

The initial estimate of the burden reduction that would be achieved, based on the regulatory initiatives listed in the final retrospective review plans, was \$10 billion.⁴⁰ Thus far, the actual results are far more modest and some of the burden reduction estimates have been questioned. Moreover, any reductions pale in comparison to ever increasing regulatory burdens.

By the Obama Administration's own estimates, the total cost of just 14 major rules in Fiscal Year (FY) 2012 was between \$14.8 billion and \$19.5 billion.⁴¹ In FY 2012, more than 3,800 final regulations were issued.⁴² A more comprehensive tally of regulatory activity shows that in 2012, 539 final rules added \$215 billion in new burdens.⁴³

While there appear to be some genuine efforts to retrospectively review and reduce existing regulatory burdens, for the most part, the results are underwhelming. Many agencies appear to be focusing their review efforts on minor existing paperwork and compliance burdens, instead of reviewing existing significant rules. It is unclear if the retrospective review results thus far are the beginning of a real positive trend or will fall short of the laudable goals of reducing significant existing burdens on regulated entities, and in particular, small businesses.

³⁷ Retrospective Review Hearing, *supra* note 1, statement of Polly Trottenberg at 4, 6-7.

³⁸ Retrospective Review Hearing, *supra* note 1, statement of Jeanne Hult at 1-2.

³⁹ Retrospective Review Hearing, *supra* note 1, statement of Cheryl Cook at 4-5.

⁴⁰ *Eliminating Job-Sapping Federal Rules Through Retrospective Reviews—Oversight of the President's Efforts: Hearing Before the Comm. on Small Business*, 112th Cong. 24-26 (2011) (statement of Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget).

⁴¹ OFFICE OF MGMT. & BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, 2013 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 3 (2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf. OIRA states that, "[t]he estimates . . . are not a complete accounting of all the benefits and costs of all regulations issued by the Federal Government during this period." *Id.* at 10.

⁴² <http://americanactionforum.org/topic/2012-costliest-year-regulation-white-house-says>.

⁴³ *Id.*