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**Testimony of
The Honorable Cass R. Sunstein
Administrator, Office of Information & Regulatory Affairs**

**Before the Committee on the Judiciary
Commercial & Administrative Law Subcommittee
U.S. House of Representatives
July 27, 2010**

Mr. Chairman and Members of the Committee:

I am most grateful to have the opportunity today to discuss some of our work at the Office of Information and Regulatory Affairs.

As you are aware, OIRA is charged with a number of functions, including coordination of statistical policy, information policy, and regulatory review. One of OIRA's most important roles is to ensure compliance with the Paperwork Reduction Act (PRA). Reducing paperwork burdens on the American public, and taking advantage of current technological possibilities, have been high priorities for us. In the last months, we have taken a number of steps to promote those goals. In April, for example, we issued a "data call" to agencies, calling for new burden reduction initiatives. We asked agencies to develop initiatives to "standardize inconsistent processes and requirements, eliminate duplicative reporting requirements, eliminate unnecessary complexity, and improve coordination among multiple offices that gather information from a common group of stakeholders." We also asked agencies for initiatives that take advantage of electronic filing, increase simplification, and reduce burdens on small business.

To promote the goals of the PRA, we have issued several new guidance documents to agencies. One of these supplies a simple, straightforward "primer" to help answer frequent questions. Another is designed to explain the relationship between the PRA and social media. This guidance makes it clear that in many ways, agencies can interact with the public and, in that sense, promote open government, without running afoul of the PRA.

Regulatory review of significant rules may well be the most visible of OIRA's functions. I shall spend the rest of my opening remarks on that topic.

The basic structure of regulatory review, established by Executive Order 12866, is simple and straightforward. Typically an agency sends a draft of a significant proposed or final rule to

OIRA, which then coordinates an interagency review process. The draft rule is sent to relevant OMB Resource Management offices, Presidential Councils, and Executive branch agencies and departments, which offer comments and suggestions. The usual practice is for OIRA to summarize those comments, together with our own, and to transmit them to the relevant rulemaking agency. Typically the agency will agree with some, but not all, of the comments that it receives. Discussion and deliberation ultimately produce a final product.

Since January 20, 2009, OIRA has used this process to review over 900 significant rules. We have placed special emphasis on ensuring that members of the public will have an opportunity to comment on assumptions and alternatives, so that rulemaking will be informed by the knowledge and perspectives of those who are interested, expert, or likely to be affected.

As I see it, regulatory review has three key purposes. First, it helps to ensure that regulations are consistent with the law and with the President's principles and priorities. Second, it promotes coordination among different parts of the executive branch. Sometimes statutes require coordination or consultation among agencies during the development of regulations, and even in cases where statutes do not so require, the positions of one agency are usefully informed by the views of other agencies with relevant experience and expertise. Third, regulatory review helps to improve the analysis that lies behind rules. Both Congress and the President have imposed important analytic requirements, including careful attention to both costs and benefits (with consideration of factors that cannot be quantified). OIRA oversees a process of interagency review that promotes compliance with these requirements, so that agencies "look before they leap."

It is important to see that when it is working well, regulatory review is sharply disciplined. Both the substance and the structure of regulatory review are limited and guided by Congress. Statutory constraints, time limits, and deadlines must be honored.

Since I was confirmed in September, OIRA has devoted special attention to working with agencies in three areas: promoting open government; improving regulatory analysis; and improving disclosure policies and increasing simplification. The unifying goal is to ensure that regulation is evidence-based and data-driven, and that it is rooted in the best available work in science (including social science). Let me offer a few words on each of these topics.

First: President Obama has placed a great deal of emphasis on open government. He has quoted the words of Supreme Court Justice Louis Brandeis: "Sunlight is said to be the best of disinfectants."¹ He has explained that "accountability is in the interest of the Government and the citizenry alike." He has emphasized that "[k]nowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge."² OMB's Open Government Directive, issued in December 2009, is designed to promote the President's goals by requiring a series of concrete steps to promote transparency, participation, and collaboration.

¹ Speech by President Obama, Jan. 28, 2009.

² Transparency and Open Government, Memorandum for the Heads of Executive Departments and Agencies, President Obama, Jan. 21, 2009.

One of these concrete steps is agency publication of high-value data sets. High-value information is defined to include information “that can be used to increase agency accountability and responsiveness; improve public knowledge of the agency and its operations; further the core mission of the agency; create economic opportunity; or respond to need and demand as identified through public consultation.” OIRA has worked closely with others in the Executive Office of the President, and with agencies, to ensure disclosure of such data sets, which can now be found on data.gov. We have also worked together to produce dozens of open government plans. We believe that the result of the process has been a dramatic increase in openness and transparency.

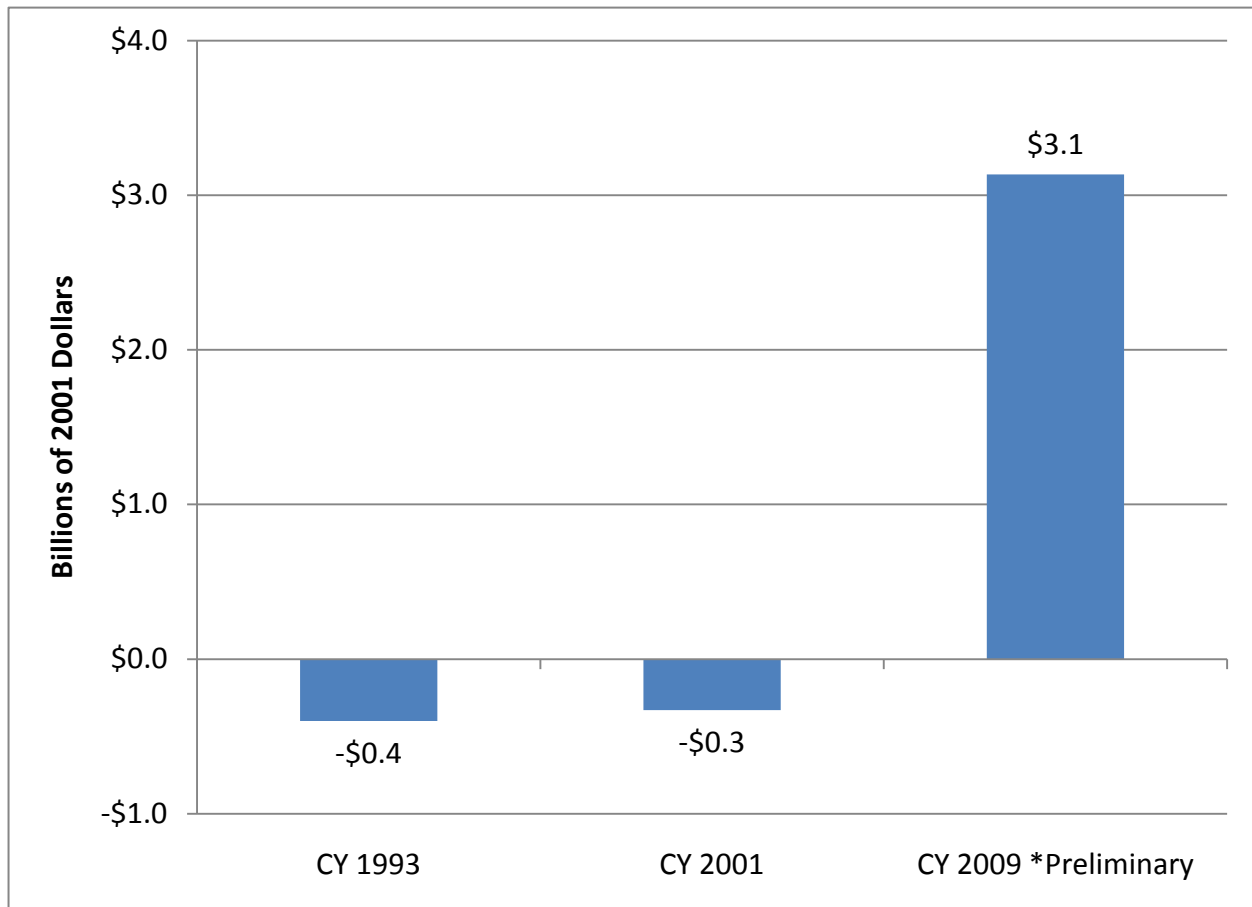
Second: For over three decades, through five administrations under both Democratic and Republican presidents, “regulatory impact analysis,” including discussion of both costs and benefits, has played an important role in the assessment and design of significant rules. As the President said on May 2, “Sometimes regulation fails, and sometimes its benefits do not justify its costs.”

With full recognition of the limits of quantification, efforts to promote an appropriate accounting of both benefits and costs can greatly inform judgments about appropriate courses of action – and can help to increase benefits, decrease burdens, and inspire new approaches and creative solutions. The process of analysis might reveal that a less or more stringent approach is better. Appropriate analysis should attempt to quantify – to the fullest extent that these can be usefully estimated -- relevant variables, to promote cost-effective choices, and to explore and evaluate different alternatives. It is also vital to encourage, through the notice and comment process, public scrutiny and review of agency rulemakings, which allows assumptions to be revealed and errors to be exposed and corrected.

With an emphasis on openness, OMB recommended (in its 2009 Report to Congress on the Costs and Benefits of Federal Regulation) that the best practice is to accompany all significant regulations with (1) a tabular presentation, placed prominently and offering a clear statement of qualitative and quantitative benefits and costs of the proposed or planned action, together with (2) a presentation of uncertainties in the evidence and (3) similar information for reasonable alternatives to the proposed or planned action. With the goal of openness in mind, OIRA has worked hard to promote greater transparency in regulatory impact analysis. By providing the public with information about proposed and final regulations, by revealing assumptions and subjecting them to public assessment, and by drawing attention to the consequences of alternative approaches, transparent analysis can promote public understanding, scrutiny, and improvement of rules. It is worth noting that the quantified benefits of final rules significantly exceeded the quantified costs for the calendar year 2009³:

³ The tabulation include only those rules for which reasonably complete monetized estimates of both benefits and costs are available. Three qualifications are important: (1) the estimates for 2009 are preliminary; (2) the groundwork for a number of regulations finalized in one administration is done in a previous administration; (3) the aggregate estimates of costs and benefits, derived from different agencies’ estimates and over different time periods, are subject to methodological inconsistencies and differing assumptions.

**Figure 1: Annual Net Benefits of Major Rules
First Calendar Year of an Administration (1/21 to 12/31)**



Of course this is only a start. As OMB’s 2009 Report to Congress says, “Indeed, careful regulatory analysis, if transparent in its assumptions and subject to public scrutiny, should be seen as part and parcel of open government. It helps to ensure that policies are not based on speculation and guesswork, but instead on a sense of the likely consequences of alternative courses of action. It helps to reduce the risk of insufficiently justified regulation, imposing serious burdens and costs for inadequate reason. It also helps to reduce the risk of insufficiently protective regulation, failing to go as far as proper analysis suggests. We believe that regulatory analysis should be developed and designed in a way that fits with the commitment to open government. Modern technologies should be enlisted to promote that goal.”

Third: In recent years, there has been a great deal of empirical work on the topics of disclosure and simplification, with the goal of developing low-cost, low-burden regulatory tools. In implementing statutory requirements, OIRA has been working closely with agencies to explore a number of ways to promote private and public accountability and to inform choices. Examples can be found in our draft 2010 Report to Congress on the Costs and Benefits of

Federal Regulation and in our June 18, 2010 guidance on disclosure and simplification as regulatory tools.

OIRA has recently created its own dashboard, which offers a clear and unprecedentedly vivid picture of the federal rulemakings under formal OIRA review (see reginfo.gov). With a very quick glance, citizens can see what is under formal review from a large number of agencies. Citizens can learn how long rules have been under such review, whether they are economically significant, what they would do, and more. The new dashboard is only a beginning, but we hope that it is a step toward greater transparency, in a way that unifies our interest in open government with our interest in smart, effective regulation.

I look forward to answering your questions.