Written Testimony of

Robert Weissman
President, Public Citizen

before the

The Senate Committee On Homeland Security and Government Affairs

on

"The Administrative State: An Examination of Federal Rulemaking"

April 20, 2016

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on regulatory policy issues. I am Robert Weissman, president of Public Citizen. Public Citizen is a national public interest organization with more than 400,000 members and supporters. For 45 years, we have advocated with some considerable success for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Public Citizen chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 75 consumer, small business, labor, scientific, research, good government, faith, community, health and environmental organizations joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all. Time constraints prevented the Coalition from reviewing my testimony in advance, and today I speak only on behalf of Public Citizen.

Over the last century, and up to the present, regulations have made our country stronger, better, safer, cleaner, healthier and more fair and just. Regulations have made our food supply safer; saved hundreds of thousands of lives by reducing smoking rates; improved air quality, saving hundreds of thousands of lives; protected children's brain development by phasing out leaded gasoline; saved consumers billions by facilitating price-lowering generic competition for pharmaceuticals; reduced toxic emissions into the air and water; empowered disabled persons by giving them improved access to public facilities and workplace opportunities; guaranteed a minimum wage, ended child labor and established limits on the length of the work week; saved the lives of thousands of workers every year; protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques; ensured financial system stability (at least when appropriate rules were in place and enforced); made toys safer; saved tens of thousands of lives by making our cars safer; and much, much more.

The benefits of rules adopted during the Obama administration, as with rules adopted during the Bush administration, vastly exceed the costs, even when measured according to corporate-friendly criteria.

We have also seen in recent years with great clarity the impact of regulatory failure—lack of regulatory enforcement, regulations delayed or rolled back, and insufficient regulatory standards and protections in place. Most notably, it was regulatory failure that was significantly responsible for the Great Recession, which imposed far greater costs on the economy and cost far more jobs than regulations ever could.

To review the facts of how regulation strengthens our country and safeguards jobs, however, is not to suggest that all is well with the regulatory system. There is a need for significant regulatory reform—including reforms to reduce regulatory delay, toughen regulatory enforcement, the imposition of inappropriate analytic obligations on agencies, address imbalances in judicial review of agency rulemaking, and address anti-competitive practices that injure small businesses, consumers and the national economy.

The first section of this testimony argues that regulatory benefits vastly exceed costs and that regulatory failure—inadequate rules, and too little regulatory enforcement—should be understood as a key cause of the Great Recession and ongoing economic weakness. The second reviews the rulemaking experience with the three rules on which this hearing is focused: The fiduciary rule, the Net Neutrality rule, and the Clean Water Rule. The third section of the testimony focuses on needed reforms to strengthen our regulatory system – especially combating needless delay -- so that it fulfills its role of protecting the American people and strengthening our economy.

I. Regulations are Economically Smart

A. Regulatory benefits vastly exceed costs

Rhetorical debates and cost-benefit abstractions can obscure the dramatic gains our country has made due to regulation. Regulation has:

- Made our food safer.[1]
- Saved tens of thousands of lives by making our cars safer.[2]
- Made it safer to breathe, saving hundreds of thousands of lives annually.[3]
- Protected children's brain development by phasing out leaded gasoline and dramatically reducing average blood levels.[4]
- Empowered disabled persons by giving them improved access to public facilities and workplace opportunities, through implementation of the Americans with Disabilities Act.[5]
- Guaranteed a minimum wage, ended child labor and established limits on the length of the work week.[6]

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[1] American Public Health Association. (2010, November 30). *APHA Commends Senate for Passing Strong Food Safety Legislation*. Retrieved 24 February, 2012, from http://www.makeourfoodsafe.org/tools/assets/files/APHA_Senate-Passage-Food-Act_FINAL2.pdf

[2] NHTSA's vehicle safety standards have reduced the traffic fatality rate from nearly 3.5 fatalities per 100 million vehicles traveled in 1980 to 1.41 fatalities per 100 million vehicles traveled in 2006. Steinzor, R., & Shapiro, S. (2010). *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment*: University of Chicago Press.

[3] Clean Air Act rules saved 164,300 adult lives in 2010. In February 2011, EPA estimated that by 2020 they will save 237,000 lives annually. EPA air pollution controls saved 13 million days of lost work and 3.2 million days of lost school in 2010, and EPA estimates that they will save 17 million work-loss days and 5.4 million school-loss days annually by 2020. *See* U.S. Environmental Protection Agency, Office of Air and Radiation. (2011, March). *The Benefits and Costs of the Clean Air and Radiation Act from 1990 to 2020*. Available from: <http://www.epa.gov/oar/sect812/feb11/fullreport.pdf>.

[4] EPA regulations phasing out lead in gasoline helped reduce the average blood lead level in U.S. children ages 1 to 5. During the years 1976 to 1980, 88 percent of all U.S. children had blood levels in excess of 10μg/dL; during the years 1991 to 1994, only 4.4 percent of all U.S. children had blood levels in excess of that dangerous amount. Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities*. Available from: <http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf>.

[5] National Council on Disability. (2007). *The Impact of the Americans with Disabilities Act*. Available from: <http://www.ncd.gov/publications/2007/07262007>.

[6] There are important exceptions to the child labor prohibition; significant enforcement failures regarding the minimum wage, child labor and length of work week (before time and a half compensation is mandated). But the

- Saved the lives of thousands of workers every year.[7]
- Saved consumers and taxpayers billions of dollars by facilitating generic competition for medicines.[8]
- Protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques.[9]
- For half a century in the mid-twentieth century, and until the onset of financial deregulation, provided financial stability and a right-sized financial sector, helping create the conditions for robust economic growth and shared prosperity.[10]

These are not just the achievements of a bygone era. Regulation continues to improve the quality of life for every American, every day. Ongoing and emerging problems and a rapidly changing economy require the issuance of new rules to ensure that America is strong and safe, healthy and wealthy. Consider a small sampling of rules recently issued, pending, or that are or should be under consideration:

- **Fuel efficiency standards.** Pursuant to the Energy Policy and Conservation Act, the Energy Independence and Security Act and the Clean Air Act, the National Highway Safety and Transportation Agency and the Environmental Protection Agency have proposed new automobile and vehicular fuel efficiency standards. The new rules, on an average industry fleet-wide basis for cars and trucks combined, establish standards of 40.1 miles per gallon (mpg) in model year 2021, and 49.6 mpg in model year 2025. The agencies estimate that fuel savings will far outweigh higher vehicle costs, and that the net benefits to society from 2017-2025 will be in the range of $311 billion to $421 billion. The auto industry was integrally involved in the development of these proposed standards, and supports their promulgation.

- **Food safety rules.** In 2010, with support from both industry and consumer groups, and in response to a series of food contamination incidents that rocked the nation, Congress passed the Food Safety Modernization Act. The Act should improve the safety of eggs,

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quality of improvement in American lives has nonetheless been dramatic. Lardner, J. (2011). *Good Rules: 10 Stories of Successful Regulation*. Demos. Available from: <http://www.demos.org/sites/default/files/publications/goodrules_1_11.pdf>.

[7] Deaths on the job have declined from more than 14,000 per year in 1970, when the Occupational Safety and Health Administration was created to under 4,500 at present. *See* AFL-CIO. (2015, April.) Death on the Job: The Toll of Neglect. p. 1. Available from: <http://www.aflcio.org/content/download/154671/3868441/DOTJ2015Finalnobug.pdf>. Mining deaths fell by half shortly after creation of the Mine Safety and Health Administration. Weeks, J. L., & Fox, M. (1983). Fatality rates and regulatory policies in bituminous coal mining, United States, 1959-1981. *American journal of public health, 73*(11), 1278.

[8] Through regulations facilitating effective implementation of the Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman"), including by limiting the ability of brand-name pharmaceutical companies to extend and maintain government-granted monopolies. Troy, D. E. (2003). *Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Amendments)*. Statement before the Senate Committee on the Judiciary. Available from: <http://www.fda.gov/newsevents/testimony/ucm115033.htm>.

[9] See 16 CFR 410-460.

[10] See Stiglitz, J. E. (2010). *Freefall: America, free markets, and the sinking of the world economy*: WW Norton & Co Inc.; Kuttner, R. (2008). *The Squandering of America: how the failure of our politics undermines our prosperity*: Vintage.

dairy, seafood, fruits, vegetable and many processed and imported foods, but its effective implementation depends on rulemaking. Not so incidentally, food contamination incidents have major harmful economic impact on the agriculture and food industries and job creation and preservation in those industries.

- **Energy efficiency standards.** Pursuant to the Energy Security and Independence Act, the Department of Energy has proposed energy efficiency standards for a range of products, including Metal Halide Lamp Fixtures, Commercial Refrigeration Equipment, and Battery Chargers and External Power Supplies, Walk-In Coolers and Walk-In Freezers, Residential Clothes Washers.[11] The Department of Energy estimates the net savings from implementation of the Energy Security and Independence Act to be $48 billion - $105 billion (in 2007 dollars).[12]

- **Rules to avert workplace hazards.** By way of example, consider the case of beryllium, a toxic substance to which workers in the electronics, nuclear, and metalwork sector are exposed. The current OSHA beryllium standard, based on science from the 1950s, allows workers to be exposed at levels that are ten times higher than those allowed by Department of Energy for nuclear power plant workers. Public Citizen petitioned OSHA to update the standard in 2001. In response, the agency began a rulemaking in November 2002. It is a testament to major problems in the regulatory process that OSHA has still not issued appropriate rules. Issuance of a rule could avert thousands of cases of serious disease.[13]

- **Controls on Wall Street.** As discussed in more detail below, the 2008 financial crash was a direct result of regulatory failures. These failures including inadequate regulation of mortgages and other consumer financial products, on the one hand, and esoteric financial products and the markets on which they trade, on the other. Another critical failure was permitting the rise of too-big-to-fail financial institutions, traceable both to the failure to enforce existing rules and policies, and the repeal and nonissuance of important rules. Few people are entirely satisfied with the Dodd-Frank legislation—Public Citizen is highly critical of a number of important omissions—but the Act does include an array of very important reforms that will make our financial system fairer and more stable—if properly implemented through robust rulemaking.

  Among many other important provisions are crucial consumer protections. Dodd-Frank created the Consumer Financial Protection Bureau, charging the agency with the single mission of protecting consumers and empowering it to issue new consumer protection rules. Given the very considerable extent to which the financial industry has constructed a business model around trickery and unjust fees, CFPB rulemaking can afford consumer dramatic benefits. Such rules may concern matters including: requiring mortgage lenders

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[11] List of Regulatory Actions Currently Under Review. Available from: <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp>.

[12] U.S. Department of Energy. (2007). *Energy Independence and Security Act of 2007 Prescribed Standards*. Available from: <http://www1.eere.energy.gov/buildings/appliance_standards/m/eisa2007.html>.

[13] U.S. Occupational Safety and Health Administration. (2007). *Preliminary Initial Regulatory Flexibility Analysis of the Preliminary Draft Standard for Occupational Exposure to Beryllium*.

to consider borrowers' ability to pay; prohibiting banks from charging excessive overdraft fees or tricking consumers into opting in to unreasonable overdraft fee harvesting schemes; eliminating forced arbitration provisions in consumer financial contracts; banning unfair practices in the payday loan industry; prohibiting kickbacks to auto dealers who steer buyers into overpriced loans; stopping student loan companies from tricking students into taking high-priced private loans before they exhaust cheaper federal loans.[14]

- **Generic competition for biotech medicines.** An overlooked component of the Affordable Care Act was the creation of a process for the Food and Drug Administration to grant regulatory approval for generic biologic pharmaceutical products—essentially generic versions of biotech medicines. Because the molecular composition of biologic drugs is more complicated than traditional medicines, FDA had adopted the position that, with some exceptions, it could not grant regulatory approval for biologics under its previously existing authority. In an important provision of the Affordable Care Act—supported by the biotech industry—FDA was explicitly granted such authority. The provision wrongly grants extended monopolies to brand-name biologic manufacturers, but belated generic competition is better than none. Implementation of the new regulatory pathway for biogenerics, however, depends on issuance of rules by the FDA. Biogeneric competition will save consumers and the government billions of dollars annually.

- **Crib safety.** Pursuant to the Consumer Product Safety Improvement Act of 2008, the Consumer Product Safety Commission (CPSC) finalized updated safety standards for cribs that halted the manufacture and sale of traditional drop-side cribs, required stronger mattress supports, more durable hardware and regular safety testing. These new crib safety standards mean "that parents, grandparents, and caregivers can now shop for cribs with more confidence—confidence that the rules put the safety of infants above all else."[15]

- **The Physician Payment Sunshine Act.** This component of the Affordable Care Act requires the disclosure of payments and gifts by pharmaceutical and medical device companies to physicians and hospitals. The mere fact of disclosure is expected to curtail the improper influence of industry over research, education and clinical decision making. Putting the Act into place required implementing rules.[16]

Although most regulations do not have economic objectives as their primary purpose, in fact regulation is overwhelmingly positive for the economy. It is worth underscoring this point, because concerns about particular rules or that the rulemaking process is unfair to regulated industry are usually rooted in economic arguments.

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[14] National Consumer Law Center. (2010). *An Agenda for the Consumer Financial Protection Bureau: Challenges for a New Era in Consumer Protection*. Retrieved 24 February, 2012, Available from:<http://www.nclc.org/images/pdf/regulatory_reform/pr-cfpb-agenda.pdf>

[15] Consumer Federation of America. (2011, June 28). *Senators, CPSC, Consumer Advocates Applaud Strong Crib Safety Standards to Prevent Infant Deaths and Injuries*. Available from: <http://www.consumerfed.org/pdfs/crib-standards-press-release-6-28-11.pdf>.

[16] 42 CFR Parts 402 and 403. February 8, 2013.

While regulators commonly do not have economic growth and job creation as a mission priority, they are mindful of regulatory cost, and by statutory directive or on their own initiative typically seek to minimize costs; relatedly, the rulemaking process gives affected industries ample opportunity to communicate with regulators over cost concerns, and these concerns are taken into account. To review the regulations actually proposed and adopted is to see how much attention regulators pay to reducing cost and detrimental impact on employment. And to assess the very extended rulemaking process is to see how substantial industry influence is over the rules ultimately adopted—or discarded.

There is a large body of theoretical and non-empirical work on the cost of regulation, some of which yields utterly implausible cost estimates. There is also a long history of business complaining about the cost of regulation—and predicting that the next regulation will impose unbearable burdens. More informative than the theoretical work, anecdotes and allegations is a review of the actual costs and benefits of regulations, though even this methodology is significantly imprecise and heavily biased against the benefits of regulation. Every year, the Office of Management and Budget (OMB) analyzes the costs and benefits of rules with significant economic impact. The benefits massively exceed costs.

The principle finding of *OMB's draft 2015 Report to Congress on the Benefits and Costs of Federal Regulation* is:

> The estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2004, to September 30, 2014, for which agencies estimated and monetized both benefits and costs, are in the aggregate between $216 billion and $812 billion, while the estimated annual costs are in the aggregate between $57 billion and $85 billion. These ranges are reported in 2001 dollars and reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.[17]

In other words, even by OMB's most conservative accounting, the benefits of major regulations over the last decade exceeded costs by a factor of more than two-to-one. And benefits may exceed costs by a factor of 15.

These results are consistent year-to-year as the following table shows.

[17] Office of Management and Budget, Office of Information and Regulatory Affairs. (2015). Draft *2015 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities*. p*p.1-2.* Available at: https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/draft_2015_cost_benefit_report.pdf.

Total Annual Benefits and Costs of Major Rules by Fiscal Year (billions of 2001 dollars)[18]

Fiscal Year	Number of Rules	Benefits	Costs
2001	12	22.5 to 27.8	9.9
2002	2	1.5 to 6.4	0.6 to 2.2
2003	6	1.6 to 4.5	1.9 to 2.0
2004	10	8.8 to 69.8	3.0 to 3.2
2005	12	27.9 to 178.1	4.3 to 6.2
2006	7	2.5 to 5.0	1.1 to 1.4
2007	12	28.6 to 184.2	9.4 to 10.7
2008	11	8.6 to 39.4	7.9 to 9.2
2009	15	8.6 to 28.9	3.7 to 9.5
2010	18	18.6 to 85.9	6.4 to 12.4
2011	13	34.3 to 98.5	5.0 to 10.2
2012	14	53.2 to 114.6	14.8 to 19.5
2013	7	25.6 to 67.3	2.0 to 2.5
2014	13	8.1 to 18.9	2.5 to 3.7

The reason for the consistency is that regulators pay a great deal of concern to comparative costs and benefits (even though there is, we believe, a built-in bias of formal cost-benefit analysis against regulatory initiative[19]; see further comments below). Very few major rules are adopted where projected costs exceed projected benefits, and those very few cases—one of which is the Congressional mandate for railroads to adopt Positive Train Controls, a technology that would have averted the recent Amtrak accident—typically involve direct Congressional mandates.

It should also be noted that relatively high regulatory compliance costs, as discussed further below, do not necessarily have negative job impacts; firm expenditures on regulatory compliance typically create new jobs within affected firms or other service or product companies with which they contract.

Moreover, the empirical evidence also fails to support claims that regulation causes significant job loss. Insufficient demand is the primary reason for layoffs. In extensive survey data collected by the Bureau of Labor Statistics, employers cite lack of demand roughly 100 times more

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[18] Office of Management and Budget, Office of Information and Regulatory Affairs. (2015). *Draft 2015 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities*. *Table 1-4,* pp. 20-21. Available at: https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/draft_2015_cost_benefit_report.pdf.. ; 2001-2004 data from: Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities*. *Table 1-3,* p. 19-20. Available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

[19] *See, e.g.*, Shapiro, S. et al., *CPR Comments on Draft 2010 Report to Congress on the Benefits and Costs of Federal Regulations* 16-19 (App. A, Pt. C.) (2010), Available from: <http://www.progressivereform.org/articles/2010_CPR_Comments_OMB_Report.pdf>; Steinzor, R. et al., *CPR Comments on Draft 2009 Report to Congress on the Benefits and Costs of Federal Regulations* 16-19 (App. A, Pt. C.) (2009), Available from: <http://www.progressivereform.org/articles/2009_CPR_Comments_OMB_Report.pdf>.

frequently than government regulation as the reason for mass layoffs![20] (Unfortunately, in response to budget cuts, the BLS ceased producing its mass layoff report in 2013.)

Reason for layoff: 2008-2012[21]

	2008	**2009**	**2010**	**2011**	**2012**
Business Demand	516,919	824,834	384,564	366,629	461,328
Governmental regulations/intervention	5,505	4,854	2,971	2,736	3,300

It is also the case that firms typically innovate creatively and quickly to meet new regulatory requirements, even when they fought hard against adoption of the rules.[22] The result is that costs are commonly lower than anticipated.

B. Job-destroying regulatory failure and the Great Recession

Missing from much of the current policy debate on jobs and regulation is a crucial, overriding fact: The Great Recession and the ongoing weak jobs market and national economy are a direct result of too little regulation and too little regulatory enforcement.

A very considerable literature, and a very extensive Congressional hearing record, documents in granular detail the ways in which regulatory failure led to financial crash and the onset of the Great Recession. "Widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets," concluded the Financial Crisis Inquiry Commission.[23] "Deregulation went beyond dismantling regulations," notes the Financial Crisis Inquiry Commission. "[I]ts supporters were also disinclined to adopt new regulations or challenge industry on the risks of innovations."[24]

The regulatory failures were pervasive, the Financial Crisis Inquiry Commission concluded:

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[20] U.S. Department of Labor, Bureau of Labor Statistics. (2012, November). *Extended Mass Layoffs in 2011. Table 5. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2009-2011.* Available from: <http://www.bls.gov/mls/mlsreport1039.pdf>.

[21] U.S. Department of Labor, Bureau of Labor Statistics. (2012, November). *Extended Mass Layoffs in 2011. Table 5. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2010-2012.* Available from: < http://www.bls.gov/mls/mlsreport1043.pdf>. U.S. Department of Labor, Bureau of Labor Statistics. (2013, September). *Extended Mass Layoffs in 2011. Table 4. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2009-2011.* Available from: <http://www.bls.gov/mls/mlsreport1039.pdf>; U.S. Department of Labor, Bureau of Labor Statistics. (2011, November). *Extended Mass Layoffs in 2010. Table 6. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2008-2010.* Available from: <http://www.bls.gov/mls/mlsreport1038.pdf>.

[22] Mouzoon, N., & Lincoln, T. (2011). *Regulation: The Unsung Hero in American Innovation*. Public Citizen. Available from: <http://www.citizen.org/documents/regulation-innovation.pdf>.

[23] Financial Crisis Inquiry Commission. (2011). *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*. Washington, D.C.: Government Printing Office. p. 30.

[24] *The Financial Crisis Inquiry Report.* p. 53.

> The sentries were not at their posts, in no small part due to the widely accepted faith in the self-correcting nature of the markets and the ability of financial institutions to effectively police themselves. More than 30 years of deregulation and reliance on self-regulation by financial institutions, championed by former Federal Reserve Chairman Alan Greenspan and others, supported by successive administrations and Congresses, and actively pushed by the powerful financial industry at every turn, had stripped away key safeguards, which could have helped avoid catastrophe. This approach had opened up gaps in oversight of critical areas with trillions of dollars at risk, such as the shadow banking system and over-the-counter derivatives markets. In addition, the government permitted financial firms to pick their preferred regulators in what became a race to the weakest supervisor.

The regulatory failure story can perhaps be summarized as follows: Financial deregulation and non-regulation created a vicious cycle that helped inflate the housing bubble and an interconnected financial bubble. Weak mortgage regulation enabled the spread of toxic and predatory mortgages that helped fuel the housing bubble. Deregulated Wall Street firms and big banks exhibited an insatiable appetite for mortgage loans, irrespective of quality, thanks to insufficiently regulated securitization, off-the-books accounting, the spread of shadow banking techniques, dangerous compensation incentives and inadequate capital standards. Reckless financial practices were ratified by credit ratings firms, paving the way for institutional funders to pour billions into mortgage-related markets; and an unregulated derivatives trade offered the illusion of systemic insurance but actually exacerbated the crisis when the housing bubble popped and Wall Street crashed.

The costs of this set of regulatory failures are staggeringly high, and far outdistance any plausible story about the "cost" of regulation.

To prevent the collapse of the financial system, the federal government provided incomprehensibly huge financial supports, far beyond the $700 billion in the much-maligned Troubled Assets Relief Program (TARP). The Special Inspector General for the Troubled Assets Relief Program (SIGTARP) estimated that "though a huge sum in its own right, the $700 billion in TARP funding represents only a portion of a much larger sum—estimated to be as large as $23.7 trillion—of potential Federal Government support to the financial system."[25] Much of this sum was never allocated, and most of the TARP funds were paid back. However, the regulatory reform policy debate should acknowledge that such unfathomable sums were put at risk thanks to regulatory failure.

Even more significant, however, are the actual losses traceable to the regulatory failure-enabled Great Recession. These losses are real, not potential; they are at a comparable scale of more than $20 trillion; they involve an actual loss of economic output, not just a reallocation of resources; and they have imposed devastating pain on families, communities and national well-being.

[25] Special Inspector General for the Troubled Assets Relief Program (SIGTARP) (2009, July 21.) Quarterly Report to Congress. p. 129. Available from: <http://www.sigtarp.gov/Quarterly%20Reports/July2009_Quarterly_Report_to_Congress.pdf>.

A GAO study found that "[t]he 2007-2009 financial crisis, like past financial crises, was associated with not only a steep decline in output but also the most severe economic downturn since the Great Depression of the 1930s."[26] Reviewing estimates of lost economic output, GAO reported that the present value of cumulative output losses could exceed $13 trillion.[27] Additionally, GAO found that "households collectively lost about $9.1 trillion (in constant 2011 dollars) in national home equity between 2005 and 2011, in part because of the decline in home prices."[28]

The recession threw millions out of work, and left millions still jobless or underemployed. "The monthly unemployment rate peaked at around 10 percent in October 2009 and remained above 8 percent for over 3 years, making this the longest stretch of unemployment above 8 percent in the United States since the Great Depression," GAO noted.[29]

The economic impact on families is crushing, even leaving aside social and psychological consequences. "Displaced workers—those who permanently lose their jobs through no fault of their own—often suffer an initial decline in earnings and also can suffer longer-term losses in earnings," reports GAO. For example, one study found that workers displaced during the 1982 recession earned 20 percent less, on average, than their non-displaced peers 15 to 20 years later.[30] Thanks to lost income and especially collapsed housing prices, families have seen their net worth plummet. According to the Federal Reserve's Survey of Consumer Finances, median household net worth fell by $49,100 per family, or by nearly 39 percent, between 2007 and 2010.[31]

The foreclosure crisis stemming from the toxic brew of collapsing housing prices, exploding and other unsustainable mortgages and high unemployment has devastated families and communities across the nation.[32]

The financial crash and Great Recession is also, not so incidentally, the primary explanation for historically high federal deficits. Reports GAO:

> From the end of 2007 to the end of 2010, federal debt held by the public increased from roughly 36 percent of GDP to roughly 62 percent. Key factors contributing to increased deficit and debt levels following the crisis included (1) reduced tax revenues, in part

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[26] U.S. Government Accountability Office. (2013, Jan. 13). *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 12. Available from: <http://www.gao.gov/products/GAO-13-180>.
[27] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 16.
[28] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 21. There is necessarily a significant amount of uncertainty around such analyses. Other estimates have placed the loss somewhat lower. A recent Congressional Budget Office study estimates the cumulative loss from the recession and slow recovery at $5.7 trillion." (Congressional Budget Office. 2012. *The Budget and Economic Outlook: Fiscal Years 2012 to 2022*. p. 26.) One complicating issue is determining which losses should be attributed to the recession and which to other issues. For example, GAO notes, "analyzing the peak-to-trough changes in certain measures, such as home prices, can overstate the impacts associated with the crisis, as valuations before the crisis may have been inflated and unsustainable.[28] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 17.
[29] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 17-18.
[30] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 18-19.
[31] Cited in *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 16.
[32] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 23-24.

> driven by declines in taxable income for consumers and businesses; (2) increased spending on unemployment insurance and other nondiscretionary programs that provide assistance to individuals impacted by the recession; (3) fiscal stimulus programs enacted by Congress to mitigate the recession, such as the American Recovery and Reinvestment Act of 2009 (Recovery Act); and (4) increased government assistance to stabilize financial institutions and markets.[33]

It should be noted that there are, to be sure, dissenting views to narratives that place regulatory failure at the core of the explanation for the Great Recession and financial crisis. Perhaps the most eloquent version of this dissent is contained in the primary dissenting statement to the Financial Crisis Inquiry Commission.

The dissent explained that "we … reject as too simplistic the hypothesis that too little regulation caused the Crisis,"[34] arguing that the *amount* of regulation is an imprecise and perhaps irrelevant metric. This is a reasonable position (and it applies equally to those who complain about "too much" regulation); what matters is the quality of regulation—both the rules and standards of enforcement.

The FCIC dissent began its explanation for the financial crisis with the creation of a credit bubble and a housing bubble, which it argued laid the groundwork for a financial crisis thanks to a series of other, interconnected factors, including the spread of nontraditional mortgages, securitization, poor functioning by credit rating firms, inadequate capitalization by financial firms, the amplification of housing bets through use of synthetic credit derivatives, and the risk of contagion due to excessive interconnectedness.

However, to review this list is to see how the FCIC dissent also implicitly argued that the crisis can be blamed in large part on regulatory failure. For all of these factors should have been tamed by appropriate regulatory action.

II. Homeland Security and Government Affairs Committee Hearing Case Study Examples

This hearing on the administrative process is focusing especially on three recent, high-profile rules: the Department of Labor's Retirement Advice Conflict of Interest Rule, the Federal Communications Commission's Net Neutrality Rule, and the Environmental Protection Agency and Army Corps of Engineers' Clean Water Rule. These rules have little in common, making it hard to draw from them important lessons about the rulemaking process. Each of them does advance important public policy objectives, however, illustrating the crucial importance of the regulatory process to improving the quality of life for Americans. Each of them also highlights the care with which agencies generally approach rulemaking, and the extensive consideration given to the views of regulated industry.

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[33] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 26.

[34] *The Financial Crisis Inquiry Report.* (Dissenting Views By Keith Hennessey, Douglas Holtz-Eakin, and Bill Thomas.) p. 414.

A. Preventing Conflicts of Interest in the Provision of Retirement Advice – the Fiduciary Rule

More than five years in the making, the Department of Labor earlier this month adopted a final version of its rule to eliminate conflicts of interest among those who provide investment advice to retirement savers.[35] This crucial consumer protection rule is known as the "fiduciary rule" because clarifies the definition of what constitutes a "fiduciary" under the Employment Retirement Income Security Act of 1974 (ERISA). In short, the common-sense rule requires that retirement investor advisors must serve the best interests of their clients.

ERISA established the definition of a fiduciary adviser as anyone who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or property of such a plan, or any authority or responsibility to do so." In implementing the law, the Department of Labor created a five-part test that must be met for an adviser to be considered a fiduciary under ERISA. This significantly narrowed the statutory definition and created loopholes that became highly problematic over time. Broker-dealers, insurance agents and other sales-based advisers have used these loopholes to provide retirement advice without abiding by a fiduciary standard. Their advice was required only to be "suitable."

Over the last several decades, the nation has seen a massive shift from defined benefit pension plans to defined contribution retirement accounts, such as 401(k)s, as well as the rise of Individual Retirement Accounts (IRAs). Defined contribution account and IRA holders are in charge of their investments, and need investment advice. The narrow definition of fiduciary prior to adoption of the fiduciary rule meant that those providing that advice could permissibly maintain undisclosed conflicts of interest. Given the increasing complexity of financial products and markets, this created an opportunity for significant abuse.

The fiduciary rule aims to mitigate these conflicts of interest. Under the rule, any person compensated for making individualized recommendations to an IRA owner or pension plan participant is a fiduciary and must provide impartial advice in their client's best interest.

It's hard to overstate how common-sense is this measure. Consumers assuredly expect that professionals on whom they rely for advice will serve their best interests. For many, navigating the complexities of the market is intimidating and confusing. Even sophisticated consumers need assistance – that is why they are seeking advice – and assume that their advisors are serving their clients' interests, not advancing the advisors' financial interests at the expense of clients. Consumers generally have little knowledge and understanding of the various legal categories that determine the duty of loyalty owed them by advisors.[36] Proportionately, very few consumers understand the significance of high fees in reducing long-term yield – even those fees that are properly disclosed -- making consumers extraordinarily vulnerable to manipulation.[37] Yet, under

[35] Final Rule, Federal Register, Vol. 81, No. 68, April 8, 2016, 20946.
[3636] Consumer Financial Protection Bureau, "Senior Designations for Financial Advisers," April 18, 2013, available at: http://files.consumerfinance.gov/f/201304_CFPB_OlderAmericans_Report.pdf.
[37] See, for example, Kate Stalter, "The Investment Fees You Don't Realize You're Paying," US News, December 15, 2014, available at: http://money.usnews.com/money/personal-finance/mutual-funds/articles/2014/12/15/the-investment-fees-you-dont-realize-youre-paying.

rules in place prior to adoption of the fiduciary rule, they were actually permitted to operate with conflicts of interest that did not have to be disclosed; give imprudent and disloyal advice; and steer IRA owners to investments based on their own, rather than the customers' best interest.[38]

Of course, many investment advisors even prior to adoption of the final rule operated to advance their clients' best interest. And, to be very clear, assuredly many of those who did not themselves serve their clients' best interest did not realize how conflicts alter the advice they give; the impact of conflicts of interest are often not apparent even to those conflicted.

Yet just as assuredly, conflicts have been rife and materially harming consumers. After a thorough review of the available literature, the Council of Economic Advisers determined that conflicts reduce investor returns to IRAs by 1 percent a year, or $17 billion annually.[39] An individual consumer could easily retire with an investment account worth 20 percent less than it would otherwise be as a result of these expenses.[40]

The fiduciary rule will assure that investment advisers serve the best interests of their clients, and eliminate the conflicts that cost consumers so significantly.

Perhaps surprisingly, broker-dealers have objected to the new rule. While regulated entities commonly oppose the adoption of news rules that constrain abusive activity, it is still noteworthy that many in the industry have sought to prevent adoption of a standard that would require them to serve their clients' best interests. Predictably, those opposed to the fiduciary rule do not argue the merits of conflicts of interest. Instead, they contend that compliance costs will be excessively burdensome and might drive small firms out of business. Neither claim stands up under scrutiny. The Department of Labor's careful and detailed cost estimate – based significantly on data provided by industry -- place compliance costs at between $3.3 billion and $3.6 billion.[41] While industry has stated publicly that compliance costs threaten business viability, leading companies are making contrary claims to their own investors. Referring to statements the companies have made in their Securities and Exchange Commission filings, Senator Elizabeth Warren and Representative Elijah Cummings write, "In contrast to their public doomsday predictions, industry leaders have told their own investors that they don't see this as a significant hurdle,' 'will once again respond to marketplace or regulatory changes effectively,' and that they are well-positioned to adapt to any regulatory framework that emerges.'"[42] Meanwhile, large and small firms can continue to profitably serve small investors with affordable advice that's in their

[38] Final Rule, Federal Register, Vol. 81, No. 68, April 8, 2016, 20946.
[39] Council of Economic Advisers, The Effects of Conflicted Investment Advice on Retirement Savings, February 2015, available at: https://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.
[40] Council of Economic Advisers, The Effects of Conflicted Investment Advice on Retirement Savings, February 2015, available at: https://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.
[41] Department of Labor, "Regulating Advice Markets," April 2016, available at: http://www.dol.gov/ebsa/pdf/conflict-of-interest-ria.pdf.
[42] Senator Elizabeth Warren and Representative Elijah Cummings, Letter to Secretary of Labor Thomas Perez and Office of Management and Budget Director Shaun Donovan, February 11, 2015, available at: http://www.warren.senate.gov/files/documents/2016-2-11_Letter_to_DOL_and_OMB.pdf.

best interest according to a wide variety of business models, including those that charge commissions, as an increasing number are starting to do in anticipation of the rule.[43]

The fiduciary rule is the product of more than five years of work. First proposed in 2010, the Department withdrew its initial proposal to address concerns that were raised. Although it aimed to reintroduce the rule in early 2012, the next iteration was not proposed until 2015. During the prolonged period of delay until it proposed the revised rule in April 2015, the Department consulted extensively, including with stakeholders and other government agencies, particularly the Securities and Exchange Commission and the Financial Industry Regulatory Authority (FINRA).[44] The revised proposal was sent to the Office of Information and Regulatory Affairs (OIRA) for review in February 2015. OIRA held 21 stakeholder meetings on the issue before releasing the proposal, including with Fidelity Investments, the Financial Services Roundtable, and the U.S. Chamber of Commerce.[45]

On April 20, 2015, the Labor Department issued its updated proposal. After receiving requests for additional time to submit input on the revised rule, the Labor Department extended the comment period by two weeks in July and held a four-day hearing during the week of August 10, 2015. The Department then re-opened the comment period again for an additional two weeks for additional public testimony and comments. In total, there were over 100 days for the public to comment on the draft rule. The Department received 3,134 total comments, including 30 petitions that encompass an additional 386,889 comments.

The public participation in the process was dominated by investment and insurance industry firms and lobbyists as compared to public interest or consumer groups, and the final rule incorporates substantial revisions in response to comments received, intended especially to reduce compliance costs.[46]

The Committee majority has issued a report raising concerns about inter-agency disagreements over the fiduciary rule. But there is no question as to the Department of Labor's jurisdiction over the matters covered by the fiduciary rule; and disagreements among staff are to be expected and are an important part of the deliberative process. The final fiduciary rule is a long overdue measure, needlessly delayed for years, to adopt commonsense protections for consumers. It will, conservatively, save consumers $17 billion every year, and materially advance the well-being of people in their retirement years. This is how regulation is supposed to work – albeit it should work more quickly.

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[43] Michael Wursthorn, "Brokerages Adapt to Pending Labor Rule," Wall Street Journal, March 16, 2016, available at: www.wsj.com/articles/brokerages-adapt-to-pending-labor-rule-1458151260; Jason Zweig, "Saving for Retirement? The Rulebook is About to Change," Wall Street Journal, April 4, 2016, available at: http://www.wsj.com/articles/new-government-rule-rewrites-retirement-savings-1459762202.
[44] See Appendix to Senate Homeland Security and Government Affairs Committee, Majority Report, "The Labor Department's Fiduciary Rule: How a Flawed Process Could Hurt Retirement Savers," (2016).
[45] EO 12,866 Meetings (2015) available at www.reginfo.gov.
[46] Department of Labor, "Regulating Advice Markets," April 2016, available at: http://www.dol.gov/ebsa/pdf/conflict-of-interest-ria.pdf.

B. Net Neutrality

The Federal Communication Commission's (FCC's) Open Internet ("Net Neutrality") order, adopted last year, is one of the most important developments in protecting consumers' access to a free and open internet.

In February 2015, the FCC voted to reclassify broadband internet service as a telecommunications service and adopt rules requiring Network Neutrality. The order followed years of contentious debate and extensive litigation, including over the FCC's jurisdictional authority. The jurisdictional issues were resolved by the agency's decision to classify broadband as a telecommunications service; and the Net Neutrality rules finally resolve crucial questions about the degree to which Internet Service Providers (ISPs) could control the flow of content over the Internet.

The rule establishes three bright line rules to protect a free and open Internet:

- No Blocking: broadband providers may not block access to legal content, applications, services, or non-harmful devices.
- No Throttling: broadband providers may not impair or degrade lawful internet traffic on the basis of content, applications, services, or non-harmful devices.
- No Paid Prioritization: broadband providers may not favor some lawful internet traffic over other lawful traffic in exchange for consideration of any kind—in other words, no "fast lanes." This rule also bans ISPs from prioritizing content and services of their affiliates.[47]

Policymakers of all stripes should celebrate the adoption of the Net Neutrality rule. It protects consumers, both from excessive tolls that could significantly impact their pocketbook, a diminished internet that would impose costs by diminishing their user experience[48] and, even more importantly, from ISP censorship or undue influence over what they could see. It advances core First Amendment values, ensuring that all lawful speech is treated equally on the Internet, made available without the censoring hand of a corporate Big Brother.[49] Without the Net Neutrality rule, ISPs might have blocked or interfered with consumer access to information that they disfavored, or which is promulgated by speakers with limited financial backing and limited ability to pay ISP-imposed tolls. And, equally as significantly, the Net Neutrality promotes competition and innovation, preventing the ISPs controlling – and slowing – the innovation that is occurring across Internet platforms.[50]

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[47] Federal Communications Commission, "Open Internet," available at: https://www.fcc.gov/general/open-internet.
[48] J. Scott Holladay, A.J. Glusman, Steven Soloway, "Internet Benefits," October 3, 2011, available at : http://policyintegrity.org/publications/detail/internet-benefits1.
[49] Jay Stanley, "Network Neutrality 101," American Civil Liberties Union, October 2010, available at: https://www.aclu.org/report/network-neutrality-101-why-government-must-act-preserve-free-and-open-internet?redirect=free-speech-technology-and-liberty/network-neutrality-101-why-government-must-act-preserve-free-and-. ("Network neutrality is a consumer issue, but it is also one of the foremost free speech issues of our time.")
[50] Digital Media Association, "Competition and Net Neutrality," available at: http://www.digmedia.org/issues-and-policy/net-neutrality.

Viewed properly, the Net Neutrality rule is fundamentally a pro-market and pro-business[51] rule. It removes not government control, but corporate goliath ISP gatekeepers that, in the absence of the rule, could stifle market competition and consumer freedom and liberty.

The opposition to the rule came from a powerful vested interest, the broadband ISPs, but one year's time has already dispelled their claims that the rule would impose catastrophic costs on them. In fact, analysts have found that the "Profits and profit margins are at historic, monopoly-like levels, and they continue to grow as ISPs exercise market power in an increasingly uncompetitive market." Broadband ISPs are increasing their capital investment as compared to the period before the rule, investing nearly $3 billion in 2015. Revenues across the industry are up, with 2015 revenues $22 billion above the previous year. Stock values have also increased.[52]

The Net Neutrality rule ranks close to the top of the highest-profile rulemakings in history. It is the product of a very lengthy FCC process and extensive litigation. One may or may not like the outcome – though the decision looks increasingly positive as time passes and promised harms do not materialize – but it is hard to argue the agency did not thoroughly vet the issue and engage the public.

Following several legal battles that demonstrated the need for the FCC to clarify that Net Neutrality principles – which have been long been the *de facto* standard of the internet – were binding commission standards, the FCC took its first steps toward the current Net Neutrality order in 2010 by proposing an Open Internet order.[53] This order was subsequently struck down by the DC Circuit Court of Appeals, but the court left open the possibility of the FCC issuing a statutorily justifiable Net Neutrality rule by reclassifying broadband services as "telecommunications services" under title II of the Communications Act.[54] In response, the FCC published a Notice of Proposed Rulemaking (NPRM) in May 2014 that fell short of adopting the reclassification of broadband services as "telecommunication services" but explicitly left open the possibility of doing so in the final rule.[55] After a robust public comment period that generated millions of public comments, the FCC released a final Report and Order in February 2015 that established strong net neutrality protections. The final order reclassified broadband services as telecommunications services; adopted Net Neutrality principles as binding rules; and invoked its discretion to forbear broadband providers from the vast majority of statutes and regulations that apply to regular telecommunication services.[56] That Order is currently being challenged in the DC Circuit Court of Appeals, although that court refused to stay the Order's enforcement pending a decision by the court.

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[51] Alex Christensen, "4 Types of Businesses that Benefit from Net Neutrality," Global Risk Insights, March 10, 2015, available at: http://globalriskinsights.com/2015/03/4-types-of-businesses-that-benefit-from-net-neutrality.

[52] See Free Press, "Same As It Ever Was: The U.S. Broadband Market Continues to Thrive One Year After the FCC's Historic Network Neutrality Vote," March 7, 2016, available at: http://www.freepress.net/sites/default/files/resources/free_press_broadband_market_one_year_later.pdf.

[53] Marguerite Reardon, "FCC Makes Net Neutrality Rules Official," CNet, December 21, 2010, available at: www.cnet.com/news/fcc-makes-net-neutrality-rules-official.

[54] *Verizon v. FEC*, January 14, 2014, available at: https://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/11-1355-1474943.pdf.

[55] FCC, Protecting and Promoting the Open Internet NPRM, May 15, 2014, available at: https://www.fcc.gov/document/protecting-and-promoting-open-internet-nprm.

[56] Final Order, https://www.fcc.gov/document/fcc-releases-open-internet-order.

The FCC's Net Neutrality rulemaking process was a true success in two respects. First, the agency received almost 4 million comments on the proposed rule through the public comment process (mostly in support of FCC's adoption of Net Neutrality).[57] This is the largest number of comments ever submitted in a federal rulemaking process—something that should be both celebrated and emulated. The notice and comment rulemaking process is predicated upon "democratizing" the way in which government agencies craft rules by encouraging broad and diverse participation from the public through submission of written comments. Done well, notice-and-comment provides a crucial way for government agencies to hear from the public and offsets the influence of powerful industries with developed channels of access into the government. Congressional efforts to reform the rulemaking process should seek to emulate the FCC's Net Neutrality success by focusing on maximizing public participation from as broad a variety of stakeholders as possible. Instead, it appears some in Congress are focusing instead on increasing the number of opportunities for public comment.[58] This approach does little to increase participation by a wide variety of stakeholders and further entrenches the current disparity between comments submitted by regulated industries as compared to average citizens in most rulemakings.[59] The solution is to make sure the government is hearing from as many voices as possible, not force the government to listen to the same voices even more times.

Second, the Net Neutrality rulemaking constituted an example of a government agency taking feedback from the public seriously, as is their legal requirement under the Administrative Procedure Act, and when appropriate making changes to their rules to respond to that feedback. It is the kind of responsiveness that should be celebrated by those who worry that public comments are ignored and notice-and-comment is meaningless because the outcome of the rulemaking is already pre-determined.

Some, including on this Committee, have contended that President Obama inappropriately influenced the FCC and pushed it to change its approach from the proposed rule to the final order.[60] These claims are misplaced. First, there is no evidence of any attempt to directly influence the FCC's rulemaking by the President or the White House. The President's public statement of support for a strong Net Neutrality rule is well within the President's authority and responsibility to make his policy views clear to the public. Agency independence does not mean the President cedes his First Amendment rights or duties to the public; it is not analogous to the need for walls between the White House and criminal investigators. And, indeed, past presidents have frequently made their policy preferences publicly known while FCC rulemakings were underway, sometimes in far more direct ways. For example, Presidents Ronald Reagan supported retaining financial syndication rules by the FCC which led the agency to withdraw its first

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[57] Edward Wyatt, "Net Neutrality Comments to F.C.C. Overwhelmingly One-Sided, Study Say," New York Times, September 18, 2014, available at: http://bits.blogs.nytimes.com/2014/09/18/net-neutrality-comments-to-f-c-c-overwhelmingly-one-sided-study-says

[58] *See e.g.* S. 1820, Early Participation In Regulations Act of 2015 (114th Congress) available at https://www.congress.gov/bill/114th-congress/senate-bill/1820

[59] Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA's Toxic Emission Standards,* 63 Admin. L. Rev. 99, 125 (2011).

[60] Majority Staff Report, Committee on Homeland Security and Government Affairs, "Regulating the Internet,"February 29, 2016, available at: http://www.hsgac.senate.gov/download/regulating-the-internet-how-the-white-house-bowled-over-fcc-independence.

attempt at revising the financial syndication rules.[61] President George H.W. Bush then directed the agency to eliminate those same rules, which the agency subsequently did.[62] President Clinton also pushed the FCC to curtail adverting of hard liquor on TV, leading to a proposed rule by the FCC to do just that.[63] Finally, George W. Bush sent a personal letter to then FCC Chair Michael Powell asking him not to delay a commission vote on media ownership deregulation.[64] Powell then denied a request to delay the vote from fellow commissioners. Second, the President's proposal was substantially different from the FCC's final order in critical respects. The FCC's final order contained extensive forbearance for broadband providers from title II restrictions on telecommunications providers and applied title II to interconnection as well. Finally, there is ample evidence that FCC Chair Wheeler was undecided on key issues in the rulemaking and was considering a wide array of possible choices, including title II, well before President Obama's announcement.[65]

It is important to note that this Committee's concern about independent agencies being unduly influenced by the President, however unfounded and misplaced it is in this context, would in fact be exacerbated by legislation the Committee passed last October, namely the Independent Agency Regulatory Analysis Act (S. 1607). That bill would require independent agencies to send their significant proposed and final rules to the Office of Information and Regulatory Affairs (OIRA) for review and feedback as part of the public comment process. OIRA's regulatory review currently only extends to executive branch agencies that are subject to the Executive Orders authorizing OIRA's review functions. The inability for OIRA to review independent agency rulemakings is one of the key elements that maintain independent agencies' independence from the executive branch, along with restrictions on removals of independent agency heads by the President. Given that one of the stated aims of OIRA review is to align agency rulemaking with presidential priorities, the Independent Agency Regulatory Analysis Act would lead to more presidential influence over the FCC and other independent agencies rather than less. Taking the Committee majority's concerns about the independence of the FCC at face value, we encourage Senators on the committee to revisit and withdraw their support for the Independent Agency Regulatory Analysis Act.

C. The Clean Water Rule

Issued by the Environmental Protection Agency and Army Corps of Engineers, the Clean Water Rule: Definition of "Waters of the United States" was published in the Federal Register on June 29, 2015 and became effective on August 28, 2015. The purpose of the rule is to provide

[61] David Burnham, "Reagan Role in FCC Case Assailed," New York Times, February 4, 1984, available at: http://www.nytimes.com/1984/02/04/arts/reagan-role-in-fcc-case-assailed.html (noting the interests of Reagan's personal friends in the outcome of the regulatory dispute).
[62] John Lippman, "Sununu Defends White House Stand on TV Rerun Rules," Los Angeles Times, *February 16, 1991, available at: http://articles.latimes.com/1991-02-16/business/fi-984_1_white-house*.
[63] John Broder, "Clinton to Ask F.C.C. to Consider Restricting Liquor Commercials," New York Times, April 1, 1997, available at: http://www.nytimes.com/1997/04/01/us/clinton-to-ask-fcc-to-consider-restricting-liquor-commercials.html.
[64] David Ho, "Bush Administration Pushes FCC on Media Ownership Review," Government Technology, April 25, 2003, available at: http://www.govtech.com/policy-management/Bush-Administration-Pushes-FCC-on-Media.html.
[65] Tom Wheeler, "This Is How We Will Ensure Network Neutrality," Wired, February 4, 2015, available at: http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality.

definitional clarity as to the waters regulated under the Clean Water Act, and to further the Act's purpose to restore and maintain the chemical, physical and biological integrity of the Nation's waters. Although the Clean Water Rule has become the source of contentious debate, it is in fact a modest measure aiming to provide more administrative certainty, and it actually reduces the regulatory scope of navigable waters and their tributaries (the key terms that determine the geographic application of the Clean Water Act). Nonetheless, in providing more regulatory certainty, the Clean Water Rule should contribute to the effective enforcement of the Clean Water Act, leaving our nation with cleaner and healthier streams and rivers.

There is little doubt that the Clean Water Rule is needed. The precise scope of Clean Water Act jurisdiction became unclear following U.S. Supreme Court decisions in S*olid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) and *Rapanos v. United States* 126 S.Ct. 2208 (2006). In his concurring opinion in *Rapanos*, Chief Justice Roberts harshly criticized the agencies for not issuing a definitional rule: "Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority."[66]

Following the instructions of Chief Justice Roberts and others, the Clean Water Rule establishes a more precise definition of navigable waters and tributaries.[67] A covered tributary must show the physical features of flowing water – a bed, bank and ordinary high water mark. The rule covers certain waters adjacent to rivers, lakes and their tributaries, because science shows these waters can impact downstream waters. The rule does not cover ditches not constructed in streams and that flow only when it rains.[68] The rule explicitly does not include puddles.[69] It does not change how storm sewer systems are treated under the Clean Water Act. Importantly to advance the objective of predictability and certainty, the rule limits the use of case-specific determinations.

The scope of the rule is narrower than previously existing regulation,[70] although it will encompass some waters that had not been covered under field practice following the Supreme Court's decisions in *SWANCC* and *Rapanos*.

Although the Clean Water Rule is merely definitional, and even though the scope of covered waters will be less than historic practice, this rule is vitally important. It will advance predictability and certainty in application of the Clean Water Rule, and should thereby help

[66] *Rapanos v. United States, Roberts, C.J. Concurring,* 126 S.Ct. 2208, 2236 (2006).
[67] Final Rule Text, § 328.3 See also: https://www.epa.gov/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf.
[68] Final Rule Text, § 230.3(s)(2)(iii)
[69] Final Rule Text, § 230.3(s)(2)(iv)(G)
[70] Federal Register, Vol. 80, No. 124, 37054 ("The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.")

enhance the cleanliness and health of our nation's waters. It is hard to exaggerate the importance of this objective. Almost one in three Americans – roughly 117 million people – get their drinking water from streams that lacked clear protection before issuance of the Clean Water Rule.[71] Tens of millions of Americans every year use the waters for fishing, paddling, swimming and other forms of recreation. And countless businesses – from recreation industries to agriculture, tourism to manufacturing – rely on clean water.

A decade in the making, the Clean Water Rule was subjected to an incredibly rigorous process of expert review and public comment. Vermont Law School Professor Patrick Parenteau, a Clean Water Act expert, comments, "In my 40+ years of experience with the Clean Water Act I cannot recall any other rulemaking that received more scientific review, public scrutiny, critical analysis, open debate and responsive action by the agencies" than the Clean Water Rule.[72]

Here's why Parenteau reaches that conclusion:

- In advance of the rulemaking, the EPA and Army Corps held more than 400 public meetings around the country, making special efforts to hear from farmers across the nation.
- EPA and the Corps met with hundreds of local officials, with EPA's Local Government Advisory Committee hosting a series of meetings around the country.
- The EPA's Science Advisory Board convened a special expert panel to review the EPA's draft report on the connectivity or isolation of streams and wetlands from larger bodies of water, such as rivers and lakes. This concerned arguably the central issue in the Clean Water Rule; tributaries and smaller bodies of water that have downstream impacts would be covered. The panel found that "the review and synthesis of the literature describing connectivity of streams to downstream waters reflects the pertinent literature and is well grounded in current science," but argued as well that the agency had taken too conservative an approach in identifying connectivity.[73]
- The EPA and Army Corps prepared an extremely detailed, 75-page economic analysis of the costs and benefits of the proposed rule. The analysis noted that because the Clean Water Rule imposes no new regulatory requirements and, separately, because it will actually reduce the scope of waters covered as compared to the historic regulatory interpretation, it can be argued that the new rule will impose no new costs whatsoever. But the analysis also recognized that there will be expanded jurisdiction as compared to recent practice, and analyzed the impact in extraordinary detail. In sum, the analysis

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[71] https://www.epa.gov/cwa-404/geographic-information-systems-analysis-surface-drinking-water-provided-intermittent

[72] Patrick Parenteau, testimony before the Senate Judiciary Committee, June 10, 2015, available at: <https://www.judiciary.senate.gov/imo/media/doc/06-10-15%20Parenteau%20Testimony.pdf>.

[73] Letter from David T. Allen and Amanda D. Rodewald to EPA Administrator Gina McCarthy, October 17, 2014, available at: https://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf.

concluded that economic benefits will definitely outpace costs, by as much as two-to-one, depending on what assumptions are made.[74]

- The rule underwent notice-and-comment, per the Administrative Procedure Act. But the notice-and-comment process was not standard. The deadline for submitting comments was extended twice beyond the original 60-day comment period. The agencies received more than 1 million comments (the vast majority form comments, in support of the rule). The agencies meticulously organized and responded to each comment. In addition to broad responses to the mass mailing campaigns, the agencies grouped comments into 17 distinct topic areas, and replied to every substantive issue and concern raised. Meaningful changes were made to the final rule in light of comments received. Altogether, those materials total more than a staggering 7,300 pages.[75]

Surprisingly, the EPA has actually been attacked for its effort at transparency and public engagement. The agency utilized a variety of online and social media tools to publicize its activities around the Clean Water Rule and urge public participation in the rulemaking process. Tenuous arguments have been made that a disclosure of EPA involvement was missing from tweets that were sent as part of a Thunderclap (although the agency was prominently labeled on the Thunderclap itself), and that the agency linked to two web pages that urged citizens to contact their Members of Congress.[76] Whatever the merits of these questionable claims, they should not obscure that they are made in the context of agency proactive efforts at openness and public involvement. Nor should it be lost that they concern very minor matters as compared to the extraordinarily robust and open process that the agencies conducted to develop the final rule.

III. Improving Regulation

Recognizing the crucial role that regulation plays in improving our standard of living underscores the importance of ensuring that the regulatory process works well. Regulators should be nimble and flexible, able to act quickly with appropriate new rules in response to changing technologies, new science and social learning, evolutions in industry structure and other emerging trends and developments. At the same time, regulators must effectively enforce new and old rules; they must be adequately funded, equipped with needed regulatory tools including inspection powers and sufficiently tough penalties for lawbreakers, independent from the parties they regulate while maintaining appropriate responsiveness, and guided by leadership with sufficient political will and protected from interference. Unfortunately, those qualities by and large do not describe the current state of the regulatory process or enforcement.

There is an acute need for regulatory reform, to address pervasive and harmful delay in the rulemaking process, increase and improve regulatory enforcement, improve transparency,

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[74] Environmental Protection Agency and U.S. Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule, May 20, 2015, available at: https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf.

[75] Response to comments for the Clean Water Rule: Definition of "Waters of the United States," available at: https://www.epa.gov/cleanwaterrule/response-comments-clean-water-rule-definition-waters-united-states.

[76] Letter from Susan Poling, GAO General Counsel, to Senator James Inhofe, December 14, 2015, available at: http://www.epw.senate.gov/public/_cache/files/b7bb198f-bbd4-4011-a756-b3627eeacfa1/gao-opinion-epa-social-media-121415.pdf.

address undue industry influence over the rulemaking process, address uneven judicial review of regulations, and adopt pro-competitive rules to level the playing field for small business and improve the economy and consumer well-being. I discuss these problem areas in this portion of my testimony, concluding each section or subsection with proposed remedies.

A. Combating unreasonable delay

Unreasonable delay permeates almost all aspects of the rulemaking process. The consequences of delay are serious. As opposed to issuance of new rules, delay creates the regulatory uncertainty that many business spokespeople denounce. Delay also means that lives are needlessly lost, injuries needlessly suffered, environmental harm needlessly permitted, consumer rip-offs extended, and more.

Four years ago, Public Citizen conducted an analysis of public health and safety rulemakings with congressionally mandated deadlines. [77] Our analysis showed that most rules are issued long after their deadlines have passed, needlessly putting American lives at risk. Of the 159 rules analyzed, 78 percent missed their deadline. Federal agencies miss these deadlines for a variety of reasons, including having to conduct onerous analyses, dealing with politically motivated delays, inadequate resources or agency commitment, and fear of judicial review.

A high proportion of pending rules with statutory deadlines are mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The financial regulatory agencies remain far behind schedule. The most recent report from the law firm DavisPolk finds that, through the last quarter of 2015, regulators have still not complied with a quarter of the 271 statutory deadlines that have passed. This is five-and-a-half years after passage of the Act.[78]

The problem of protracted delay is pervasive in the rulemaking sphere and reflective of a rulemaking process gone askew. This is far more than a “bureaucratic” problem; the source of the problem is not inept government officials and workers, but a thicket of legislatively mandated process and multiple analyses, along with inappropriate influence exerted by and for regulated parties. And the consequences are far more severe than a generic inefficiency—lengthy delay costs money and lives; it permits ongoing ecological destruction and the infliction of needless injury; it enables fraudsters and wrongdoers to perpetuate their misdeeds; and it denies businesses the regulatory certainty they need to make sound investment decisions.

Although extended delay is arguably the defining feature of rulemaking, the extent, severity, causes and consequences of such delay are not well understood. I highlight several illustrative examples here to illuminate these matters.

1. Oil Train Safety

[77] Mouzoon, N. (2012). *Public Safeguards Past Due: Missed Deadlines Leave Public Unprotected.* Public Citizen. Available from: <http://www.citizen.org/documents/public-safeguards-past-due-report.pdf>.
[78] DavisPolk. (2016) *Dodd-Frank Progress Report*. Available from: <http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report>.

Last year, the U.S. Department of Transportation finalized new standards for trains transporting highly volatile oil, often through highly populated areas. The rule was a long-overdue response to the sharp increase in domestic oil production and rail shipment of oil and ethanol and a resulting series of deadly oil train disasters. In strengthening standards for oil tank car safety, requiring new braking standards, and designating new procedures for oil trains including notification to local government agencies, the rule should reduce the incidence oil train derailments and explosions.[79]

The final issuance of the rule followed justifiable bipartisan criticism that the Department of Transportation had taken too long to put new rules in place while multiple oil train derailments and explosions occurred across the country. These explosions and crashes have led to numerous deaths, and shaken up communities across the country. Elected officials rightly demanded action, and were furious about the delays in responsive rulemaking. Safety experts echoed the concern. "Federal requirements simply have not kept pace with evolving demands placed on the railroad industry and evolving technology and knowledge about hazardous materials and accidents," testified the chair of the National Transportation Safety Board.[80]

The Department itself shared frustration with the slow pace of its rulemaking. One of the regulators made clear why the Department was unable to move faster saying, "To be clear, I think we have to function in the regulatory process that exists. And it's not built for speed. I wish it was. And no one is more frustrated by our regulatory process and how long it takes than I am on occasion. But if we are trying to govern and regulate as quickly as we possibly can, the rulemaking process is not the way to do it."[81]

The Department could have expedited issuance of the rules by foregoing optional rulemaking steps that added to the regulatory delay. The Department's decision to issue an advanced notice of proposed rulemaking (ANPRM) instead of directly proceeding to propose a draft rule, likely added a year or more to the oil train rulemaking process.

Unfortunately, this committee has passed legislation that would mandate the extra procedural step of ANPRMs for all major rules such as the oil train rule.[82] The oil train rule delay makes clear that there are real-world consequences – often a matter of life and death – to measures that delay the rulemaking process. It is a reminder as well that policymakers who support measures to slow and complicate the rulemaking process may find that, if they succeed, the required delays will boomerang to block regulatory action in areas of their priority concern.

2. Cranes and derricks.

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[79] https://www.transportation.gov/briefing-room/final-rule-on-safe-rail-transport-of-flammable-liquids
[80] Chris A. Hart, testimony before the Committee on Transportation and Infrastructure, U.S. House of Representatives, "Oversight of the Ongoing Rail, Pipeline, and Hazmat Rulemakings," April 14, 2015, available at: http://transportation.house.gov/uploadedfiles/2015-04-14-hart.pdf.
[81] Sarah Feinberg, Acting Administrator, Federal Railroad Administration, U.S. House Transportation and Infrastructure Committee, Oversight of the Ongoing Rail, Pipeline, and Hazmat Rulemakings, April 14, 2015, available at: http://transportation.house.gov/calendar/eventsingle.aspx?EventID=398734.
[82] *See e.g.* S. 1820, Early Participation In Regulations Act of 2015 (114th Congress) available at https://www.congress.gov/bill/114th-congress/senate-bill/1820.

The Occupational Safety and Health Administration's cranes and derricks rule, adopted in 2010, is designed to improve construction safety. By the late 1990s, construction accidents involving cranes were killing 80 to 100 workers a year. OSHA later estimated that a modernized rule would prevent about 20 to 40 of those annual tragedies. Worker safety advocates and the construction industry alike wanted an updated rule.

Nonetheless, it took a dozen years to get a final rule adopted. "During the dozen years it took to finalize the cranes rule," a Public Citizen report summarized, "OSHA and other federal agencies held at least 18 meetings about it. At least 40 notices were published in the Federal Register. OSHA was required by a hodgepodge of federal laws, regulations and executive orders to produce several comprehensive reports, and revisions to such reports, on matters such as the makeup of industries affected by the rule, the number of businesses affected, and the costs and benefits of the rule. OSHA also was repeatedly required to prove that the rule was needed, that no alternative could work, and that it had done everything it could to minimize the effects on small businesses. The regulatory process afforded businesses at least six opportunities to weigh in with concerns that the agency was required to address."[83]

3. Silica rule.

After more than a dozen years of delay, OSHA's life-saving silica dust standard is finally set to take effect this year. More than two million workers in the United States are exposed to silica dust, especially construction workers and others who operate jackhammers, cut bricks or use sandblasters. Inhaling the dust causes a variety of harmful effects, including lung cancer, tuberculosis, and silicosis (a potentially fatal respiratory disease). The rule will reduce the permissible exposure limit for silica to 50 micrograms per cubic meter (from the currently allowed 100) over an 8-hour workday. "OSHA estimates that the proposed rule would prevent between 579 and 796 fatalities annually—375 from non-malignant respiratory disease, 151 from end-stage renal disease, and between 53 and 271 from lung cancer—and an additional 1,585 cases of moderate-to-severe silicosis annually."[84]

The new standard requires employers to measure exposures, conduct medical exams for workers with high exposures and train workers about the hazards of silica. It requires effective measures to reduce silica exposure, which "can generally be accomplished by using common dust control methods, such as wetting down work operations to keep silica-containing dust from getting into the air, enclosing an operation ('process isolation'), or using a vacuum to collect dust at the point where it is created before workers can inhale it,"[85] while giving businesses flexibility in choosing appropriate control methods.

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[83] Lincoln, T. and Mouzoon, N. (2011, April.) Cranes & Derricks: The Prolonged Creation of a Key Public Safety Rule. Public Citizen. p. 4. Available from: <http://www.citizen.org/documents/CranesAndDerricks.pdf>.
[84] OSHA. (2013). *Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis: Supporting document for the Notice of Proposed Rulemaking for Occupational Exposure to Crystalline Silica*. Available at: https://www.osha.gov/silica/Silica_PEA.pdf.
[85] OSHA, OSHA's Proposed Crystalline Silica Rule: Overview, available at: **https://www.osha.gov/silica/factsheets/OSHA_FS-3683_Silica_Overview.html**.

OSHA has long acknowledged that its current silica dust standard, adopted in 1971, is obsolete.[86] The first concrete action it took to update the standard was in October 2003, when it convened a small business panel to review its proposed rule. In 2011, OSHA submitted to OIRA a draft proposed rule to reduce exposure to deadly silica dust. Although OIRA is supposed to complete reviews in three months, it took years for OIRA to complete the review. No explanation for this delay ever emerged. After OIRA finally released the rule, the rule remained stuck at OSHA.

Dating to OSHA's 1998 move of silica exposure standards to the pre-rule stage, the inexcusable delay in finalizing an updated health standard translates into the needless deaths of roughly 12,000 people. Inexcusable is really far too gentle a term; the industry-led obstruction of the rule cost thousands of lives – not statistical abstractions, but the lives of real workers.

Silica-related disease is not evenly distributed across the U.S. population. As a result, the benefits of the new rule will be felt most strongly among working class communities and communities of color. In Michigan, studies show the incidence of silicosis in African Americans is almost 6 times greater than that of Caucasians.[87] Latino workers now constitute 24 percent of the workforce in foundries, and almost 26 percent of the workforce in construction, are especially at risk for working jobs where silica dust exposure is paired with a lack of protection.

OSHA estimates the rule will provide average net benefits of about $2.8 to $4.7 billion annually over the next 60 years (benefits calculated by assigning a dollar value to each anticipated life saved and illness avoided).

4. Truck driver training.

In 1991, Congress passed a law requiring a rulemaking on training for entry-level commercial motor vehicle operators. More than 20 years, three lawsuits, and another statutory mandate later, the Department of Transportation still has not enacted regulations requiring entry-level drivers to receive training in how to drive a commercial motor vehicle. It now says it plans to complete the rule this year.[88]

In the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, Congress required the Secretary of Transportation to report to Congress on the effectiveness of private sector training of entry-level commercial motor vehicle drivers by December 18, 1992, and to complete a rulemaking proceeding on the need to require training of all entry level drivers of commercial motor vehicles by December 18, 1993. The required report, which was submitted to Congress on February 2, 1996 (slightly more than three years later), concluded that training of new commercial motor vehicle drivers was inadequate; in an accompanying analysis, the agency determined that the benefits of an entry-level driver training program would outweigh its costs. It

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[86] OSHA *Occupational Exposure to Crystalline Silica*, 75 Fed. Reg. 79.603 (2010, Dec. 20).

[87] Rosenman, K. and Reilly, M.J. (2014, July 1). 2012 *Annual Report Tracking Silicosis and Other Work-Related Lung Diseases in Michigan*, Michigan State University, available at: http://www.oem.msu.edu/userfiles/file/Annual%20Reports/Silica/2012Silicosis_OccLungDiseaseAnnRpt.pdf.

[88] A full account of this history is included in In Re Advocates for Highway and Auto Safety: Petition for Writ of Mandamus, September 18, 2014. Available from: <http://www.citizen.org/documents/in-re-advocates-for-highway-and-auto-safety-petition-for-writ-of-mandamus.pdf>.

requested comments on the studies and held one public hearing on training entry-level drivers. In the next six years, however, the agency took no steps towards issuing a rule on entry-level driver training.

In November 2002, organizations concerned about motor vehicle safety filed a petition for a writ of mandamus in the DC Circuit Court of Appeals, seeking an order directing the Secretary of Transportation to fulfill his statutory duty to promulgate overdue regulations relating to motor vehicle safety, including the regulation on entry-level driver training. As part of a settlement agreement between the organizations and DOT, DOT agreed to issue a final rule on minimum training standards for entry-level commercial motor vehicle drivers by May 31, 2004.

On August 15, 2003, almost 12 years after ISTEA was enacted, DOT (through the Federal Motor Carrier Safety Administration, FMCSA) published a notice of proposed rulemaking on minimum training requirements for entry-level commercial motor vehicle operators, and on May 21, 2004, it published a final rule.

Although the agency expressly acknowledged that training for entry-level drivers was inadequate and stated its belief that a 360-hour model curriculum developed by the Federal Highway Administration that includes extensive behind-the-wheel training "represents the basis for training adequacy," it proposed instead a weak rule that required only 10 hours of training.

Advocates for Highway and Auto Safety, among others, subsequently filed a petition for review of the final rule, arguing that the rule was arbitrary and capricious because it did not require entry-level drivers to receive any training in how to operate a commercial motor vehicle. The DC Circuit agreed, holding that the FMCSA had "adopted a final rule whose terms have almost nothing to do with an 'adequate' CMV [commercial motor vehicle] training program."

On December 26, 2007, approximately two years after the court ruling, FMCSA issued a stronger proposed rule. But, four years after the comment period had closed, the agency still had not issued a final rule.

In 2012, Congress again directed DOT to conduct a rulemaking on the issue, requiring a final rule by October 1, 2013.

Yet instead of moving forward, the FMSCA published notice in September 2013 that it was withdrawing its proposed rule.

We still have no proposed rule. In September 2014, Public Citizen with Advocates for Highway Safety filed another lawsuit, on behalf of a number of parties, asking that the agency be ordered to issue a rule in compliance with the law. That case is now stayed, in reliance on an agency statement that it plans to issue a rule by September 2016.

More than 20 years have passed since Congress ordered the DOT to adopt an appropriate truck driver training rule, and there is still no rule. This is due in large part to the agency's overly cozy relationship with the trucking industry. Congress has mandated a driver training rule—twice—out of the recognition that better driver training will save lives; and the two-decade-long refusal

of the agency to comply with Congressionally imposed obligations means lives have been—and continue to be—lost needlessly.

5. Backover rule[89]

One night in 2002, Dr. Greg Gulbransen was backing up his SUV in his driveway when his two-year-old son Cameron darted out into the driveway behind the vehicle. Too small to be seen by his father using any of the vehicle's rearview or sideview mirrors, Cameron was struck by the moving car and killed. Dr. Gulbransen's tragedy is not an isolated case; each week, 50 children are injured, two fatally, in these "backover" crashes, that is, collisions in which a vehicle moving backwards strikes a person (or object) behind the vehicle. Each year on average, according to the Department of Transportation, backovers kill 292 people and injure 18,000 more—most of whom are children under the age of five, senior citizens over the age of 75, or persons with disabilities. Backovers generally occur when the victim is too small to be seen in the rearview mirror of the vehicle or too slow to move out of the way of the vehicle, even one moving at slow speed.

To prevent the injuries and deaths caused by backovers, in 2008 Congress passed and the President signed the Cameron Gulbransen Kids Transportation Safety Act. The Gulbransen Act directed DOT to revise an existing federal motor vehicle safety standard to expand the area that drivers must be able to see behind their vehicles. (This can be done through the use of rear-view cameras, or other technologies.) The Gulbransen Act mandated that DOT issue the final rule within three years of the law's enactment—by February 28, 2011. The Act also allowed DOT to establish a new deadline for the rulemaking, but only if the otherwise-applicable deadline "cannot be met."

When it prepared a draft final rule in 2010, DOT estimated that the proposed rule, which specified an area immediately behind each light vehicle that a driver must be able to see when the car is in reverse gear, would prevent between 95 and 112 deaths and between 7,072 and 8,374 injuries each year.

DOT failed to meet the February 2011 deadline. Instead, DOT repeatedly set a new "deadline," failed to meet it, and then set yet another "deadline," although the agency never made a showing that the statutory deadline could not be met.

In light of the extent of the delay, the repeated self-granted extensions, and the hundreds of preventable deaths and thousands of preventable injuries that will occur while the public waits for the final rule, Public Citizen filed a petition with the United States Court of Appeals for the Second Circuit seeking a writ of mandamus compelling DOT to issue the rule within 90 days. The petition was filed September 25, 2013 on behalf of Dr. Gulbransen, Sue Auriemma (another parent who backed into her own child), and the consumer safety groups Advocates for Highway and Auto Safety, KidsAndCars.org, and Consumers Union. On March 31, 2014, one day before

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[89] A full account of this history is available from In Re Dr. Greg Gulbransen: Petition for a Writ of Mandamus, September 25, 2013. Available from: <http://www.citizen.org/documents/In-re-Gulbransen-Backover-Petition.pdf>.

the Second Circuit was scheduled to hear argument in the case, DOT issued the rear visibility safety standard that petitioners sought.

In this case, much remains unknown about the cause of the protracted delay. The department had been on track to issue a rule by or near the Congressional deadline, but then pulled back. It is widely believed that the rule was delayed by OIRA out of concern about the agency's cost-benefit analysis—the auto makers predictably made unrealistic claims about potential cost—or by political intervention from high officials in the White House.

Whatever the cause, that delay led to the pointless deaths of hundreds and tens of thousands of injuries. What a horrible tragedy it is for a parent to live with the knowledge that he or she ran over their child. But what a monstrous outrage for those tragedies to perpetuate because corrective action was delayed due to inappropriate political influence.

6. Executive pay ratio rule.

Section 953(b) of the Dodd Frank Act requires companies to disclose the ratio of CEO-to-median workers' pay. This is perhaps the simplest of Dodd Frank required rules. Companies already disclose their CEO compensation. Basic accounting requires them to know what they pay their employees, and determining the median pay for all employees is a simple enough determination. Figuring out the ratio between the two is a simple enough arithmetic calculation. Somehow, however, the nation's biggest firms have proffered the view that such a disclosure requirement and calculation would be incredibly burdensome. This hard-to-swallow claim, apparently, paralyzed the Securities and Exchange Commission. It proposed a rule in September 2013 with a standard 60-day comment period; but the final rule was not issued until August 2015. This is a modest measure to be sure—though it will provide important information to both investors and employees—but precisely because of its simplicity, the SEC should have been able to issue a rule expeditiously.[90]

7. Blowout Preventers

The April 20, 2010 explosion aboard the Deepwater Horizon in BP's Macondo Prospect killed 11 people and ultimately spewed 5 million barrels of oil directly into the Gulf of Mexico until the Coast Guard finally certified that efforts to permanently plug the well succeeded after 5 months.

The disaster was the result of cascading failures by all parties involved: BP, the manager of the operation; Transocean, the owner of the semi-submersible oil exploration platform; Halliburton, the company in charge of the oil well cementing; and Cameron International Corp., the Houston supplier of the failed blowout preventer. Cameron ended up agreeing to pay BP $250 million in December 2011 to settle the company's legal liabilities associated with the failures of its blowout preventer.[91]

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[90] See Naylor, B. (2015, June 2.) Mary Jo Wait. Huffington Post. Available from: <http://www.huffingtonpost.com/bartlett-naylor/mary-jo-wait_b_7494336.html>.
[91] Tom Fowler, "Cameron Will Pay BP to Settle Spill Claims," Wall Street Journal, December 17, 2011, available at: www.wsj.com/articles/SB10001424052970204466004577102050498485784.

Cameron's blowout preventer was a five-story, 400-ton device that sat on the ocean floor, connected to the wellhead, that was supposed to "contain pressure within the wellbore and halt an uncontrolled flow of hydrocarbons to the rig,"[92] known as a blowout. A blowout preventer features a number of different components to allow deep water drillers to maintain well control, including the device's last line of defense, a blind shear ram, that cuts the drill pipe to seal the well in the event of a blowout. But all of Cameron's blowout preventer features failed on April 20 and in the days afterword.

Subsequent independent investigations detailed the failures of blowout preventers to be properly designed and tested to successfully prevent blowouts in deep sea drilling operations.

President Obama created the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling one month after the explosion.[93] The Commission's final report, issued in January 2011, faulted the industry's reliance on self-testing by blowout preventer manufacturers and well operators, and the fact that these tests were done on land, rather than under pressure deep underwater. In addition, the Commission recommended "design modifications" in blowout preventers to ensure they are "equipped with sensors or other tools to obtain accurate diagnostic information."[94]

This self-certification that failed to replicate actual operating conditions was one reason that the U.S. Department of Interior proposed new rules governing just the testing blowout preventers on September 30, 2010,[95] including a new requirement for "independent third party verification that the blind-shear rams are capable of cutting any drill pipe in the hole under maximum anticipated surface pressure," minimum personnel training requirements for blowout preventer operators, and additional required testing once the blowout preventer is installed on the seafloor.[96] While first proposed in September 2010, the rule for third-party, independent, real-condition testing of blowout preventers did not become final until August 2012.[97]

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[92] National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Final Report, January 11, 2011, p. 114, available at: http://cybercemetery.unt.edu/archive/oilspill/20121211005636/http://www.oilspillcommission.gov/sites/default/files/documents/FinalReportPartII.pdf.

[93] www.whitehouse.gov/the-press-office/executive-order-national-commission-bp-deepwater-horizon-oil-spill-and-offshore-dri

[94] National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Final Report, January 11, 2011, p. 35, available at: http://cybercemetery.unt.edu/archive/oilspill/20121211005636/http://www.oilspillcommission.gov/sites/default/files/documents/FinalReportPartII.pdf.

[95] www.doi.gov/news/pressreleases/Salazar-Announces-Regulations-to-Strengthen-Drilling-Safety-Reduce-Risk-of-Human-Error-on-Offshore-Oil-and-Gas-Operations.

[96] www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/093010_Fact-Sheet_Drilling-Safety-Rule.pdf.

[97] Final Rule, available at: www.bsee.gov/uploadedFiles/BSEE/Regulations_and_Guidance/Recently_Finalized_Rules/Final_Drilling_Safety_Rule/AA02%20FR%20publication%20(08-22-12)%20(1).pdf.

While third-party, independent, real-condition testing is important, investigations concluded that a bigger challenge was that blowout preventers needed to be redesigned to actually work effectively.

A December 2011 report by the National Academy of Engineering concluded that blowout preventer systems "are neither designed nor tested to operate in the dynamic conditions that occurred during the accident" and should be "redesigned, rigorously tested, and maintained to operate reliably."[98]

Similarly, on April 12, 2016, the U.S. Chemical Safety and Hazard Investigation Board released a draft report on the Deepwater Horizon disaster, with one of their primary conclusions: "Testing limitations masked latent failures of the Deepwater Horizon BOP, affecting its operation on the day of the incident, *and these latent failures will continue to exist for similarly designed blowout preventers unless modifications are made to current standard industry testing protocols*"[99] (emphasis added).

The origins of the latest blowout preventer rule, designed to overhaul the design of blowout preventers, began with a technical conference hosted by the Bureau of Safety and Environmental Enforcement in May 2012,[100] with then-Deputy Interior Secretary David Hayes claiming a proposed rule would come by September 2012.[101]

But the Bureau of Safety and Environmental Enforcement didn't send its proposed rule to the Office of Information and Regulatory Affairs until December 11, 2014.[102] The proposed rule wasn't published in the Federal Register until April 2015.[103] The final rule wasn't released until April, 2016.

It is unfathomable that the primary regulatory response to the worst environmental disaster in U.S. history took six years. Indeed, "unfathomable" was the very term used to describe the delay by S. Elizabeth Birnbaum, the head of the Minerals Management Service at the time of the BP oil blowout – a full two years before the final rule was issued!

> It's unfathomable that the administration has failed to act on the findings of the December 2011 report of the National Academy of Engineering, which gave us some very bad news about Deepwater Horizon's blowout preventer.

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[98] National Academy of Engineering, Macondo Well-Deepwater Horizon Blowout, December 14, 2011, available at: www.nae.edu/Publications/Reports/53926.aspx.

[99] U.S. Chemical Safety and Hazard Investigation Board, "Drilling Rig Explosion and Fire at the Macondo Well," April 20, 2010, p. 8, available at: www.dropbox.com/s/oadxmn7me0xbdg9/20160412%20Macondo%20Full%20Exec%20Summary.pdf.

[100] www.bsee.gov/BSEE-Newsroom/Press-Releases/2012/Secretary-Salazar,-BSEE-Director-Watson-to-Kick-Off-Technical-Forum-on-Next-Generation-Blowout-Preventer-and-Control-Systems/

[101] Paul Voosen, "Regs for blowout preventers imminent," Greenwire, May 22, 2012.

[102] Phil Taylor, "White House reviewing rule to reduce blowout threats," E&E Reporter, December 15, 2014.

[103] Final Rule, www.bsee.gov/uploadedFiles/BSEE/Regulations_and_Guidance/Recently_Finalized_Rules/Well_Control_Rule/2015-08587.pdf.

> Its massive cutting blades were supposed to slice through the drill pipe to stop the flow of gushing oil. But it turned out that these huge pieces of equipment were not adequately engineered to stop emergency blowouts in deep water.
>
> The academy's report was detailed and damning. Deepwater Horizon's blowout preventer "was neither designed nor tested for the dynamic conditions that most likely existed at the time that attempts were made to recapture well control," the report said. More troubling, the shortcomings of Deepwater's equipment "may be present" at other deepwater drilling operations, the report said.
>
> Administration officials promised an immediate response to the N.A.E. report, including regulations to set new standards for blowout preventers by the end of 2012. Today, 16 months after that deadline and four years after the blowout, we still have not seen even proposed rules. Deepwater drilling continues in the gulf. New leases are being offered by the government and sold to energy companies each year. Yet the N.A.E. report warned that a blowout in deep water may not be controllable with current technology.[104]

We may have escaped another BP-style disaster as a result of this unconscionable regulatory delay, but if so, it has merely been a matter of luck. The American people deserve better.

8. Pipeline Safety

Oil and gas pipeline spills have long been a concern for the public but the situation has deteriorated significantly since 2010. Major pipeline incidents have occurred in communities across the country, including Marshall, Michigan; San Bruno, California; Allentown, Pennsylvania; Sissonville, West Virginia; Harlem, New York; Mayflower, Arkansas; two spills into the Yellowstone River; in South Dakota a few days ago; and too many more.

In response, Congress passed a critical new pipeline safety bill in 2011 that required the Pipeline and Hazardous Materials Safety Administration (PHMSA) to produce dozens of new pipeline safety rules. Unfortunately, after almost 5 years, the law has yet to make any pipelines safer or prevent any future pipeline spills. This is because a broken regulatory process has left PHMSA unable to finalize a single new major safety rule despite strict deadlines set out by Congress in the law. As Cal Weimer of the Pipeline Safety Trust told the House Committee on Transportation and Infrastructure, there are several factors that have made PHMSA's rulemaking process dysfunctional and ineffective. Most important is that PHMSA must meet a demanding and rigid cost-benefit analysis standard when producing new safety rules. This requirement stems from the 1996 re-authorization of the pipeline safety program and was part of a broader and concerted effort in the mid-1990s to codify Executive Order requirements from Presidents Reagan and Clinton regarding regulatory cost-benefit analysis. Twenty years later, the results of this effort are clear: rather than improving rulemaking at PHMSA, cost-benefit analysis has led to regulatory paralysis at the agency. Specifically, pipeline operators control the information PHSMA requires to meet its cost-benefit requirement and are reluctant to agree to new reporting requirements that would provide this information to PHMSA. This put PHMSA in the "catch 22"

[104] S. Elizabeth Birnbaum and Jacqueline Savitz, "The Deepwater Horizon Threat," New York Times, April 16, 2014, available at: http://www.nytimes.com/2014/04/17/opinion/the-deepwater-horizon-threat.html?_r=0.

of not being able to fix pipeline safety problems because it does not have the information to understand what and where the problems are at the outset. Making matters worse, PHMSA needs more resources and staff to meet its stringent cost-benefit requirement and often encounters delays entirely outside its control when its rules undergo excessively lengthy reviews at the Office of Information and Regulatory Affairs (OIRA).[105]

To illustrate the problems PHMSA encounters in meeting its cost-benefit mandate, one only has to look at PHMSA's inability to regulate rural natural gas gathering lines. These pipelines pose many of the same risks as transmission pipelines, but because they are located in rural areas outside of the jurisdiction of any federal or state pipeline safety jurisdiction, there is little to no collection of information with respect to these pipelines. Thus, it is nearly impossible for PHMSA to pass regulations on rural natural gas gathering lines because PHMSA is unable to determine, much less quantify, the costs and benefits of the regulation.

Remedies: There needs to be much more Congressional oversight of rulemaking delay. The agencies appear to treat congressionally mandated deadlines for the issuance of new rules as suggestions rather than duties; it is up to Congress to hold them accountable.

The problem of industry exercising inappropriate influence at regulatory agencies, or even through the White House, is not easily cured. One important step to help would be new legislation to slow the revolving door between regulatory agencies and regulated parties. When agency officials and staff slide back-and-forth between working for the public and working on behalf of regulated parties, it's only natural that they will be overly sympathetic to industry when in public service, more deferential to requests for delay and less urgent in their advocacy for the public interest. The revolving door is a fundamental feature of the regulatory state. A recent report from the Project on Government Oversight (POGO) highlighted the pervasiveness of the problem at one agency, the Securities and Exchange Commission, finding that "from 2001 through 2010, more than 400 SEC alumni filed almost 2,000 disclosure forms saying they planned to represent an employer or client before the agency." And those disclosures, POGO notes, "are just the tip of the iceberg, because former SEC employees are required to file them only during the first two years after they leave the agency."[106]

Appropriate statutory reform would require longer cooling off periods before ex-agency staff can lobby their former agency for pecuniary purposes, broader definitions of what constitutes lobbying activity, strong rules against the reverse revolving door (persons moving from regulated industry employment to regulating agencies) and with high standards for any exceptions.

OIRA-caused delay is a less significant problem than earlier in the Obama administration, but reforms are necessary to ensure the agency does not contribute to delay or inappropriately

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[105] Cal Weiner, Pipeline Safety Trust, testimony on "Reauthorization of DOT's Pipeline Safety Program, before the Subcommittee on Railroads, Pipelines and Hazardous Materials of the Committee on Transportation and Infrastructure, February 25, 2015, available at: http://transportation.house.gov/uploadedfiles/2016-02-25-weimer.pdf.

[106] Project on Government Oversight. (2013, February 11.) Dangerous Liaisons: Revolving Door at SEC Creates Risk of Regulatory Capture. Available from: <http://pogoarchives.org/ebooks/20130211-dangerous-liaisons-sec-revolving-door.pdf>.

weaken rules. OIRA processes are closed and non-transparent.[107] What is known is that OIRA meetings with outside parties are dominated by regulated industries (with industry meetings five times more prevalent than those with public interest groups), and that meetings correlate with changes in rules.[108] If OIRA is going to continue to its current function, it must be subject to much more transparency requirements. For example, agencies should put in the rulemaking docket all documents submitted to OIRA, and all changes and comments that they receive on proposed and/or final rules from OIRA or other agencies.

Most importantly, Congress must not act to make the problem of regulatory delay worse. In recent years, there have been numerous legislative proposals to further hinder agencies' abilities to do their jobs, imposing vast new analytic requirements on agencies and increasing the scope of OIRA authority. To review the record of persistent regulatory delay—and to recognize the degree to which current analytic requirements are responsible for that delay—is to understand how misguided these proposals are, and how serious would be their consequences. Many of these proposals would require agencies to perform new and additional cost-benefit analyses, a particularly flawed approach which I discuss in more detail below.

B. Strengthening regulatory enforcement

In general, it is fair to say that the inspection agencies are understaffed and under-resourced.

Nowhere is the shortfall of inspectors more glaring than in the workplace safety and health area. "The federal Occupational Safety and Health Administration (OSHA) and the state OSHA plans have a total of 1,882 inspectors (8947 federal and 1,035 state inspectors) to inspect the 8 million workplaces under the OSH Act's jurisdiction," according to an AFL-CIO analysis. "This means there are enough inspectors for federal OSHA to inspect workplaces once every 140 years, on average, and for state OSHA plans to inspect workplaces once every 91 years."[109] Our nation's workers deserve better.

To take another example among many, there is general agreement that the Food and Drug Administration (FDA) does not have sufficient resources to meet its statutorily mandated responsibilities to ensure the safety of drugs and medical products, including through inspection of overseas plants. "Our current examination of FDA's resources confirms that the agency's ability to protect Americans from unsafe and ineffective medical products is compromised," the GAO recently found.[110] GAO explained that "[t]he structure of the agency's funding—its reliance on user fees to fund certain activities, particularly those related to the review of new products—is

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[107] Government Accountability Office. (2009, April.) *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews.* Available from: <http://www.gao.gov/new.items/d09205.pdf>.

[108] Steinzor, R., Patoka, J. and Goodwin, J. Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety and the Environment. Center for Progressive Reform. 2011. Available from: <http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf>.

[109] AFL-CIO. (2015, April.) Death on the Job: The Toll of Neglect. p. 1. Available from: <http://www.aflcio.org/content/download/154671/3868441/DOTJ2015Finalnobug.pdf>.

[110] Government Accountability Office. (2009, June.) Food and Drug Administration: *FDA Faces Challenges Meeting Its Growing Medical Product Responsibilities and Should Develop Complete Estimates of Its Resource Needs*. p.34. Available from: <http://www.gao.gov/new.items/d09581.pdf>.

a driving force behind which responsibilities FDA does and does not fulfill. The approval of new products has increasingly become the beneficiary of the agency's budget, without parallel increases in funding for activities designed to ensure the continuing safety of products, once they are on the market."

Of course, the issue with adequate enforcement is not solely a matter of resources. Many agencies do an inadequate job of enforcing rules due less to resource limitations than issues involving allocation of resources, prioritization and/or insufficient rigor. The 2013 fungal meningitis outbreak, for example, could and should have been prevented by FDA. The agency issued a warning letter to the New England Compounding Center in 2006, instructing the company to stop manufacturing-scale operations. However, FDA failed to follow up adequately. For whatever reason, whether inattentiveness or lack of compliance and legal resources, by not aggressively enforcing the regulations related to drug manufacturing and interstate commerce, the FDA allowed the company to continue its wide-scale manufacturing and interstate distribution operation of multiple high-risk drugs, including injectable steroids. The eventual result was the meningitis outbreak and 48 deaths.[111]

The GM ignition switch debacle provides another example of regulatory failure—resulting in at least 111 deaths, and climbing. What is unique here is that the agency, now under new leadership, acknowledges its failures. A recent NHTSA report blames GM for its horrible misconduct, but also assigns major responsibility to NHTSA itself.[112] The report's major findings:

- GM withheld critical information about engineering changes that would have allowed NHTSA to more quickly identify the defect.
- NHTSA did not hold GM accountable for providing inadequate information.
- Neither GM nor NHTSA completely understood the application of advanced air bag technology in GM vehicles.
- NHTSA did not consider alternate theories proposed by internal and external sources.
- NHTSA did not identify and follow up on trends in its own data sources and investigations.

Remedies: The agency resource problem is easily solved with sufficient political will, though budget tightening efforts have cramped rather than expanded enforcement budgets. This is surely a penny wise but pound foolish approach. In areas where regulators are able to apply stiffer penalties, they may be able to bring more money into the treasury than they expend. Far more important is the social cost accounting: the economic benefits of properly enforced laws vastly exceed costs. This is most obviously true in the financial sector, as the discussion earlier regarding the Great Recession and regulatory failure elaborates, but it is true in virtually all areas. The economic benefits of reducing food contamination through inspection and regulatory enforcement, for example, vastly exceed costs. Indeed, if regulatory budgets were set based on

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[111] See Carome, M. and Wolfe, S. (2012, October 24.) Letter to Secretary of Health and Human Services Kathryn Sebelius. Available from: <http://www.citizen.org/documents/2080.pdf>.
[112] Department of Transportation (2015). NHTSA's Path Forward. Available from: <http://www.nhtsa.gov/About+NHTSA/Press+Releases/nhtsa-forming-new-safety-teams>.

the kind of cost-benefit analyses that are applied to new regulation, they would be dramatically larger.

Ensuring a sufficiently robust enforcement culture at regulatory agencies is not a problem that lends itself to a simple solution, though and stronger Congressional oversight of agency enforcement would go a long way. The NHTSA example of critical self-reflection in the wake of horrendous failure—a major change for the agency—should be monitored, studied and, assuming it does generate a change in the culture and practice at the agency, emulated.

C. An Appropriate Role for Cost-Benefit Analysis

Whatever the benefits of cost-benefit analysis as a tool to assist in regulatory decision-making, it should be recognized that cost-benefit analysis is highly imperfect and, at least as implemented in the real world, suffers from a set of flaws that tend to systematically skew in favor of regulated parties and against the broader public interest, by overestimating costs and underestimating benefits. Even ardent supporters of cost-benefit analysis, such as Cass Sunstein, the former OIRA administrator, argue that cost-benefit analysis is more appropriate as a guidance tool for agencies, rather than as a definitive metric directing agencies into a particular course of action.[113] As such, it would be a mistake to require any additional cost-benefit analysis in the regulatory system, or to give it a more prescriptive role in regulatory decision making.

The problems with cost-benefit analysis are legion.

First, regulated industry typically has an undue influence over cost estimates, in large part because it controls access to internal corporate information, as well as because of its ability to commission studies that tend to support the interest of their funders. This information asymmetry is a significant problem in the conduct of cost-benefit analysis, including because businesses may not provide important cost information or disclose methodological assumptions in their submitted cost estimates.[114]

It should not be controversial to recognize that corporations have a natural bias to overestimate cost of rules that may affect the way they conduct business. As a result, while there is a long history of industry claiming that the next regulation under consideration would unreasonably raise the cost of doing business, those claims routinely prove to be overblown.

- Bankers and business leaders described the New Deal financial regulatory reforms in foreboding language, warning that the Federal Deposit Insurance Commission and related agencies constituted "monstrous systems," that registration of publicly traded securities constituted an "impossible degree of regulation," and that the New Deal reforms would

[113] U.S. Senate Comm. on Homeland Sec. and Governmental Affairs, Pre-hearing Questionnaire for the Nomination of Cass R. Sunstein to Be Administrator of the Office of Information and Regulatory Affairs, p. 5. Available from: <http://www.ombwatch.org/files/regs/PDFs/Sunstein_questions.pdf>. ("[C]ost-benefit analysis is a tool meant to inform decisions; it should not be used to place regulatory decisions in an arithmetic straightjacket").
[114] Ruttenberg, R. (2004). Not Too Costly, After All: An Examination of the Inflated Cost Estimates of Health, Safety and Environmental Protections. Available from <https://www.citizen.org/documents/ACF187.pdf>.

"cripple" the economy and set the country on a course toward socialism.[115] In fact, those New Deal reforms prevented a major financial crisis for more than half a century—until they were progressively scaled back.

- Chemical industry leaders said that rules requiring removal of lead from gasoline would "threaten the jobs of 14 million Americans directly dependent and the 29 million Americans indirectly dependent on the petrochemical industry for employment." In fact, while banning lead from gasoline is one of the single greatest public policy public health accomplishments, the petrochemical industry has continued to thrive. The World Bank finds that removing lead from gasoline has a ten times economic payback.[116]

- Big Tobacco long convinced restaurants, bars and small business owners that smokefree rules would dramatically diminish their revenue—by as much as 30 percent, according to industry-sponsored surveys. The genuine opposition from small business owners—based on the manipulations of Big Tobacco—delayed the implementation of smokefree rules and cost countless lives. Eventually, the Big Tobacco-generated opposition was overcome, and smokefree rules have spread throughout the country—significantly lowering tobacco consumption. Dozens of studies have found that smokefree rules have had a positive or neutral economic impact on restaurants, bars and small business.[117]

- Rules to confront acid rain have reduced the stress on our rivers, streams and lakes, fish and forests.[118] Industry projected costs of complying with acid rain rules of $5.5 billion initially, rising to $7.1 billion in 2000; ex-ante estimates place costs at $1.1 billion to $1.8 billion.[119]

- In the case of the regulation of carcinogenic benzene emissions, "control costs were estimated at $350,000 per plant by the chemical industry, but soon thereafter the plants developed a new process in which more benign chemicals could be substituted for benzene, thereby reducing control costs to essentially zero."[120]

- The auto industry long resisted rules requiring the installation of air bags, publicly claiming that costs would be more than $1000-plus for each car. Internal cost estimates actually showed the projected cost would be $206.[121] The cost has now dropped

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[115] Lincoln, T. (2011). *Industry Repeats Itself: The Financial Reform Fight*. Public Citizen. Available from: <http://www.citizen.org/documents/Industry-Repeats-Itself.pdf>.
[116] Crowther, A. (2013). *Regulation Issue: Industry's Complaints About New Rules Are Predictable -- and Wrong. p*.8. Available from: <http://www.citizen.org/documents/regulation-issue-industry-complaints-report.pdf>
[117] *Regulation Issue: Industry's Complaints About New Rules Are Predictable -- and Wrong.* p.10.
[118] Environmental Protection Agency. *Acid Rain in New England: Trends.* Available from: <http://www.epa.gov/region1/eco/acidrain/trends.html>.
[119] The Pew Environment Group. (2010, October). *Industry Opposition to Government Regulation*. Available from: <http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Fact_Sheet/Industry%20Clean%20Energy%20Factsheet.pdf>.
[120] Shapiro, I., & Irons, J. (2011). *Regulation, Employment, and the Economy: Fears of job loss are overblown*. Economic Policy Institute. Available from <http://www.epi.org/files/2011/BriefingPaper305.pdf>.
[121] Behr, P. (August 13, 1981). U.S. Memo on Air Bags in Dispute. Washington Post.

significantly below that. The National Highway Traffic Safety Administration estimates that air bags saved 2,300 lives in 2010, and more than 30,000 lives from 1987 to 2010.[122]

There is a long list of other examples from the last century—including child labor prohibitions, the Family Medical Leave Act, the CFC phase out, asbestos rules, coke oven emissions, cotton dust controls, strip mining, vinyl chloride[123]—that teach us to be wary of Chicken Little warnings about the costs of the next regulation.

Second, cost-benefit analyses tend to include static estimates of cost, based on existing technologies and business systems. But industry and our national economy is characterized by technological dynamism, and compliance costs regularly fall quickly once new rules are in place. Many of the examples above—from benzene to air bags—illustrate this point, and there are many other examples. Indeed, regulation spurs innovation and can help create efficiencies and industrial development wholly ancillary to its directly intended purpose.

Looking at a dozen emissions regulations in 1997, Hodges found that early estimates of cost were at least double subsequent estimates or actually realized costs. (Interestingly, the Hodges study found that while emissions reductions estimated or actual costs fell dramatically over time, costs for clean-up typically exceeded estimates—underscoring the case for preventative regulation.)[124]

"Part of the reason for the error" of repeated overestimations of regulatory cost," Hodges found "is that, over time, process and product technologies change. An estimate of the cost of compliance with a particular regulation might be based on one technology while actual compliance costs are based on another." Once business must respond to implemented regulations, they stop bemoaning them and work to do so as efficiently as possible; technological innovation, learning by doing, and economies of scale routinely cut costs far below initial estimates.[125]

A decade ago, in a detailed report prepared for Public Citizen, Ruttenberg cited a series of factors that explained how technological dynamism led to actual costs far below those estimated in cost-benefit analysis:

- Cost-benefit analyses routinely exhibit inaccurate assumptions about the compliance path industry actually follows once new standards are in place;

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[122] National Highway Traffic Safety Administration. (2012). Traffic Safety Facts: Occupant Protection. Available from: <http://www-nrd.nhtsa.dot.gov/Pubs/811619.pdf>.
[123] *Regulation Issue: Industry's Complaints About New Rules Are Predictable -- and Wrong*; Hodges, H. (1997). Falling Prices: Cost of Complying With Environmental Regulations Almost Always Less Than Advertised. Economic Policy Institute. Available from: <http://www.epi.org/publication/bp69>; Shapiro, I., & Irons, J. (2011). *Regulation, Employment, and the Economy: Fears of job loss are overblown*. Economic Policy Institute. Available from: <http://www.epi.org/files/2011/BriefingPaper305.pdf>.
[124] Hodges, H. (1997). Falling Prices: Cost of Complying With Environmental Regulations Almost Always Less Than Advertised. Economic Policy Institute. Available from: <http://www.epi.org/publication/bp69>
[125] Hodges, H. (1997). Falling Prices: Cost of Complying With Environmental Regulations Almost Always Less Than Advertised. Economic Policy Institute. Available from: <http://www.epi.org/publication/bp69>

- Cost-benefit analyses regularly fail to consider new adaptations of existing technologies to meet new standards;
- Cost-benefit analyses generally do not consider the positive effects of learning by doing and economies of scale;
- Cost-benefit analyses often fail to considering adaptations to technology already in place in other industries; and
- Cost-benefit analyses typically fail to account for new innovations that follow from new regulatory standards.[126]

Ruttenberg highlights the case of vinyl chloride as an illustrative case study. When OSHA began developing a new health standard to reduce the risk of workers developing liver cancer, the industry claimed that the new standard threatened to “shut down” the industry and estimated costs on the order of $65-90 billion. Once the standard was in place, industry quickly implemented six technological changes—ranging from improved housekeeping to reduce exposures to new computerized production processes that reduced exposures and saved money—within 18 months. Retrospective analyses of costs placed them at far below 1 percent of industry’s pre-rule analyses, with actual costs placed at between $25 million to $182 million, depending on how costs are calculated. [127]

Third, although numerous business trade association papers suggest to the contrary, capital-intensive compliance costs do not continue to accumulate in perpetuity. When a new standard is in place, industry invests in improvements or new capital equipment to comply with new rules, after which costs are generally not recurring. (There are, to be sure, ongoing compliance costs in some instances, notably for ongoing reporting requirements, but those typically do not involve costs at the scale of regulations requiring significant capital investments.) One piece of evidence in this regard is that while industry regularly and aggressively contests new rules, at least in the health, safety and environmental areas, it does not continue to complain about rules once they are well established.[128]

Fourth, claims of precision notwithstanding, cost-benefit analysis is open to bizarre and second- and third-order accounting, in practice especially on the cost side. One deeply troubling example of bizarre cost-accounting is the “lost pleasure principle,” an application of “consumer surplus” theory. Under this theory, when a regulation takes away an option from consumers or makes it less likely they will choose an option they would have in the absence of the regulation, cost-benefit analysis should take into account the resulting “lost pleasure.” This is not the kind of factor that proponents of cost-benefit analysis would normally factor on the benefit side, to say the least, as I discuss further below. But they urge it be considered on the cost side. And the value they attribute to this purported cost can be extraordinarily high, since they impute the price

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[126] Ruttenberg, R. (2004). Not Too Costly, After All: An Examination of the Inflated Cost Estimates of Health, Safety and Environmental Protections. Available from <https://www.citizen.org/documents/ACF187.pdf>. pp 22-32.
[127] Ruttenberg, R. (2004). Not Too Costly, After All: An Examination of the Inflated Cost Estimates of Health, Safety and Environmental Protections. Available from <https://www.citizen.org/documents/ACF187.pdf>. pp 32-33.
[128] Lincoln, T. (2014, September 16.) Streamlining the Rules-Making Process. The Hill. Available from: <http://thehill.com/blogs/congress-blog/the-administration/217751-streamline-the-rules-making-process>.

that consumers were willing to pay for the product pre-regulation as the cost (multiplied by number of purchases).[129]

Confoundingly, some economists have even argued for application of the lost pleasure principle when regulations lead consumers to make new choices simply based on new information; one would actually anticipate that consumer welfare increases when consumers are better informed and make choices accordingly, with no diminution in consumer "pleasure." If I choose to eat apples instead of apple pie because nutrition labeling has educated me on the health impact of eating too much apple pie, it hardly makes sense to say a regulation has cost me pleasure. I've made my own choice, based on regulation helping me better understand my choices.

Yet actual economists doing cost-benefit analysis that helps establish new government rules have employed exactly this Through-the-Looking-Glass logic. They have done so even in the case of an addictive product, cigarettes, [130] where there is a new layer of absurdity because most adult users actually say they would like to stop using it.[131]

Against all measures of common sense, these economists for a time succeeded in applying the lost pleasure principle to food labeling and tobacco regulations. After an ensuing public controversy—and deep concern expressed by a number of Senators—the Department of Health and Human Services scaled back, at least for now, use of the lost pleasure principle.[132] Thus, it appears that the ongoing outrage of the lost pleasure principle interfering with proper standard setting—at least in the consumer health area—has been alleviated, for now. But the serious suggestion of such an approach, which was held to reduce benefits by as much as 70-90 percent in some cases, shows how easy it is to manipulate cost-benefit analysis, and underscores the massive imprecision in cost-benefit exercises.

Fifth, cost-benefit analysis systematically underestimates benefits. New regulatory costs can—and should—also be considered benefits in many cases. That is, costs to regulated businesses are not the same as social costs. New productive capital investment helps create new demand, creates new jobs, and helps spur new technology. These benefits are rarely captured in cost-benefit analyses, in part because they are uncertain, in part because they appear to be second-order effects (even though they are the mirror image of direct costs). Yet these benefits are significant, which is why the actual impact on employment of consumer, health, safety and

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[129] See Ashley, E., Nardinelli, C. and Lavaty, R. (2015.) Estimating the Benefits of Public Health Policies that Reduce Harmful Consumption. 24 Health Economics 5, 617-624.

[130] See Begley, S. (2014, June 2.) FDA Calculates Costs of Lost Enjoyment if E-cigarette Rules Prevent Smoking. Reuters. Available from: <http://www.reuters.com/article/2014/06/02/us-fda-tobacco-insight-idUSKBN0ED0A620140602>.

[131] See Chaloupka, F. et. al. (2014, December 30.) An evaluation of the FDA's Analysis of the Costs and Benefits of the Graphic Warning Label Regulation. Tobacco Control. 10.1136/tobaccocontrol-2014-052022; Song, A., Brown, P., Glantz, S. (2014, May 30). Comment on the Inappropriate Application of a Consumer Surplus Discount in the FDA's Regulatory Impact Analysis, Docket No. FDA-2014-N-0189. Available from: <https://tobacco.ucsf.edu/sites/tobacco.ucsf.edu/files/u9/FDA-comment-consumer-surplus-May30-%201jy-8cdp-qb60.pdf>.

[132] Begley, S. and Clarke, T. (2015, March 18.) U.S. to Roll Back "Lost Pleasure" Approach on Health Rules. Reuters. Available from: <http://www.reuters.com/article/2015/03/18/us-usa-health-lostpleasure-idUSKBN0ME0DD20150318>.

environmental regulation is far less than anti-regulatory forces claim and in many cases may well register a net zero or positive impact.

Cost-benefit analysis also systematically underestimates benefits because of its insistence on, or at least strong bias in favor of, monetization. Yet health, safety, consumer, environmental, employment and similar regulatory protections yield benefits that are not easily monetized; and attempts to translate these benefits into monetary terms almost always fall short of capturing the full range of improvements they afford to our standard of living. The benefits of not losing an arm, of not choking for air when breathing, of not dying a painful and early death from cancer, of not feeling the stress of debt collector calls or the prospect of losing your home go far beyond what can be captured in a dollar figure. So too many other benefits of regulation—enhanced privacy, dignity, equality, freedom and liberty, fairness, community, a functioning democracy and many others—evade easy capture by a dollar figure.

What is the price tag on the pain a parent feels when they back their car over their child? That's not easily answered, but surely the benefit of preventing that pain is real. But such considerations generally do not merit inclusion in official cost-benefit analyses.

When Congress directs the Department of Justice to eliminate prison rape but to avoid "substantial additional costs," should the government also conduct a cost-benefit analysis reliant in part on what victims would be willing to pay to avoid rape? It is common sense that the answer is no, but this actually occurred. Morally revolting on its face, Georgetown University Professor Lisa Heinzerling lays bare the logic of this exercise: "In the strange logic and twisted morality of cost-benefit analysis, the victim—not the perpetrator—must be willing to pay up to avoid the crime." She adds, pointedly, that "rape is a serious crime, not a market transaction" and "that framing rape as a market transaction strips it of the coercion that defines it."[133]

Last, and related to the previous point, while perhaps it is unavoidable in some areas of public policy, the idea of placing a dollar value on a human life should, at minimum, be approached with great humility—an attribute one would not normally associate with the practitioners of cost-benefit analysis.

Two years ago, 8 men and women were killed in an Amtrak crash near Philadelphia.[134] The National Transportation Safety Board says that crash could have been prevented if Positive Train Control technology had been in place, as the NTSB has long advocated. Yet although the NTSB has urged adoption of the technology since 1970, and although Congress in 2008 mandated that all railroads deploy the technology by December 31, 2015, this objective was not met. (Amtrak appears to be ahead of most railroads in deployment.) There are plainly many factors accounting for the delay in meeting the Congressional mandate. But it may be that one reason for that

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[133] Heinzerling, L. (2012, June 14.) Cost-Benefit Jumps the Shark: The Department of Justice's Economic Analysis of Prison Rape. Available from: <http://www.progressivereform.org/CPRBlog.cfm?idBlog=EB3B070D-F7A0-1489-B361DA6B35ABC16E>.

[134] AP. (2014, May 14.) All 8 Fatal Victims in Amtrak Crash Identified. Available from: < http://6abc.com/news/all-8-fatal-victims-in-amtrak-crash-idd/719973>.

regulatory delay was that some officials believed that the regulatory standard was not cost effective.[135]

That was easy enough to say when the deaths averted were just statistical abstractions. Now, with the horrible and apparently preventable deaths of identifiable human beings, things are dramatically different. The cost-benefit-analysis-influenced delay of the implementation of Positive Train Control technology now seems callous, cruel and fundamentally wrong—and it was. But all that has changed is we now replace statistical abstractions with human compassion.

Remedies: Decision makers should recognize that cost-benefit analysis is a flawed analytic tool that may be of some assistance on some occasions, but not one that should be determinative in the rulemaking process. At bare minimum, Congress should not act to impose new cost-benefit analytic requirements on agencies, or to make cost-benefit determinations more controlling.

D. Imbalanced and inappropriate judicial review

Judicial review of agency action is an important and necessary part of our administrative process and general system of checks and balances, but judicial review of rulemakings has gone awry. Most major rules are challenged in court upon issuance, and lengthy challenges by regulated parties are standard. One significant problem is that there is a major imbalance in the ability of regulated parties and the public to challenge rules (or the failure to issue rules) on procedural or substantive grounds. A second major problem is the misguided importation by courts of cost-benefit requirements into review of agency action. There are other problems related to judicial review of agency action, notably an overly expansive view of corporate First Amendment speech rights, that are beyond the purview of this testimony, but worth noting.

1. Imbalanced rights to challenge agency action: the standing problem.

On behalf of consumers and the public whom all regulation is ultimately intended to benefit, Public Citizen has brought numerous challenges to agency regulations during our almost 45-years of work. The challenges are an important tool for ensuring that agencies adhere to statutory requirements and make rational decisions based on the available information. Over the past 20 or so years, however, a series of unduly narrow standing decisions have impeded our ability, and the ability of litigants representing the broad public interest, to obtain judicial redress for unlawful agency action that will cause them injury.

The Supreme Court's and DC Circuit's standing decisions aim to confine the federal courts to their legitimate function of resolving "actual cases or controversies" and "to prevent the judicial process from being used to usurp the powers of the political branches."[136] But in too many cases, a court has denied standing to parties who are threatened with "certainly impending" injuries that are "fairly traceable" to an agency's action,[137] —even action that they claim violates a clear

[135] See Mann, T. (2013, June 17.) Rail Safety and the Value of a Life. Wall Street Journal. Available from: http://www.wsj.com/articles/SB10001424127887323582904578485061024790402; Freedman, D. (2015, May 18.) Obama Official Once Said Train-Safety Cost Outweighed Benefit. Connecticut Post. Available from: <http://www.ctpost.com/local/article/Obama-official-once-said-train-safety-cost-6271486.php>.
[136] *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).
[137] *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013).

statutory limit on the agency's authority. In these cases, to dismiss the case for lack of standing constitutes an abdication of the judicial function of deciding cases. That abdication is all the more serious when, as has happened in several cases, it prevents adjudication of a legal issue that has profound national consequences.

To be sure, "generalized grievances" are not a basis for standing.[138] And we do not suggest that the fact that a regulation or policy may be harmful means that the particular parties challenging it necessarily have standing. By the same token, the fact that a policy causes concrete harms to a many members of the public does not mean that each of those persons do not have standing to challenge it.[139]

For example, in one case, the DC Circuit's very narrow view of standing barred litigation of challenge to a NHTSA rule setting the standard for tire pressure monitoring systems that Congress directed the agency to make driving safer. Although the standard was intended for the benefit of the public, that court held that Public Citizen did not have standing to challenge it on behalf of our members (all at some point vehicle owners, drivers, passengers, or pedestrians) unless we could show statistically that the agency's rule presented a substantially increased risk of harm to consumers and that the ultimate risk is substantial. In addition, the court said that because the injury alleged was based on the government's regulation of automakers, not regulation of Public Citizen members, to demonstrate standing we had to show that causation did not depend on choices made by the automakers. Specifically, we were instructed to show that automakers would not voluntarily exceed the safety standard that NHTSA adapted; that drivers would not seek to prevent injury to themselves or to other people by manually checking their tires and then inflating them properly; and to show that drivers will pay attention to the warning light that will be installed in cars. Not only had two of these topics had been addressed specifically in the Federal Register notices that accompanied issuance of both rules, but the court's instruction effectively questioned the conclusions of Congress in enacting the law requiring NHTSA to require these monitoring devices.

When Congress has addressed the matter that is the subject of our suit and the agency failed to do what Congress asked it to do, the courts are an appropriate and proper place to hold the executive branch accountable for failure to abide by the law. It is simply not practicable or desirable to expect Congress to revisit the issue each time the agency does not live up to the legislative mandate. Congress, through the Administrative Procedure Act and statutes that authorize judicial review of agency actions, has confirmed that courts can and should entertain such suits. That does not mean that a plaintiff or a petitioner does not need to have stake in the case, because, after all, the case or controversy requirement comes from the Constitution, not from Congress. Once Congress has spoken, however, and the agency has acted, the courts have an important role to play.

What is crucial to emphasize is that judicially created standing doctrine does not affect all parties evenly; instead, it creates a structural advantage for the corporate sector. In general, the courts typically hold that regulated parties have standing to challenge agency action. In contrast, organizations and individuals seeking to realize rights and protections conferred by Congress

[138] *Lance v. Coffman*, 549 U.S. 437, 439 (2007).
[139] *See Federal Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998).

face much greater difficulties; under the case law, it is not uncommon that no person or individual is deemed to have standing to enforce agency compliance with congressional directives.

2. Judicially imposed requirements of cost-benefit analysis.

The relationship between Congress, the regulatory agencies and the courts is a complicated one, not subject to simple formulaic rules about appropriate level of judicial deference to agency action. On the one hand, it is appropriate for the courts to ensure agencies are faithful to Congressional directives. On the other hand, the courts need show deference to the technical expertise of agencies, which are designed to convert broad Congressional directives into concrete rules. Judges should not abrogate well-crafted rules, nor invent requirements for rules to be justified by cost-benefit tests that are not statutorily required.

Yet as cost-benefit analysis has intruded deeper into the rulemaking process, courts have begun to subject these analyses to scrutiny, or to impose their own cost-benefit requirements on agency decision making. Because of the inherent imprecision of cost-benefit analysis, and because of relative institutional strengths, courts should subject agency cost-benefit analyses to no or exceedingly deferential review and should not impose cost-benefit requirements on agencies.

Business Roundtable v. SEC[140] is a case that highlights the concern about courts and cost-benefit analysis. In *Business Roundtable*, the D.C. Circuit struck down rule 14a-11 (the "proxy access rule"). Adopted by the SEC pursuant to authority under the Dodd-Frank Act, the rule would have allowed long-term shareholders to include nominees for the board of directors in a publicly traded company's proxy statement. Without such a right, shareholders in most instances have no realistic means of running candidates for director against management-selected candidates.

The D.C. Circuit held that the SEC had failed to meet its "unique obligation"[141] to analyze rules for their impact upon "efficiency, competition, and capital formation"[142] under Section 3(f) of the Exchange Act,[143] thereby rendering the SEC's promulgation of the rule "arbitrary and capricious."[144] Yet, nothing in the relevant legislative history indicates that Congress intended for the SEC's economic analyses relating to "efficiency, competition, and capital formation" to be akin to full blown cost-benefit analysis or take precedence over the SEC's primary mission to protect investors.[145] Nonetheless, in a string of recent cases,[146] the D.C. Circuit has interpreted this language as imposing a duty on the SEC to fully assess the costs and benefits of their regulations and determine, in some instances, that the regulation yields a "net benefit."[147] In the *Business Roundtable* opinion, the D.C. Circuit lambasted the SEC for "having failed once again

[140] *Business Roundtable v. SEC* 647 F.3d 1144 (D.C. Cir. 2011).
[141] *Business Roundtable v. SEC*,1148.
[142] *Business Roundtable v. SEC*,1148.
[143] 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a–2(c).
[144] *Business Roundtable v. SEC*, 1155.
[145] *See Generally* James D. Cox and Benjamin J.C. Baucom, *The Emperor Has No clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 Tex. L. Rev 1811 (2012).
[146] *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005); *American Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010).
[147] *Business Roundtable v. SEC*, 1153.

… adequately to assess the economic effects of a new rule"[148] by having "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgment; contradicted itself; and failed to respond to substantial problems raised by commenters."[149]

Several features of the decision are remarkable. First, the SEC was acting pursuant to specific Dodd-Frank-conferred power, which authorized the agency to adopt a rule requiring "that a solicitation of proxy, consent, or authorization by (or on behalf of) an issuer include a nominee submitted by a shareholder to serve on the board of directors of the issuer."[150] This fact was unmentioned in the court's decision, and earned the agency no deference. Second, the court failed to address the fact that the benefit of advancing shareholder democracy is inherently non-quantifiable. Third, the extraordinarily intrusive review of agency decision-making included a challenge to the benefit of shareholder democracy—a value that one might think speaks for itself, but in any case was clearly the underlying objective of Congress in authorizing the SEC to issue a proxy access rule.[151]

Remedies: *Business Roundtable* has cast a shadow over Dodd-Frank and other agency rulemaking, making agencies fearful and reluctant to proceed with rulemakings. Congress should act to establish clearer and more deferential standards of judicial review where agencies are acting in response to specific Congressional directives, and as regards cost-benefit analysis, and should make clear that courts are not to impose their own cost-benefit tests on agency action.

E. Regulation to assist small business and promote competitive markets

Much of the regulatory policy debate over the last couple years has misleadingly focused on the impact of regulation on small business, with regulation critics claiming that regulation poses unreasonable burdens on small business. In surveys and poll data, small businesses generally do not agree with their purported advocates. They cite inadequate demand and economic uncertainty as their biggest problems.[152] And regulatory law is replete with special and intentional protections for smaller firms, which are exempt from many rules.

What has been missing from the regulatory policy debate is a focus on the ways that regulation does—or should—assist small business in creating a level playing field.

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[148] *Business Roundtable v. SEC*, 1148.
[149] *Business Roundtable v. SEC*, 1148-49.
[150] Section 971.
[151] *Business Roundtable v. SEC*. ("By ducking serious evaluation of the costs that could be imposed upon companies from use of the rule by shareholders representing special interests, particularly union and government pension funds, we think the Commission acted arbitrarily.")
[152] Small Business Majority. (2011). *Opinion Survey: Small Business owners Believe National Standards Supporting Energy Innovation Will Increase Prosperity for Small Firms*. Available from: <http://smallbusinessmajority.org/energy/pdfs/Clean_Energy_Report_092011.pdf>. Similarly, in a 2011 informal survey, McClatchy/Tribune News Service found no business owners complaining about regulation. Hall, K. G. (2011, 1 September). *Regulations, taxes aren't killing small business, owners say*. McClatchy Newspapers. Available from: <http://www.mcclatchydc.com/2011/09/01/122865/regulations- taxes-arent-killing.html>.

First, as a preliminary matter in this area, policymakers concerned about aiding small business might fruitfully focus on the issue of regulatory compliance. Small firms may on occasion have difficulty discerning what standards apply to them and what they must do to meet their obligations under various rules. There may be value in legislation encouraging agencies to conduct more outreach, education and compliance assistance to small businesses on their regulatory obligations. Agencies with Small Business Ombudsman offices could be tasked with ensuring that those offices are conducting effective regulatory outreach and education to small businesses. "Best practices" guidelines for federal agencies could be established, including those with Small Business Ombudsman offices, to follow when working to ease regulatory compliance for small businesses.

A larger area of Congressional focus should aim to address the problem that leading sectors of the economy are highly concentrated, and that widespread anti-competitive conduct unfairly disadvantages small business, while also hurting consumers and overall economic efficiency.

Congress and regulators should look to reinvigorate antitrust and competition policy. Action across a broad range of areas would very meaningfully advance small business success, and ensure smaller companies are not unfairly exploited, disadvantaged or eliminated by larger rivals.

- Large banks receive a massive implicit government subsidy thanks to the widespread market perception that these institutions are "too big to fail"—in other words, that protestations to the contrary, the government will in times of crisis bail out these giant banks to prevent a financial system meltdown. Because the market judges these institutions too big to fail, the giant banks are able to access capital at costs significantly below that are available to regular banks, as well as obtain other implicit subsidies. Various analysts place this benefit as ranging from tens of billions of dollars annually to more than $100 billion, with the scale of the subsidy varying over time.[153]

  Remedies: This subsidy plainly disadvantages smaller banks and credit unions, and is itself a compelling reason—there are many other such reasons—to break up the giant banks. At bare minimum, this goliath bank subsidy emphasizes the imperative of a financial sector competition policy that removes the unfair advantage giant firms obtain.

- Patent enforcement by patent acquiring entities—often known colloquially as "patent trolls"—imposes a significant tax on innovation, especially by small business. Enforcement actions and license fees by these entities are skyrocketing, now costing almost $30 billion a year, with researchers finding only a quarter of this total flowing back to innovation.[154]

[153] See Federal Reserve of Minneapolis. (2013, November 18-19). Workshop: Quantifying the Too Big to Fail Subsidy. Available from: < https://www.minneapolisfed.org/publications/special-studies/too-big-to-fail/quantifying-the-too-big-to-fail-subsidy>. Bloomberg. (2013, Feb 20.) *Why Should Taxpayers Give Big Banks $83 Billion a Year*. Available from: <http://www.bloomberg.com/news/2013-02-20/why-should-taxpayers-give-big-banks-83-billion-a-year-.html>.

[154] See Leibowitz., J. (2012, Dec. 10.) Patent Assertion Entity Workshop: Opening Remarks. Federal Trade Commission. Available from: <http://www.ftc.gov/speeches/leibowitz/121210paeworkshop.pdf>; Skitol, R. (2012, Dec. 14.) FTC-DOJ Workshop on Patent Assertion Entity Activities: Fresh Thinking on Potential Antitrust

Remedies: Stronger rules should protect small business innovators, and innovative large corporations as well, from improper patent enforcement actions.

- Anticompetitive practices are widespread in the energy industry, including in electricity markets. "Anticompetitive agreements between sellers in regional wholesale electricity markets have forced consumers to pay hundreds of millions of dollars more for electricity than they would have in the absence of such conduct," notes the America Antitrust Institute's Diana Moss. "In these markets, which are structurally vulnerable to the exercise of market power, anticompetitive agreements spanning even a short time can result in large wealth transfers from consumers to suppliers."[155] Those consumers include small business.

  Recently, enforcement against anticompetitive conduct by the Federal Electric Regulatory Commission has picked up considerably, with FERC notably suspending companies found to have lied to regulators and engaging in anticompetitive actions. However, the deregulated structure of electricity markets creates the potential for anticompetitive activity, and suggests the need for new rules to ensure competitive benefits are actually accruing.

  Last year, for example, Public Citizen filed an emergency complaint at FERC[156] alleging that Houston-based Dynegy, Inc. may have intentionally withheld several of its power plants from a power auction conducted by the Midcontinent Independent System Operator (MISO), the results of which were announced on April 14, 2015. The auction was intended to procure adequate supplies through 2016 for most of downstate and midstate Illinois. The bidding strategies of Dynegy and other suppliers, combined with the rules under which the auction was conducted, pushed auction prices up for much of Illinois from $16.75 per megawatt-day last year to $150 this year, an increase of 800 percent. Even if illegal manipulation did not occur, the dramatic spike—resulting in a rate for Illinois that is more than 40 times that in neighboring states despite abundant generating capacity in Illinois—indicates a violation of the Federal Power Act's fundamental requirement that rates be just and reasonable. These are the sort of market abuses that impact small business and demand a regulatory response.

  Remedies: New rules should be created to ensure transparency standards apply to the non-governmental agencies, known as Regional Transmission Organizations, charged with running deregulated electricity markets. New rules should be established to ensure consumer, small business and state government representation in their decision-making

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Responses to Abusive Patent Troll Enforcement Practices. Available from: <http://www.antitrustinstitute.org/~antitrust/sites/default/files/PAE%20Workshop%20(3051321_1).pdf>.

[155] Moss, D. (2013, Jan. 10.) *Collusive Agreements in the Energy Industry: Insights into U.S. Antitrust Enforcement.* American Antitrust Institute. p. 6. Available from: <http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI%20Working%20Paper%2013-2_%20Section%201%20Energy.pdf>.

[156] Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc.. Emergency Section 206 Complaint of Public Citizen, Inc. And Request For Fast Track Processing, May 28, 2015, Available from: <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=5533>.

processes. Additionally, legislation or perhaps new regulation is needed to overturn the "filed rate doctrine," which can immunize electricity traders from antitrust liability where conduct involves regulated, filed rates.

- Private antitrust enforcement—an important tool for small firms victimized by unfair practices from larger competitors—has become increasingly difficult. One notable obstacle to effective private enforcement are unreasonably high pleading standards, which require victimized plaintiffs to make evidentiary showings that they frequently cannot make before undertaking discovery.

  Remedies: Congress should act to overturn the ruling in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), as well as *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

- Forced arbitration provisions in contracts are denying small businesses and consumers effective access to justice on a large scale. These provisions also often unfairly treat small business franchisees, which are often victimized by forced arbitration provisions in their franchise agreements.

  In recent years, the Supreme Court has issued a series of rulings holding that the pro-arbitration preference of the Federal Arbitration Act preempts state rules designed to ensure consumers access to traditional civil courts, as well as state rules protecting consumers' rights to join together in class actions. As a result, large corporations are able to include forced arbitration provisions in standard form contracts; and to insert anti-class action language into their arbitration provisions as a way to block collective actions that are often critical to addressing wrongdoing that affects large numbers of people in a small way.

  The Supreme Court's 2013 decision in *American Express v. Italian Colors Restaurant* illustrates the potential stakes for small business.[157] In this case, American Express sought to enforce an arbitration agreement that prohibits merchants that accept its charge cards from filing class actions or otherwise sharing the cost of legal proceedings against it. The merchants aimed to hold American Express liable for a tying arrangement that allegedly violated antitrust laws (American Express insists merchants accept its unpopular credit cards if they want to accept its popular charge cards), but because expensive expert testimony was required to prove the claims, the cost of arbitrating an individual case would dwarf any possible recovery. Even in this case, where the arbitration agreement and class action ban concededly made it impossible for a small business to bring an antitrust lawsuit against a large company, the Supreme Court held that the arbitration agreement was controlling. It did not matter to the Court that this was a case where a large company used its market power to force on small business a provision that prevents them from seeking a remedy to an abuse of market power.

[157] American Express v. Italian Colors Restaurant, 570 U. S. ____ (2013).

Remedies: Congressional remedies to these problems should include a prohibition on forced arbitration provisions in consumer, employment and civil rights cases[158] and a restoration of states' authority to enforce their contract and consumer protection laws.

III. Conclusion: Strengthening the System of Regulatory Protections to Strengthen America

There is much to celebrate in our nation's system of regulatory protections. It has tamed marketplace abuses and advanced the values we hold most dear: freedom, safety, security, justice, competition and sustainability. We should celebrate the achievements of regulatory protections.

But in its current form, the regulatory system is failing to meet its promise. Rather than looking at how to scale back or hinder the regulatory system, Congress should look to reforms to strengthen regulatory enforcement, stiffen penalties for corporate wrongdoing, speed the rulemaking process, address uneven judicial review of regulations, and adopt pro-competitive rules to level the playing field for small business and improve the economy and consumer well-being.

[158] See the Arbitration Fairness Act, S. 1133, introduced by Senator Al Franken.