Written Testimony of

**Robert Weissman**
**President, Public Citizen**

before the

**Subcommittees on Interior, Energy and the Environment and on Intergovernmental Affairs**

of the

**The Committee on Oversight and Government Reform**

**on**

"Examining Sue and Settle Agreements: Part II"

July 25, 2017

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 more than 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 co-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.

This is the context in which all regulatory policy debates should be placed. Today's hearing requires additional context: the problem of unacceptable and life-threatening delay in the issuance of new regulatory protections. Deadline suits, the subject of this hearing, aim to do nothing more than address unreasonable delays that occur in contravention of Congressional instruction.

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 section of the testimony focuses on the issue of regulatory delay, showing that is becoming a worsening problem, with case study illustrations showing both the problem and its consequences. The third section clarifies issues surrounding deadline suits. The concluding section directs attention to a real problem with Department of Justice settlement policy – completely distinct from deadline suits: sweetheart deals for corporate wrongdoers.

## 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]

---

[1] American Public Health Association. (2010, November 30). *APHA Commends Senate for Passing Strong Food Safety Legislation*. Available at: 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 at: 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 at: 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 at: 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 quality of improvement in American lives has nonetheless been dramatic. Lardner, J. (2011). *Good Rules: 10 Stories*

- 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 38.3 miles per gallon (mpg) in model year 2021, and 46.3 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 hundreds of billions of dollars. The auto industry was integrally involved in the development of these proposed standards, and supported their promulgation. However, the industry has seen opportunity with the Trump administration to block adoption of heightened fuel efficiency standards for the 2021-2025 period, and a substantial portion of the potential gains to consumers – nearly $100 billion – may be lost.[11]

---

*of Successful Regulation*. Demos. Available at: 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 at: 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 at: 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.

[11] EPA, California Air Resources Board and NHTSA, "Draft Technical Assessment Report: Midterm Evaluation of Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2022-2025 Executive Summary, July 2016, available at: https://www.nhtsa.gov/corporate-average-fuel-economy/light-duty-cafe-midterm-evaluation.

- **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, 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.[12] 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),[13] although it is now unclear if the Trump administration will implement all of the rules.[14]

- **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. Finally, in June 2016, OSHA issued a final rule, which would avert thousands of cases of serious disease.[15] Unfortunately, the Trump administration now aims to undermine crucial protections in that rule.[16]

- **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

---

[12] List of Regulatory Actions Currently Under Review. Available at: http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp**.**

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

[14] Timothy Cama, Dem AGs, Green Groups Sue Trump Over Paused Energy Efficiency Rules, The Hill, June 13, 2017, available at: http://thehill.com/policy/energy-environment/337631-dem-ags-greens-sue-trump-over-paused-energy-efficiency-rules.

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

[16] Emily Gardner and Sammy Almashat, "The Trump Administration's Beryllium Rule Would Poison Workers," Real Clear Health, June 30, 2017, available at: http://www.realclearhealth.com/articles/2017/06/30/the_trump_administrations_beryllium_proposal_would_poison_workers_110655.html.

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."[17]

- **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 should curtail the improper influence of industry over research, education and clinical decision making. Putting the Act into place required implementing rules.[18]

- **Other examples.** The list of regulatory benefits is almost endless. Other recent examples from the wide spectrum include rules to address invasive species, require labeling of gluten in food, and specifying the migratory bird hunting season.

Although most regulations do not have economic objectives as their primary purpose, in fact regulation is overwhelmingly positive for the economy.

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

[17] Consumer Federation of America. (2011, June 28). *Senators, CPSC, Consumer Advocates Applaud Strong Crib Safety Standards to Prevent Infant Deaths and Injuries*. Available at: http://www.consumerfed.org/pdfs/crib-standards-press-release-6-28-11.pdf.
[18] 42 CFR Parts 402 and 403. February 8, 2013.

significantly imprecise and heavily biased against the benefits of regulation. Every year, the Office of Management and Budget analyzes the costs and benefits of rules with significant economic impact. The benefits massively exceed costs.

The principle finding of *OMB's draft 2016 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, 2005, to September 30, 2015, for which agencies estimated and monetized both benefits and costs, are in the aggregate between $208 billion and $672 billion, while the estimated annual costs are in the aggregate between $57 billion and $85 billion, reported in 2001 dollars. … These ranges reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.[19]

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 12.

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

[19] Office of Management and Budget, Office of Information and Regulatory Affairs. (2016). Draft *2016 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities*. *Table 1-4*, p.2. Available at: https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf

**Total Annual Benefits and Costs of Major Rules by Fiscal Year (billions of 2001 dollars)**[20]

| 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 |
| 2015 | 21 | 19.6 to 36.9 | 4.2 to 5.3 |

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.[21] Very few major rules are adopted where projected costs exceed projected benefits, and those very few cases typically involve direct Congressional mandates.

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 cited lack of demand roughly 100 times more frequently than government regulation as the reason for mass layoffs![22] (Unfortunately, in response to budget cuts, the BLS ceased producing its mass layoff report in 2013.)

---

[20] Office of Management and Budget, Office of Information and Regulatory Affairs. (2016). Draft *2016 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://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf ; 2001-2003 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.

[21] *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 at: 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 at: http://www.progressivereform.org/articles/2009_CPR_Comments_OMB_Report.pdf.

[22] 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 at: http://www.bls.gov/mls/mlsreport1039.pdf.

**Reason for layoff: 2008-2012**[23]

| | 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.[24] 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.[25] "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."[26]

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

> 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

[23]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 at: 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 at: 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 at: http://www.bls.gov/mls/mlsreport1038.pdf.

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

[25] 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.

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

> 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."[27] 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.

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."[28] Reviewing estimates of lost economic output, GAO

---

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

[28] U.S. Government Accountability Office. (2013, Jan. 13). *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 12. Available at: http://www.gao.gov/products/GAO-13-180.

reported that the present value of cumulative output losses could exceed $13 trillion.[29] 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."[30]

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.[31]

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.[32] 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.[33]

The foreclosure crisis stemming from the toxic brew of collapsing housing prices, exploding and other unsustainable mortgages and high unemployment devastated families and communities across the nation, with effects that remain pervasive throughout society.[34]

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,"[35] 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

---

[29] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 16.
[30] *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.[30] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 17.
[31] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 17-18.
[32] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 18-19.
[33] Cited in *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 16.
[34] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 23-24.
[35] *The Financial Crisis Inquiry Report.* (Dissenting Views By Keith Hennessey, Douglas Holtz-Eakin, and Bill Thomas.) p. 414.

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. Combating unreasonable delay

The corollary to understanding the value of regulatory protections in advancing health and safety, enhancing living standards, strengthening the economy, safeguarding the environment and making America fairer and more just is that we need a nimble and responsive regulatory system. Agencies need to move quickly and efficiently to adopt new rules in response to new technologies, market innovations, corporate scams, scientific discoveries and more.

Yet the current rulemaking process is the opposite of quick and nimble, with agencies routinely failing to issue rules not only by their own self-imposed targets but by Congressionally mandated deadlines.

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.

### A. Extensive regulatory delay is now normalized

Last year, Public Citizen unveiled a ground-breaking empirical analysis to identify both the length of these delays and the extent of the delays across different agencies.

The report, entitled Unsafe Delays,[36] examines regulatory delays by collecting and analyzing one of the most comprehensive data sets of rulemaking actions to date. Our report gathered data on all rules listed in the Unified Agenda over the previous 20 years, from the first Unified Agenda available electronically in 1995 to the spring 2016 Unified Agenda. In total, we studied a total of

[36] Public Citizen, Unsafe Delays: An Empirical Analysis Shows That Federal Rulemakings To Protect the Public Are Taking Longer Than Ever, June 28, 2016, available at: http://www.citizen.org/documents/Unsafe-Delays-Report.pdf. All data, charts and figures in this section of my testimony are drawn from this report. The study is based on data published in the federal government's Unified Agenda of rulemakings, which has been published twice annually in every year but one since 1996. The full methodology is discussed on pages 10-11 of the report.

24,311 rulemakings, of which 18,146 were actually completed. The picture of delay that emerges from the report is deeply troubling and highlights the dysfunction in our regulatory system – dysfunction that impedes regulatory agencies from acting to carry out congressionally assigned responsibilities and to protect Americans.

Overall, we found that the rules that are most important to protecting the environment as well as the public's health, safety, and financial security were also the rules that took the longest to finalize and encountered the most delays in the regulatory process. On the other hand, routine or technical rules that were not considered "significant," which comprised the vast majority of all rulemakings, encountered few delays and were usually finalized in a fairly efficient manner. In other words, the "economically significant" rules subject to the most procedural requirements in the rulemaking process are also the rules with the greatest delays.

It may not be surprising that rules which must go through more steps in the rulemaking process will take longer, but what is striking and worrisome is the extent of the delay we found.

- Overall, the average length of rulemakings for all economically significant rules is 2.4 years, 41 percent longer than the overall age for all rules (1.7) years.
- Economically Significant rules that required a Regulatory Flexibility Analysis (RFA) took on average 2.5 years to complete.
- Economically Significant rules that began with an Advanced Notice of Proposed Rulemaking (ANPRM) took on average 4.4 years to complete, almost twice as long as Economically Significant rules without ANPRMs.
- Economically Significant rules that included both ANPRMs and RFA analyses took almost five years to complete on average. Hence, the inclusion of major additional procedural requirements leads to substantial additional delay in the rulemaking process.

**Number of Rulemakings and Average Length - All Rulemakings Begun and Finished 1996 - 2016**

| | Number of Rules | Average Rulemaking Length |
|---|---|---|
| **All Rulemakings** | 24,311 | 2.1 |
| Uncompleted | 6,165 | 3.2 |
| Completed | 18,146 | 1.7 |

**Length of Completed Rulemakings (RM) With and Without Inclusion of ANPRM *and* RFA Analysis**

| Priority | ANPRM | | | | | Non ANPRM | | | |
|---|---|---|---|---|---|---|---|---|---|
| | RFA Required | | | No RFA Required | | RFA Required | | No RFA Required | |
| | # | Average RM Length | % Longer than non-ANPRM non-RFA | # | Average RM Length | # | Average RM Length | # | Average RM Length |
| Economically Significant | 24 | 4.7 | 114% | 27 | 4.1 | 235 | 2.3 | 450 | 2.2 |
| Other Significant | 30 | 4.5 | 105% | 162 | 3.3 | 388 | 2.4 | 3,319 | 2.2 |
| Substantive, Nonsignificant | 37 | 3.3 | 120% | 239 | 3.1 | 1,115 | 1.5 | 10,577 | 1.5 |

Among the agencies that took the longest to complete Economically Significant rules on average were the Department of Energy (5 years) and the Environmental Protection Agency (3.8 years) (the third and fourth slowest agencies). We also found that important sub-agencies within larger agencies are more prone to substantial rulemaking delays for Economically Significant rules. For example, two EPA sub-agencies, the office of Solid Waste and Emergency response and the Water office, both take longer than 5 years on average to complete Economically Significant rulemakings. Another sub-agency with noteworthy delays for Economically Significant rules is the DOE Energy Efficiency and Renewable Energy (5.1 years).

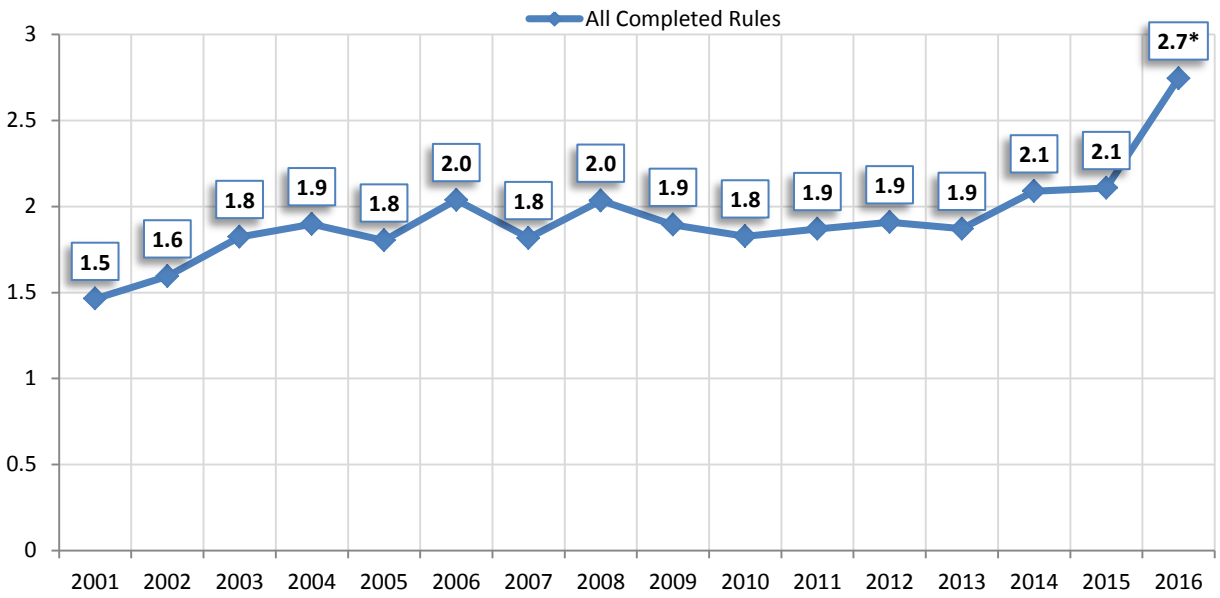
**Number and Average Rulemaking (RM) Length of Completed Rules**

| Agency | Name | Economically Significant | | Other Significant | |
|---|---|---|---|---|---|
| | | # | Average RM Length | # | Average RM Length |
| **DOJ** | Department of Justice | 6 | 5.5 | 173 | 3.0 |
| **DOL** | Department of Labor | 27 | 5.4 | 172 | 2.7 |
| **DOE** | Department of Energy | 28 | 5.0 | 40 | 2.8 |
| **EPA** | Environmental Protection Agency | 72 | 3.8 | 323 | 2.9 |
| **DHS** | Department of Homeland Security | 22 | 3.4 | 91 | 2.5 |
| **TREAS** | Department of the Treasury | 15 | 3.3 | 70 | 2.0 |
| **DOT** | Department of Transportation | 56 | 2.9 | 252 | 2.9 |
| **HUD** | Dept. of Housing and Urban Development | 8 | 2.6 | 166 | 2.6 |
| **USDA** | Department of Agriculture | 73 | 2.1 | 343 | 2.5 |
| **DOC** | Department of Commerce | 13 | 1.9 | 217 | 1.6 |
| **HHS** | Department of Health and Human Services | 262 | 1.7 | 468 | 2.2 |
| **DOD** | Department of Defense | 12 | 1.7 | 163 | 2.0 |
| **DOI** | Department of the Interior | 24 | 1.5 | 214 | 2.4 |
| **ED** | Department of Education | 27 | 0.9 | 89 | 1.2 |
| **Other*** | | 91 | 1.5 | 1,118 | 2.0 |
| **Total** | | **736** | **2.4** | **3,899** | **2.3** |

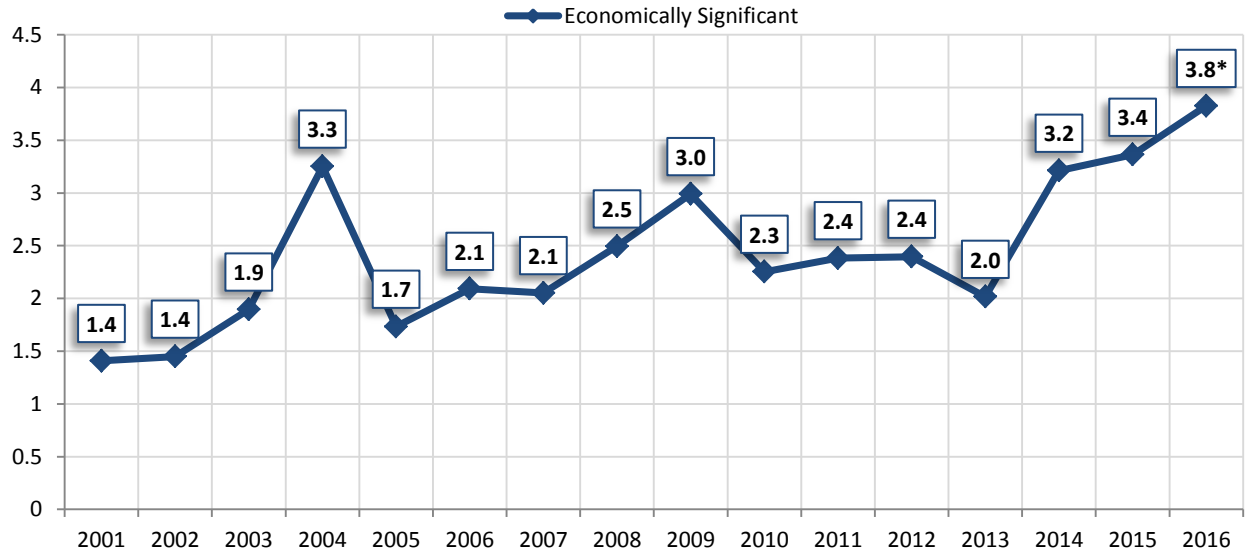
*This category, which includes 67 agencies, regards rulemakings for which the field in the Unified Agenda typically devoted to cabinet level agencies is blank and the agency conducting the rulemaking is listed in the Unified Agenda field normally devoted to sub agencies. Most agencies in this category are independent agencies. Two agencies included in this category – the State Department and Veterans Affairs Department – are cabinet level agencies.

The clear takeaway from our comprehensive empirical research is that many agencies are simply unable to complete Economically Significant rulemakings over the course of one presidential term. Unfortunately, the data in our report also shows that the trend is going in the wrong direction, with regulatory delay increasing. We found that the George W. Bush and Obama Administrations experienced similar rulemaking lengths for their first five years. Beginning in the sixth year of the Obama Administration, completed Economically Significant rulemakings became substantially longer than in the corresponding year in the Bush Administration. Over the last three years, the average length of rulemakings has increased steadily from 3.2 years in 2014 to 3.4 years in 2015 and now 3.8 years this year. In short, the rulemaking delays have reached new heights over the last few years. The data for other types of rules also reflects an increase in rulemaking lengths over the last few years. It has become clear that our current problems with regulatory delay are getting worse.

## Length of Completed Rulemakings (in years)




## Length of Completed Economically Significant Rules



**Years in Which the Average Completed Rulemakings Were the Longest**

| A. All Completed Rules | | |
|---|---|---|
| **Year** | **President** | **Average Rulemaking Length** |
| 2016* | Obama | 2.745 |
| 2015 | Obama | 2.111 |
| 2014 | Obama | 2.089 |
| 2006 | Bush | 2.038 |
| 2008 | Bush | 2.034 |
| **B. Economically Significant Completed Rules** | | |
| **Year** | **President** | **Average Rulemaking Length** |
| 2016* | Obama | 3.826 |
| 2015 | Obama | 3.363 |
| 2004 | Bush | 3.251 |
| 2014 | Obama | 3.211 |
| 2009 | Obama | 2.990 |
| **C. Other Significant Completed Rules** | | |
| **Year** | **President** | **Average Rulemaking Length** |
| 2016* | Obama | 3.582 |
| 2015 | Obama | 3.027 |
| 2014 | Obama | 3.014 |
| 2006 | Bush | 2.751 |
| 2007 | Bush | 2.636 |

## B. Agencies routinely fail to meet statutory rulemaking deadlines

Five years ago, Public Citizen conducted an analysis of public health and safety rulemakings with congressionally mandated deadlines.[37] 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 are far behind schedule. The most recent report from the law firm DavisPolk finds that, through July

[37] Mouzoon, N. (2012). *Public Safeguards Past Due: Missed Deadlines Leave Public Unprotected.* Public Citizen. Available at: http://www.citizen.org/documents/public-safeguards-past-due-report.pdf.

2016, regulators have still not complied with almost one quarter of the 271 statutory deadlines that have passed. This is six years after passage of the Act.[38]

## C. Regulatory delay is often extreme and costs lives

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. Backover rule[39]

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.

---

[38] DavisPolk. (2016) *Dodd-Frank Progress Report*. Available at: https://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report.

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

In light of the extent of the delay, the repeated self-granted extensions, and the hundreds of preventable deaths and thousands of preventable injuries occurring while the public waited 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 the Second Circuit was scheduled to hear argument in the case, DOT issued the rear visibility safety standard that petitioners sought.

The delay in finalizing this rule 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 the Department of Transportation failed to comply with Congressional instructions to timely issue a corrective rule.

**2. Truck driver training.**

In 1991, Congress passed a law requiring a rulemaking on training for entry-level commercial motor vehicle operators. It took more than 25 years, three lawsuits, and another statutory mandate, before the Department of Transportation finally enacted regulations requiring entry-level drivers to receive training in how to drive a commercial motor vehicle.

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 late), 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 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.

The agency finally issued a rule, though an insufficiently robust one, in December 2016. After an additional Trump administration delay, it finally became effective on June 5 of this year, 26 years after passage of ISTEA, and 24 years after the Congressionally mandated deadline.

**3. Cranes and derricks.**

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."[40]

[40] Lincoln, T. and Mouzoon, N. (2011, April.) Cranes & Derricks: The Prolonged Creation of a Key Public Safety Rule. Public Citizen. p. 4. Available at: http://www.citizen.org/documents/CranesAndDerricks.pdf.

**4. Silica rule**.

More than two million workers in the United States are exposed to silica dust, with construction, foundry and metal workers most at risk. Inhaling the dust causes a variety of harmful effects, including lung cancer, tuberculosis, and silicosis (a potentially fatal respiratory disease). OSHA long ago acknowledged that its silica dust standard was obsolete.[41] 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 the Office of Information and Regulatory Affairs (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, it was further delayed at OSHA. The rule was finally issued in June 2016. Enforcement was set to begin in June of this year, but has been delayed until September.[42]

As a result of this prolonged delay, people have died – and continue to die – needlessly. OSHA estimates that the 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."[43] If the rule does go into effect this year, it will be almost a decade and a half from commencement of the rulemaking to implementation.

**III. Deadline Suits**

In the wake of pervasive regulatory delay, nonprofit enforcement litigation has emerged as a crucial instrument in facilitating agency action at least to meet Congressionally mandated rulemaking deadlines. Public Citizen regularly and proudly files such deadline or enforcement cases, for the purpose of combating unjustified delay.

Congress created the rights for deadline lawsuits, though the Administrative Procedure Act and an array of sector-specific statutes, and Congress should embrace such litigation, which has the purpose of enforcing Congressional mandates against recalcitrant agencies.

Nonetheless, and as is reflected in today's hearing, a contrived controversy has emerged regarding deadline lawsuit settlements. These settlement agreements have been pejoratively dubbed "sue and settle" agreements by opponents of strong regulatory standards.

The criticism of such settlements rests on a number of false and misleading allegations that federal agencies are colluding with public interest groups to enter into settlement agreements that ultimately result in outcomes preferred by those public interest groups. The December 2014 Government Accountability Office (GAO) report, "Impact of Deadline Suits on EPA's

[41] OSHA Occupational Exposure to Crystalline Silica, 75 Fed. Reg. 79.603 (2010, Dec. 20).
[42] See https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=31082.
[43] 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.

Rulemaking Is Limited,"[44] dispels these myths. The report focuses specifically on the Environmental Protection Agency (EPA) and, it should be noted, was requested by Republican members of the House of Representatives Committee on Energy and Commerce of the House of Representatives. The GAO report makes three overriding points.

First, the GAO explains, the lawsuits should be considered "deadline suits"[45] because they allege that the EPA failed to perform a nondiscretionary, or mandatory, act by a deadline established by Congress. In other words, these lawsuits allege that agencies such as the EPA broke the law by failing to take a congressionally mandated action by a congressionally mandated date. These lawsuits are among the simplest to understand and prove. To illustrate, if the law says EPA must finalize a rule by September 8th, 2017 and the EPA does not finalize the rule by that date, third parties are entitled to bring a "deadline suit" to enforce the congressionally mandated deadline. The point of these lawsuits is obvious and simple: to enforce the law by holding federal agencies accountable when they ignore Congress.

That EPA, working with the Department of Justice (DOJ), seeks to settle these lawsuits instead of going to trial should surprise no one. It makes little sense to waste taxpayer resources to defend against claims that the EPA didn't perform a legal requirement by a congressionally imposed deadline when the parties who are bringing the suit only have to point to the calendar in order to prove their case. In these situations, "it is very unlikely that the government will win the lawsuit," according to the GAO report.[46]

Second, deadline lawsuit settlements do not pre-ordain the *substance* of the agency action that the EPA and other agencies agree to finalize under the terms of the settlement. According to the GAO report, "EPA officials stated that they have not, and would not agree to settlements in a deadline suit that finalizes the substantive outcome of the rulemaking or declare the substance of the final rule."[47] This is consistent with a 1986 DOJ memo from President Reagan's Attorney General Edwin Meese which prohibits the EPA from entering into settlement agreements that prescribe specific substantive outcomes regarding final rules. Thus, the allegation that deadline lawsuits involve back-room negotiations between pro-regulatory groups and complicit federal agencies which result in agreements that dictate the content of rules or bind agency discretion is false.

Third, and relatedly, deadline litigation settlements do not replace the notice-and-comment process, they just provide a new timeline in light of agency failure to meet Congressional directives. The settlement agreement that results from a deadline suit sets out nothing more than a simple timeline for the agency, the EPA in the GAO report, that has missed a Congressionally mandated deadline to complete the action. If the action is a rule involving rulemaking, the agency must generally follow the traditional public notice and comment rulemaking process prescribed by the Administrative Procedures Act or procedures prescribed by the agency's authorizing statute. In the case of the EPA, all of the settlements scrutinized by GAO pursuant to

[44] U.S. Government Accountability Office, GAO-15-34, Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking is Limited, December 2014, available at: http://www.gao.gov/assets/670/667533.pdf.
[45] *Id.* at 3.
[46] *Id.* at 7.
[47] *Id.* at 8.

the EPA's rulemaking authority under the Clean Air Act went through the public notice and comment process, allowing all members of the public an opportunity to comment on the rule before it is finalized.[48]

Since the allegations claiming the existence of collusion or impropriety in reaching settlement agreements under deadline lawsuits are unsubstantiated, it is fair to assume that the discussion of "sue and settlement" actually opposition to the regulatory action itself. In the case of the EPA, more often than not such action involves air pollution regulations that implement the Clean Air Act.

Deadline suits are, simply, a function of missed deadlines. As discussed above, those are pervasive. The GAO report bears this out with eye-opening examples. For example, the Clean Air Act rules that GAO studied included rules which missed Congressional deadlines by shocking and unacceptable margins. One rule was finally implemented 26 years after the Congressional deadline to finalize the rule.[49] Another missed its deadline by 19 years.[50]

## IV. Conclusion: Real Problems with Justice Department Settlements

There are real problems at the Justice Department related to settlement policy, but settlements of deadline suits are not among them. Members of Congress have expressed concern on a bipartisan basis about civil and criminal settlements with banks and other corporate wrongdoers that create a two-track justice system: a genteel, light-handed and often non-punitive approach for large corporations and their executives, and a wholly different standard for regular people. This is a topic on which the Committee could shed useful light.

### A. Settling with the Big Banks

Remarkably, given the scale of corporate wrongdoing and devastation wreaked, the perpetrators that caused the Great Recession escaped any criminal prosecution. No criminal prosecution of the giant corporations who ripped off borrowers; no criminal prosecutions for widespread securitization fraud, save for a single, relatively low-level case; no criminal prosecution for the ratings companies that knowingly blessed widespread misconduct. No criminal prosecution of the Big Banks, and no prosecution of their executives.

The failure to prosecute is a major blemish on the record of the Department of Justice. It enabled wrongdoers to escape accountability, left victims uncompensated and failed utterly to establish a commitment to enforcement that will deter future wrongdoing.

Very belatedly, as a kind of mop-up operation, the Department of Justice starting in 2013 entered into a series of settlements of civil claims against the largest banks. The first major "global settlement" was with JPMorgan, for a purported $13 billion, entered into in November 2013.[51] It

[48] *Id.* at 12.
[49] *Id.* at 11
[50] *Id.*
[51] Department of Justice, "Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages," November 13,

was followed by a July 2014 purported $7 billion deal with Citigroup,[52] and a purported $16.6 billion settlement with Bank of America in August 2014.[53]

Later deals included a purported $2.6 billion settlement with Morgan Stanley[54] and a purported $5 billion settlement with Goldman Sachs[55] in 2016, and a purported $864 million settlement with Moody's,[56] a purported $7.2 billion settlement with Deutsche Bank,[57] and a purported $5.28 billion settlement with Credit Suisse, all in January 2017.[58]

Although the details of the settlements varied, they aimed to resolve claims related to the improper issuance of residential mortgage-backed securities.

Perhaps because of frustration and resignation over DOJ's decision not to engage in criminal prosecutions, or perhaps because the settlements did involve large sums of money, and although they were front-page news for a day, these giant deals received very little scrutiny. That was a mistake that Congress should remedy. These settlements were reached through secretive and faulty processes; they failed to provide any serious accounting to the public of what the Department had uncovered and why it thought billions of dollars in penalties and restitution were in order; the public relations hype around the settlements obscured the extent to which substantial portions of the settlement totals imposed no or minimal actual costs on the settling banks; and although the non-transparent aspect of the settlements makes this impossible to determine with certainty, they very likely let the banks off cheap relative to their potential liability. While "rough justice" is sometimes the best that can be obtained, there is an almost ad hoc element to these deals that suggests a mutually face-saving, slipshod negotiation rather than an appropriately deliberative and thoughtful process.

---

2013, Available at: https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement.

[52] Department of Justice, "Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages," July 14, 2014, available at: https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement.

[53] Department of Justice, "Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis," August 21, 2014, available at: https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading.

[54] Justice Department, February 11, 2016, Morgan Stanley Agrees To Pay $2.6 Billion Penalty In Connection With Its Sale Of Residential Mortgage Backed Securities, available at: https://www.justice.gov/usao-ndca/pr/morgan-stanley-agrees-pay-26-billion-penalty-connection-its-sale-residential-mortgage.

[55] Justice Department, April 11, 2016, Goldman Sachs Agrees to Pay More than $5 Billion in Connection with Its Sale of Residential Mortgage Backed Securities, available at: https://www.justice.gov/opa/pr/goldman-sachs-agrees-pay-more-5-billion-connection-its-sale-residential-mortgage-backed.

[56] Department of Justice, January 13, 2017, Justice Department and State Partners Secure Nearly $864 Million Settlement With Moody's Arising From Conduct in the Lead up to the Financial Crisis, available at: https://www.justice.gov/opa/pr/justice-department-and-state-partners-secure-nearly-864-million-settlement-moody-s-arising.

[57] Department of Justice, January 17, 2017, Deutsche Bank Agrees to Pay $7.2 Billion for Misleading Investors in its Sale of Residential Mortgage-Backed Securities, available at: https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-72-billion-misleading-investors-its-sale-residential-mortgage-backed.

[58] Department of Justice, January 18, 2017, Credit Suisse Agrees to Pay $5.28 Billion in Connection with its Sale of Residential Mortgage-Backed Securities, available at: https://www.justice.gov/opa/pr/credit-suisse-agrees-pay-528-billion-connection-its-sale-residential-mortgage-backed.

In the case of the JPMorgan settlement, for example, the Department never filed nor published a complaint against the megabank, though DOJ lawyers had apparently drafted a detailed version. Instead, the settlement contains only an 11-page statement of facts that purports to describe the misdeeds of JPMorgan and its acquired Bear Stearns and Washington Mutual operations. This statement of facts may generously be characterized as bare bones.

The Big Bank civil settlements deserve ongoing Congressional scrutiny, to determine bank compliance but especially to prevent such flawed deals in the future.

**B. Inappropriate use of deferred and non-prosecution agreements**

Far too often, corporations are able to commit crimes but escape criminal prosecution, even when caught. In the past 15 years, there has been a dramatic rise in federal prosecutors choosing not to prosecute corporations that have committed crimes. Instead, the U.S. Department of Justice has adopted an alternative approach, entering into agreements with corporations to either defer prosecution or abstain from prosecution entirely if the corporation meets the terms set out in these agreements. When first introduced, these types of agreements, also known as "pre-trial diversion," were intended to apply not to corporations, but primarily to juvenile delinquents, with the aim of clearing the courts to allow them to attend to major criminal cases.[59] Yet, when deferred and non-prosecution agreements are used in response to massive corporate crimes, it is exactly such perpetrators of major crimes that reap the benefits. Indeed the extent and nature of deferred and non-prosecution of agreements is such that they have turned much of DOJ's corporate criminal practice into a branch of civil enforcement – a deeply problematic state of affairs precisely because criminal and civil enforcement aim to achieve distinct if overlapping objectives.

Prior to 2003, the DOJ entered into fewer than five deferred prosecution agreements and non-prosecution agreements with corporations per year. In the first decade following the millennium, these numbers gradually crept upwards, entering the double digits by 2005. Numbers rose to a high of 42 deferred and non-prosecution agreements in 2007 and continue to number in the dozens every year, according to a forthcoming report from Public Citizen.[60]

Deferred and non-prosecution agreements are a special gift to large corporations, which are enabled to escape prosecution for serious crimes in a manner rarely afforded to individuals or small business. The logic of these agreements is that they permit prosecutors to put in place special compliance mechanisms to prevent future wrongdoing. These compliance mechanisms can equally be obtained through criminal plea agreements, however, so the claim that deferred and non-prosecution agreements offer some unique benefit is incorrect. Worse, deferred prosecution agreements offer little or no deterrent effect, either for the (non-)charged corporation or for others. Corporations entering into deferred and non-prosecution agreements have a

[59] Mokhiber, R. (2005). Crime without Conviction: The Rise of Deferred and Non Prosecution Agreements. Available at: http://corporatecrimereporter.com/deferredreport.htm

[60] Ben-Ishai, E. and Weissman, R. (forthcoming, 2017). Justice Deferred – and Denied. Public Citizen. The most detailed account and analysis of deferred prosecution agreements is contained in Garrett, B. (2014.) Too Big To Jail: How Prosecutors Compromise with Corporations. Harvard University Press.

strikingly high recidivism rate, including companies such as AIG, Barclays, Bristol-Myers Squibb, Chevron, GlaxoSmithKline, Hitachi, Lucent, Merrill Lynch, Pfizer, Prudential and UBS.[61]

Perhaps the most appalling example of the abuse of deferred prosecution – one which emphasizes how this kid-glove treatment is designed primarily for giant corporations – involves the banking giant HSBC. In December 2012, the company agreed to pay more than $1 billion in fines and entered into a deferred prosecution agreement for anti-money laundering and sanctions violations. Assistant Attorney General Lanny Breuer said the company was guilty of "stunning failures of oversight – and worse" and that the "record of dysfunction that prevailed at HSBC for many years was astonishing."[62] Yet no criminal prosecution occurred. According to Breuer, the worry was that a criminal prosecution of a giant bank like HSBC might bring down the company and threaten the global financial system's stability.[63] "

In other words, the mere fact of its excessive size enabled HSBC to escape criminal penalties; it was judged too big to jail.

Criticisms of disparate treatment for large banks did strike a chord inside the Department of Justice, however. DOJ has recently secured some criminal pleas from giant financial firms, most notably in regards to the extraordinary manipulation of foreign exchange markets by five major banks. These banks – Barclays, Citigroup, JP Morgan Chase, the Royal Bank of Scotland and UBS – colluded on the size, timing and nature of their buy and sell orders for U.S. dollars and euros. The conspirators referred to themselves as the "mafia," and one said, "if you ain't cheatin', you ain't tryin'." There is no question of intentionality in this case.[64]

Yet even though guilty pleas were obtained from four of the banks and a deferred prosecution agreement was rescinded for the fifth, UBS, the Department of Justice maneuvered yet again to protect the banks from the normal consequences of law-breaking. A final deal on the guilty pleas was apparently held off until the SEC granted waivers to the banks from rules that would otherwise prevent them from undertaking certain securities activities.[65] It has also been reported that the Department of Justice obtained pleas from the banks' parent companies, rather than from subsidiaries, to protect those subsidiaries from other possible sanctions, including state charter revocation.[66]

---

[61] Ben-Ishai, E. and Weissman, R. (forthcoming, 2016). Justice Deferred – and Denied. Public Citizen.
[62] Breuer, L. (2012, December 11.) *Assistant Attorney General Lanny A. Breuer Speaks at the HSBC Press Conference*. Available at: http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1212111.html.
[63] O'Toole, J. (2012, December 12.) *HSBC: Too Big to Jail?* CNNMoney. Available at: http://money.cnn.com/2012/12/12/news/companies/hsbc-money-laundering/index.html.
[64] Department of Justice. (2015, May 20.) Five Major Banks Agree to Parent-Level Pleas. Available at: http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.
[65] Reuters. (2015, May 20.) U.S. SEC Grants Waivers to Banks After Guilty Pleas. Available at: http://www.reuters.com/article/2015/05/20/banks-forex-settlement-waivers-idUSL1N0YB1GA20150520.
[66] Protess, B. and Corkery, M. (2015, May 13.) 5 Big Banks Expected to Plead Guilty to Felony Charges, but Punishments May Be Tempered. New York Times. Available at: http://www.nytimes.com/2015/05/14/business/dealbook/5-big-banks-expected-to-plead-guilty-to-felony-charges-but-punishments-may-be-tempered.html.

To be very clear, the inappropriate use of deferred and non-prosecution agreements is not limited to the financial sector. Consider, for example, the case of the GM ignition switch**.** Starting in 2002, GM sold a host of cars containing a faulty ignition switch that would suddenly shut off the engine during driving, and prevent airbags from deploying in the event of a crash. GM has acknowledged that 174 people have died as a result of ignition switch failures, and the actual number may be much higher.

The problems with the General Motors ignition switch began more than a decade before defective cars were finally recalled. "During the time between GM's approval of the low-torque ignition switch in 2002 and its 2014 recall of 2.6 million vehicles affected by the ignition switch defect, key facts were withheld by, or unrecognized within, GM, making detection of the connection between the faulty ignition switch and non-deployments of air bags difficult for both GM and NHTSA, and leading to a tragic delay in instituting a recall," a National Highway Transportation and Safety Administration (NHTSA) review found. "GM's delay in disclosing the defect at issue was the product of actions by certain personnel responsible for shepherding safety defects through GM's internal recall process, who delayed the recall until GM could fully package, present, explain, and handle the deadly problem," according to the Department of Justice.[67]

In September 2015, GM entered into a deferred prosecution agreement with the Justice Department. Simultaneous with the filing of the deferred prosecution agreement, prosecutors filed a criminal information against the company, alleging it had illegally concealed information from NHTSA (under 18 U.S.C. 1001) and engaged in wire fraud by misleading consumers as to the truth about the ignition switch.[68] GM agreed to pay $900 million in penalties as part of the deal. No individuals have been charged in connection with the case, and it is not expected that any will be.

It turns out that a number of individual drivers were prosecuted for manslaughter for crashes that were in fact attributable to the ignition switch defect; the contrast with the ultimate treatment of GM could not be starker in showing the double standards applied to corporate criminal prosecutions and in underscoring the challenges in prosecuting individuals involved in such cases.[69]

When it comes to corporate wrongdoing, our system of criminal justice has gone awry. Because of a lack of will and/or statutory authority, prosecutors fail to prosecute corporations and corporate executives for reckless conduct the likes of which would generate full-on prosecution and harsh sentences if committed by individuals outside of the corporate context. Through deferred and non-prosecution agreements, large companies, and especially but not only big

---

[67] Department of Justice, "Manhattan U.S. Attorney Announces Criminal Charges Against General Motors And Deferred Prosecution Agreement With $900 Million Forfeiture," September 17, 2015, available at: http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred.

[68] United States of America v. General Motors Company, Information, September 17, 2015, available at: http://www.justice.gov/usao-sdny/file/772301/download.

[69] See Jeff Bennett, "Texas Woman Driving GM Recalled Car Cleared In Death of Fiancé," Wall Street Journal, November 24, 2014, available at: http://www.wsj.com/articles/gm-confirms-texas-accident-linked-to-faulty-ignition-switch-1416842193.

banks, get special treatment, enabling them to avoid criminal prosecution for egregious wrongdoing simply by promising not to commit wrongs in the future. And even criminal prosecutions are engineered to enable giant banks to avoid meaningful penalties.

### C. Worrying Developments: Backtracking on the Yates Memo?

In tacit recognition of some of the problems discussed here, particularly the failure to hold any individuals criminally accountable for the Wall Street crash, in 2015 the Justice Department issued the Yates Memorandum, urging more aggressive prosecution of individuals at criminal wrongdoers, and adopted certain prosecutorial guidelines aimed at spurring more such prosecutions.[70]

Although the evidence is mixed after issuance of the memo, there were some signs of progress. Notably, the Justice Department obtained criminal convictions of the executives associated with the New England Compounding Center-induced fungal meningitis outbreak that killed at least 64 patients,[71] a one-year criminal sentence against former Massey Energy CEO Don Blankenship for willful violation of coal safety rules,[72] a 28-year sentence against the former head of the Peanut Corporation of America in connection with a salmonella outbreak that killed nine people,[73] and a settlement with Volkswagen for its emissions cheating that included more than $4 billion in fines, a criminal plea for the corporation and indictments against numerous VW executives and managers associated with the scandal.[74]

But recent developments in the new administration's Justice Department suggest cause for concern. Attorney General Jeff Sessions has made clear that he aims to seek the toughest sentences permissible for low-level, nonviolent drug offenders, but he has made no comparable statements about corporate wrongdoers, who inflict vastly greater harm on society and, as the utmost rational actors, should be far more responsive to tougher enforcement and criminal sanction.

In May, the Justice Department settled a case with Citigroup involving what the Department described as criminal violations related to money laundering.[75] The case involved more than

---

[70] Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing," September 9, 2015, available at: http://www.justice.gov/dag/file/769036/download.

[71] Justice Department, Owner of New England Compounding Center Convicted of Racketeering Leading to Nationwide Fungal Meningitis Outbreak, March 22, 2017, available at: https://www.justice.gov/opa/pr/owner-new-england-compounding-center-convicted-racketeering-leading-nationwide-fungal.

[72] Justice Department, Blankenship Sentenced to a Year in Federal Prison, April 6, 2016, available at: https://www.justice.gov/usao-sdwv/pr/blankenship-sentenced-year-federal-prison.

[73] Kevin McCoy, Peanut Exec in Salmonella Case Gets 28 Years, USA Today, September 22, 2015, available at: https://www.usatoday.com/story/money/business/2015/09/21/peanut-executive-salmonella-sentencing/72549166/. Although filed long before the Yates Memo was issued, this case can fairly be considered part of the Department's recent, stepped-up effort to get somewhat tougher on corporate wrongdoing.

[74] Justice Department, Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests, January 11, 2017, available at: https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six.

[75] Justice Department, Banamex USA Agrees to Forfeit $97 Million in Connection with Bank Secrecy Act Violations, May22, 2017, available at: https://www.justice.gov/opa/pr/banamex-usa-agrees-forfeit-97-million-connection-bank-secrecy-act-violations.

18,000 alerts covering $142 million in what the DOJ called "potentially suspicious remittance transactions" at Citi's Banamex USA division. The Bank Secrecy Act makes it a crime to "willfully fail to establish and maintain" a robust anti-money laundering compliance program. Details released by the DOJ show that between 2007 and 2012, the firm processed more than 30 million remittances to Mexico covering $8.8 billion with "virtually no investigation for suspicious activity." In one instance, a Mexican beneficiary received 1,400 remittances from more than 950 different senders in 40 different states in the U.S. But the Citi subsidiary never filed a suspicious activity report, which is a bank investigation of the issue. The DOJ charged that the firm made at least $92 million in these transactions – but it only required Citi to forfeit $97.4 million. Outrageously, Citi was let off with a non-prosecution agreement, notwithstanding its long record of violating the law. It does not appear that any individual prosecutions will be forthcoming.

This and the other examples discussed here are real injustices, with far-reaching consequences for maintaining a system of equal justice for all and for deterring corporate wrongdoing. It is to these settlement issues that the Committee should turn its attention.