Written Testimony of

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before the

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on

"The Federal Government on Autopilot: Delegation of Regulatory Authority to an Unaccountable Bureaucracy."

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Mr. Chairman King, Ranking Member Cohen, and Members of the Task Force,

Thank you for the opportunity to testify today on the importance of regulations to public health and safety. I am Amit Narang, Regulatory Policy Advocate at Public Citizen's Congress Watch. Public Citizen is a national public interest organization with more than 450,000 members and supporters. For more than 40 years, we have successfully advocated 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 150 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 I write only on behalf of Public Citizen.

Over the last century, and through the Obama administration, regulations have made our food supply safer; saved hundreds of thousands of lives by reducing smoking rates; improved air quality, 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 more.

To review the facts of how regulation has benefitted and strengthened our country, however, is not to suggest that all is well with the regulatory system. Indeed, our regulatory system is in need of reform, but not because there is too much regulation. Rather, under-regulation is the status quo and too little regulation is hurting the public.

The evidence of under-regulation includes both massive and dramatic disasters that catch the public's attention as well as daily tragedies that could have been easily prevented with regulatory standards in place. In both instances, the common link is a complete absence of any regulatory standards or ineffective and weak standards that do not protect the public. The costs of under-regulation are real and are borne by working families, consumers, taxpayers, and the public.

Regulations are Smart for our Economy

Regulation has led to some of the most important public health, safety, environmental and economic success stories in our country's history. 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]
- Saved the lives of thousands of workers every year.[7]

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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 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>.

- 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]

Regulation continues to improve the quality of life for every American, every day. Ongoing and emerging problems as well as a rapidly changing economy require the continual issuance of new rules to ensure that America is strong, safe, healthy and economically prosperous. Below is a selective and small sampling of rules recently issued, pending, or 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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[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]

- **Wall Street Accountability.** 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. While the Dodd-Frank Act is not perfect, it 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

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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*.

rules. Given the very considerable extent to which the financial industry has constructed a business model around deception and unjust fees, CFPB rulemaking can afford consumer dramatic benefits. Such rules concern matters including: requiring mortgage lenders 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

[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>.

the improper influence of industry over research, education and clinical decision making. Putting the Act into place required implementing rules.[16]

- **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 sourcing and origin in food, establishing standards for school lunch programs and specifying the migratory bird hunting season.

When viewed in the aggregate, regulations are overwhelmingly positive for the economy and reinforce the examples above. According to official government figures, the benefits that federal regulations provide to our country consistently dwarf the costs of those regulations. Every year, the Office of Management and Budget (OMB) analyzes the costs and benefits of rules with a major economic impact in a report to Congress. The most recent OMB report found that:

> 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 $261 billion and $981 billion, while the estimated annual costs are in the aggregate between $68 billion and $103 billion. These ranges are reported in 2010 dollars and reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.[17]

This means that even by the most conservative OMB estimates, the benefits of major federal regulations over the last decade have exceeded their costs by a factor of more than two-to-one, and benefits may have exceeded costs by a factor of up to fourteen. This makes regulation one of the best returns on investment and one that rivals some of the top performing businesses.

Congress Deserves Credit for Protecting the Public

A simple but often overlooked fact is that Congress is the source of regulatory protections for consumers and working families even though federal agencies are the ones developing the regulations. In fact, agencies are not able to take action to protect the public unless Congress has delegated authority to the agencies to do so. The delegation of authority to federal agencies to implement laws is simply fundamental to the proper functioning of our government. Without the ability for Congress to delegate authority to agencies to implement the laws it passes, Congress will be restricted from using its power to address pressing public policy concerns, including

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

[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.1. available at: https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf

protecting the health and safety of the public. Before turning to the very serious practical consequences of preventing delegation of authority from Congress to federal agencies, it is important to make clear that the principle of delegation is fully grounded in the Constitution and the vision of the Founding Fathers rather than violating both as some incorrectly contend.

It is undeniable the Constitution bars the delegation of legislative power. The Vesting clause of Article I provides that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[18] Likewise, the President has a constitutional obligation to "take Care that the laws be faithfully executed."[19] Thus, when Congress validly enacts a statute that grants authority to the executive branch, that statutory grant of authority to the executive isn't a *transfer* of legislative power but rather an *exercise* of legislative power that fully comports with the President's constitutional duty to execute the law. In other words, executive branch agents acting within the terms of such a statutory grant are exercising executive power, not legislative power.

This constitutional principle in support of delegation has been re-affirmed repeatedly by the Supreme Court. For example, in *INS v. Chadha*,[20] the Court emphatically denied that an executive officer exercises legislative power when performing duties, including rulemaking, pursuant to statutory authorization. Creating rules pursuant to valid statutory authority isn't lawmaking, but law execution. When delegations have been challenged, the Court has upheld the delegation in virtually every case, although in certain cases it has required delegations under statutory authority to be subject to an "intelligible principle." Yet, even in these cases, the Court has not insisted on a high bar for what statutory language constitutes an "intelligible principle."[21]

With respect to the Framers, the overall picture is that the founding era wasn't concerned about delegation. A review of the records of the constitutional convention, the ratification debates, the Federalist papers, and early government legislation reveals very little to support misleading claims that the Framers believed delegation would result in the executive branch assuming authority intended for the legislative branch. Instead, the Framer's clear concern was with legislative aggrandizement at the expense of other institutions rather than with legislative grants of statutory authority to the executive branch.[22] A quick survey of the statutes enacted by the First or Second Congresses makes clear that those Congresses delegated enormous authority to the Executive with significant discretion to accomplish broad objectives related to military pensions, trade with Indian tribes, issuance of patents, and fines levied by the Treasury.[23] Claims

[18] U.S. Const. Article 1, Section 1.
[19] U.S Const. Article 2, Section 3.
[20] *See* 462 U.S. 919 (1983).
[21] *See Whitman v. American Trucking Associations*, 531 U.S. 457, 474 (2001)(In short, we have "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.")
[22] *See* James O. Freedman, Delegation and Institutional Competence, 43 U. Chi. L. Rev. 307, 309 (1976).
[23] *See* Harold J. Krent, *Delegation and Its Discontents*, 94 Colum. L. Rev. 710 (1994).

by originalists that the Founding Fathers opposed legislative delegation of authority to the Executive do not stand up to scrutiny of the historical record.

Beyond the fact that delegation of authority by Congress to federal agencies is firmly rooted in the Constitution and the Framers' vision, the ability of Congress to effect such a delegation is central to the functioning of our government as a practical matter. Just as CEOs of corporations delegate tasks and empower employees to perform those tasks using the employees' specialized skills and expertise, so does Congress empower federal agencies to carry out the laws Congress enacts using the agencies' institutional expertise. Thus, the relationship between Congress and federal agencies resembles that of the typical principal-agent model. The ubiquity of this model in private and public institutions explains the ubiquity of delegation in modern life.

Unfortunately, public discourse and rhetoric has increasingly but misleadingly framed federal agencies as the principals rather than as the agents. Claims that "unaccountable bureaucrats" are "making new laws" have grown commonplace despite being patently false. Federal agencies are anything but "free agents" when it comes to developing regulations under statutory authority. Agencies know full well that violating that statutory authority by exceeding it will result in a court challenge and potential reversal of the regulation. Federal agencies are ultimately accountable to Congress and subject to its oversight. Constant villainizing of agency officials and regulatory protections has led the public to believe that our regulatory system is somehow rogue and unaccountable. Nothing is further from the truth and it is past time to put this myth to bed.

In the absence of delegation, congressional power to enact public policy will be limited and result in a state of affairs that should be a concern to all members of Congress. If Congress is not able to delegate authority for federal agencies to "fill in the gaps" of statutes when applying those statutes to narrow and specific policy issues, federal agencies will resort to simply parroting the language of the statute in its regulations, no matter how vague or ambiguous the statutory language may be. This will make it much harder for businesses across the country who want to comply with regulations in good-faith but have little to no direction on how to do so. State and local regulators will be left on their own to determine how to implement and enforce federal regulations, resulting in widely varying and potentially conflicting approaches to what is intended to be a uniform national law. In turn, compliance with the regulation will be unpredictable and will result in increased enforcement actions for non-compliance.

For strong constitutional and practical reasons, broad delegations of authority to federal agencies to implement congressional mandates are not only appropriate, but also necessary for our government to function in the 21st century.

The Myth of Regulations Hurting our Economy

Sadly, false and misleading rhetoric propagates the myth that our country cannot have a strong economy without sacrificing bedrock public health, safety, environmental, and financial stability protections. There is simply no credible, independent, and peer-reviewed empirical evidence supporting the claim that there is a trade-off between economic growth and strong, effective regulatory standards. Experts from across the political spectrum have acknowledged that arguments linking regulations to job losses are nothing more than mere fiction. For example, Bruce Bartlett, a prominent conservative economist who worked in both the Reagan and George H.W. Bush administrations, referred to the argument that cutting regulations will lead to significant economic growth as "just nonsense" and "made up."[24]

Mr. Bartlett's claims are backed up by a recent book entitled "Does Regulation Kill Jobs?"[25], a comprehensive empirical study conducted by numerous distinguished regulatory experts and academics that closely scrutinized the claim that regulations are linked to job loss and concluded that "to date the empirical work suggests that regulation plays relatively little role in affecting the aggregate number of jobs in the United States."[26] The authors go on to definitively state that "the empirical evidence actually provides little reason to expect that U.S. economic woes can be solved by reforming the regulatory process."[27]

By contrast, the so-called "evidence" that regulations are killing jobs or ruining the economy comes from biased and partisan sources using methodology that is not peer-reviewed and doesn't pass muster under scrutiny. For example, the *Washington Post* recently vetted a report entitled "the Ten Thousand Commandments" from the Competitive Enterprise Institute claiming that the annual regulatory burden adds up to $15,000 for each household in America or 1.8 trillion for the whole country.[28] As the *Post* notes, the report foregoes any attempt at computing the benefits of the regulations it includes and the *Post* found that the report has "serious methodological problems" and deserved "two pinocchios" given that the report's authors themselves admit that the report is "not scientific" and "back of the envelope."[29] Reports using similar methodology

[24] Charles Babington, Bruce Bartlett, Ex-Reagan Economist: Idea That Deregulation Leads to Jobs 'Just Made Up,' Huffington Post, October 30, 2011, http://www.huffingtonpost.com/2011/10/31/gop-candidates-plans-on-economy-housing_n_1066949.html?view=print&comm_ref=false.
[25] CARY COGLIANESE & ADAM M. FINKEL &CHRISTOPHER CARRIGAN, DOES REGULATION KILL JOBS (2013).
[26] *Id*. at 7
[27] *Id*. at 10
[28] Glenn Kessler, *The Claim That American Households Have a 15,000 Regulatory 'Burden'*, WASHINGTON POST (Jan 14, 2015) , http://www.washingtonpost.com/blogs/fact-checker/wp/2015/01/14/the-claim-that-american-households-have-a-15000-regulatory-burden/
[29] *Id*.

and reporting similar trillion dollar cost figures have also been exposed as flawed and have been disavowed.[30]

These latest implausible and unfounded claims about regulations hurting the economy follow a long history of business complaining about the cost of regulations and predicting that the next regulation will impose unbearable burdens. Yet, in a 2013 report,[31] Public Citizen looked back at previous claims linking job losses to regulations, and found that none of them turned out to be even remotely accurate. Indeed, the disconnect between rhetoric and reality could not be more stark. In each case covered in the report, industry's claims look preposterous in retrospect. For instance, in the late-1970s, the petrochemical industry claimed that the phasing out of lead from gasoline would threaten an eye-popping 43 million jobs. Instead, the phase-out became an unmitigated public health and safety success story across the world. A 2011 study backed by the United Nations concluded that banning lead from gasoline had led to $2.4 trillion in annual benefits and 1.2 million fewer premature deaths, annually. The technological hurdles to find a suitable substitute for lead to stop engine "knock" barely rated a speed bump. Similar success stories regarding fuel efficiency measures, banning of carcinogenic vinyl chloride, Clean Air Act pollution standards, and unpaid family leave regulations proved that apocalyptic predictions from industry had no empirical basis whatsoever.

Lack of Strong and Effective Regulations Hurts Americans and Our Economy

Under-regulation is a form of regulatory failure that costs lives, results in preventable injuries, harms the environment often irreversibly, leaves consumers vulnerable to unsafe products and abusive practices, and leads to instability and recklessness in our financial system. Under-regulation touches virtually every regulatory sector and agency. Below is a sample of recent and current instances of under-regulation and the costs borne by the public and our economy:

- 2008 Wall Street Crash: The rampant deregulation that led to the crash cost our economy anywhere from 6 trillion to 14 trillion dollars or 50,000 to 120,000 for every US household. In addition, 8.7 million Americans lost their jobs during or immediately following the crisis.[32]

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[30] Mark Drajem, *Rules Study Backed by Republicans 'Deeply Flawed,' Sunstein Says* (Bloomberg, June 3, 2011) *available at* http://www.bloomberg.com/news/2011-06-03/rules-study-backed-by-republicans-deeply-flawed-sunstein-says.html

[31] http://www.citizen.org/regulations-are-entirely-to-blame-report

[32] http://ourfinancialsecurity.org/blogs/wp-content/ourfinancialsecurity.org/uploads/2012/09/Costs-of-The-Financial-Crisis-September-20142.pdf

- Climate Change Inaction: Blocking or delaying new carbon emission rules from the EPA and other climate change measures will cost our country up to 150 billion dollars annually in economic damage in the future.[33]
- Preventable Workplace Deaths and Injuries: Every day, an average of 150 workers die from job injuries or occupational diseases. Every year, the lack of effective workplace safety protections costs our country 250 billion to 330 billion dollars in injuries and illnesses.[34]
- BP Oil Spill: This massive environmental disaster in the Gulf ended up costing more than 42 billion dollars. The oil spill harmed thousands of Gulf Coast residents and destroyed many local small businesses. BP has now been found "grossly negligent" in causing the disaster and faces up to 18 billion dollars in fines, some of which will go to Gulf Coast restoration projects.[35]
- 2014 West Virginia Elk River Chemical Spill: those who were hurt by the damage caused by the spill are claiming 160 million in damages from the spill. These include small businesses in Charleston who were forced to shut down for days and the many thousands of residents who were forced to buy bottled water because of the severe water contamination.[36]
- Oil Freight Train Explosions: Trains carrying highly explosive crude oil are traveling through communities every day without most of those communities even aware of the threat. In 2013, a massive oil train derailment and explosion in Canada killed 47 people. The Department of Transportation expects an average of 10 oil train derailments each year over the next ten years totaling over 4.5 billion dollars in damages. [37]
- Lake Erie Algae Bloom: a half million Ohio residents were forced to buy bottled water because their water had become so badly contaminated from algae. In 2008, the government estimated algae blooms resulted in 82 million dollars annually in economic damages.[38] Algae Bloom damage to Lake Erie can be directly traced to successful attempts to roll back the Clean Water Act by special interests.[39]

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[33] http://fortune.com/2014/07/29/white-house-inaction-on-climate-costs-150-billion-a-year/
[34] AFL-CIO. (2015, April.) Death on the Job: The Toll of Neglect., http://www.aflcio.org/content/download/126621/3464561/DOTJ2014.pdf
[35] http://www.edf.org/blog/2014/09/05/bp-oil-spill-ruling-could-jumpstart-gulf-coast-restoration-work
[36] http://www.insurancejournal.com/news/southeast/2014/08/12/337282.htm
[37] http://www.sfgate.com/nation/article/Oil-trains-forecast-to-derail-at-10-per-year-in-6095446.php
[38] http://www.cop.noaa.gov/stressors/extremeevents/hab/current/econimpact_08.pdf the
[39] http://www.foodandwaterwatch.org/blogs/the-toledo-water-crisis-wont-be-the-last/

Regulatory Paralysis Is One of the Main Causes of Under-Regulation

It is true that the regulatory system is broken, but not because there is too much regulation. Rather the system is broken because the current regulatory process is too slow, too calcified, and too inflexible to respond to public health and safety threats as they emerge. As Public Citizen's striking visual depiction of the regulatory process shows,[40] the current process is a model of inefficiency, with a dizzying array of duplicative and redundant requirements interspersed throughout a byzantine network that is a virtual maze for agencies to navigate. This is the result of an accumulation of analyses and procedures that Congress and the Executive have imposed on agencies over the years leaving agencies in a state of "paralysis by analysis." Far from the popular conception of "regulators run amok," the reality is that agency delays are rampant, congressional and judicial deadlines are routinely missed or pushed back, and ample evidence exists that the situation is getting worse.

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. As is apparent, delay permeates all aspects of the rulemaking process, touching virtually all agencies and regulatory sectors.

1. Oil Train Safety

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.[41]

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

[40] Public Citizen, *The Federal Rulemaking Process*, http://www.citizen.org/documents/Regulations-Flowchart.pdf.

[41] https://www.transportation.gov/briefing-room/final-rule-on-safe-rail-transport-of-flammable-liquids

industry and evolving technology and knowledge about hazardous materials and accidents," testified the chair of the National Transportation Safety Board.[42]

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."[43]

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, the House has passed legislation this[44] this Congress that would mandate the extra procedural step of ANPRMs for all major rules such as the oil train rule. 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.

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

[42] 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.
[43] 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.
[44] H.R. 185, The Regulatory Accountability Act (2015).

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."[45]

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."[46]

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,"[47] while giving businesses flexibility in choosing appropriate control methods.

OSHA has long acknowledged that its current silica dust standard, adopted in 1971, is obsolete.[48] 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

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[45] 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>.

[46] 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.

[47] OSHA, OSHA's Proposed Crystalline Silica Rule: Overview, available at: **https://www.osha.gov/silica/factsheets/OSHA_FS-3683_Silica_Overview.html**.

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

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.[49] 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.[50]

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 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

[49] 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.

[50] 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>.

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[51]

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

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[51] 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>.

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.

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.[52]

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

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[52] 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>.

December 2011 to settle the company's legal liabilities associated with the failures of its blowout preventer.[53]

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,"[54] 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.[55] 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."[56]

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,[57] 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.[58] While

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[53] Tom Fowler, "Cameron Will Pay BP to Settle Spill Claims," Wall Street Journal, December 17, 2011, available at: www.wsj.com/articles/SB10001424052970204466004577102050498485784.

[54] 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.

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

[56] 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.

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

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

first proposed in September 2010, the rule for third-party, independent, real-condition testing of blowout preventers did not become final until August 2012.[59]

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."[60]

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*"[61] (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,[62] with then-Deputy Interior Secretary David Hayes claiming a proposed rule would come by September 2012.[63]

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.[64] The proposed rule wasn't published in the Federal Register until April 2015.[65] 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

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[59] 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.

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

[61] 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.

[62] 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/

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

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

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

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.

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.[66]

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.

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[66] 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.

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" 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).[67]

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 if 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.

Four years ago, Public Citizen conducted an analysis of public health and safety rulemakings with congressionally mandated deadlines. [68] 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.

Unreasonable delay extends to 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

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[67] 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.

[68] 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>.

needlessly lost, injuries needlessly suffered, environmental harm needlessly permitted, consumer rip-offs extended, and more.

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."[69]

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 weaken rules. OIRA processes are closed and non-transparent.[70] 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.[71] 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.

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[69] 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>.

[70] 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>.

[71] 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>.

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.

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."[72] 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.[73] 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 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

[72] 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>.
[73] 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>.

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.[74]

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

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[74] 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>.

[75] Department of Transportation (2015). NHTSA's Path Forward. Available from: <http://www.nhtsa.gov/About+NHTSA/Press+Releases/nhtsa-forming-new-safety-teams>.

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.

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.[76] 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.[77]

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.

There is a long list of 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

[76] 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”).
[77] 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>.

controls, strip mining, vinyl chloride[78]—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.)[79]

"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.[80]

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;

- Cost-benefit analyses regularly fail to consider new adaptations of existing technologies to meet new standards;

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78 *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>.
79 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>
80 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 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.[81]

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. [82]

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.[83]

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

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[81] 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.

[82] 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.

[83] 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>.

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 that consumers were willing to pay for the product pre-regulation as the cost (multiplied by number of purchases).[84]

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, [85] where there is a new layer of absurdity because most adult users actually say they would like to stop using it.[86]

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, including on this committee—the Department of Health and Human Services scaled back, at least for now, use of the lost pleasure principle.[87] 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.

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84 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.

85 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>.

86 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>.

87 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>.

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 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."[88]

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.

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88 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>.

Two years ago, 8 men and women were killed in an Amtrak crash near Philadelphia.[89] 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 will not be 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 regulatory delay was that some officials believed that the regulatory standard was not cost effective.[90]

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.

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.

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[89] 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>.

[90] 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>.

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."[91] 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,[92] —even action that they claim violates a clear 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.[93] 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 <u>not</u> have standing to challenge it.[94]

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

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[91] *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).
[92] *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013).
[93] *Lance v. Coffman*, 549 U.S. 437, 439 (2007).
[94] *See Federal Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998).

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

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[95] 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"[96] to analyze rules for their impact upon "efficiency, competition, and capital formation"[97] under Section 3(f) of the Exchange Act,[98] thereby rendering the SEC's promulgation of the rule "arbitrary and capricious."[99] 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.[100] Nonetheless, in a string of recent cases,[101] 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."[102] In the *Business Roundtable* opinion, the D.C. Circuit lambasted the SEC for "having failed once again … adequately to assess the economic effects of a new rule"[103] 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."[104]

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."[105] 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

[95] *Business Roundtable v. SEC* 647 F.3d 1144 (D.C. Cir. 2011).
[96] *Business Roundtable v. SEC*,1148.
[97] *Business Roundtable v. SEC*,1148.
[98] 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a–2(c).
[99] *Business Roundtable v. SEC*, 1155.
[100] *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).
[101] *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).
[102] *Business Roundtable v. SEC*, 1153.
[103] *Business Roundtable v. SEC*, 1148.
[104] *Business Roundtable v. SEC*, 1148-49.
[105] Section 971.

itself, but in any case was clearly the underlying objective of Congress in authorizing the SEC to issue a proxy access rule.[106]

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.

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.[107] 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.

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.

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[106] *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.")

[107] 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>.

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.[108]

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.[109]

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

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[108] 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>.

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

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."[110] 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[111] 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 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,

[110] 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>.

[111] 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>.

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.[112] 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.

Remedies: Congressional remedies to these problems should include a prohibition on forced arbitration provisions in consumer, employment and civil rights cases[113] and a restoration of states' authority to enforce their contract and consumer protection laws.

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[112] American Express v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013).
[113] See the Arbitration Fairness Act, S. 1133, introduced by Senator Al Franken.

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, equality, 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 the rulemaking process and regulatory enforcement which would address under-regulation that costs lives and our economy and would lead to new opportunities for minority populations.