Written Testimony of

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on

"The Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness"

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Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on regulatory policy issues. I am Robert Weissman, president of Public Citizen. Public Citizen is a national public interest organization with more than 300,000 members and supporters. For more than 40 years, we have advocated with some considerable success for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

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

This hearing has the provocative title, "The Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness." While the rhetorical flourish is eye-catching, the premise of the title is mistaken. There is no such regulatory war underway.

Regulations issued under the Obama administration, like those issued under previous administrations, Republican and Democratic alike, have made our country stronger, better, safer, cleaner, healthier and more fair and just.

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

There has been no significant surge in rulemaking under the Obama administration, a surprising fact given the relative paucity of rulemaking under the previous administration and the large number of new rules mandated by Congress as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

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

There is in fact a significant nexus between regulation and jobs. It was regulatory failure that was significantly responsible for the Great Recession, which has imposed far greater costs on the economy and cost far more jobs than regulations ever could.

To review the facts of how regulation strengthens our country and safeguards jobs, however, is not to suggest that all is well with the regulatory system. There is a need for significant regulatory reform -- reforms to toughen regulatory enforcement, increase criminal penalties for corporate wrongdoers, reduce industry influence over the rulemaking process, and address anti-competitive practices that injure small businesses, consumers and the national economy.

The first section of this testimony argues that regulatory benefits vastly exceed costs and that regulatory failure -- inadequate rules, and too little regulatory enforcement -- should be understood as a key cause of the Great Recession and ongoing economic weakness. The second section of the testimony focuses on needed reforms to strengthen our regulatory system so that it fulfills its role of protecting the American people and strengthening our economy.

I. Regulations are Economically Smart

A. Regulatory benefits vastly exceed costs

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

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

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

The principle finding of *OMB's draft 2012 Report to Congress on the Benefits and Costs of Federal Regulation* is:

> The estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2001, to September 30, 2011, for which agencies estimated and monetized both benefits and costs, are in the aggregate between $141 billion and $700 billion, while the estimated annual costs are in the aggregate between $43.3 billion and $67.3 billion. These ranges reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.[1]

[1] Office of Management and Budget, Office of Information and Regulatory Affairs. (2012). Draft *2012 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal*

In other words, even by OMB's most conservative accounting, the benefits of major regulations over the last decade exceeded costs by a factor of more than two-to-one. And benefits may exceed costs by a factor of 14.

These results are consistent year-to-year:

Total Annual Benefits and Costs of Major Rules by Fiscal Year (billions of 2001 dollars)[2]

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

The reason for the consistency is that regulators pay a great deal of concern to comparative costs and benefits (too great a concern, in our view, given the built-in bias of cost-benefit analysis against regulatory initiative[3]). Very few major rules are adopted where projected costs exceed projected benefits, and those cases typically involve direct Congressional mandates.

Relatively high regulatory compliance costs, it should be noted, do not necessarily have negative job impacts; firm expenditures on regulatory compliance typically create new jobs within affected firms or other service or product companies with which they contract.

Moreover, the empirical evidence also fails to support the claim that regulation causes significant job loss. Insufficient demand is the primary reason for layoffs. In extensive survey

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Entities. p.3. Available from: <http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf>.

[2] Office of Management and Budget, Office of Information and Regulatory Affairs. (2012). Draft *2012 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities. Table 1-3,* p. 19. Available from: <http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf>. ; 2001 data from: Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities. Table 1-3,* p. 19-20. Available from: <http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf>.

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

data collected by the Bureau of Labor Statistics, employers cite lack of demand roughly 100 times more frequently than government regulation as the reason for mass layoffs![4]

Reason for layoff: 2008-2011[5]

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

It is also the case that firms typically innovate creatively and quickly to meet new regulatory requirements, even when they fought hard against adoption of the rules.[6] The result is that costs are commonly lower than anticipated.

While there is a long history of industry claiming that the next regulation under consideration would unreasonably raise the cost of doing business, those claims routinely prove to be overblown.

- Bankers and business leaders described the New Deal financial regulatory reforms in foreboding language, warning that the Federal Deposit Insurance Commission and related agencies constituted "monstrous systems," that registration of publicly traded securities constituted an "impossible degree of regulation," and that the New Deal reforms would "cripple" the economy and set the country on a course toward socialism.[7] In fact, those New Deal reforms prevented a major financial crisis for more than half a century -- until they were progressively scaled back.
- Chemical industry leaders said that rules requiring removal of lead from gasoline would "threaten the jobs of 14 million Americans directly dependent and the 29 million Americans indirectly dependent on the petrochemical industry for employment." In fact, while banning lead from gasoline is one of the single greatest public policy public health accomplishments, the petrochemical industry has continued to thrive. The World Bank finds that removing lead from gasoline has a ten times economic payback.[8]
- Big Tobacco long convinced restaurants, bars and small business owners that smokefree rules would dramatically diminish their revenue -- by as much as 30 percent, according to industry-sponsored surveys. The genuine opposition from small business owners -- based on the manipulations of Big Tobacco -- delayed the implementation of smokefree rules and cost countless lives. Eventually, the Big Tobacco-generated

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

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

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

[7] Lincoln, T. (2011). *Industry Repeats Itself: The Financial Reform Fight.* Public Citizen. Available from: <http://www.citizen.org/documents/Industry-Repeats-Itself.pdf>.

[8] Crowther, A. (2013). *Regulation Issue: Industry's Complaints About New Rules Are Predictable -- and Wrong. p.*8. Available from: <http://www.citizen.org/documents/regulation-issue-industry-complaints-report.pdf>

opposition was overcome, and smokefree rules have spread throughout the country -- significantly lowering tobacco consumption. Dozens of studies have found that smokefree rules have had a positive or neutral economic impact on restaurants, bars and small business.[9]

- Rules to confront acid rain have reduced the stress on our rivers, streams and lakes, fish and forests.[10] Industry projected costs of complying with acid rain rules of $5.5 billion initially, rising to $7.1 billion in 2000; ex-ante estimates place costs at $1.1 billion - $1.8 billion.[11]
- In the case of the regulation of carcinogenic benzene emissions, "control costs were estimated at $350,000 per plant by the chemical industry, but soon thereafter the plants developed a new process in which more benign chemicals could be substituted for benzene, thereby reducing control costs to essentially zero."[12]
- The auto industry long resisted rules requiring the installation of air bags, publicly claiming that costs would be more than $1000-plus for each car. Internal cost estimates actually showed the projected cost would be $206.[13] The cost has now dropped significantly below that. The National Highway Traffic Safety Administration estimates that air bags saved 2,300 lives in 2010, and more than 30,000 lives from 1987 to 2010.[14]

There is a long list of other examples from the last century -- including child labor prohibitions, the Family Medical Leave Act, the CFC phase out, asbestos rules, coke oven emissions, cotton dust controls, strip mining, vinyl chloride[15] -- that teach us to be wary of Chicken Little warnings about the costs of the next regulation.

The important lessons here are that impacted industries have a natural bias to overestimate costs of regulatory compliance, and projections of cost regularly discount the impact of technological dynamism. Indeed, regulation spurs innovation and can help create efficiencies and industrial development wholly ancillary to its directly intended purpose.

It should also be emphasized that while the discussion here is confined to narrow economic terms, 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.

"While cost, inconvenience, complexity and hardship can play roles in regulation, this corporate taxonomy fails to consider the most important freedom -- the freedom of victims," wrote David

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[9] *Regulation Issue: Industry's Complaints About New Rules Are Predictable -- and Wrong.* p.10.

[10] Environmental Protection Agency. *Acid Rain in New England: Trends.* Available from: <http://www.epa.gov/region1/eco/acidrain/trends.html>.

[11] The Pew Environment Group. (2010, October). *Industry Opposition to Government Regulation.* Available from: <http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Fact_Sheet/Industry%20Clean%20Energy%20Factsheet.pdf>.

[12] 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>.

[13] Behr, P. (August 13, 1981). U.S. Memo on Air Bags in Dispute. Washington Post.

[14] National Highway Traffic Safety Administration. (2012). Traffic Safety Facts: Occupant Protection. Available from: <http://www-nrd.nhtsa.dot.gov/Pubs/811619.pdf>.

[15] *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>.

Bollier and Joan Claybrook a quarter century ago. "Victims do not assert an imperial, callous freedom that tramples on the sanctity of other individuals. Their quest is for a freedom from the myriad of harms that threaten their lives and health."[16]

B. Job-destroying regulatory failure and the Great Recession

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

A very considerable literature, and a very extensive Congressional hearing record, documents in granular detail the ways in which regulatory failure led to financial crash and the onset of the Great Recession. "Widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets," concluded the Financial Crisis Inquiry Commission.[17] "Deregulation went beyond dismantling regulations," notes the Financial Crisis Inquiry Commission. "[I]ts supporters were also disinclined to adopt new regulations or challenge industry on the risks of innovations."[18]

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

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

A sampling of the very extensive regulatory failures that contributed to the crisis include:

Failure to stop toxic and predatory mortgage lending that blew up the housing bubble. Concludes the Financial Crisis Inquiry Commission: "The prime example is the Federal Reserve's pivotal failure to stem the flow of toxic mortgages, which it could have done by setting prudent mortgage-lending standards. The Federal Reserve was the one entity empowered to do so and it did not."[19] Regulators failed almost completely to use then-existing authority to crack down on abusive lending practices. The Federal Reserve took three formal actions against subprime lenders from 2002 to 2007.[20] The Office of Comptroller of the Currency, with authority

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[16] Bollier, D. and Claybrook, J. (1986). Freedom From Harm: The Civilizing Influence of Health, Safety and Environmental Regulation. Washington, D.C.: Public Citizen and The Democracy Project.
[17] Financial Crisis Inquiry Commission. (2011). *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*. Washington, D.C.: Government Printing Office. p. 30.
[18] *The Financial Crisis Inquiry Report.* p. 53.
[19] *The Financial Crisis Inquiry Report.* p. xvii.
[20] Tyson, J., Torres, C., & Vekshin, A. (2007, March 22). *Fed Says It Could Have Acted Sooner on Subprime Rout*. Bloomberg. Available from: <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a1.KbcMbvIiA&refer=home>.

over almost 1,800 banks, took three consumer-protection enforcement actions from 2004 to 2006.[21]

Repeal of the Glass-Steagall Act. The Financial Services Modernization Act of 1999 formally repealed the Glass-Steagall Act of 1933 (also known as the Banking Act of 1933) and related laws, which prohibited commercial banks from offering investment banking and insurance services. The 1999 repeal of Glass-Steagall helped create the conditions in which banks created and invested in creative financial instruments such as mortgage-backed securities and credit default swaps, investment gambles that rocked the financial markets in 2008. More generally, the Depression-era conflicts and consequences that Glass-Steagall was intended to prevent re-emerged once the Act was repealed. The once staid commercial banking sector quickly evolved to emulate the risk-taking attitude and practices of investment banks, with disastrous results. "The most important consequence of the repeal of Glass-Steagall was indirect -- it lay in the way repeal changed an entire culture," notes economist Joseph Stiglitz. "When repeal of Glass-Steagall brought investment and commercial banks together, the investment-bank culture came out on top. There was a demand for the kind of high returns that could be obtained only through high leverage and big risk taking."[22]

Unregulated Financial Derivatives. The 2008 crash proved Warren Buffet's warning that financial derivatives represent "weapons of mass financial destruction" to be prescient.[23] Financial derivatives amplified the financial crisis far beyond the troubles connected to the popping of the housing bubble. AIG made aggressive bets on credit default swaps (CDSs) that went bad with the housing bust, and led to a taxpayer-financed rescue of more than $130 billion. AIG was able to put itself at such risk because its CDS business was effectively subject to no governmental regulation or even oversight. That was because first, high officials in the Clinton administration and the Federal Reserve, including SEC Chair Arthur Levitt, Treasury Secretary Robert Rubin, Deputy Treasury Secretary Lawrence Summers and Federal Reserve Chair Alan Greenspan, blocked the Commodity Futures Trading Commission (CFTC) from regulating financial derivatives;[24] and second, because Congress and President Clinton codified regulatory inaction with passage of the Commodity Futures Modernization Act, which enacted a statutory prohibition on CFTC regulation of financial derivatives.

The SEC's Voluntary Regulation Regime for Investment Banks. In 1975, the SEC's trading and markets division promulgated a rule requiring investment banks to maintain a debt-to-net capital ratio of less than 12 to 1. It forbade trading in securities if the ratio reached or exceeded 12 to 1, so most companies maintained a ratio far below it. In 2004, however, the SEC succumbed to a push from the big investment banks -- led by Goldman Sachs, and its then-

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[21] Torres, C., & Vekshin, A. (2007, March 14). *Fed, OCC Publicly Chastised Few Lenders During boom*. Bloomberg. Available from: <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6WTZifUUH7g&refer=us>.
[22] Stiglitz, J. (2009). Capitalist fools. *Vanity Fair, 51*(1).
[23] Buffett, W. (2003). *Report to Shareholders, February 21, 2003*. Berkshire Hathaway. Available from: <http://www.berkshirehathaway.com/letters/2002pdf.pdf>.
[24] After the collapse of Long-Term Capital Management, Born issued a new call to regulate financial derivatives. "This episode should serve as a wake-up call about the unknown risks that the over-the-counter derivatives market may pose to the U.S. economy and to financial stability around the world," Born told the House Banking Committee two days later. "It has highlighted an immediate and pressing need to address whether there are unacceptable regulatory gaps relating to hedge funds and other large OTC derivatives market participants." But what should have been a moment of vindication for Born was swept aside by her adversaries, and Congress enacted a six-month moratorium on any CFTC action regarding derivatives or the swaps market. In May 1999, Born resigned in frustration. Born, B. (1998). *Testimony of Brooksley Born, Chairperson, Commodity Futures Trading Commission Concerning Long-Term Capital Management Before the U.S. House of Representatives Committee on Banking and Financial Services.* Available from: <http://www.cftc.gov/opa/speeches/opaborn-35.htm>.

chair, Henry Paulson -- and authorized investment banks to develop their own net capital requirements in accordance with standards published by the Basel Committee on Banking Supervision. This essentially involved complicated mathematical formulas that imposed no real limits, and was voluntarily administered. With this new freedom, investment banks pushed borrowing ratios to as high as 40 to 1, as in the case of Merrill Lynch. This super-leverage not only made the investment banks more vulnerable when the housing bubble popped, it enabled the banks to create a more tangled mess of derivative investments -- so that their individual failures, or the potential of failure, became systemic crises. On September 26, 2008, as the crisis became a financial meltdown of epic proportions, SEC Chair Christopher Cox, who spent his entire public career as a deregulator, conceded "the last six months have made it abundantly clear that voluntary regulation does not work."[25]

Poorly Regulated Credit Ratings Firms. The credit rating firms enabled pension funds and other institutional investors to enter the securitized asset game, by attaching high ratings to securities that actually were high risk -- as subsequent events revealed. The credit ratings firms have a bias toward offering favorable ratings to new instruments because of their complex relationships with issuers,[26] and their desire to maintain and obtain other business dealings with issuers. This institutional failure and conflict of interest might and should have been forestalled by the SEC, but the Credit Rating Agencies Reform Act of 2006 gave the SEC insufficient oversight authority. In fact, under the Act, the SEC was required to give an approval rating to credit ratings agencies if they adhered to their own standards -- even if the SEC knew those standards to be flawed.

The regulatory failure story can perhaps be summarized as follows: Financial deregulation and non-regulation created a vicious cycle that helped inflate the housing bubble and an interconnected financial bubble. Weak mortgage regulation enabled the spread of toxic and predatory mortgages that helped fuel the housing bubble. Deregulated Wall Street firms and big banks exhibited an insatiable appetite for mortgage loans, irrespective of quality, thanks to insufficiently regulated securitization, off-the-books accounting, the spread of shadow banking techniques, dangerous compensation incentives and inadequate capital standards. Reckless

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[25] Faoila, A., Nakashima, E., & Drew, J. (2008, October 15). *What Went Wrong*. The Washington Post. Available from: <www.washingtonpost.com/wp-dyn/content/story/2008/10/14/ST2008101403344.html>.

[26] The CEO of Moody's reported in a confidential presentation that his company is "continually 'pitched' by bankers" for the purpose of receiving high credit ratings and that sometimes "we 'drink the Kool-Aid.'" A former managing director of credit policy at Moody's testified before Congress that, "Originators of structured securities [e.g., banks] typically chose the agency with the lowest standards," allowing banks to engage in "rating shopping" until a desired credit rating was achieved. The agencies made millions on mortgage-backed securities ratings and, as one member of Congress said, "sold their independence to the highest bidder." Banks paid large sums to the ratings companies for advice on how to achieve the maximum, highest quality rating. "Let's hope we are all wealthy and retired by the time this house of cards falters," a Standard & Poor's employee candidly revealed in an internal email obtained by congressional investigators.

Other evidence shows that the firms adjusted ratings out of fear of losing customers. For example, an internal email between senior business managers at one of the three ratings companies calls for a "meeting" to "discuss adjusting criteria for rating CDOs [collateralized debt obligations] of real estate assets this week because of the ongoing threat of losing deals." In another email, following a discussion of a competitor's share of the ratings market, an employee of the same firm states that aspects of the firm's ratings methodology would have to be revisited in order to recapture market share from the competing firm.

See Weissman, R., & Donahue, J. (2009, March). *Sold Out: How Wall Street and Washington Betrayed America*. Essential Information and Consumer Education Foundation. Available from: <http://wallstreetwatch.org/reports/sold_out.pdf>.

financial practices were ratified by credit ratings firms, paving the way for institutional funders to pour billions into mortgage-related markets; and an unregulated derivatives trade offered the illusion of systemic insurance but actually exacerbated the crisis when the housing bubble popped and Wall Street crashed.

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

To prevent the collapse of the financial system, the federal government provided incomprehensibly huge financial supports, far beyond the $700 billion in the much-maligned Troubled Assets Relief Program (TARP). The Special Inspector General for the Troubled Assets Relief Program (SIGTARP) estimated that "though a huge sum in its own right, the $700 billion in TARP funding represents only a portion of a much larger sum -- estimated to be as large as $23.7 trillion -- of potential Federal Government support to the financial system."[27] Much of this sum was never allocated, and most of the TARP funds are being paid back. However, the regulatory reform policy debate should acknowledge that such unfathomable sums were put at risk thanks to regulatory failure.

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

A recent GAO study finds that "[t]he 2007-2009 financial crisis, like past financial crises, was associated with not only a steep decline in output but also the most severe economic downturn since the Great Depression of the 1930s."[28] Reviewing estimates of lost economic output (current and projected until a return to the baseline scenario in 2018), GAO reports that the present value of cumulative output losses could exceed $13 trillion.[29] Additionally, GAO finds that "households collectively lost about $9.1 trillion (in constant 2011 dollars) in national home equity between 2005 and 2011, in part because of the decline in home prices."[30]

The recession threw millions out of work, and has left millions still jobless. "The monthly unemployment rate peaked at around 10 percent in October 2009 and remained above 8 percent for over 3 years, making this the longest stretch of unemployment above 8 percent in the United States since the Great Depression," GAO notes.[31]

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

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

[29] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 16.

[30] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 21. There is necessarily a significant amount of uncertainty around such analyses. Other estimates have placed the loss somewhat lower. A recent Congressional Budget Office study estimates the cumulative loss from the recession and slow recovery at $5.7 trillion." (Congressional Budget Office. 2012. *The Budget and Economic Outlook: Fiscal Years 2012 to 2022*. p. 26.) One complicating issue is determining which losses should be attributed to the recession and which to other issues. For example, GAO notes, "analyzing the peak-to-trough changes in certain measures, such as home prices, can overstate the impacts associated with the crisis, as valuations before the crisis may have been inflated and unsustainable.[30] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 17.

[31] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 17-18.

The economic impact on families is crushing, even leaving aside social and psychological consequences. "Displaced workers -- those who permanently lose their jobs through no fault of their own -- often suffer an initial decline in earnings and also can suffer longer-term losses in earnings," reports GAO. For example, one study found that workers displaced during the 1982 recession earned 20 percent less, on average, than their nondisplaced peers 15 to 20 years later.[32] Thanks to lost income and especially collapsed housing prices, families have seen their net worth plummet. According to the Federal Reserve's Survey of Consumer Finances, median household net worth fell by $49,100 per family, or by nearly 39 percent, between 2007 and 2010.[33]

The foreclosure crisis stemming from the toxic brew of collapsing housing prices, exploding and other unsustainable mortgages and high unemployment has devastated families and communities across the nation.[34]

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

> From the end of 2007 to the end of 2010, federal debt held by the public increased from roughly 36 percent of GDP to roughly 62 percent. Key factors contributing to increased deficit and debt levels following the crisis included (1) reduced tax revenues, in part driven by declines in taxable income for consumers and businesses; (2) increased spending on unemployment insurance and other nondiscretionary programs that provide assistance to individuals impacted by the recession; (3) fiscal stimulus programs enacted by Congress to mitigate the recession, such as the American Recovery and Reinvestment Act of 2009 (Recovery Act); and (4) increased government assistance to stabilize financial institutions and markets.[35]

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

The dissent explains that "we … reject as too simplistic the hypothesis that too little regulation caused the Crisis,"[36] arguing that the *amount* of regulation is an imprecise and perhaps irrelevant metric. This is a reasonable position (and it applies equally to those who complain about "too much" regulation); what matters is the quality of regulation -- both the rules and standards of enforcement.

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

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[32] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 18-19.
[33] Cited in *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 16.
[34] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 23-24.
[35] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 26.
[36] *The Financial Crisis Inquiry Report.* (Dissenting Views By Keith Hennessey, Douglas Holtz-Eakin, and Bill Thomas.) p. 414.

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

II. Improving Regulation

There is no regulatory war on jobs or the economy. However, there is an acute need for regulatory reform, to increase and improve regulatory enforcement, stiffen penalties for corporate wrongdoing, improve transparency, address undue industry influence over the rule-making process, correct inappropriate judicial review of regulations, and adopt pro-competitive rules to level the playing field for small business and improve the economy and consumer well-being. I discuss these problem areas in this portion of my testimony, concluding each section or subsection with proposed remedies.

A. 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 2,178 inspectors (892 federal and 1,286 state inspectors) to inspect the 8 million workplaces under the OSH Act's jurisdiction," according to AFL-CIO analysis. "Federal OSHA can inspect workplaces on average once every 131 years; the state OSHA plans can inspect them once every 73 years. The current level of federal and state OSHA inspectors provides one inspector for every 58,687 workers."[37] 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.[38] 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 involving allocation of resources, prioritization and/or insufficient rigor. The recent and ongoing 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

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[37] AFL-CIO. (2012, April.) Death on the Job: The Toll of Neglect. p. 1. Available from: <http://www.aflcio.org/content/download/22781/259751/DOTJ2012nobugFINAL.pdf>.

[38] 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>.

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 current outbreak and 48 deaths.[39]

Remedies: The agency resource problem is easily solved with sufficient political will, though of course the prospect of the budgetary sequester becoming operative suggests the government is about to proceed in the wrong direction in this regard. Ensuring a sufficiently robust enforcement culture at regulatory agencies is not a problem that lends itself to a simple solution, though addressing the revolving door problem (see below) and stronger Congressional oversight of agency enforcement would go a long way.

B. Criminal prosecution of corporations for egregious violation of regulations and criminal statutes.

Although there are some areas of vibrant corporate criminal prosecution, including for violations of the Foreign Corrupt Practices Act, illegal marketing of drugs and some environmental crimes, in many areas, massive corporate wrongdoing escapes criminal enforcement. Widespread illegality by Big Banks and Wall Street firms, including in connection with the ongoing foreclosure crisis, is a case in point.

Often, corporations are able to commit crimes but escape criminal prosecution, even when caught. In the past decade, there has been a dramatic rise in federal prosecutors choosing not to prosecute corporations that have committed crimes. Instead, the U.S. Department of Justice has adopted an alternative approach, forming agreements with corporations to either defer prosecution or abstain from prosecution entirely if the corporation meets the terms set out in these agreements. When first introduced, these types of agreements, also known as "pre-trial diversion," were intended to apply not to corporations, but primarily to juvenile delinquents, with the aim of clearing the courts to allow them to attend to major criminal cases.[40] Yet, when deferred and non-prosecution agreements are used in response to massive corporate crimes, it is exactly such perpetrators of major crimes that reap the benefits.

Prior to 2003, the DOJ entered into fewer than five deferred prosecution agreements and non-prosecution agreements with corporations per year. In the first decade following the millennium, these numbers gradually crept upwards, entering the double digits by 2005. Numbers rose to a high of 42 deferred and non-prosecution agreements in 2007 and continue to number in the dozens every year, according to a forthcoming report from Public Citizen.[41]

Deferred and non-prosecution agreements are a special gift to large corporations, which are enabled to escape prosecution for serious crimes in a manner not usually afforded to individuals or small business. The logic of these agreements is that they permit prosecutors to put in place special compliance mechanisms to prevent future wrongdoing. These compliance mechanisms can equally be obtained through criminal plea agreements, however, so the claim that deferred and non-prosecution agreements offer some unique benefit is incorrect. Worse, deferred

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[39] 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>.

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

[41] Ben-Ishai, E. and Weissman, R. (forthcoming, 2013). Justice Deferred -- and Denied. Public Citizen.

prosecution agreements offer little or no deterrent effect, either for the (non-)charged corporation or for others. Corporations entering into deferred and non-prosecution agreements have a strikingly high recidivism rate, including companies such as AIG, Barclays, Bristol-Myers Squibb, Chevron, GlaxoSmithKline, Hitachi, Lucent, Merrill Lynch, Pfizer, Prudential and UBS.[42]

A recent, particularly appalling example of the abuse of deferred prosecution -- one which emphasizes how this kid-glove treatment is designed primarily for giant corporations -- involves the banking giant HSBC. In December, the company agreed to pay more than $1 billion in fines and entered into a deferred prosecution agreement for anti-money laundering and sanctions violations. Assistant Attorney General Lanny Breuer said the company was guilty of "stunning failures of oversight -- and worse" and that the "record of dysfunction that prevailed at HSBC for many years was astonishing."[43]

Breuer was correct.

The statement of facts attached to the deferred prosecution agreement with HSBC is startling. Just two illustrative examples:

- As regards money laundering for Latin American drug cartels, "Senior business executives at HSBC Mexico repeatedly overruled recommendations from its own AML [anti-money laundering] committee to close accounts with documented suspicious activity. In July 2007, a senior compliance officer at HSBC Group told HSBC Mexico's Chief Compliance Officer that '[t]he AML committee just can't keep rubber-stamping unacceptable risks merely because someone on the business side writes a nice letter. It needs to take a firmer stand. It needs some cojones. We have seen this movie before, and it ends badly.'"[44]

- As regards efforts to facilitate evasion of U.S. government sanctions against other countries, the statement of facts says, "[B]eginning in the 1990s, HSBC Bank plc ("HSBC Europe"), a wholly owned subsidiary of HSBC Group, devised a procedure whereby the Sanctioned Entities put a cautionary note in their SWIFT payment messages including, among others, 'care sanctioned country,' 'do not mention our name in NY,' or 'do not mention Iran.' Payments with these cautionary notes automatically fell into what HSBC Europe termed a 'repair queue' where HSBC Europe employees manually removed all references to the Sanctioned Entities. The payments were then sent to HSBC Bank USA and other financial institutions in the United States without reference to the Sanctioned Entities, ensuring that the payments would be processed without delay and not be blocked or rejected and referred to OFAC. HSBC Group was aware of this practice."[45]

Why did a company engaging in such egregious practices, which facilitated illegal drug trafficking and evasion of U.S. sanctions against foreign countries, escape without a criminal prosecution?

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[42] Ben-Ishai, E. and Weissman, R. (forthcoming, 2013). Justice Deferred -- and Denied. Public Citizen.
[43] Breuer, L. (2012, December 11.) *Assistant Attorney General Lanny A. Breuer Speaks at the HSBC Press Conference*. Available from: <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1212111.html>.
[44] United States of America Against HSBC Bank USA, N.A. and HSBC Holdings PLC, HSBC Deferred Prosecution Agreement Attachment - Statement of Facts. (2012, December 11.) p. 13. Available from: <http://www.justice.gov/opa/documents/hsbc/dpa-attachment-a.pdf>.
[45] HSBC Deferred Prosecution Agreement Attachment - Statement of Facts. pp. 22-23.

According to Breuer, the worry was that a criminal prosecution of a giant bank like HSBC might bring down the company and threaten the global financial system's stability.[46] "In trying to reach a result that's fair and just and powerful, you also have to look at the collateral consequences," Breuer said at the news conference announcing the deferred prosecution deal.[47] "If you think that by doing a certain thing you risk either a charter being revoked, you think that counterparties in a massive financial institution may go away, you think that there is a risk that many, many innocent people will be harmed from a resolution, and by another resolution you think you can mitigate the risk of innocent people suffering, the economy being affected, and you can home in on those and the institutions and address the issues underlying, to the Department of Justice, that's a very real factor, and so it is a fact that you consider. It's one factor," Breuer said.[48]

A smaller bank, presumably, would have received no such deferential treatment.

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

American Banker -- not an outlet known for shrill criticism of the banking industry -- has eloquently captured the moral outrage of this state of affairs. American Banker highlighted the case of G&A Check Cashing, a small firm found to have violated anti-money laundering laws for over $8 million in transactions. (By contrast, HSBC was found to have laundered at least $881 million in drug trafficking proceeds, and failed to monitor properly $200 trillion in wire transfers.) Two of its executives were sentenced to jail terms, and the company was placed on probation for two years. The case highlights "the disparate treatment of certain institutions for violations of anti-laundering laws," American Banker commented. "[M]any have responded to the settlement with disdain for the basic message they said it sent about parity under the law."[49]

A related issue at the nexus of regulatory violations and criminal penalties is insufficient criminal penalties for companies that recklessly endanger consumers or their workers. There are no or inadequate statutory criminal penalties for violating auto safety rules in ways that endanger consumers, for recklessly selling unsafe pharmaceuticals, for recklessly putting other hazardous consumer products into the stream of commerce, and for endangering or killing workers due to unsafe working conditions.

Remedies: Justice has gone the wrong way with the proliferation of deferred and non-prosecution agreements for wrongdoing corporations. Whether from inside the Department of Justice or imposed by Congress, there needs to be new guidelines regarding deferred and non-prosecution agreements. If they are not prohibited outright, at minimum a strong presumption against such deals should be established, so they are used only in rare cases upon specific showings of their necessity.

The HSBC example, as well as other examples from the financial sector, point to the need to look not just at prosecutorial policy. Given plausible claims that prosecution of giant financial

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[46] O'Toole, J. (2012, December 12.) *HSBC: Too Big to Jail?* CNNMoney. Available from: <http://money.cnn.com/2012/12/12/news/companies/hsbc-money-laundering/index.html>.
[47] Viswanatha, A. and Wolf, B. (2012, December 12.) HSBC to pay $1.9 billion U.S. fine in money-laundering case. Reuters. Available from: <http://www.reuters.com/article/2012/12/11/us-hsbc-probe-idUSBRE8BA05M20121211>.
[48] Finkle, V. (2013, Jan. 22.) *Are Some Banks 'Too Big To Jail'?* American Banker. Available from: <http://www.americanbanker.com/issues/178_15/are-some-banks-too-big-to-jail-1056033-1.html?zkPrintable=1&nopagination=1>.
[49] *Are Some Banks 'Too Big To Jail'?*

institutions threatens financial system stability, the only way to prevent giant financial institutions from unfairly escaping criminal prosecution -- and it is a virtual certainty that this situation will recur -- is to break up these goliaths.

Congress should act to remedy this problem of insufficient criminal penalties by adopting a reckless endangerment criminal statute, making it a crime for businesses to recklessly expose consumers or workers to deadly products or working conditions.[50]

C. Combating unreasonable delay

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

Last July, Public Citizen conducted an analysis of public health and safety rulemakings with congressionally mandated deadlines. [51] Our analysis showed that most rules are issued long after their deadlines have passed, putting American consumers at risk. Of the 159 rules analyzed, 78 percent missed their deadline and more than half remained incomplete at the time. Federal agencies miss these deadlines for a variety of reasons, including having to conduct onerous analyses, dealing with politically motivated delays, inadequate resources or agency commitment, and fear of judicial review.

A high proportion of pending rules with statutory deadlines are mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The financial regulatory agencies are far behind schedule. The most recent report from the law firm DavisPolk finds that, as of February 1, 2013, a total of 279 Dodd-Frank rulemaking requirement deadlines have passed. Regulators have missed almost two thirds -- 176 -- of those deadlines, and met 103 with finalized rules.[52]

A thicket of legislatively mandated process and multiple analyses mires rulemaking with significant economic impact in delay.

By way of example, consider the issuance of the Occupational Safety and Health Administration's cranes and derricks rule, 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

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[50] See, for example, The Dangerous Products Warning Act, H.R. 322, introduced in the last Congress by Rep. John Conyers.
[51] 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>.
[52] DavisPolk. (2013, Feb.) *Dodd-Frank Progress Report.* Available from: <http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report>.

makeup of industries affected by the rule, the number of businesses affected, and the costs and benefits of the rule. OSHA also was repeatedly required to prove that the rule was needed, that no alternative could work, and that it had done everything it could to minimize the effects on small businesses. The regulatory process afforded businesses at least six opportunities to weigh in with concerns that the agency was required to address."[53]

Although it is not the case for most Dodd-Frank rules, one important source of rulemaking delay is prolonged review at the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). Among rules included in Public Citizen's July 2012 analysis, all 14 rules then under review at OIRA had been there longer than the agency's allotted four-month review period.[54]

One notable example of OIRA-exacerbated delay is OSHA's silica rule. OSHA's lifesaving silica dust standard has been delayed for more than nine years. More than two million workers in the United States are exposed to silica dust, with construction, foundry, and metal workers most at risk. Inhaling the dust causes a variety of harmful effects, including lung cancer, tuberculosis, and silicosis (a potentially fatal respiratory disease). OSHA acknowledges that its current silica dust standard is obsolete.[55] 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. Two years ago, 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 is instead functioning as a regulatory black hole; workers are still waiting for OIRA to complete the review. One asks in vain for an explanation.

What is clear: people are dying needlessly due to delay. Over this nine-year period of delay, a standard would have prevented an estimated 165 cases of lung cancer, 365 cases of fatal silicosis, and 22,400 cases of non-fatal silicosis.[56]

There's no way for the public to know why OIRA is delaying the silica rule, in part because OIRA processes are closed and non-transparent.[57] What is known is that OIRA meetings with outside parties are dominated by regulated industries, and that meetings correlate with changes in rules. We also know that OIRA is a one-way ratchet, insisting that rules get weaker, but almost never stronger.

A 2011 report from the Center for Progressive Reform found that:

- Industry dominates the OIRA meetings process. In the 10 years studied in the report, OIRA hosted 1,080 meetings, with 5,759 appearances by outside participants. Sixty-five percent of the participants represented regulated industry interests; 12 percent of participants appeared on behalf of public interest groups.

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[53] 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>.
[54] *Public Safeguards Past Due: Missed Deadlines Leave Public Unprotected.*
[55] OSHA Occupational Exposure to Crystalline Silica, 75 Fed. Reg. 79.603 (2010, Dec. 20).
[56] OSHA, Preliminary Initial Regulatory Flexibility Analysis of the Draft Proposed OSHA Standard for Silica Exposure for General Industry and Maritime (2003). OSHA, Preliminary Initial Regulatory Flexibility Analysis of the Draft Proposed OSHA Standard for Silica Exposure in Construction (2003). Assumes PEL of 50 µg/m3.
[57] 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>.

- OIRA meetings correlate with changes to rules. Rules that were the subject of meetings were 29 percent more likely to be changed than those that were not. OIRA does not disclose its changes, but it is widely understood that OIRA-initiated revisions are intended to weaken rules.
- OIRA ignores public disclosure requirements. OIRA is required by executive order to make available "all documents exchanged between OIRA and the agency during the review by OIRA," and agencies are required to "identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA." Such requirements are routinely ignored.[58]

The last Congress saw introduction of many bills that would further hinder agencies' abilities to do their jobs, imposing vast new analytic requirements on agencies and increasing the scope of OIRA authority. The Regulatory Analysis Act, for example, would have added more than 60 new procedural and analytic requirements to the rulemaking process, subordinated statute-specific regulatory missions to an overarching and overbearing cost-benefit analysis including an analysis of *indirect* costs and benefits and cumulative costs and benefits, and forced agencies to more frequently adopt formal rulemaking processes that add still more delay.[59] Another misguided effort was the Independent Agency Regulatory Analysis Act, which would have expanded OIRA's scope of authority to cover independent agencies, including the financial regulators.

Remedies: Instead of imposing new delays on the rulemaking process -- delays which are the primary source of regulatory uncertainty -- lawmakers should seek ways to alleviate the undue burdens on agencies. Agencies should be sufficiently resourced to issue rules, including those directly mandated by Congress. And 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.

D. Reining in judicial regulatory overreach

Rules that do finally get adopted are frequently challenged in court, imposing still more delay, and with judges frequently abrogating well-crafted rules. 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.

Recent developments do point to two, interconnected areas of judicial overreach in reviewing regulations. First, in some instances, Congress directs agencies to create specific rules. While translating legislation into rulemaking inevitably requires the agencies to make countless

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[58] 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>.

[59] See Coalition for Sensible Safeguards, (2012.) *The Regulatory Accountability Act of 2011: Legislation Would Override and Threaten Decades of Public Protections.* Available from: <http://www.sensiblesafeguards.org/assets/documents/raa_fact_sheet.pdf>; Coalition for Sensible Safeguards, (2012.) Impacts of the Regulatory Accountability Act. Available from: <http://www.sensiblesafeguards.org/assets/documents/impact_of_the_regulatory_accountability_act.pdf>.

implementation decisions, where the agency is following a specific Congressional directive, courts should afford it more deference. Second, 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. 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 a definitive metric directing agencies into a particular course of action.[60]

Business Roundtable v. SEC[61] 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"[62] to analyze rules for their impact upon "efficiency, competition, and capital formation"[63] under Section 3(f) of the Exchange Act,[64] thereby rendering the SEC's promulgation of the rule "arbitrary and capricious."[65] 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.[66] Nonetheless, in a string of recent cases,[67] 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."[68] 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"[69] 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."[70]

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

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[60] 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").
[61] *Business Roundtable v. SEC* 647 F.3d 1144 (D.C. Cir. 2011).
[62] *Business Roundtable v. SEC*,1148.
[63] *Business Roundtable v. SEC*,1148.
[64] 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a–2(c).
[65] *Business Roundtable v. SEC*, 1155.
[66] *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).
[67] *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).
[68] *Business Roundtable v. SEC*, 1153.
[69] *Business Roundtable v. SEC*, 1148.
[70] *Business Roundtable v. SEC*, 1148-49.

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."[71] This fact was unmentioned in the court's decision, and earned the agency no deference. Second, the court failed to address the fact that the benefit of advancing shareholder democracy is inherently non-quantifiable. Third, the extraordinarily intrusive review of agency decision-making included a challenge to the benefit of shareholder democracy -- a value that one might think speaks for itself, but in any case was clearly the underlying objective of Congress in authorizing the SEC to issue a proxy access rule.[72]

Subsequent cases show the dangers of the overly expansive rationale of *Business Roundtable*. For example, various business interests are now challenging a "conflict mineral" rule (requiring public companies to disclose whether they use conflict minerals -- those originating from the Democratic Republic of the Congo) mandated by Dodd-Frank. Even though Congress *mandated* the rule, industry challengers claim the rule should be disallowed because the SEC did not quantify the degree to which the rule would decrease conflict and violence in the Democratic Republic of the Congo. Industry petitioners also similarly challenge other key elements of the SEC's rule, arguing that they fail cost-benefit-type tests.[73]

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.

E. Stopping the revolving door

Notwithstanding some important recent reforms from the Obama administration, the revolving door continues to spin rapidly between regulated agencies and regulated industries. The traffic through the door goes both ways: from industry to regulator, from regulator to industry.

A recent report from the Project on Government Oversight (POGO) highlights the pervasiveness of the problem at one agency, the Securities and Exchange Commission. POGO found 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."

The POGO report considers the case of the SEC's recent failed effort to tighten regulations of money market funds, an instance where the desire of the Commission's then-chair, Mary Schapiro, was thwarted. Noting that it's not possible to identify the exact cause for why Schapiro's effort failed, the report identifies the numerous former staff who lobbied the agency on the issue on behalf of the investment industry.

[71] Section 971.
[72] *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.")
[73] *National Association of Manufacturers; Chamber of Commerce of the United States of America; Business Roundtable v. Securities Exchange Commission*, U.S. District Court of Appeals for the District of Columbia Circuit, Opening brief of petitioners, January 16, 2013.

The POGO report contains an interesting comment from a mutual fund company spokesperson, arguing that the revolving door actually helps investors. "We strongly believe that having people with industry experience work for a regulator and having people with a regulatory background work in the industry benefits both sides as well as investors," T. Rowe Price spokesman Brian Lewbart said in an e-mail message to POGO.

It's easy enough to see why regulated companies might maintain a good-faith belief in the merits of the revolving door. Agency staff with industry experience understand how industry works and are generally sympathetic to industry's standard practices. Former agency staff at companies can give insights into how things look from the regulator perspective. The revolving door from this perspective offers efficiencies and facilitates insightful and informed mutual interaction.

Of course, from the public point of view, these dynamics explain exactly what is wrong with the revolving door. Regulators become too close to industry, too sympathetic to their rationalizations, too willing to give the benefit of the doubt to friends and former colleagues, too easily influenced by former colleagues now lobbying for industry, too prone to be soft on enforcement and too reluctant to issue appropriately tough new rules.

Remedies: That's why the revolving door is a key *regulatory* problem, and one that a genuine regulatory reform effort should try to address, with 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.

F. 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.[74]

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. Leading sectors of the economy are highly concentrated, and 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.

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[74] 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>.

- 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 available to regular banks. Bloomberg has recently calculated the value of this subsidy for the 10 largest banks at a staggering $83 billion, or $64 billion for the top five.[75]

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

- Anticompetitive practices are widespread in the energy industry, including in electricity markets. "Anticompetitive agreements between sellers in regional wholesale electricity markets have forced consumers to pay hundreds of millions of dollars more for electricity than they would have in the absence of such conduct," notes the America Antitrust Institutes 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."[77] 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.

  Remedies: New rules should be created to ensure transparency standards apply to the non-governmental agencies, known as Regional Transmission Organizations, charged

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[75] 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>.

[76] 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>.

[77] 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>.

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.

- Concentration and monopolies in agribusiness markets deny farmers access to open and competitive markets. Livestock and poultry farmers are unable to sell on competitive markets, for example, and are forced to work as de facto contract workers for giant packers and processors.[78] Meanwhile, oligopolistic control over seed markets squeezes farmers on the input side, and threatens biodiversity.[79] ***Remedies:*** Recent USDA regulations would limit some unfair packer practices, and it is important that Congress not interfere with those rules. In fact, stronger pro-competitive rules are needed.[80] If antitrust enforcers are unable to break the seed cartel, then new competition policy rules are needed to do so.

- Private antitrust enforcement -- an important tool for small firms victimized by unfair practices from larger competitors -- has become increasingly difficult. One notable obstacle to effective private enforcement are unreasonably high pleading standards, which require victimized plaintiffs to make evidentiary showings that they frequently cannot make before undertaking discovery. ***Remedies:*** Congress should act to overturn the ruling in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), as well as *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

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

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

  A pending case at the Supreme Court, *American Express v. Italian Colors Restaurant*, illustrates the potential stakes for small business. In this case, American Express seeks 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 are attempting to hold American Express liable for a tying arrangement that violates antitrust laws (American Express insists merchants accept its unpopular credit cards if they want to accept its popular charge cards), but because expensive expert

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[78] See Hauter, W. *Foodopoly: The Battle Over the Future of Food and Farming in America*. New York: New Press, 2012.
[79] See Hauter, W. *Foodopoly: The Battle Over the Future of Food and Farming in America*. New York: New Press, 2012.
[80] National Family Farm Coalition. (2012, Sept. 11) *Letter to Senators*. Available from: <http://www.nffc.net/Pressroom/Letters/2012/gipsaltr.sept2012.pdf>.

testimony is required to prove the claims, the cost of arbitrating an individual case would dwarf any possible recovery. This is a case where a large company is using its market power to force on small business a provision that prevents them from seeking a remedy to an abuse of market power. Public Citizen has argued in an *amicus* brief that arbitration agreements that actually prevent arbitration by making it impossible to assert statutory rights are not enforceable under the Federal Arbitration Act, but it remains unclear how the Court will rule.[81]

Remedies: Congressional remedies to these problems should include a prohibition on forced arbitration provisions in consumer, employment and civil rights cases[82] and restore states' authority to enforce their contract and consumer protection laws.

Strengthening the system of regulatory safeguards to strengthen America

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

But in its current form, the regulatory system is failing to meet its promise. Rather than looking at how to scale back or hinder the regulatory system, Congress should look to reforms to strengthen regulatory enforcement, speed the rulemaking process, curtail undue industry influence at regulatory agencies, and rein in judicial overreach.

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[81] Brief of Amicus Curiae Public Citizen, Inc., Supporting Respondents. *American Express v. Italian Colors Restaurant* (2013, Jan.) Available from: <http://www.citizen.org/documents/American-Express-v-Italian-Colors-Restaurant-Amicus.pdf>.

[82] See the Arbitration Fairness Act, H.R. 1873, introduced by Rep. Hank Johnson in the previous Congress.