Written Testimony of

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to Improve Accountability, Transparency and Integrity"

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PUBLIC CITIZEN

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on regulatory policy issues. I am Robert Weissman, president of Public Citizen. Public Citizen is a national public interest organization with more than 400,000 members and supporters. For more than 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.

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

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

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

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

The first section of this testimony argues that regulatory benefits vastly exceed costs and that regulatory failure—inadequate rules, and too little regulatory enforcement—should be understood as a key cause of the Great Recession and ongoing economic weakness. The second 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

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

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

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

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

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

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

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

[6] There are important exceptions to the child labor prohibition; significant enforcement failures regarding the minimum wage, child labor and length of work week (before time and a half compensation is mandated). But the quality of improvement in American lives has nonetheless been dramatic. Lardner, J. (2011). *Good Rules: 10 Stories*

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

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

- **Fuel efficiency standards.** Pursuant to the Energy Policy and Conservation Act, the Energy Independence and Security Act and the Clean Air Act, the National Highway Safety and Transportation Agency and the Environmental Protection Agency have proposed new automobile and vehicular fuel efficiency standards. The new rules, on an average industry fleet-wide basis for cars and trucks combined, establish standards of 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, dairy, seafood, fruits, vegetable and many processed and imported foods, but its effective

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of Successful Regulation. Demos. Available from: <http://www.demos.org/sites/default/files/publications/goodrules_1_11.pdf>.

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

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

[9] See 16 CFR 410-460.

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

implementation depends on rulemaking. Not so incidentally, food contamination incidents have major harmful economic impact on the agriculture and food industries and job creation and preservation in those industries.

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

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

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

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

[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*.

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

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

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

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

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

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

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

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

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 2014 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, 2003, to September 30, 2013, for which agencies estimated and monetized both benefits and costs, are in the aggregate between $217 billion and $863 billion, while the estimated annual costs are in the aggregate between $57 billion and $84 billion. These ranges are reported in 2001 dollars and reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.[17]

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

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

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[17] Office of Management and Budget, Office of Information and Regulatory Affairs. (2014). Draft *2014 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities*. p*p.1-2.* Available from: <https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/draft_2014_cost_benefit_report-updated.pdf>.

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

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

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

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

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

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[18] Office of Management and Budget, Office of Information and Regulatory Affairs. (2014). Draft *2014 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities*. *Table 1-4*, pp. 20-21. Available from: <https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/draft_2014_cost_benefit_report-updated.pdf>. ; 2001-2003 data from: Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities*. *Table 1-3*, p. 19-20. Available from: <http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf>.

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

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

Reason for layoff: 2008-2012[21]

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

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

B. Job-destroying regulatory failure and the Great Recession

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

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

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

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

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

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

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

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

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

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."[25] 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.[26] The Office of Comptroller of the Currency, with authority over almost 1,800 banks, took three consumer-protection enforcement actions from 2004 to 2006.[27]

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."[28]

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[25] *The Financial Crisis Inquiry Report.* p. xvii.
[26] 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>.
[27] 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>.
[28] Stiglitz, J. (2009). Capitalist fools. *Vanity Fair, 51*(1).

Unregulated Financial Derivatives. The 2008 crash proved Warren Buffet's warning that financial derivatives represent "weapons of mass financial destruction" to be prescient.[29] 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;[30] 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-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."[31]

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

[29] Buffett, W. (2003). *Report to Shareholders, February 21, 2003*. Berkshire Hathaway. Available from: <http://www.berkshirehathaway.com/letters/2002pdf.pdf>.

[30] 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>.

[31] 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>.

have a bias toward offering favorable ratings to new instruments because of their complex relationships with issuers,[32] 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 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

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[32] 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>.

$23.7 trillion—of potential Federal Government support to the financial system."[33] Much of this sum was never allocated, and most of the TARP funds were paid back. However, the regulatory reform policy debate should acknowledge that such unfathomable sums were put at risk thanks to regulatory failure.

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

A GAO study found that "[t]he 2007-2009 financial crisis, like past financial crises, was associated with not only a steep decline in output but also the most severe economic downturn since the Great Depression of the 1930s."[34] Reviewing estimates of lost economic output, GAO reported that the present value of cumulative output losses could exceed $13 trillion.[35] Additionally, GAO found that "households collectively lost about $9.1 trillion (in constant 2011 dollars) in national home equity between 2005 and 2011, in part because of the decline in home prices."[36]

The recession threw millions out of work, and left millions still jobless or underemployed. "The monthly unemployment rate peaked at around 10 percent in October 2009 and remained above 8 percent for over 3 years, making this the longest stretch of unemployment above 8 percent in the United States since the Great Depression," GAO noted.[37]

The economic impact on families is crushing, even leaving aside social and psychological consequences. "Displaced workers—those who permanently lose their jobs through no fault of their own—often suffer an initial decline in earnings and also can suffer longer-term losses in earnings," reports GAO. For example, one study found that workers displaced during the 1982 recession earned 20 percent less, on average, than their non-displaced peers 15 to 20 years later.[38] 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

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[33] 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>.

[34] 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>.

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

[36] *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.[36] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 17.

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

[38] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 18-19.

2010.[39]

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.[40]

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.[41]

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

The dissent explained that "we … reject as too simplistic the hypothesis that too little regulation caused the Crisis,"[42] arguing that the *amount* of regulation is an imprecise and perhaps irrelevant metric. This is a reasonable position (and it applies equally to those who complain about "too much" regulation); what matters is the quality of regulation—both the rules and standards of enforcement.

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

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

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[39] Cited in *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 16.
[40] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 23-24.
[41] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 26.
[42] *The Financial Crisis Inquiry Report.* (Dissenting Views By Keith Hennessey, Douglas Holtz-Eakin, and Bill Thomas.) p. 414.

II. Improving Regulation

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

There is an acute need for regulatory reform, to increase and improve regulatory enforcement, stiffen penalties for corporate wrongdoing, improve transparency, address undue industry influence over the rule-making process, address uneven judicial review of regulations, and adopt pro-competitive rules to level the playing field for small business and improve the economy and consumer well-being. I discuss these problem areas in this portion of my testimony, concluding each section or subsection with proposed remedies.

A. 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 (8947federal 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."[43] 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.[44] 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

[43] 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>.
[44] 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>.

increases in funding for activities designed to ensure the continuing safety of products, once they are on the market."

Of course, the issue with adequate enforcement is not solely a matter of resources. Many agencies do an inadequate job of enforcing rules due less to resource limitations than issues involving allocation of resources, prioritization and/or insufficient rigor. The 2013 fungal meningitis outbreak, for example, could and should have been prevented by FDA. The agency issued a warning letter to the New England Compounding Center in 2006, instructing the company to stop manufacturing-scale operations. However, FDA failed to follow up adequately. For whatever reason, whether inattentiveness or lack of compliance and legal resources, by not aggressively enforcing the regulations related to drug manufacturing and interstate commerce, the FDA allowed the company to continue its wide-scale manufacturing and interstate distribution operation of multiple high-risk drugs, including injectable steroids. The eventual result was the meningitis outbreak and 48 deaths.[45]

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 just released NHTSA report blames GM for its horrible misconduct, but also assigns major responsibility to NHTSA itself.[46] 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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[45] 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>.
[46] 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—a major change for the agency—of critical self-reflection in the wake of horrendous failure should be monitored, studied and, assuming it does generate a change in the culture and practice at the agency, emulated.

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 meaningful criminal enforcement.

Widespread illegality by Big Banks and Wall Street firms is a case in point, and the situation is probably far worse than we know, with Wall Street professionals themselves saying that criminal behavior is rampant in the industry.[47] Nearly half of Wall Street respondents to a recent survey believe their competitors have ignored the law or acted unethically, and a third of those making over half a million dollars annually say they have first-hand knowledge of wrongdoing in their own office.

1. Inappropriate use of deferred and non-prosecution agreements.

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, entering into agreements with corporations to either defer prosecution or abstain from prosecution entirely if the corporation meets the terms set out in these agreements. When first introduced, these types of agreements, also known as "pre-trial diversion," were intended to apply not to corporations, but primarily to juvenile delinquents, with the aim of clearing the courts to allow them to attend to major criminal cases.[48] 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.[49]

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[47] University of Notre Dame and Labaton Sucharow LLP. (2015, May.) The Street, the Bull and the Crisis. Available from: <http://www.labaton.com/en/about/press/Historic-Survey-of-Financial-Services-Professionals-Reveals-Widespread-Disregard-for-Ethics-Alarming-Use-of-Secrecy-Policies-to-Silence-Employees.cfm>.

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

[49] Ben-Ishai, E. and Weissman, R. (forthcoming, 2015). Justice Deferred -- and Denied. Public Citizen. The most detailed account and analysis of deferred prosecution agreements is contained in Garrett, B. (2014.) Too Big To Jail: How Prosecutors Compromise with Corporations. Harvard University Press.

Deferred and non-prosecution agreements are a special gift to large corporations, which are enabled to escape prosecution for serious crimes in a manner rarely afforded to individuals or small business. The logic of these agreements is that they permit prosecutors to put in place special compliance mechanisms to prevent future wrongdoing. These compliance mechanisms can equally be obtained through criminal plea agreements, however, so the claim that deferred and non-prosecution agreements offer some unique benefit is incorrect. Worse, deferred prosecution agreements offer little or no deterrent effect, either for the (non-)charged corporation or for others. Corporations entering into deferred and non-prosecution agreements have a strikingly high recidivism rate, including companies such as AIG, Barclays, Bristol-Myers Squibb, Chevron, GlaxoSmithKline, Hitachi, Lucent, Merrill Lynch, Pfizer, Prudential and UBS.[50]

Perhaps the most appalling example of the abuse of deferred prosecution—one which emphasizes how this kid-glove treatment is designed primarily for giant corporations—involves the banking giant HSBC. In December 2012, the company agreed to pay more than $1 billion in fines and entered into a deferred prosecution agreement for anti-money laundering and sanctions violations. Assistant Attorney General Lanny Breuer said the company was guilty of "stunning failures of oversight—and worse" and that the "record of dysfunction that prevailed at HSBC for many years was astonishing."[51]

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.'"[52]

- 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

[50] Ben-Ishai, E. and Weissman, R. (forthcoming, 2015). Justice Deferred -- and Denied. Public Citizen.
[51] 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>.
[52] 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>.

> 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."[53]

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?

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

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

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

American Banker—not an outlet known for shrill criticism of the banking industry—eloquently captured the moral outrage of this state of affairs. Shortly after the HSBC deferred prosecution deal, 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."[57]

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[53] HSBC Deferred Prosecution Agreement Attachment - Statement of Facts. pp. 22-23.
[54] 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>.
[55] 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>.
[56] 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>.
[57] *Are Some Banks 'Too Big To Jail'?*

In response to the very strong public criticism around the HSBC and other deferred prosecution deals, top officials at the Department of Justice walked back prior statements that such sweetheart deals were needed because of the potential systemic risk posed by prosecuting Wall Street giants. But there is little doubt that the too-big-to-jail comments reflected the actual views inside the Department of Justice.

Criticisms of disparate treatment for large banks did strike a chord inside the Department of Justice, however. DOJ has recently secured some criminal pleas from giant financial firms, most notably in regards to the extraordinary manipulation of foreign exchange markets by five major banks. These banks—Barclays, Citigroup, JP Morgan Chase, the Royal Bank of Scotland and UBS—colluded on the size, timing and nature of their buy and sell orders for U.S. dollars and euros. The conspirators referred to themselves as the "mafia," and one said, "if you ain't cheatin', you ain't tryin'." There is no question of intentionality in this case.[58]

Yet even though guilty pleas were obtained from four of the banks and a deferred prosecution agreement was rescinded for the fifth, UBS, the Department of Justice maneuvered yet again to protect the banks from the normal consequences of law-breaking. A final deal on the guilty pleas was apparently held off until the SEC granted waivers to the banks from rules that would otherwise prevent them from undertaking certain securities activities.[59] It is expected in the next several months that the Department of Labor will consider whether to waive its normal penalties for pension providers guilty of criminal wrongdoing. The very strong expectation, unfortunately, is that the Labor Department will follow the lead of the SEC—unless perhaps sufficient public and political pressure is brought to bear. It has also been reported that the Department of Justice obtained pleas from the banks' parent companies, rather than from subsidiaries, to protect those subsidiaries from other possible sanctions, including state charter revocation.[60]

DOJ's efforts to protect the banks from the consequences of a criminal plea are so far-reaching that it is fair to say that we may be entering the era of prosecution in name only—deferred prosecution by another name.

Again, it is virtually inconceivable that a small financial firm, or any small business, would be accorded such extraordinary accommodations in the context of pleading guilty to such a far-reaching conspiracy.

2. Reckless endangerment and concealment of hazards: the criminal penalty gap.

Paralleling the problem of insufficient prosecution of corporate wrongdoers under existing criminal statutes is the problem of insufficient criminal penalties for companies that recklessly

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[58] Department of Justice. (2015, May 20.) Five Major Banks Agree to Parent-Level Pleas. Available from: <http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>.

[59] Reuters. (2015, May 20.) U.S. SEC Grants Waivers to Banks After Guilty Pleas. Available from: <http://www.reuters.com/article/2015/05/20/banks-forex-settlement-waivers-idUSL1N0YB1GA20150520>.

[60] Protess, B. and Corkery, M. (2015, May 13.) 5 Big Banks Expected to Plead Guilty to Felony Charges, but Punishments May Be Tempered. New York Times. Available from: <http://www.nytimes.com/2015/05/14/business/dealbook/5-big-banks-expected-to-plead-guilty-to-felony-charges-but-punishments-may-be-tempered.html>.

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.

In some notable cases, prosecutors have used general criminal statutes to criminally prosecute companies and individual executives who have recklessly endangered the public or workers. Recent examples include prosecutions related to the BP oil platform explosion and subsequent oil eruption—both for violation of environmental statutes and for reckless behavior that led to the death of 11 oil workers—the New England Compounding Center disaster, and the Peanut Company of America.[61]

But these examples are the exception to the rule. Reckless action that kills employees is rarely criminally prosecuted. There are unlikely to be appropriate criminal charges related to the GM ignition switch debacle—despite the deaths of at least 111 people—or the flawed Takata air bags that have resulted in at least six deaths, or the Jeep defective fuel tanks which have killed dozens or perhaps many more. This even though in all of these cases there is substantial evidence that the companies knew of the product defects, knew what the consequences would be, and concealed information from regulators and the public. Similarly, companies too frequently sell dangerous drugs, despite their own studies showing unacceptable risks, resulting in hundreds, thousands or even tens of thousands of deaths in the case of Vioxx, but evade criminal prosecution. These actions simply aren't treated as criminal, in part because there are inadequate specific criminal provisions in relevant regulatory statutes or the general criminal law.

Remedies:[62] When it comes to corporate wrongdoing, our system of criminal justice has gone awry. Because of a lack of will and/or statutory authority, prosecutors fail to prosecute corporations and corporate executives for reckless conduct the likes of which would generate full-on prosecution and harsh sentences if committed by individuals outside of the corporate context. Through deferred and nonprosecution agreements, large companies, and especially but not only big banks, get special treatment, enabling them to avoid criminal prosecution for egregious wrongdoing simply by promising not to commit wrongs in the future. And even criminal prosecutions are engineered to enable giant banks to avoid meaningful penalties.

These matters should be a priority concern for the committee, both because of the nexus with regulatory policy and especially because they involve core issues related to the equal application of the criminal law and the failure to use of criminal prosecution to deter future wrongdoing.

Aggressive oversight can hopefully cure some of these problems, but oversight alone is not enough.

First, Congress should act to remedy the problem of insufficient criminal penalties by adopting a criminal statute to make it a crime for corporations or corporate executives to conceal

[61] For careful and detailed profiles of these cases, see Steinzor, R. (2014.) Why Not Jail? Cambridge University Press.
[62] For discussion of the kinds of remedies highlighted here, but also especially the need for individual corporate executive prosecutions, see Steinzor, R. (2014.) Why Not Jail? Cambridge University Press.

information of hazards posing a risk of serious injury or death to workers or consumers. Senators Blumenthal, Harkin and Casey introduced such legislation, the Hide No Harm Act, in the last Congress.

Second, the abuse of deferred and non-prosecution agreements must be curbed. Whether from inside the Department of Justice or imposed by Congress, there should be new guidelines regarding these arrangements. 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, and never in cases of repeat offenders.

Third, criminal prosecutions and guilty pleas should come with consequences, and not just fines which giant companies can easily absorb, almost no matter the size. If Congress has seen fit to adopt statutes that strip persons or corporations that have pled or been found guilty of a crime of the right to carry out certain activities, sell to the government, hold certain licenses or maintain privileges, then those sanctions should be enforced. Congress should look to prohibit the granting of waivers in these areas, or at minimum imposing tough standards as a prerequisite to such waivers.

Fourth, so long as deferred prosecutions and waivers continue, there should be greatly enhanced transparency around the decision-making process. If government officials are worried that prosecuting a financial firm will pose too much systemic risk, that has important policy consequences, and Congress and the public need to know. They also need to know who is expressing such worries, and how they are interacting with prosecutors. Similarly, if government prosecutors are declining to prosecute drug companies, or manipulating the corporate entity that they prosecute, out of a fear that the government would otherwise not be able to buy needed pharmaceuticals from that company, they should say so explicitly. There is little reason to expect this transparency to come voluntarily. Congress should pass legislation that requires it.

Fifth, and similarly, when the government operates in the civil context and settles cases relating to serious wrongdoing, it should be required to disclose what it has learned in its investigation. Otherwise, the public and the courts have no way to assess the adequacy of any proposed settlement, nor can there be an appropriate debate over legislative and regulatory remedies to prevent future wrongdoing. The DOJ's November 2013 $13 billion settlement with JP Morgan is instructive; the government failed to disclose meaningful information about what it had found in its investigation, or why the $13 billion settlement amount was commensurate with the wrongs discovered.[63]

Last, the HSBC example, as well as other examples from the financial sector, point to the need to look not just at prosecutorial policy. It is clear that regulators genuinely are afraid of enforcing the law when it comes to the megabanks. As a result, these banks are not deterred from violating the law—indeed, they are literally not subject to the same standards as other banks and other companies. A democratic society cannot tolerate having banks above the law. The solution to this problem is straightforward: these megabanks should be broken up.

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[63] See Better Markets v. Department of Justice. Complaint for Declaratory and Injunctive Relief, February 2014, Available from: <http://www.scribd.com/doc/206070627/Complaint-Better-Markets-v-U-S-Department-of-Justice>.

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.

Three years ago, Public Citizen conducted an analysis of public health and safety rulemakings with congressionally mandated deadlines. [64] Our analysis showed that most rules are issued long after their deadlines have passed, needlessly putting American lives at risk. Of the 159 rules analyzed, 78 percent missed their deadline. Federal agencies miss these deadlines for a variety of reasons, including having to conduct onerous analyses, dealing with politically motivated delays, inadequate resources or agency commitment, and fear of judicial review.

A high proportion of pending rules with statutory deadlines are mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The financial regulatory agencies are far behind schedule. The most recent report from the law firm DavisPolk finds that, through the first quarter of 2015, regulators have still not complied with a third of the 271 statutory deadlines that have passed. This is five years after passage of the Act.[65]

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

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

1. 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.

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[64] 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>.
[65] DavisPolk. (2015) *Dodd-Frank Progress Report*. Available from: <http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report>.

Nonetheless, it took a dozen years to get a final rule adopted. "During the dozen years it took to finalize the cranes rule," a Public Citizen report summarized, "OSHA and other federal agencies held at least 18 meetings about it. At least 40 notices were published in the Federal Register. OSHA was required by a hodgepodge of federal laws, regulations and executive orders to produce several comprehensive reports, and revisions to such reports, on matters such as the makeup of industries affected by the rule, the number of businesses affected, and the costs and benefits of the rule. OSHA also was repeatedly required to prove that the rule was needed, that no alternative could work, and that it had done everything it could to minimize the effects on small businesses. The regulatory process afforded businesses at least six opportunities to weigh in with concerns that the agency was required to address."[66]

2. Silica rule.

OSHA's lifesaving silica dust standard has been delayed for a dozen 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.[67] 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. Since OIRA finally released the rule, it has been stuck at OSHA.

What is clear: people are dying needlessly due to delay. “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.”[68]And the rule has now been a dozen years in the making.

3. 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 in 2016.[69]

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[66] 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>.
[67] OSHA Occupational Exposure to Crystalline Silica, 75 Fed. Reg. 79.603 (2010, Dec. 20).
[68] 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 from: <https://www.osha.gov/silica/Silica_PEA.pdf>.
[69] 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>.

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 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.

4. Backover rule[70]

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.

[70] 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>.

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

5. 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 has, 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 has yet to emerge. In the latest Unified Agenda of Regulatory and Deregulatory Actions, the agency inexplicably reports that the rule is now targeted for completion by April 2016. 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.[71]

Remedies: There needs to be much more Congressional oversight of rule-making 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

[71] 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>.

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."[72]

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.[73] 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.[74] If OIRA is going to continue to its current function, it must be subject to much more transparency requirements. For example, agencies should put in the rulemaking docket all documents submitted to OIRA, and all changes and comments that they receive on proposed and/or final rules from OIRA or other agencies.

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

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[72] 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>.

[73] 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>.

[74] 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>.

D. 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.[75] 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.[76]

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

- Bankers and business leaders described the New Deal financial regulatory reforms in foreboding language, warning that the Federal Deposit Insurance Commission and related agencies constituted "monstrous systems," that registration of publicly traded securities constituted an "impossible degree of regulation," and that the New Deal reforms would "cripple" the economy and set the country on a course toward socialism.[77] 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

[75] 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").
[76] 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>.
[77] Lincoln, T. (2011). *Industry Repeats Itself: The Financial Reform Fight*. Public Citizen. Available from: <http://www.citizen.org/documents/Industry-Repeats-Itself.pdf>.

accomplishments, the petrochemical industry has continued to thrive. The World Bank finds that removing lead from gasoline has a ten times economic payback.[78]

- Big Tobacco long convinced restaurants, bars and small business owners that smokefree rules would dramatically diminish their revenue—by as much as 30 percent, according to industry-sponsored surveys. The genuine opposition from small business owners—based on the manipulations of Big Tobacco—delayed the implementation of smokefree rules and cost countless lives. Eventually, the Big Tobacco-generated opposition was overcome, and smokefree rules have spread throughout the country—significantly lowering tobacco consumption. Dozens of studies have found that smokefree rules have had a positive or neutral economic impact on restaurants, bars and small business.[79]

- Rules to confront acid rain have reduced the stress on our rivers, streams and lakes, fish and forests.[80] Industry projected costs of complying with acid rain rules of $5.5 billion initially, rising to $7.1 billion in 2000; ex-ante estimates place costs at $1.1 billion to $1.8 billion.[81]

- 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."[82]

- 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.[83] 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.[84]

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[85]—that teach us to be wary of Chicken Little warnings about the costs of the next regulation.

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[78] 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>
[79] *Regulation Issue: Industry's Complaints About New Rules Are Predictable -- and Wrong.* p.10.
[80] Environmental Protection Agency. *Acid Rain in New England: Trends.* Available from: <http://www.epa.gov/region1/eco/acidrain/trends.html>.
[81] 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>.
[82] 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>.
[83] Behr, P. (August 13, 1981). U.S. Memo on Air Bags in Dispute. Washington Post.
[84] National Highway Traffic Safety Administration. (2012). Traffic Safety Facts: Occupant Protection. Available from: <http://www-nrd.nhtsa.dot.gov/Pubs/811619.pdf>.
[85] *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).

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.)[86]

"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.[87]

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;
- 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.[88]

Regulation, Employment, and the Economy: Fears of job loss are overblown. Economic Policy Institute. Available from: <http://www.epi.org/files/2011/BriefingPaper305.pdf>.

[86] 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>

[87] 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>

[88] 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.

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. [89]

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.[90]

Fourth, claims of precision notwithstanding, cost-benefit analysis is open to bizarre and second- and third-order accounting, in practice especially on the cost side. One deeply troubling example of bizarre cost-accounting is the "lost pleasure principle," an application of "consumer surplus" theory. Under this theory, when a regulation takes away an option from consumers or makes it less likely they will choose an option they would have in the absence of the regulation, cost-benefit analysis should take into account the resulting "lost pleasure." This is not the kind of factor that proponents of cost-benefit analysis would normally factor on the benefit side, to say the least, as I discuss further below. But they urge it be considered on the cost side. And the value they attribute to this purported cost can be extraordinarily high, since they impute the price that consumers were willing to pay for the product pre-regulation as the cost (multiplied by number of purchases).[91]

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.

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[89] 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.

[90] 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>.

[91] 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.

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, [92] where there is a new layer of absurdity because most adult users actually say they would like to stop using it.[93]

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.[94] Thus, it appears that the ongoing outrage of the lost pleasure principle interfering with proper standard setting—at least in the consumer health area—has been alleviated, for now. But the serious suggestion of such an approach, which was held to reduce benefits by as much as 70-90 percent in some cases, shows how easy it is to manipulate cost-benefit analysis, and underscores the massive imprecision in cost-benefit exercises.

Fifth, cost-benefit analysis systematically underestimates benefits. New regulatory costs can—and should—also be considered benefits in many cases. That is, costs to regulated businesses are not the same as social costs. New productive capital investment helps create new demand, creates new jobs, and helps spur new technology. These benefits are rarely captured in cost-benefit analyses, in part because they are uncertain, in part because they appear to be second-order effects (even though 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.

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[92] 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>.

[93] 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>.

[94] 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>.

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."[95]

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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Jim Gaines.

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Rachel Jacobs.

Dr. Derrick Griffith.

Giuseppe Piras.

Laura Finamore.

Bob Gildersleeve.

These are the names of the men and women killed in the recent Amtrak crash.[96] 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

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[95] 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>.

[96] 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>.

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.[97]

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.

E. Imbalanced and inappropriate judicial review

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

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

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

The Supreme Court's and DC Circuit's standing decisions aim to confine the federal courts to their legitimate function of resolving "actual cases or controversies" and "to prevent the judicial process from being used to usurp the powers of the political branches."[98] But in too many cases, a court has denied standing to parties who are threatened with "certainly impending" injuries that

[97] 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>.
[98] *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

are "fairly traceable" to an agency's action,[99] —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.[100] 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 people do <u>not</u> have standing to challenge it.[101]

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

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

What is crucial to emphasize is that judicially created standing doctrine does not affect all parties evenly; instead, it creates a structural advantage for the corporate sector. In general, the courts

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

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 no person or individual is deemed to have standing to enforce agency compliance with congressional directives.

2. Judicially imposed requirements of cost-benefit analysis.

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

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

Business Roundtable v. SEC[102] 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"[103] to analyze rules for their impact upon "efficiency, competition, and capital formation"[104] under Section 3(f) of the Exchange Act,[105] thereby rendering the SEC's promulgation of the rule "arbitrary and capricious."[106] 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.[107] Nonetheless, in a string of recent cases,[108] the D.C. Circuit has interpreted this language as imposing a duty on the SEC to fully assess the costs and benefits of their

[102] *Business Roundtable v. SEC* 647 F.3d 1144 (D.C. Cir. 2011).
[103] *Business Roundtable v. SEC*,1148.
[104] *Business Roundtable v. SEC*,1148.
[105] 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a–2(c).
[106] *Business Roundtable v. SEC*, 1155.
[107] *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).
[108] *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).

regulations and determine, in some instances, that the regulation yields a "net benefit."[109] 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"[110] 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."[111]

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."[112] 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.[113]

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.

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.[114] And regulatory law is replete with special and intentional protections for smaller firms, which are exempt from many rules.

[109] *Business Roundtable v. SEC*, 1153.
[110] *Business Roundtable v. SEC*, 1148.
[111] *Business Roundtable v. SEC*, 1148-49.
[112] Section 971.
[113] *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.")
[114] 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>.

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.

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.[115]

  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

[115] 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>.

back to innovation.[116] ***Remedies:*** Stronger rules should protect small business innovators, and innovative large corporations as well, from improper patent enforcement actions.

- Anticompetitive practices are widespread in the energy industry, including in electricity markets. "Anticompetitive agreements between sellers in regional wholesale electricity markets have forced consumers to pay hundreds of millions of dollars more for electricity than they would have in the absence of such conduct," notes the America Antitrust Institute's Diana Moss. "In these markets, which are structurally vulnerable to the exercise of market power, anticompetitive agreements spanning even a short time can result in large wealth transfers from consumers to suppliers."[117] 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 month, for example, Public Citizen filed an emergency complaint at FERC[118] 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

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[116] 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>.

[117] 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>.

[118] 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>.

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, 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.[119] 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.

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

Remedies: Congressional remedies to these problems should include a prohibition on forced arbitration provisions in consumer, employment and civil rights cases[120] and a restoration of states' authority to enforce their contract and consumer protection laws.

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

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

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

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