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# A GROWTH AGENDA: REDUCING UNNECESSARY REGULATORY BURDENS

## HEARING

BEFORE THE

## COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

FEBRUARY 1, 2017

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

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# A GROWTH AGENDA: REDUCING UNNECESSARY REGULATORY BURDENS

**WEDNESDAY, FEBRUARY 1, 2017**

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
*Washington, DC.*

The Committee met, pursuant to notice, at 10:04 a.m. in room SH–216, Senate Hart Office Building, Hon. John Thune, Chairman of the Committee, presiding.

Present: Senators Thune [presiding], Nelson, Udall, Blumenthal, Schatz, Blunt, Markey, Inhofe, Hassan, Wicker, Cruz, Moran, Sullivan, Peters, Young, Cantwell, Klobuchar, Booker, Cortez Masto, Duckworth, Heller, Fischer, Johnson, Gardner, Capito, and Lee.

## OPENING STATEMENT OF HON. JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA

The CHAIRMAN. Good morning. This hearing will come to order. Today we are diving into an issue that's dominated much of the recent debate about Washington: the unnecessary and burdensome regulations that stifle growth in America without offsetting benefits to Americans.

"I believe a thriving private sector is the lifeblood of our economy. I think there are outdated regulations that need to be changed. There is red tape that needs to be cut." That statement of belief, however, is not my own. Those exact words were spoken by President Obama in his last State of the Union address.

Despite these laudable sentiments, the American Action Forum has reported that just since Election Day on November 8, 2016, the Obama administration issued rules with $157 billion, with a "B," in regulatory costs. And in December alone, the last administration approved 99 new regulations.

My hope is that today's hearing will examine how we can make the rhetoric of regulatory reform a reality. Let me start by stating my belief that not all regulations are bad. In fact, there are many rules on the books that are necessary for economic growth and for the life and liberty of the American people. For instance, our Federal agencies enforce critical rules to protect the health and safety of our citizens, ensure fairness in the marketplace, and provide important protections for the environment.

But there are also unbalanced regulations that provide negligible net benefits, raise barriers to entry for startups, restrain would-be job creators, and expose firms and employees to unnecessary burdens, from increased paperwork to onerous requirements to avoidable exposure litigation.

A regulatory overhaul, though clearly necessary, must be thoughtful. We need to avoid a chaotic process, which would result in uncertainty for businesses in the public. We must also be mindful that any action at the Federal level could result in a confusing patchwork of regulations as states move in to fill the voids.

We begin this new Congress with a mandate to do our part to provide relief from excess regulation. Together, with the new administration and effective stakeholders, including the public, we need to undertake a review of the regulations enforced by agencies under the jurisdiction of this Committee. We will seek to identify what works, what doesn't, what should be scrapped, and what can be improved upon.

Many of these regulations have been on the books for years. Some, as I've noted, were newly enacted in the final days and hours of the previous administration, and some are not yet finalized. Accordingly, I applaud President Trump for making this issue a top priority. One of his first official acts as President on January 20 was to issue a memorandum entitled, "Regulatory Freeze Pending Review." This memo, which is consistent with longstanding bipartisan precedent, ensures both the President's appointees and the Congress will have an opportunity to review new and pending regulations.

And on Monday, the President issued an Executive Order entitled, "Reducing Regulation and Controlling Regulatory Costs." This Order instructs Federal departments and agencies to identify at least two prior regulations for elimination for each new regulatory proposed, with certain exceptions. There will still be much more work for Congress to do, though, since the Order does not apply to independent agencies, such as the Federal Communications Commission.

Today, we'll be hearing directly from stakeholders about specific regulations issued by the Federal administrative agencies under the jurisdiction of the Senate Commerce Committee to assess their usefulness, balance, and day-to-day impact on the regulated entities subject to these rules.

Federal rulemaking procedures dictate a so-called "notice and comment" process for agencies to hear from the regulated community and other stakeholders about proposed regulations. In theory, these requirements constitute procedural safeguards to ensure that the American public has a voice in the process. In practice, however, we know that some agencies choose to provide only perfunctory responses to critical comments rather than engaging with stakeholders in a meaningful effort to improve noticed regulations.

The same can be said of other regulatory requirements designed to produce thoughtful regulations that provide a net benefit to the American people. For more than 30 years, Presidents of both parties have promoted the idea that regulatory benefits should outweigh costs, but agencies are not always rigorous in conducting such analyses. We have seen agencies attempt to manipulate the process by cherry-picking available evidence or relying on outdated or incomplete data. And we have sometimes seen regulatory overreach where agencies attempt to promulgate rules outside of their jurisdiction or beyond their particular statutory grant of authority. These practices result not only in unbalanced rules with specious net benefits to Americans, but also embroil agency resources in costly litigation for which the American taxpayers must foot the bill.

I began my remarks today with a quote from President Obama, and I would like to finish with a comment from Professor Cass Sunstein, who led the Office of Information and Regulatory Affairs for the last administration. About a year ago, looking ahead to areas of possible common ground on regulatory reform, he wrote, and I quote, "The good news is that across ideological divides, there's a lot of room for bipartisan reform that would significantly cut costs and burdens and do so without compromising safety, health, and environmental goals." Well, let's prove that he's right.

To help us begin this discussion, we've invited a distinguished group of witnesses to testify today: Mr. Jack Gerard is President and CEO of the American Petroleum Institute; Ms. Lisa Heinzerling is the Justice William J. Brennan, Jr., Professor of Law at the Georgetown University Law Center; Mr. Rosario Palmieri is the Vice President for Labor, Legal, and Regulatory Policy at the National Association of Manufacturers; Mr. Gary Shapiro is the President and CEO of the Consumer Technology Association; and Mr. Adam White is a Research Fellow at the Hoover Institution.

And I want to thank you all for being here today, and I look forward to hearing your testimony.

And we'll turn now to our Ranking Member, Senator Nelson, for any opening remarks that he would like to make.

## STATEMENT OF HON. BILL NELSON, U.S. SENATOR FROM FLORIDA

Senator NELSON. Thank you, Mr. Chairman. And you can see by the size of the audience and the fact that so many Committee members are here, this is a topic of enormous interest and import. And over the last two years, you and I have worked in a bipartisan manner to identify and, when appropriate, remove outdated, duplicative, or overburdensome rules. For example, during last year's FAA bill, we crafted a provision that streamlined the aircraft certification process and would likely have spurred job growth in the aviation industry. And while the House balked at the provision, it serves as an example of how this Committee has come together in the past to remove the unnecessary burdens to commerce.

At the same time, Mr. Chairman, this Committee has taken numerous bipartisan actions to protect the health and safety of all Americans. For example, we have witnessed numerous injuries and deaths from dangerous toys and children's products due to weak government oversight. I'll never forget the research lab of the Consumer Product Safety Commission. About 10 years ago, it was a card table with toys thrown on top of it.

And this culminated in the disastrous 2007 summer of recalls for a variety of children's products. One young child, who died as a result, was named Garret Davis. Garret was a four and half-month-old who suffocated on an unsafe mattress in a portable crib during a trip to my state in 2000. Garret's mother, Joyce, is in the audience today, and I want to thank her for tirelessly advocating for tougher product safety standards.

And we also have the Hartung family here, whose daughter, Abigail, was injured by a defective crib in 2007.

And Tim Frink, whose granddaughter, Brianna, was killed by unsafe window blinds in 2012 in Tennessee while her parents were serving in the Army at Fort Campbell. We have a picture of Tim. Her parents are here, and they are seated in the second row.

And it's tragedies such as these that remind us of the human costs when we fail to address dangerous products. They are why this Committee responded by enacting the Consumer Product Safety Improvement Act of 2008, which gave regulators the power to quickly enact rules when there is a danger to children's safety. And while we've made strides, there are still so many areas in which we have to be vigilant.

Take, for example, the ongoing saga of Takata airbags. It seems like every week there's a new story in the newspapers about additional recalls, and those recalls worldwide could be hundreds of millions of vehicles—more than 40 million vehicles have already been recalled just in the U.S. More than two years ago, this Committee heard testimony from Lieutenant Stephanie Erdman, who was seriously injured when her Takata airbag exploded in her face. She almost lost her eye, and she almost lost her career in the Air Force as a result of that accident.

If you fast-forward to today, it is hard to believe that we still have no government rules to ensure the safety of these airbags—despite 11 deaths in the U.S., hundreds of injuries, and the single largest recall in history.

Well, I could go on and on with other examples. How about the *Deepwater Horizon* explosion? Eleven people were killed, the seafood and tourism industry in many parts of the Gulf were destroyed. That explosion occurred because BP cut corners.

So, Mr. Chairman, while I look forward to working with you to identify common sense regulatory reforms, I strongly urge the Committee members to refrain from taking a wrecking ball to regulations that protect the health and safety of all Americans.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Nelson.

We will now proceed to our panel, and we'll start on my left and your right, Mr. Gerard, and if each of you would proceed in order and confine your remarks as close to 5 minutes as possible, and then we'll get a chance to ask some questions.

So, Mr. Gerard, please proceed.

**STATEMENT OF JACK N. GERARD, PRESIDENT AND CEO, AMERICAN PETROLEUM INSTITUTE**

Mr. GERARD. Thank you, Chairman Thune and Ranking Member Nelson and members of the Committee. It's a pleasure to be here today and to speak about the opportunities to promote a pro-growth agenda while reducing regulatory burdens and to discuss areas where we can collaborate to create a more workable regulatory framework.

America is now the world's leading producer and refiner of oil and natural gas, a reality that was unimaginable just a decade ago. We have transitioned from an era of energy scarcity and dependence to one of energy abundance and security. The developments of the past decade have brought cost savings for American consumers, good paying jobs, renewed opportunities for U.S. manufacturing, a stronger economy, and greater national security. And record U.S. production refining is happening alongside greater environmental progress: $CO_2$ from power generation is down to 25-year lows, thanks primarily to greater use of clean-burning natural gas.

In 2015, energy-related savings put an extra $1,337 back in the pocket of the average American family. AAA reports that drivers saved as much as $550 a year in fuel costs. Energy abundance is helping to cut energy and material costs for America's manufacturers and to attract manufacturing back to the United States. Electricity costs for domestic manufacturers are 30 to 50 percent lower than our foreign competitors. And overall manufacturing costs are now 10 to 20 percent lower than those in Europe and could be 2 to 3 percent lower than in China by 2018, a significant competitive advantage.

Technological innovations and industry leadership have propelled the oil and gas industry forward despite the unprecedented onslaught of 145 new and pending Federal regulatory actions targeting our industry.

The time has come to review these regulations and to have a frank discussion about the costs and the benefits to the American people. For example, on methane, the previous administration proposed an expensive and unnecessary regulatory approach that ignored industry's accomplishments in favor of a government-run program that could mean an additional $800 million in annual costs. Industry's own leadership brought the emissions down by 15 percent in real terms while increasing production of natural gas by 45 percent.

Then the BLM, a public lands agency, decided they wanted to step in and regulate methane as well, adding another $400 million in costs. It's no wonder that from 2010 to 2015, U.S. Federal onshore natural gas production decreased 18 percent, while production on state and private lands increased 55 percent.

Other actions by the previous administration that should be reviewed include removing leased areas from the 5-year plan, resulting in 94 percent of Federal offshore being off limits now to energy discovery and development. These decisions place a roadblock in front of a potential for nearly 840,000 new jobs and $200 billion in cumulative government revenue through 2035 while largely ignoring America's strategic energy future.

In another example under this Committee's jurisdiction, PHMSA has strayed from its risk-based approach in regulating natural gas transmission rules and guidelines, moving away from highest risk to one-size-fits-all, all risks.

The EPA, Coast Guard, and 20 states have formed a confusing patchwork, and I would like to thank the Chairman, Senator Nelson, and many others on this Committee for passage of the Commercial Vessel Incidental Discharge Act just last week to address this patchwork of conflicting costly regulation.

This week, we support the efforts of the Congress now as it takes its first step to pull back on a number of these ill-considered and hasty regulations under the Congressional Review Act.

The oil and natural gas industry remains committed to regulatory structures that promote safety, environmental protection, and responsible operations, and it continues to look for ways to collaborate with regulators. Some might be surprised to know that since 1924, API has been the leader in developing industry standards that promote safety and reliability through the use of proven engineering practices under an ANSI-accredited process. Nearly 400 API standards are cited throughout Federal and state regulations.

Federal regulatory policy can either strengthen or weaken the U.S. energy renaissance, with impacts that extend far beyond our industry. Regulatory actions should be rooted in sound science and data with consideration of the costs and benefits. With these goals in mind, we stand ready to work with the Congress, with you, and with the administration to find reasonable solutions to the challenges before us.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gerard follows:]

PREPARED STATEMENT OF JACK N. GERARD, PRESIDENT AND CEO, AMERICAN PETROLEUM INSTITUTE

Good morning Chairman Thune, Ranking Member Nelson, and members of the Committee. Thank you for the invitation to speak today about the opportunities to promote a pro-growth agenda by reducing regulatory burdens and to discuss areas where we can collaborate to create a more workable regulatory framework.

The American Petroleum Institute is the only national trade association representing all facets of the oil and natural gas industry, which supports 9.8 million U.S. jobs and 8 percent of the U.S. economy. API's more than 625 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms.

America is now the world's leading producer and refiner of oil and natural gas, a reality that was unimaginable just a decade ago. We've transitioned from an era of energy scarcity and dependence to one of energy abundance and security. The developments of the past decade have brought cost savings for American consumers, good paying jobs, renewed opportunities for U.S. manufacturing, a stronger economy and greater national security. And record U.S. production and refining is happening alongside greater environmental progress: $CO_2$ from power generation is down to 25 year lows, thanks in large part to greater use of natural gas. Also, cleaner burning transportation fuels and industry investments in emissions reducing technologies have enabled reduced emissions of criteria air pollutants.

In 2015, energy-related savings put an extra $1,337 back in the pocket of the average American family, and AAA reports that drivers saved as much as $550 in fuel costs. Energy abundance is helping to cut energy and material costs for American manufacturers and to attract manufacturing back to the U.S. Electricity costs for domestic manufacturers are 30–50 percent lower than our foreign competitors, and overall manufacturing costs are now 10 to 20 percent lower than those in Europe and could be 2 to 3 percent lower than in China by 2018, an important competitive edge.

Technological innovations and industry leadership have propelled the oil and gas industry forward despite the unprecedented onslaught of 145 new and pending Federal regulatory actions targeting our industry. The time has come to review these regulations and to have a frank discussion about the costs and the benefits to the American people.

For example, on methane, the previous administration proposed an expensive and unnecessary regulatory approach that ignored industry's accomplishments in favor of a government-run program that could mean an additional $800 million in annual costs. Industry's own leadership on emissions have led to a 15 percent reduction in total annual methane emissions since 1990, even as U.S. natural gas production increased 45 percent.

Then, the BLM, an agency with limited regulatory authority over air emissions, stepped in with its own methane regulation, which could cost more than $400 million per year. It's no wonder that from 2010–2015, U.S. Federal onshore natural gas production decreased 18 percent while production on state and private lands increased 55 percent.

Other actions by the previous administration that should be reviewed include removing lease areas from the Five-Year Plan, resulting in 94 percent of Federal offshore acreage being off-limits to energy development. These decisions place a roadblock in front of a potential for nearly 840,000 new jobs and $200 billion in cumulative government revenue through 2035 while largely ignoring America's strategic energy future.

In another example, directly under this Committee's jurisdiction, PHMSA has strayed from a risk-based approach in its proposed natural gas transmission rule that diverts resources from areas of highest risk to areas of lower risks. The EPA, Coast Guard, and more than 20 states have formed a confusing patchwork of rules that defines the current regulatory framework for ballast water treatment on vessels that are needed to transport our products to consumers. I'd like to extend a thank you to Chairman Thune, Ranking Member Nelson and this committee for passage of the Commercial Vessel Incidental Discharge Act last week to address these concerns.

This week, we support the efforts of Congress as it takes the first step to pull back a number of these ill-considered and hasty regulations under the CRA. These include Section 1504 of Dodd-Frank, which places U.S.-based energy companies at a competitive disadvantage in the world marketplace, and BLM's methane regulations, which are technically flawed and redundant to state regulation. Furthermore, we look forward to the anticipated CRA resolution on EPA's redundant and unnecessary Risk Management Program rulemaking.

The oil and natural gas industry remains committed to regulatory structures that promote safety, environmental protection, and responsible operations and it continues to look for ways to collaborate with regulators. Since 1924, API has been the leader in developing industry standards that promote safety and reliability through the use of proven engineering practices under an ANSI-accredited process. Nearly 400 API standards are cited throughout Federal and state regulations.

Our industry actions and standards go above and beyond the regulatory framework. For example, before PHMSA issued its recent tank car rule, industry had already adopted and started implementing a standard that exceeded Federal requirements. One of the industry's hallmark standards, Pipeline Safety Management Systems, ushered in a culture of safety that can be applied broadly across our industry.

Federal regulatory policy can either strengthen or weaken the U.S. energy renaissance, with impacts that extend far beyond our industry. Regulatory actions should be rooted in sound science and data, with a consideration of the costs and benefits. With these goals in mind, we stand ready to work with Congress and the administration to find reasonable solutions to the challenges before us.

The CHAIRMAN. Thank you, Mr. Gerard.

Mr. Palmieri.

## STATEMENT OF ROSARIO PALMIERI, VICE PRESIDENT, LABOR, LEGAL AND REGULATORY POLICY, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. PALMIERI. Thank you for the opportunity to testify today. The U.S. is the world's largest manufacturing economy, producing more than $2 trillion in value each year and directly employing nearly 12 million Americans and supporting 18 million jobs in the economy.

Manufacturers believe regulation is critical to the protection of worker and consumer safety, public health, and our environment. We believe some critical objectives of government can only be achieved through regulation. But that does not mean our regulatory system is not in need of considerable improvement and reform. Regulations are often unnecessarily complex, duplicative, and ineffectively achieve their benefits. Excessive regulatory changes and uncertainty impose high costs, especially on small businesses. And small businesses bear a disproportionate burden of regulation because of the often high fixed costs of compliance not subject to economies of scale.

While the NAM's membership is affected by all areas of the Committee's jurisdiction, including aviation, highway safety, the digital economy, and pipelines, I've been asked to focus my remarks on consumer product safety.

Manufacturers of consumer products are committed to producing safe products. In 2008, as identified by Ranking Member Nelson in the wake of intolerable lapses in children's product safety, the Consumer Product Safety Improvement Act was passed. The NAM supported that law and provisions that would give the CPSC more staff and financial resources to deal with the dramatic rise in imported consumer products and globalized supply chains.

Since the CPSC's creation, the private sector has worked hand-in-hand with the agency to protect consumers. A key principle of the Consumer Product Safety Act is that the Commission rely upon voluntary consumer product safety standards when it will adequately address risks. The safety of consumers for thousands of product categories depend on those voluntary standards.

Unfortunately, the CPSC has engaged in a series of highly controversial rulemakings without engaging stakeholders and often exceeded its statutory authority. Here are a couple examples.

The CPSC proposed a rule to change the voluntary recall process. It's the process whereby a company works with the CPSC to voluntarily recall a product. This might be initiated by a company after receiving adverse reports or in discussions with the CPSC after they've investigated a concern. Speed and effectiveness of the recall are the two most important attributes. The proposed rule would have added legal complexity and harmed the company's defenses if litigation arose. Each one of these changes would lengthen the negotiation process and actually put in jeopardy the CPSC's award-winning fast track recall program. It was concerning. Even a former Democratic Chairwoman of the CPSC and Democratic Senators recommended a halt to the proposal.

Another example, the CPSC will soon vote to issue a proposed mandatory rule on table saws. There are strong voluntary standards in place that continue to be strengthened. Safety concerns are mostly a result of improper use of the product, and significant redesigns have been completed to increase safety. Unfortunately, the Commission fell in love with a patented technology that would increase the price of these products by $1,000, pricing a new product out of the market for most consumers and eliminating a whole segment of this category.

Picking a technology winner is not what the CPSC is supposed to do; it's supposed to set performance standards and allow competition and innovation to deliver increasingly safer products to customers.

The CPSC also went down this path with recreational off-highway vehicles. The Commission presented proposals, including statutorily prescribed design standards to achieve questionable results. Ultimately, the Commission acceded to the industry's voluntary standards, but have failed to terminate the rulemaking.

To reduce unnecessary burdens at the CPSC and across this Committee's jurisdiction, we recommend the following: encourage the current Chairman of the CPSC to step aside and confirm a new Chair; encourage the Commission to focus on its mandate and address serious risks; encourage better benefit-cost analysis and interagency coordination at the Commission and across government by having independent regulatory agencies submit their regulations for third-party review to OIRA, CBO, or some other body; give Congress an analytical office to review the costs and benefits of regulation like in Senator Klobuchar's SCORE Act; encourage the CPSC and other agencies to improve their scientific analysis and risk assessment through peer review; encourage better retrospective review of rules by planning for reviews at the time a rule is written, like in Senator Heitkamp's and Senator Lankford's Smarter Regulations Through Advanced Planning and Review Act; improve small business impacts analysis through passage of legislation like the Small Business Regulatory Flexibility Improvements Act; strengthen and support institutions like OIRA and the SBA's Office of Advocacy to help single-mission agencies have a broader view.

These and other reforms before the Senate and House will help us to achieve our regulatory objectives without imposing unnecessary burdens. Thank you again for this opportunity.

[The prepared statement of Mr. Palmieri follows:]

PREPARED STATEMENT OF ROSARIO PALMIERI, VICE PRESIDENT, LABOR, LEGAL AND REGULATORY POLICY, NATIONAL ASSOCIATION OF MANUFACTURERS

Chairman Thune, Ranking Member Nelson and members of the Committee on Commerce, Science, and Transportation, thank you for the opportunity to testify about Federal regulations and how the rulemaking process impacts businesses in the United States. I am pleased to provide this testimony on the regulatory agenda of the U.S. Consumer Product Safety Commission (CPSC) and the impact of its regulations on manufacturers and other stakeholders.

My name is Rosario Palmieri, and I am the vice president of labor, legal and regulatory policy for the National Association of Manufacturers (NAM). The NAM is the Nation's largest industrial trade association and voice for more than 12 million men and women who make things in America. The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs. Manufacturers appreciate your attention to the regulatory burdens that are impacting their competitiveness and growth. In particular, we thank the Chairman and Ranking Member for their efforts to improve our regulatory system. Manufacturers that produce finished goods or component parts regulated by the CPSC and their suppliers account for 6.5 million jobs in the United States in 2015.[1]

The Committee's attention to the impact of agency regulations on manufacturers in the United States is extremely important, and the NAM is pleased that special attention has been focused on the CPSC. As an independent regulatory agency, the CPSC is not bound by orders that direct Executive Branch agencies to employ sound regulatory principles, and the justifications and data the CPSC uses for its regulatory are not subject to any substantive review by an objective third party. Manufacturers greatly appreciate the efforts by Chairman Thune and Senator Moran, Chairman of the Subcommittee on Consumer Protection, Product Safety, Insurance and Data Security, to hold the CPSC accountable so that its resources are devoted to efforts that would enhance consumer safety and advance its mission as Congress has intended.

**I. Manufacturing in the United States**

Manufacturing in the United States lost 2.3 million jobs in the past recession. Since then, we have gained back 822,000 manufacturing jobs. Yet, the sector has struggled over the past two years from global headwinds and economic uncertain-

[1] Source: U.S. Census Bureau, Annual Survey of Manufacturers, Retrieved from *https://factfinder.census.gov/*

ties. Manufacturing employment declined by 45,000 in 2016, with essentially stagnant production growth.

On the positive side, signs at year's end indicated that business leaders and consumers were more upbeat about activity in 2017, especially since the election. To ensure that demand and output improve this year, the United States needs not only improved economic conditions but also government policies more attuned to the realities of global competition.

Manufacturing has the highest multiplier effect of any economic sector. For every $1.00 spent in manufacturing, another $1.81 is added to the economy. In addition, for every worker in manufacturing, another four employees are hired elsewhere. In 2015, manufacturers in the United States contributed $2.17 trillion to the economy (or 12.1 percent of GDP), and the average manufacturing worker in the United States earned $81,289 annually, including pay and benefits—27.4 percent more than the average nonfarm business worker.

Nearly 95 percent of all manufacturers in the United States have fewer than 100 employees, and the Small Business Administration defines a small manufacturer as a firm with fewer than 500 employees. To compete on a global stage, manufacturers in the United States need policies that enable them to thrive and create jobs. Growing manufacturing jobs will strengthen the U.S. middle class and continue to fuel America's economic recovery. Manufacturers appreciate the committee's focus on ways to reduce regulatory burdens. Unnecessarily burdensome regulations place manufacturers of all sizes at a competitive disadvantage with our global counterparts.

*a. Regulatory Burdens Facing Manufacturers*

Manufacturers face more environmental and safety regulations than other businesses. The NAM issued a study[2] on the expansive set of Federal regulatory requirements that are holding manufacturers back. Manufacturers face 297,696 restrictions on their operations from Federal regulations. Eighty-seven percent of manufacturers surveyed as part of our study indicated that if compliance costs were reduced permanently and significantly, they would invest the savings on hiring, increased salaries and wages, more research and development and/or capital investment. Regulations impose real costs that impact a company's bottom line, so it is extremely important that our regulatory system be transformed so that we are effectively protecting health and the environment while minimizing and seeking to eliminate unnecessary burdens. Despite the acknowledgment of lawmakers of the problems with our regulatory system, things are getting worse. Ninety-four percent of manufacturers surveyed said the regulatory burden has gotten higher in the past five years, with 72 percent reporting that the burden is "significantly higher."

Manufacturers, particularly small manufacturers, know very well the importance of allocating scarce resources effectively to achieve continued success, which includes increased pay and benefits for employees. Every dollar that a company spends on complying with an unnecessary and ineffective regulatory requirement is one less dollar that can be allocated toward new equipment or to expand employee pay and benefits. Government-imposed inefficiencies through poorly designed and inefficient regulations are more than numbers in an annual report. They are manifested in real costs borne by the men and women who work hard to provide for their families.

*b. Regulatory Environment and the Need for Reform*

Our regulatory system is in need of considerable improvement and reform. New regulations are too often poorly designed and analyzed and ineffectively achieve their benefits. They are often unnecessarily complex and duplicative of other mandates. Their critical inputs—scientific and other technical data—are sometimes unreliable and fail to account for significant uncertainties. Regulations are allowed to accumulate with no real incentives to evaluate existing requirements and improve effectiveness. In addition, regulations many times are one-size-fits-all without the needed sensitivity to their impact on small businesses. We can do better.

The complexity of rulemaking and its reliance on highly technical scientific information has only increased since the passage of the Administrative Procedure Act (APA) in 1946. Whereas independent regulatory agencies like the CPSC, the National Labor Relations Board and the Securities and Exchange Commission are not bound by Executive Branch orders, memorandum and guidance, these agencies are required to comply with the APA.

[2] NAM. *Holding Us Back: Regulation of the U.S. Manufacturing Sector.* January 2017. Retrieved from *http://www.nam.org/Data-and-Reports/Reports/Holding-Us-Back—Regulation-of-the-U-S—Manufacturing-Sector/*

As the modern Federal regulatory state expanded, Congress grew increasingly concerned about the significant regulatory and paperwork burdens imposed on the public, particularly small businesses. In September 1980, the Regulatory Flexibility Act (RFA) was signed into law and requires Federal agencies—including independent regulatory agencies—to thoughtfully consider small businesses and other small entities when developing regulations. If an agency determines that a regulation is likely to have a "significant economic impact on a substantial number of small entities," the agency must engage in additional analysis and seek less burdensome regulatory alternatives. In addition to requiring improved regulatory analysis to better determine the small entity impact, the RFA attempted to improve public participation in rulemaking by small businesses. It also requires agencies to publish an agenda semiannually, listing expected rulemakings that would impact small businesses and to conduct "look-back" reviews—required under Section 610 of the law—of regulations that affect small entities to identify rules in need of reform.

There have also been presidential directives aimed at improving the regulatory state. The NAM welcomed efforts by President Barack Obama to reduce regulatory burdens. The president signed executive orders, and the Office of Management and Budget (OMB) issued memoranda on the principles of sound rulemaking, considering the cumulative effects of regulations, strengthening the retrospective review process and promoting international regulatory cooperation. Executive Order 13563 affirmed the principles of sound rulemaking, and Executive Order 13579 strongly encouraged independent regulatory agencies like the CPSC to comply with those provisions. The former order states,

> Our regulatory system must protect public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. . . . It must measure, and seek to improve, the actual results of regulatory requirements.

Manufacturers and the general public agree with these principles and believe the regulatory system can be improved in a way that protects health and safety without compromising economic growth. Unfortunately, this initiative and others of past administrations have not yielded real cost reductions for manufacturers or other regulated entities.

Agencies are failing in their responsibility to conduct analysis that would better assist them in understanding the true benefits and costs of their rules and how to best achieve policy objectives. Despite existing statutory requirements and clear directives from the President to improve the quality of regulations, manufacturers face an increasingly inefficient and complex myriad of regulations that place unnecessary costs on the public.

*c. Improving Regulations Issued by the CPSC*

The president does not exercise similar authority over independent regulatory agencies like the CPSC as he does over other agencies within the executive branch. Independent agencies are not required to comply with the same regulatory principles outlined in executive orders and OMB guidance as Executive Branch agencies and often fail to conduct any analysis to determine expected benefits and costs.

Congress should require independent regulatory agencies to conduct robust cost-benefit analyses of their significant rules and subject their analysis to third-party review through the Office of Information and Regulatory Affairs (OIRA) or some other office. Congress should also confirm the President's authority over these agencies. If there is consensus that this process makes Executive Branch rules better, why would we not want to similarly improve the rules issued by independent regulatory agencies? Consistency across the government in regulatory procedures and analysis would only improve certainty and transparency of the process.

Independent regulatory agencies are required to comply with the RFA, but agencies are adept at utilizing loopholes in current law to escape many of the substantive requirements as Congress intended. Since independent regulatory agencies are not accountable to the OIRA nor do they participate in interagency review of their rules, accountability mechanisms to ensure Executive Branch agency compliance with the RFA do not exist for them. A stronger RFA is necessary because the courts are the only backstop to noncompliance by independent agencies. Congress should reform the RFA and close loopholes in the law so that agencies conduct robust analysis of their rules and issue more efficient and effective regulations.

## II. Regulatory Activity by the CPSC

The CPSC was created in 1972 with the enactment of the Consumer Product Safety Act (CPSA), which established the authority for the CPSC to regulate consumer products and pursue recalls. In the wake of intolerable lapses in children's product safety, the Consumer Product Safety Improvement Act (CPSIA) was passed in 2008, amending the CPSA and providing the agency additional regulatory and enforcement authority. The NAM supported the law and provisions that would give the CPSC more staff and financial resources to deal with the dramatic rise in imported consumer products and globalized supply chains.

Since the CPSC's creation, the private sector has worked hand-in-hand with the CPSC in protecting consumers. The founding principle of the CPSA makes clear that product safety is best achieved through a cooperative relationship with the private sector. Congress further asserted this principle when it amended the CPSC's governing statute through enactment of the CPSIA in 2008. Manufacturers and the CPSC have a shared commitment to product safety, and we firmly believe that any significant changes to policies and processes should be developed cooperatively as Congress intended. Unfortunately, the CPSC has engaged in a series of highly controversial rulemakings without engaging stakeholders and is evolving into a command-and-control regulatory agency, which is antithetical to the longstanding intent of Congress.

The success of the U.S. regulatory system for protecting consumers relies heavily on a cooperative relationship between the CPSC and all stakeholders, including manufacturers, retailers, importers, consumer groups and others. Over the past decade, the CPSC has seemingly ignored this important principle. It has unilaterally issued proposed regulations that exceed its statutory authority or are in violation of the CPSA. This aggressive agenda diverts important resources that should be devoted to protecting consumers. Meanwhile, the CPSC has all but ignored a congressional mandate [3] that it reduce the regulatory burdens imposed by third-party testing.

### *a. Failure to Engage Stakeholders*

Manufacturers of consumer products and other stakeholders support a collaborative effort between the CPSC and industry to promote product safety for consumers. This is particularly important as the agency considers significant changes in its longstanding policies on engaging with stakeholders on important activities, such as voluntary recalls, corrective action plans (CAPs), the public disclosure of information and import risk assessment. However, many of these regulatory proposals are drafted behind closed doors with no input from manufacturers, retailers, importers or other impacted entities.

Over the past three and a half years, the NAM, other interested parties and Congress have requested that the CPSC improve its engagement with stakeholders. These requests have been ignored or dismissed. In July 2016, the House-passed Financial Services and General Government Appropriations Act for Fiscal Year 2017 (H.R. 5485) would have dedicated $1 million of the CPSC's funding toward the creation of advisory committees with the goal of improving stakeholder participation in key policy decisions made by the CPSC. Though the provision was not included in the continuing resolution passed at the end of the previous session of Congress, the intent of Congress is clear: engagement with stakeholders is critical for the agency to understand complex international supply chains and consumer behavior. Instead of issuing rulings and policies from an isolated ivory tower, such engagement would enable the agency to formulate regulations that will quickly, effectively and efficiently enhance product safety without unduly burdening the regulated community. Transparency is critical for the regulated community and consumer advocates to understand the CPSC's expectations and priorities.

### *b. Proposed Rule on Voluntary Recalls*

Since enactment of the CPSIA, the most controversial regulation put forth by the CPSC arguably has been a proposed rule known as the "voluntary recall rule." Published in November 2013, the proposed rule [4] would negatively impact the CPSC's voluntary recall process and would place significant burdens on manufacturers and retailers of consumer products. The proposed rule, among other things, would make voluntary CAPs and voluntary recalls legally binding, remove a company's ability to disclaim admission of a defect or potential hazard and empower CPSC staff to include compliance programs in CAPs. If finalized, firms could face increased enforcement jeopardy and legal consequences in product liability, other commercial

[3] Pub. Law 112–28
[4] 78 Fed. Reg. 69793

contexts or a civil penalty matter. The rule would also violate protections guaranteed under the First Amendment by prohibiting firms from making truthful public statements expressing their views regarding the existence of a safety defect. From a policy standpoint, the paramount concern of manufacturers, retailers and others is that the rule would harm the CPSC's and industry's efforts to protect consumers effectively. Nearly all public comments to the proposed rule expressed this concern.

Instead of enhancing consumer protections, the proposed changes would extend the period of negotiation between a subject firm and CPSC staff, slowing down or impeding agreement on CAPs. Any delays in implementing a recall can increase the risk to consumers. The proposal also seriously threatens the Fast-Track recall program—an expedited recall process which the agency touts as a model of good governance. The concern is so significant that former Democratic CPSC Chair Ann Brown and Senators Angus King (I–ME), Bob Casey (D–PA) and Pat Toomey (R–PA) submitted letters expressing concern over the proposed rule and the impact it would have on the Fast-Track program.

The CPSC developed this monumental proposed change to the voluntary recall process without any input from stakeholders and to date has not sought any stakeholder feedback outside of the 2013 notice. The CPSC also has rebuffed repeated requests by lawmakers and interested parties, including the NAM, to engage stakeholders on ways to improve recall effectiveness and the voluntary recall process. Common sense dictates that the CPSC, at a minimum, should participate in a constructive dialogue with industry partners who are primarily responsible for conducting recalls.

The CPSC also conducted no regulatory analysis to assist it in developing a regulatory proposal that would effectively meet its goal of improving recall effectiveness. To the contrary, the NAM and nearly every other commenter discussed ways in which the proposed rule would actually harm the CPSC's and industry's abilities to conduct recalls effectively. In its notice of proposed rulemaking, the CPSC provides no data or information supporting its conclusion that the proposal is necessary or that there is a problem that the CPSC does not already have the tools to address. Interestingly, the CPSC asserts that it is not required to comply with the procedural requirements of the APA and the analytical requirements of the RFA because it determined its proposal is an "interpretative rule." However, the substantive provisions of the proposed regulation would place new obligations on companies, implement fundamental changes of longstanding practice and processes, establish new rights and responsibilities on regulated entities and legally bind subject firms in ways not currently provided. Moreover, because the proposed rule would be the basis for enforcement decisions and would broaden existing legal requirements, the CPSC should comply with both the rulemaking procedures established by the APA for substantive rules and the analytical requirements of the RFA.

CPSC Chairman Elliot Kaye has repeatedly stated that the rule is not safety-focused in his opinion and was not a priority. In an October 2015 hearing before the Commerce Committee's Consumer Protection, Product Safety, Insurance and Data Security Subcommittee, Chairman Kaye committed to Subcommittee Chairman Moran that he would keep the committee fully informed if there were any changes in his intentions to move forward on this proposal. Manufacturers and others were then alarmed when the CPSC announced at an August 31, 2016, decisional meeting that it intended to consider a final version of this proposal. There had been no indication—and no outreach to stakeholders—that the CPSC would consider a final rule.

As the CPSC continues with this rulemaking, it is ignoring clear direction from Congress that the rule be withdrawn. The joint explanatory statement for the FY 2015 omnibus appropriations bill (H.R. 83) clearly expressed bipartisan opposition to the proposed rule. In recent years, the House has twice passed amendments to the Financial Services and General Government funding bills, which would prevent the agency from proceeding on this rule.

The NAM stands united with private-sector stakeholders in urging the CPSC to withdraw this misguided proposal and work cooperatively with interested parties to develop strategies that will improve the effectiveness of recalls and accomplish the desired policy objectives. We further ask the CPSC to formalize stakeholder engagement on this and other important issues. Through formal engagement with manufacturers, retailers, consumer advocacy organizations and others, the CPSC can better maximize the effectiveness of product safety programs and minimize unnecessary burdens on both regulated entities and CPSC staff. It will also provide the CPSC with additional resources for responding to emerging issues, whether they be product-focused or a newly identified need to modify CPSC policies and processes.

*c. Proposed Mandatory Standards for Table Saws*

The CPSC will soon vote on a motion to issue proposed mandatory safety standards for table saws. The briefing package [5] was made publicly available on January 18. The CPSC initiated the rulemaking in October 2011 with an advance notice of proposed rulemaking,[6] which followed a 2006 CPSC vote granting a petition to impose mandatory standards that could be achieved only through the use of one claimed patented technology owned by the person who submitted the original petition in 2003.

If the CPSC were to proceed with this rulemaking, it would create a government-mandated monopoly run by the petitioner, who possesses more than 100 granted patents related to the technology that the CPSC would mandate. Currently, the most popular table saw models can be purchased for a couple hundred dollars. In its briefing package, the CPSC acknowledges that the least expensive model on the market employing the technology it would mandate is $1,300, contradicting its own claim that the least expensive table saws under a mandatory standard would increase in price by only $300. Table saws incorporating the patented technology would increase in price by approximately $1,000—four times the average price and an $875 million impact only for the benchtop category of table saws. This would essentially eliminate or ban cost-effective models from the market, significantly harming businesses that use the machines. Such a burden is not justifiable for do-it-yourself or small contractor customers.

The CPSA requires the CPSC to conduct regulatory analysis, including potential costs and benefits when issuing a proposed rule.[7] The analysis relies on inadequate and outdated data as justification for its monopoly-setting standard. For example, the CPSC's estimate for anticipated increases in the retail costs for table saws is based on information provided by the petitioner and owner of the patented technology the CPSC seeks to mandate. This rulemaking illustrates a trend at the agency where the CPSC has failed to conduct adequate cost-benefit analyses with its rulemakings and imposes prohibitive costs on manufacturers and consumers without accounting for the actual risks associated with the products.

Regulation should not be used to advantage one technology or one company over another. The CPSA dictates that the CPSC can issue a mandatory standard only on a finding that an existing voluntary standard would not prevent or adequately reduce the unreasonable risk of injury in a manner less burdensome than the proposed CPSC mandatory standard. If the CPSC proceeds with a mandatory standard, such action would undermine the industry's incentive to develop new alternative table saw safety technology, cause companies to exit the table saw market and impose unnecessary and significantly increased costs on consumers.

*d. Proposed Rule on the Public Disclosure of Information, Section 6(b)*

In February 2014, the CPSC issued a proposed interpretative rule that would significantly alter its policy on publicly disclosing information on companies and products. Section 6(b) of the CPSA requires the CPSC to "take reasonable steps to assure" any disclosure of information relating to a consumer product safety incident is accurate and fair. The congressionally mandated protections of Section 6(b) are critical as they encourage companies to report potential product hazards and defects voluntarily and work cooperatively with the CPSC. With enactment of the CPSIA in 2008 and H.R. 2715 as recently as 2012, Congress chose to preserve Section 6(b) and the protections it provides manufacturers.

The proposed rule would undermine a successful and cooperative process that has been in place for more than 30 years. The CPSC's proposal is not aligned with the intent of Section 6(b) and would limit the protections afforded to manufacturers when the CPSC publicly discloses information. If finalized, the rule would significantly narrow the information that is subject to Section 6(b) requirements and permit the CPSC to not notify firms when releasing information that is "substantially the same as" information it previously disclosed. A company also would not be allowed to request notification that the CPSC plans to subsequently disclose similar information. The rule would also eliminate protections for the disclosure of information subject to attorney–client privilege and limit a company's ability to have comments withheld. Importantly, the CPSC is proposing to exempt from Section 6(b) information that is publicly available, including information that is available on the internet.

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[5] CPSC Briefing Package. "Proposed Rule: Safety Standard Addressing Blade-Contact Injuries on Table Saws." January 2017. Retrieved from *https://www.cpsc.gov/Newsroom/FOIA/ReportList?field_nfr_type_value=commission*

[6] 76 Fed. Reg. 62678

[7] 15 U.S.C. 2058(c)(1)

As with the voluntary recall rule, the CPSC developed its proposed changes to Section 6(b) behind closed doors with absolutely no input from the stakeholders who would be directly impacted by the rule. We strongly urge the CPSC to withdraw this rule. Yet, the CPSC announced this past August its desire to finalize the rule. We believe that the private sector and the CPSC share a common goal to better protect consumers and lessen the burdens associated with the Section 6(b) process on CPSC staff, while ensuring the CPSC complies with the statutory requirements that information it releases is fair and accurate. Without stakeholder engagement, the CPSC's advancement of this rule could chill the strong and cooperative relationship it has with businesses—a relationship that is a fundamental element of the CPSC's and industry's success in protecting consumers from potentially hazardous products.

*e. Proposed Mandatory Standard for Recreational Off-Highway Vehicles (ROVs)*

In October 2014, the CPSC proposed a mandatory standard for ROVs despite admitting that it had no evidence showing its proposed changes would improve safety. If the CPSC continues with its rulemaking, it would be a precedent-setting maneuver in that it is forcing the industry to accept unproven changes under the threat of a mandatory standard rulemaking. A mandatory rule would also violate the CPSA requirement that the CPSC defer to voluntary standards.[8]

The industry has recently updated voluntary consensus standards to address many of the safety concerns that have been raised by CPSC staff over the past few years. The ROV industry is highly innovative and employs extensive safety measures through advancements in research and technology. The industry uses engineering and the consideration of vehicle use (including driver preferences and the conditions in which vehicles are driven) to make ROVs the safest possible. If the CPSC finalizes its proposed rule, it would violate the CPSA by establishing a design mandate, directing companies on what features vehicles should have and how those vehicles should be manufactured.

On January 25, the CPSC voted against a motion to terminate the ROV rulemaking, despite the implementation of a robust new voluntary standard. The failure to terminate this rulemaking unmistakably conflicts with the CPSA's requirements that the CPSC defer to voluntary standards and terminate a rulemaking proceeding when voluntary standards would address concerns the CPSC may have.

*f. Proposed Rule on the Prohibition of Children's Toys and Child Care Articles Containing Specified Phthalates*

The CPSIA established the Chronic Hazard Advisory Panel (CHAP) to study the effects of all phthalates and phthalate alternatives used in children's toys and child care articles. The law[9] further directs the CPSC to issue a final rule based on the panel's findings and recommendations. The CHAP issued its report and recommendations in July 2014, more than three years after the statutory deadline. On December 30, 2014, the CPSC published a proposed rule to implement the CHAP's recommendations. The CHAP report relied on outdated data and was not subject to an open public comment period in accordance with guidelines set forth in the OMB's "Final Information Quality Bulletin for Peer Review" and was only subjected to a nonpublic peer review. The OMB bulletin establishes strict minimum requirements for the peer review of highly influential scientific assessments, including a requirement that an agency "make the draft scientific assessment available to the public for comment at the same time it is submitted for peer review . . . and sponsor a public meeting where oral presentations on scientific issues can be made to the peer reviewers by interested members of the public."

The need for more rigorous peer review is essential because the CPSC's proposed rule is predicated on a precedent-setting cumulative risk assessment used by the CHAP as it developed its recommendations. The CPSC should ensure that the data and analysis used to support regulatory activity complies with the OMB's and the CPSC's own information quality guidelines, which state that the CPSC will apply "risk assessment practices . . . that are widely accepted among domestic and international public health agencies." When misapplied within the regulatory process, this cumulative risk assessment methodology could have broad implications across different agencies and numerous regulatory programs and for all manufacturers of industrial chemicals and consumer products.

**III. Conclusion**

Chairman Thune, Ranking Member Nelson and members of the Committee, thank you for the opportunity to testify today and your attention to these issues. The

[8] 15 U.S.C. 2056(b)(1)
[9] 15 U.S.C. 2057c

CPSC's aggressive regulatory agenda would establish significant challenges in meeting the consumer protection objectives that manufacturers, retailers and others share with the CPSC. The CPSC should embrace the prospect of developing regulatory proposals cooperatively with impacted stakeholders, including manufacturers, retailers, consumer advocacy organizations and others.

We urge the CPSC to formalize proactive engagement with interested parties so that its commitment is realized in actions and not just words. We are committed to working together with the CPSC and other stakeholders to advance consumer protections and improve its processes.

The CHAIRMAN. Thank you, Mr. Palmieri.

Mr. Shapiro.

**STATEMENT OF GARY SHAPIRO, PRESIDENT AND CEO, CONSUMER TECHNOLOGY ASSOCIATION**

Mr. SHAPIRO. Thank you, Chairman Thune and Ranking Member Nelson, for the opportunity to testify about how regulation stifles innovation. Also, thank you both for sponsoring the MOBILE NOW Act, which focuses directly on broadband and innovation.

The Consumer Technology Association represents over 2,200 companies across the U.S. consumer technology industry. We also own and produce the world's largest business event, the CES, held each January in Las Vegas. Our mission is simple, to promote innovation.

We are the most innovative nation on Earth, but I believe that the changes in technology benefiting mankind are actually just beginning. And it's not just the big flashy companies; over 80 percent of our members are small businesses and startups. For them, the cost of overregulation may mean the difference between survival and failure.

The cost and complexity of following Federal rules slows product launches, hurts the hiring of Americans, and is a drag on innovation. It has created a lawyer tax on American companies. Simply put, every dollar a company spends hiring lawyers is a dollar not spent hiring productive Americans. In fact, according to the Competitive Enterprise Institute, since 2009, Federal regulators have issued more than 20,000 rules, costing at least $100 billion annually in new compliance costs.

Every regulator means well, but many of the regulations have unintended consequences. For example, rules barring unpaid student internships, rules encouraging promiscuous student loans for any course of study, rules mandating health care for any hire working more than a few months, and rules requiring overtime for anyone making less than $47,000 have combined to dampen prospects for recent college graduates and probably contributed to the fact that over half of the student loans, 3 years out of college, are not even being timely repaid.

While a Federal court recently struck down the overtime rule, just planning for it frustrated entrepreneurs who work day and night to get their products to market. They don't understand why the Federal Government insists they pay overtime to young professionals eager to get experience or take a risk with their friends on a new venture.

And Federal mandates don't just impact the labor market, they also limit the ability of companies of all sizes to develop new products. Take self-driving cars. We're engaged with the DOT and

NHTSA on the Federal Automated Vehicles Policy, and we're very actually encouraged by their focus on a national policy and the safety of self-driving vehicles, which allows innovation and competition.

While NHTSA has been forward-looking on self-driving cars, it has totally overstepped its authority by issuing guidelines seeking to regulate every device and application that a driver can simply carry into the car. By issuing guidelines on how smartphones and tablets and even wearable fitness devices function near a driver, NHTSA has exceeded its authority and invited uncertainty in litigation.

There are positive models. One bipartisan model where reason prevails has been the Federal Trade Commission. Acting FTC Chairman Maureen Ohlhausen describes her approach as follows: first, approach issues with regulatory humility, recognizing the fundamental limits of regulation; second, prioritize action to resolve areas of real consumer harm; and, third, use the appropriate tools.

Chairman Thune, you've spoken about updating the communications laws, and we look forward to working closer with you. We also look forward to working with Chairman Pai as we look at the 1996 Act and revise it. That Act encourages new technology and innovation.

Now, a few weeks ago at CES in Las Vegas, we saw developments in health care, security, food production, and education, which will improve lives, and they all rely on artificial intelligence, deep data, and Internet connectivity. The Internet of Things is actually what describes how incredibly low-cost sensors connected to the Internet will change how we manufacture, travel, learn, stay healthy, become educated, and even our safety, but a 2015 Politico investigation revealed that IoT neighbor technologies occurred by at least 2 dozen Federal agencies and more than 30 congressional committees. We welcome the efforts of Senators Fischer, Booker, and Schatz on the DIGIT Act, which creates greater coordination with the U.S. Government on IoT.

Regulation is a blunt and static instrument. Unnecessary mandates not only waste taxpayer money, they impose burdens that slow innovation, stifle creativity, reduce consumer choice, and ultimately threaten jobs and our economy. And, I give President Trump credit for highlighting that business leaders have an ethical obligation to our country that transcends the morass of highly detailed rules every U.S. business must follow, but by removing unjustified rules and encouraging reasonable bipartisan consumer protections and competition will free up companies to spend less on lawyers and more on hiring Americans.

Another approach, welcomed by the FTC, is for industry to set guidelines and standards so that government does not intervene. For example, we certify installers of car technology, and we have developed privacy guidelines for fitness wearable device makers. Government should step in only if business fails to or if it sets unfair barriers to industry.

Our industry supports more than 15 million American jobs, and we do what we do best, develop new technologies that improve lives when people with big dreams have the flexibility to innovate.

We look forward to working with you to ensure the U.S. remains a world technology and innovation leader.

[The prepared statement of Mr. Shapiro follows:]

PREPARED STATEMENT OF GARY SHAPIRO, PRESIDENT AND CEO, CONSUMER TECHNOLOGY ASSOCIATION

**About CTA and CES**

Thank you for Chairman Thune and Ranking Member Nelson for the opportunity to testify about how over-regulation stifles innovation. I am Gary Shapiro, President and CEO of the Consumer Technology Association (CTA)™.

CTA represents more than 2,200 member companies who comprise the $292 billion U.S. consumer technology industry, which supports more than 15 million American jobs. We work to advance public policy that fosters innovation, advances competitiveness and promotes job and business creation. Our members touch every aspect of tech and innovation including traditional consumer technology companies, sharing economy and Internet companies, and auto manufacturers and suppliers. Eighty percent of our member companies are small businesses and startups. For these businesses, the cost of over-regulation means the difference between survival and failure. In fact, CTA recently surveyed our member companies in November on public policy priorities and over-regulation was raised as one of their primary business challenges in growing jobs and continuing innovation in the United States.

CTA also owns and produces CES®—the world's largest business event, held every January in Las Vegas. At CES 2017, less than one month ago, we celebrated 50 years as the largest global gathering of innovation and connectivity. With more than 3,800 exhibiting companies stretching across more than 2.6 million net square feet, this year's CES showcased how our industry is bettering the world through connectivity and innovation, touching every facet of our lives—and the lives of those around the world.

I've been at the helm of CTA for more than 20 years, and from this vantage point, I have had the good fortune of having a front row seat each day as our members develop and introduce innovative and life-changing products and services, create jobs and grow our economy. But tech companies—startups and Fortune 500s alike—need flexibility to innovate.

**Examples of Over-regulation**

The simple fact is, over-regulation stifles growth and harms innovation. Since 2009, Federal regulators have issued 20,642 regulations, increasing regulatory compliance costs by more than $100 billion annually. Independent estimates suggest total regulatory costs exceed $2 trillion annually, with small businesses shouldering a disproportionate share of the burden—36 percent more than the regulatory cost facing large firms.

*Overtime Rule:* The Obama Administration's overtime rule, which would have doubled the overtime floor from $23,660 to $47,476 per year—is a prime example of good policy intentions with harmful regulatory results. Increasing the minimum exemption eligibility for white-collar employees may seem beneficial to workers. However, the consequences would have been devastating for small businesses, startups and the people they want to hire.

The Department of Labor's proposed rule disregarded the realities of running a small business or startup and ignored how the rule would choke U.S. innovation. Startups—especially tech firms—are a primary source of job creation in the U.S., but most of them cannot pay the higher salaries of more-established companies. The one-size-fits-all mandate left virtually no flexibility for startups—especially technology companies—that don't rely on a traditional timecard pay structure. Fortunately, a Federal court judge granted a preliminary injunction of the entire rule prior to its December 1 effective date.

The overtime rule is not an exception. Over the last eight years we've seen regulatory overreach on everything from student loans to banning unpaid internships keeping useful work experiences from those seeking to learn. These new rules, combined with the rising costs of the Affordable Care Act, have contributed to bleak training and job prospects, particularly in the tech workforce.

*Conflict Minerals:* Another well-intended law with a tremendously adverse impact is the Conflict Minerals Provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. In an attempt to improve human rights in one African nation (the Democratic Republic of the Congo), the provision requires that any publicly listed company using a variety of raw materials comply with a series of onerous and costly certification and auditing mandates. Oversight of this major new obligation was delegated to the Securities and Exchange Commission, an already-overburdened agency with no experience overseeing manufacturing or import-exports. The National Association of Manufacturers reports compliance costs to the U.S. economy between $9 and $16 billion each year. Ironically, by incentivizing manufacturers to avoid minerals from the Congo, the Conflict Minerals rule has apparently harmed the Congolese economy and worsened the humanitarian situation.

**CTA Regulatory Engagement with Departments and Agencies Under Jurisdiction of Senate Commerce, Space, and Transportation Committee**

CTA works closely with a number departments and regulatory agencies under the jurisdiction of the Senate Commerce, Space, and Transportation Committee to advance pro-innovation policy and reduce regulatory barriers to entry. We also work with other departments and agencies not under the Committee's jurisdiction which present regulatory burdens in need of attention. While we have worked successfully with many departments and agencies to advance innovation, I appreciate the opportunity to highlight particular instances of over-regulation and urge regulatory humility on others.

*U.S. Department of Transportation, NHTSA—Federal Automated Vehicles Policy*

CTA represents a broad cross-section of the vehicle technology ecosystem including mapping companies, suppliers, automakers, aftermarket suppliers and installers. As vehicle and self-driving technology continue to evolve, automakers, technology companies and startups are partnering on new approaches to vehicle and transportation network design. At CES® 2017, our members showcased the latest transportation technology that will increase safety and accessibility, positively disrupt legacy markets, create new employment opportunities, and revolutionize the way we do business and operate on-the-go. We are actively engaged with the Department of Transportation and the National Highway Traffic Safety Administration (NHTSA) on its Federal Automated Vehicles Policy and are encouraged by its recognition of the need for consistency for self-driving vehicles and the importance of flexibility for the industry to continue to innovate.

*U.S. Department of Transportation, NHTSA—Phase II Driver Distraction Guidelines*

Without question, distracted driving is unsafe and unacceptable. A driver's highest priority must be maintaining safe control of the vehicle at all times. CTA has been engaged with NHTSA on its Phase II voluntary guidelines to address driver distraction. Our member companies have created driver-assist technologies and apps that reduce or eliminate distractions such as drowsiness, in-car adjustments or texting while driving. Other innovations like Bluetooth solutions and do-not-disturb apps assist in initiating corrective actions when drivers lose focus. In addition to innovations within the car environment, the technology industry has made considerable strides to raise awareness of the dangers of distracted driving through initiatives and campaigns such as "It Can Wait." More, we are working to advance the ultimate solution to distracted driving—the rapid rollout of self-driving cars.

CTA shares NHTSA's concerns about the hazards of distracted driving. However, we believe the Phase II Guidelines take the wrong approach to technology, both in substance and by impermissibly reaching beyond NHTSA's statutory authority under the National Traffic and Motor Vehicle Safety Act ("Safety Act"). NHTSA does not have the authority to dictate the design of smartphone apps and other devices used in cars—its legal jurisdiction begins and ends with motor vehicle equipment. This regulatory overreach could thwart innovative safety solutions from ever coming to market. NHTSA's regulatory premise is dangerously expansive, representing the worst of government overreach. Under NHTSA's vision, it could have the effect of influencing the design of technology products down to the fitness tracker worn on a driver. Such a vast and extreme expansion of NHTSA's authority, if it were to happen, would have to be explicitly granted by Congress.

Further, NHTSA justifies this overreach by arguing that the proposed guidelines "are voluntary and nonbinding, they will not require action of any kind, and for that reason they will not confer benefits or impose costs." This may be true in a technical sense; however, in practice the existence of Federal guidelines creates tremendous pressure for industry to adhere to them. NHTSA's intention to monitor compliance with the guidelines may create a particular kind of pressure for industry to adhere, rather than risk the appearance of disagreement with or disregard for the agency's perspective. The bottom line is agency pronouncements have the power to induce or coerce industry action; if they did not, then there would be no point to the agency's lengthy and involved process of developing the proposed guidelines.

*Federal Aviation Administration—Unmanned Aircraft Systems (Drones)*

I would like to highlight the positive example the Federal Aviation Administration has set in handling the emerging drone technology industry. FAA's early and ongoing engagement with the drone industry and user community is to be commended, and I hope, replicated by other departments and agencies approaching new industries. FAA reached out to the emerging industry early, appointing staff to engage directly and keeping the path of communication open. They solicit feedback from industry and stakeholders regularly, even appointing an advisory committee (the Drone Advisory Committee) to assist the agency with key issues. However, even with this orientation and approach, regulatory flexibility for FAA is needed as they still must work through a regulatory regime established long before consumer and commercial drones took to the air.

*Federal Communications Commission—Broadband Privacy Rules*

Late last year and over many objections, the Federal Communications Commission (FCC) adopted privacy rules for broadband and telecommunications services related to its broader Open Internet Order. Unfortunately, in adopting new broadband privacy rules the FCC took actions that threaten the current and future viability of and the innovations that have come from a vibrant internet. While the rules only apply to Internet service providers, it may establishes a dangerous precedent for the entire Internet ecosystem. CTA, along with Internet and telecommunications entities, petitioned the FCC to reconsider its rules given they substantially differ from the time-tested and successful Federal Trade Commission (FTC) framework and fail to ensure a coherent and consistent approach to privacy. As an example, the FCC broadband privacy rules classify Web-browsing and application (app) usage information that carriers currently collect as sensitive and thus subject to opt-in consent for most usage and disclosures. This threatens to undermine the innovation and competition within the vibrant Internet ecosystem which has greatly benefited consumers and the U.S. economy. Even more, the FTC—the primary government agency responsible for privacy—provided expert recommendations urging a sensitivity-based approach to information consistent with the FTC's current and successful privacy regime that the FCC failed to adopt. The FCC also disregarded the FTC's concerns about "notice fatigue" of receiving too many notices resulting in consumers ignoring important notices. The result is broad regulatory overreach over the Internet by the FCC that creates legal uncertainty compared to the more studied consultative approach of the FTC which looks at real harm to real Americans.

CTA has joined with a number of telecommunications, technology and Internet companies and organizations in support of congressional efforts to use the congressional review act to vitiate the FCC's broadband privacy rules.

CTA continues to believe that an "actual harm"-based approach toward regulation is more effective in protecting consumers, rather than the ex ante regulations that the FCC has more recently favored. Further, in the words of Acting FTC Chairman Maureen Ohlhausen, it is imperative that regulators practice "regulatory humility" when doing their jobs. As Commissioner Ohlhausen has so aptly stated: "First, approach issues with regulatory humility, recognizing the fundamental limits of regulation. Second, prioritize action to resolve areas of real consumer harm. Third, use the appropriate tools." I agree with Acting FTC Chairman Ohlhausen's view that "these principles apply to regulation generally, but that they are particularly critical for technology or other fast-moving industries."

*Federal Communications Commission—Communications Act Rewrite*

Chairman Thune has indicated the importance of updating our communications laws, and we look forward to working closely with the Senate Commerce Committee to advance communications policy that advances innovation and doesn't stifle the next wave of technology and Internet company founders and application developers. Twenty years after it became law, the 1996 Telecom Act still helps encourage new technology and innovation. As I said at the time, the Act would aid our successful transition to HDTV, move in the right direction on spectrum and enable flexibility in product offering and consumer choice. In the last two decades, the Act has not hindered companies from creating new products and services, and thanks to the internet, new services and business models have benefitted the American people.

As we seek to improve upon the 1996 Telecom Act, we welcome the opportunity to ensure that any updates continue to enable regulatory flexibility. We also look forward to working with FCC Chairman Ajit Pai to ensure that the commission is focused on regulations that promote innovation and flexibility.

*Department of Commerce, NTIA, and NIST—The Internet of Things (IoT)*

This year's CES showcased the power of innovation and connectivity, and how it's changing our lives for the better. Whether it's called the Internet of Things, the Connected World, or the Internet of Everything, this rapidly expanding connectivity among our everyday devices is improving our efficiency, our sustainability and the way we interact with people. This connectivity will save consumers time and money, drive economic growth and enhance the United States' role as a global leader in technology if we continue to exercise regulatory humility and not curb current and future innovations.

CTA recently released a White Paper, "Internet of Things: A Framework for the Next Administration" in which we addressed both the opportunities and challenges of IoT consumer applications, and address ways policymakers can encourage and support their growth.

The opportunities and benefits of the IoT are clear. In modernizing our homes, we'll be able to monitor systems to alert us to intruders, or if the family pet has wandered off. An app—designed with veterans in mind—can track the symptoms of post-traumatic stress disorder (PTSD) during sleep in order to wake PTSD sufferers out of their night terrors. Remote health monitoring devices can reduce the need for doctor's visits and allow us to care for our loved ones even if we're not there. Connected blood glucose meters can upload readings in real time to the cloud and provide diabetes patients with instant feedback. The IoT implemented In self-driving vehicles can expand mobility and independence for seniors and the visually-impaired, while improving safety for all. And connected cars with vehicle-to-vehicle sensors will improve real-time information on hazards ahead, enhancing safety.

A significant challenge presented by the IoT is the fragmented approach of Federal Government agencies toward its development. A 2015 *POLITICO* investigation revealed that "new networked-object technologies are covered by at least two dozen separate Federal agencies—from the Food and Drug Administration (FDA) to the NHTSA, from aviation to agriculture—and more than 30 different congressional committees."

We welcome the efforts of Senator Deb Fischer (R–NE), Senator Cory Booker (D–NJ), and Senator Brian Schatz (D–HI) on S.88, the Developing Innovation and Growing the Internet of Things (DIGIT Act) that seeks to create greater coordination within the U.S. Government. This bill would create a working group that would address challenges facing IoT, such as ensuring Federal agencies are prepared to adopt the IoT and identifying spectrum needs.

Government must allow consumers and the market to decide IoT winners and losers, rather than dictating outcomes itself. In this way, regulation is on its own a challenge spurred by rapid IoT developments. Government can serve as either an enabler or an inhibitor to achieving the IoT's promise. And it can be an unintentional inhibitor, chilling innovation, when it sends mixed messages through various government agencies engaging in uncoordinated oversight activities.

**Regulation and the Jobs of the Future**

As has happened since the industrial revolution, innovation is changing the structure and skills required for employment. For example, more Americans are now opting for independent and flexible work arrangements. This choice is made possible by online platforms that allow individuals to be entrepreneurs using resources they own. These new employment options should be embraced by Congress, and we must ensure that our health care and employment benefits policies reflect the realities of the new employment marketplace. What we should not do is attempt via regulation to shoehorn these new models into regulations designed for employment structures of the past.

Disruption by its very nature is unsettling to the status quo and incumbent players. At CTA we embrace disruption and support disruptive companies through our Disruptive Innovation Council. The Council includes companies that were not household names five years ago, but are now dominating their respective industries and creating new economic opportunities and solutions to a variety of challenges across the country.

Regulation can often be used by incumbent players to protect their business models. We've seen this activity in states and municipalities, where policymakers have gone after ridesharing and home-sharing companies in an attempt to protect incumbent competitors, but instead have artificially limited consumer choice and closed off new job prospects for sharing economy workers. Innovation will continue to create new economic possibilities, and inevitably will create some challenges.

More, many of these new technologies allow users and providers to rate each other. For example, a potential ride-service user can see how previous riders have rated the driver, and the driver can see a similar rating for the passenger. Based on this information, both participants can decide whether they wish to continue the transaction or not. This obviates one of the key "consumer protection" rationales for regulation, where the government was required to guarantee the quality and integrity of market participants.

Rather than reacting to any challenges with restrictive regulation, government should exercise regulatory humility to work with industry to make sure Americans across the country are best able to take advantage of the opportunities created by new technologies.

**Conclusion**

Tech is a major driver of U.S. jobs and economic activity. Our industry directly and indirectly accounts for 10 percent of our country's gross domestic product. In 2015 alone, the tech sector generated $413 billion in taxes, created $3.5 trillion in economic output and supported 15.3 million U.S. jobs.

More, technology is improving lives and transforming our society in a positive way. Self-driving cars will soon drastically reduce the number of Americans who perish tragically every year on our Nation's highways. Sensors will enable our cities to efficiently manage energy usage, reducing carbon emissions and making our environment cleaner. New medical advances promise to revolutionize the detection and treatment of cancer and other diseases.

Americans like, trust and eagerly adopt our industry's products and services. Indeed, our members are at or near the top of virtually every list of America's most trusted companies. The technology business is uniquely dynamic and fiercely competitive. Companies rise to the top only to be quickly displaced. If users judge that a company fails to meet expectations—by, for example, failing to adequately safeguard consumer data—the consumer response is swift and severe. The powerful incentive that ensures our members meet consumer needs isn't regulation, but the nature of the innovation marketplace itself.

Regulation is a blunt and static instrument. Unnecessary mandates not only waste taxpayer money—they impose burdens that slow innovation, stifle creativity, reduce consumers' choices and ultimately threaten jobs and the economy. By addressing new technologies with a smart, flexible and light-touch regulatory approach, Congress and the administration can allow businesses leaders to invest time and resources into growing their companies and creating high paying new jobs.

Our industry does what it does best—empower entrepreneurs, grow companies and improve lives—when people with big dreams have the flexibility to innovate. We look forward to working with you to ensure that the United States remains the world's technology leader.

The CHAIRMAN. Thank you, Mr. Shapiro.

Mr. White.

## STATEMENT OF ADAM J. WHITE, RESEARCH FELLOW, HOOVER INSTITUTION

Mr. WHITE. Chairman Thune, Ranking Member Nelson, and other Members of the Committee, thank you for inviting me to testify today on this issue of profound national importance. The modern administrative state's ever-growing burdens on the American economy have been the focus of serious national debate in agency proceedings, on the campaign trail, and even in the Supreme Court. But it is crucial for these issues to be discussed here in the first branch, for Congress is ultimately responsible for establishing the agencies, for empowering and funding them, and, when necessary, for modernizing and reforming them. And today, reform is badly needed.

As Chief Justice Roberts recently observed, "[t]he administrative state wields vast power that touches almost every aspect of daily life . . . The Framers could hardly have envisioned today's vast and varied Federal bureaucracy and the authority that administrative agencies now hold over our economic, social, and political activities. . . . The administrative state, with its reams of regulations, would leave them, the Framers, rubbing their eyes."

In other words, the present crisis is not just a failure of public administration; rather, the modern administrative state reflects a profound failure of Republican self-government. And, as I note in my written testimony, the burdens of this failure fall more heavily on some people and businesses than others. Big businesses can afford armies of lawyers, lobbyists, and compliance officers; small businesses only wish they could.

As one prominent CEO remarked just a few years ago, a flood of regulatory requirements becomes, in his word, the moat that protects the biggest companies from new competitors. Please, I urge you, drain that moat. While our country needs big and small businesses alike, we especially need small businesses to fuel the American economic recovery.

With that in mind, my written testimony offers three reforms I hope you'll consider.

First, Congress needs to reform and modernize the statutes that create, empower, and limit agencies. Many of them, like the FCC, operate under antiquated statutes enacted decades and decades ago. They need to be reformed and modernized to reflect current circumstances and Congress's modern legislative intentions.

Second, Congress should require agencies to look back at their old regulations. Specifically, agencies should look back at the analyses and predictions that they used to justify regulations in the first place, to see what predictions proved right and which proved wrong. Only when agencies confront their own failures and successes will they begin to approach future rulemakings with a truly open mind and modesty.

Finally, Congress should require agencies to modernize their compliance frameworks, to rely more effectively on modern technology, to minimize compliance burdens on both the public and the agencies.

Let me close with this: opponents of regulatory reform often complain that Congress should not modernize the statute's governing agencies because this would burden the agencies' own freedom and discretion. Those are important concerns, but I urge you to also have the same concerns for the burdens and limits that agencies themselves put on American people and businesses.

Perhaps the biggest cost of overregulation is the opportunity cost, the economic growth that is stifled, the new technologies that would have improved or saved lives, but are never invented. You can't photograph these lost opportunities, you can't describe them, but they are costs all the same.

I'm not opposed to regulations or to agencies, but just as we count on agencies to regulate us in the public interest, we need Congress to regulate the regulators in the public interest. In carrying out that responsibility, Congress should ignore legal fictions and long-outdated notions of what the administrative state was 70 years ago. Instead, Congress must grapple with today's administrative reality.

Thank you.

[The prepared statement of Mr. White follows:]

PREPARED STATEMENT OF ADAM J. WHITE, HOOVER INSTITUTION [1]

Chairman Thune, Ranking Member Nelson, and other members of the Committee, thank you for inviting me to testify today on an issue of such immediate national importance: the modern administrative state's heavy burdens on the American people and American businesses. This has been a subject of particularly intense national debate in recent years, in a variety of forums: in Congress; in agency proceedings; on the presidential campaign trail; and even in the Supreme Court and other Federal courts.

Indeed, this problem was diagnosed candidly by President Obama just six years ago, in his 2011 executive order directing agencies to reduce their existing regulatory burdens. "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation," he said. To that end, agencies "must promote predictability and reduce uncertainty," and "must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends." And because "[s]ome sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping," President Obama further recognized that "[g]reater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules," and so he directed the agencies to promote "coordination, simplification, and harmonization," and to "identify, as appropriate, means to achieve regulatory goals that are designed to promote innovation." [2]

The failures and errors of today's administrative state are not simply problems of public administration. More fundamentally, today's administrative state is a profound failure of republican self-governance under a Constitution of limited Federal powers. As Chief Justice Roberts observed recently, "[t]he administrative state wields vast power and touches almost every aspect of daily life. . . . The Framers could hardly have envisioned today's vast and varied Federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities. . . . The administrative state with its reams of regulations would leave them rubbing their eyes." [3]

But however true and important such statements from the executive and judicial branches are, it is even more important for these matters to be discussed here in the First Branch—for Congress truly is the primary source of the modern administrative state. While the Executive Branch instills "energy" in the myriad Federal agencies, and the judicial branch's deferential habits have for decades facilitated the agencies' expansive assertions of power, the legislative branch bears ultimate responsibility for empowering agencies and, when necessary, reining them back in.

As the Supreme Court once observed, "an agency literally has no power to act . . . unless and until Congress confers power upon it." [4] Congress has conferred immense power on the agencies—and over the last century it has often legislated such grants in words so capacious that the agencies have found great success securing judicial deference to regulators' unabashed reach for even greater powers well beyond Congress's original intentions. By the same token, it must fall to Congress to reform those grants of power to reflect the modern administrative, legal, economic, social, and technological reality.

**I. Drain the "Moat": Modern Regulation Disproportionately Burdens Small Businesses**

Much of the cost of regulations—in billions or trillions of dollars, or in thousands of pages of regulations, or in countless man-hours dedicated to compliance with all of the regulations—is evident in myriad reports by scholars and policy analysts studying regulatory burdens,[5] and my fellow witnesses surely have examples from their own industries.

[1] Research Fellow, the Hoover Institution; Adjunct Professor, the Antonin Scalia Law School at George Mason University; Council Member, the ABA's Section of Administrative Law and Regulatory Practice. He is of counsel to the firm of Boyden Gray & Associates PLLC in a case involving the FCC's spectrum incentive auction, as described in this testimony. The views expressed in this testimony are mine alone, and are not offered on behalf of the Hoover Institution or any other organization.

[2] Exec. Order 13563 (Jan. 18, 2011).

[3] *City of Arlington, Tex.* v. *FCC,* 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quotation marks, brackets, and citations omitted).

[4] *La. Pub. Serv. Comm'n* v. *FCC,* 476 U.S. 355, 374 (1986).

[5] Some of these studies and reports, by the George Washington University Regulatory Studies Center, Mercatus Center, Competitive Enterprise Institute, Heritage Foundation, American Action Forum, are noted in the new book that I co-authored with Oren Cass and Kevin Kosar, titled *Policy Reforms for an Accountable Administrative State.* Published by *National Affairs,* the

But before turning my focus to some of the legal and policy reforms needed to alleviate those regulatory burdens, I think it is important to stress one of the most regrettable and regressive aspects of those burdens: they fall disproportionately on small businesses, precisely the businesses on whom the Nation is counting to spur a wide-reaching economic recovery.

I came to see this firsthand in my time as a practicing lawyer. Before joining the Hoover Institution, my law-firm colleagues and I were hired as co-counsel to a small community bank from Big Spring, Texas, in a Federal lawsuit challenging the Consumer Financial Protection Bureau's unprecedented (and, we argued, unconstitutional) structure.[6] We saw the immense costs that our client was bearing from the CFPB's aggressive regulatory agenda, but we also saw that bigger banks found the regulatory burdens much more sustainable. In fact, the biggest banks did not hesitate to *boast* that regulatory burdens were the big banks' competitive advantage. The CEO of JPMorgan Chase told analysts in 2013 that new financial regulations could serve as the "moat" that would make the industry (in the analysts' words) "more expensive and tend to make it tougher for smaller players to enter the market."[7] Goldman Sachs's CEO made the same point two years later, in 2015: "More intense regulatory and technology requirements have raised the barriers to entry higher than at any other time in modern history," he told an investor conference. "This is an expensive business to be in, if you don't have the market share in scale. Consider the numerous business exits that have been announced by our peers as they reassessed their competitive positioning and relative returns."[8]

And the facts suggest that the Jamie Dimon's and Lloyd Blankfein's predictions were well founded. As the Mercatus Center, AEI, and others have reported, the years since Dodd-Frank have witnessed significant consolidation in the banking industry, as community banks give up and merge.[9] While community banks and financial regulation fall outside of this Committee's jurisdiction, the lessons that that industry has learned from Dodd-Frank should inform regulatory reform across industries.

Another example I witnessed firsthand hits closer to this Committee's home. Before I joined the Hoover Institution, my law-firm colleagues and I became counsel to parties challenging the FCC's orders establishing the unprecedented broadcast spectrum incentive auction, in which the FCC would conduct a reverse auction to buy back spectrum usage rights from licensees, then reorganize the available spectrum, and finally auction spectrum usage rights back to the public for new non-television uses.[10] In the Spectrum Act, which Congress legislated to authorize to the FCC to undertake an incentive auction, Congress took care to expressly protect the spectrum usage rights of low-power television (LPTV) stations, which tend to broadcast for religious or ethnic communities that would otherwise go unserved by major broadcasters. Specifically, Congress provided in the Spectrum Act that "[n]othing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations."[11] But the FCC radically reinterpreted that provision to presume that LPTV stations actually have *no* spectrum usage rights that prevent the FCC from unilaterally taking away their licenses without compensation, even when the LPTV stations' broadcasts have not interfered with the broadcasts of other licensees; and the D.C. Circuit ultimately affirmed the FCC's interpretation of what

book is freely available online at *http://www.nationalaffairs.com/publications/page/regulation-policy-book.*

[6] The case, still pending in the U.S. District Court for the District of Columbia, is *State National Bank of Big Spring* v. *Lew.* In recent months the D.C. Circuit declared the CFPB's structure unconstitutional, in another case in which we participated, *PHH Corp.* v. *CFPB,* 839 F.3d 1 (D.C. Cir. 2016) (petition for reh'g *en banc* pending). While Boyden Gray & Associates continues to represent the plaintiffs, I am no longer counsel to the plaintiffs in that case or in any other challenge to the CFPB.

[7] Citi Research, *JP Morgan Chase & Co. (JPM): Meeting Notes w/CEO Jamie Dimon; Reiterate Buy and $53 Target as Solid Execution Drives Double-Digit Returns in 2013* (Feb. 3, 2013), quoted in John Carney, "Surprise! Dodd-Frank Helps JPMorgan Chase," *CNBC* (Feb. 4, 2014), at *http://www.cnbc.com/id/100431660; see also* Hugh Son, "Dimon Says Banks to Gain as Crisis-Era Rules Sting Poor," *Bloomberg* (Apr. 10, 2014), at *https://www.bloomberg.com/news/articles/2014-04-10/dimon-says-banks-to-gain-as-crisis-era-rules-sting-poor.*

[8] Editorial, "Regulation Is Good for Goldman," *Wall St. Journal* (Feb. 11, 2015), at *https://www.wsj.com/articles/regulation-is-good-for-goldman-1423700859.*

[9] Hester Peirce *et al., How Are Small Banks Faring Under Dodd-Frank?,* Mercatus Working Paper No. 14–05 (Feb. 2014), at *https://www.mercatus.org/system/files/Peirce_SmallBankSurvey_v1.pdf;* Tanya D. Marsh & Joseph W. Norman, AEI (May 2013), at *http://www.aei.org/wp-content/uploads/2013/05/-the-impact-of-doddfrank-on-community-banks_164334553537.pdf*

[10] I continue to be "of counsel" to Boyden Gray & Associates, and to the clients, in their ongoing challenge to the FCC's spectrum auction orders.

[11] 47 U.S.C. § 1452(b)(5).

the court held to be ambiguous statutory language.[12] That regrettable outcome—which threatens to force the shutdown of many LPTV stations, by the FCC's own admission[13]—highlights another major disadvantage that smaller companies face in the regulatory context: when Congress legislates in broad terms, it gives regulators much more discretion to impose their own policy preferences with the added benefit of significant judicial deference. In that context, small companies are left to fend for themselves in agency proceedings, where they enjoy far fewer of the resources and tools wielded by their much larger competitors.

Thus, for all of the talk today of "economic inequality"—of structural biases that systematically benefit the richest instead of the poorest—I would urge you to keep in mind the modern problem of "*regulatory inequality":* the structural biases that systematically benefit the biggest businesses, who fare much better before Federal regulators than their smaller competitors do. Because the prospects for economic recovery depend so heavily on the fate of small businesses, I urge you to keep in mind the need to focus especially on reforms to relax the significant regulatory burdens on small businesses—which requires, as I've noted here, fundamental reform of the modern administrative state. Let me now offer a few general suggestions for regulatory reform.

**II. Modernize the Statutes that Empower and Limit the Agencies**

As I noted above, one of the major challenges of modern administration is the fact that Congress long ago delegated regulatory power to administrative agencies in astonishingly broad terms. And today's administrative agencies rely on those open-ended statutory authorizations to justify regulatory programs far beyond anything that the past Congresses could have expected. The FCC, for example, formulated an unprecedented assertion of regulatory power over broadband Internet service providers—the Orwellian-named "Open Internet Order," often called "net neutrality"—based on not just the decades-old Telecommunications Act of 1996 but also the *eighty*-year-old Communications Act of 1934. Using old terms of art, such as "the public interest" or "public convenience and necessity," that long ago came unmoored from their originally understood meanings and contexts, the FCC and other agencies use these vague grants of power to impose the policies of their own choosing, and judicial deference to the agencies' interpretations of these "ambiguous" statutes gives the agencies immense discretion to do so. In that context, there is little or no law constraining the agencies or anchoring the agencies to Congress's original mandates—and thus the regulated public and companies must fend for themselves in the agency process.

While the agency process itself (under the antiquated Administrative Procedure Act of 1946) desperately needs reform,[14] the most important reform will be for Congress to modernize and reform the statutes delegating power to the agencies in the first place. Only by updating old statutes to more accurately reflect Congress's intent, in light of modern economic, social, and regulatory realities, can Congress sustainably reform the costs of regulation. The point is not to end regulation, but rather (as President Obama observed in his aforementioned executive order) to "protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation," to "promote predictability and reduce uncertainty," and to "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends." Congress should take up President Obama's own challenge to the agencies, and reform regulatory programs that are "redundant, inconsistent, or overlapping."[15] While it may fall to other parts of Congress to take the lead on reforming the Administrative Procedure Act and other parts of administrative law, it falls squarely within this Committee's jurisdiction to take the lead on reforming the statutes that empower Federal agencies in the first place.

**III. Improve the Regulatory Process by Helping the Agencies to Remember the Importance of Modesty**

I am proud to serve on the leadership council of the American Bar Association's Administrative Law Section. Before last year's election, the council drafted a Report to the President-Elect of the United States, suggesting a number of important reforms for him or her to undertake in the next four years, to improve the administra-

[12] *Mako Communications* v. *FCC,* 835 F.3d 146 (D.C. Cir. 2016). Our own parallel case, *Free Access & Broadcast Telemedia, LLC* v. *FCC,* was dismissed on jurisdictional grounds.

[13] 27 FCC Rcd. 12357, 12528 ¶ 30 (2012).

[14] My co-authors and I propose many such reforms in *Policy Reforms for an Accountable Administrative State,* a new book published by *National Affairs,* freely available online at *http://www.nationalaffairs.com/publications/page/regulation-policy-book.*

[15] Exec. Order 13563 (Jan. 18, 2011).

tive process.[16] Among those reforms, we urged the next President to require agencies to regularly conduct "retrospective review" to calculate the costs imposed by old regulations, to calculate the benefits produced by those regulations, and to compare those results to the agencies' original forecasts.

This was not an original or radical idea. President Obama called on his agencies to conduct such retrospective reviews in his Executive Order 13563, and again (for "independent" agencies) in Executive Order 13579. His OIRA Administrator, Cass Sunstein, sent the agencies a memorandum further explaining how the agencies should conduct such reviews.[17] And the vaunted Administrative Conference of the United States has also recommended that agencies undertake retrospective reviews; indeed, ACUS has reported on the significant benefits that agencies have reaped from reviewing their own past work.[18]

My fellow reformers often promote retrospective review as a tool for identifying and repealing outdated or counterproductive regulations. And while that is a benefit of retrospective review, it's not the most important benefit. Retrospective review's biggest benefit is actually *forward*-looking.[19]

That is, by forcing agencies to look back at their previous rulemakings and analyze their costs and benefits today, the Administration would force agencies and the public to confront how accurate or inaccurate the agencies' own projections were in forecasting the rules' impacts in the first place.

As scholars and policy analysts have often observed, agencies' forecasts of costs and benefits are woefully inaccurate. Former OIRA Administrator Susan Dudley colorfully described agencies' tendency "perpetuate puffery" by exaggerating rules' benefits and understating their costs.[20] She's not alone in making these claims. In testimony last year before the Senate Committee on Homeland Security and Government Reform's Subcommittee on Regulatory Affairs and Federal Management, I cited several other reports—from ACUS to the CFTC's Inspector General—criticizing agencies for haphazard analysis.[21] And as Resources for the Future's scholars observed a few years ago, independent agencies' cost-benefit analyses are *especially* questionable.[22]

Whatever the reason for the underwhelming quality of agencies' own predictive analyses, retrospective review offers a useful antidote. By forcing agencies to go back and review their own work, under the public's watchful eye, agencies may learn from their past mistakes, identify their own biases and blind spots, and thus become more modest and lest prejudiced in their own predictions and policy preferences going forward. Once agencies are made to grapple seriously with the ways in which their rules' actual impacts resemble or depart from the agencies' own original predictions, those agencies should demonstrate greater "epistemic modesty" in making new predictions next time.

This is one of the major lessons to be found in *Superforecasting*, the widely acclaimed 2015 book by Philip Tetlock and Dan Gardner, following the authors' decades of close study of forecasters. Reflecting on the experience of the national intelligence agencies, Tetlock and Gardner urge that forecasters should keep score of their predictive successes and failures, and that they should be held meaningfully accountable—and "*meaningful* accountability requires more than getting upset when

[16] The report is available at *http://bit.ly/2jQEqPB*.

[17] Sunstein's memorandum, issued October 26, 2011, is archived at *https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/implementation-of-retrospective-review-plans.pdf*.

[18] *See* ACUS Recommendation 2014–5, *Retrospective Review of Agency Rules,* at *https://www.acus.gov/research-projects/retrospective-review-agency-rules; see also* ACUS Consultant Report of Joseph E. Aldy, *Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy,* at *https://www.acus.gov/report/retrospective-review-report*.

[19] The discussion that follows is adapted from my recent online essay, "Retrospective Review, for Tomorrow's Sake," published on the *Yale Journal on Regulation's* "Notice & Comment" blog: *http://yalejreg.com/nc/retrospective-review-for-tomorrows-sake-by-adam-j-white/*.

[20] Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation,* 47 Bus. Econ. 165 (2012); Susan E. Dudley, "OMB's Reported Benefits of Regulation: Too Good to Be True?," *Regulation* (Summer 2013).

[21] *See* Adam J. White, "Reviewing Independent Agency Rulemaking," Written Testimony before the Senate Committee on Homeland Security and Government Affairs, Subcommittee on Regulatory Affairs and Federal Management (Sept. 8, 2016), at *https://www.hsgac.senate.gov/hearings/reviewing-independent-agency-rulemaking*.

[22] Arthur Fraas & Randall Lutter, *On the Economic Analysis of Regulations at Independent Regulatory Commissions,* RFF Discussion Paper 11–16 (Apr. 2011), at *http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-11-16_final.pdf*.

something goes awry. It requires systemic tracking of accuracy[.]"[23] At the end of their book, they tell aspiring "superforecasters" to look back at their own past errors (though without hindsight bias): "Don't try to justify or excuse your failures. Own them! Conduct unflinching postmortems: Where exactly did I go wrong? And remember that although the more common error is to learn too little from failure and overlook flaws in your basic assumptions, it is also possible to learn too much (you may have been basically on the right track but made a minor technical mistake that had big ramifications). Also don't forget to do postmortems on your successes too."[24]

This is advice that agencies need as much as anyone. Agencies are in the prediction business. The public interest depends upon the agencies becoming as accurate as possible in making those predictions. Retrospective review—institutionalized, rigorous retrospective review—is an indispensable step toward that goal. Only once agencies are forced to confront their own predictive successes and failures will they learn to be more modest in future regulatory proceedings—and only then will the regulatory process become more transparent, more honest, more open-minded, and less dominated by the unconscious (or conscious) biases of regulators.

Again, while other parts of Congress may take the lead on reforming the Administrative Procedure Act, this Committee can and should reform the agencies' own substantive statutes to incorporate retrospective-review requirements. And this Committee can also use its oversight power to challenge agencies to rigorously scrutinize their own previous analyses.

### IV. Eliminate Truly Unnecessary Regulatory Burdens by Modernizing the Compliance System

Modern regulation places immense compliance burdens on American businesses. Some of those burdens are truly unavoidable: companies must take the time and effort to identify whether their operations and services comply with the law, and then they must explain themselves to Federal regulators. And then Federal agencies must labor to review and react to all of that material.

But much of today's compliance burden—on the regulators and regulated alike—is utterly unnecessary. Today's technology offers significant opportunities to reform and improve Federal regulatory compliance, eliminating myriad redundancies and automating the submission of compliance data. The Data Coalition, a trade group, highlighted these opportunities in a December 2016 preview of forthcoming research paper on "Standard Business Reporting."[25] The Data Coalition argues that if Federal agencies would reform their regulatory compliance frameworks to rely more on standardized, freely-available data (also known as "Open Data"), then companies' regulatory compliance costs would be cut in at least two ways: "First, if government agencies standardize data fields and formats for the information they collect, rather than expressing that information as unstructured documents, businesses' software can automatically compile and report it, reducing manual labor. Second, if multiple agencies align their fields and formats with one another, by adopting universal standards for overlapping information collections, software can automatically comply with multiple reporting requirements at once, eliminating the duplicated effort of overlapping reporting requirements."

And, the Data Coalition further observed, a shift to Open Data would cut the agencies' own costs, by allowing the agencies to review, analyze, and share compliance data much more efficiently. This would help to alleviate some of the most significant burdens on the agencies' own budgets—and, thus, on Congress's budget, and on the taxpayers. The Data Coalition points to the experience of Australia, which moved to embrace "Standard Business Reporting" in recent years, and which claimed to have reduced compliance burdens on both the government and the regulated public by more than $1 billion in 2015–2016.[26]

Of course, there are limits on the extent to which regulatory compliance can be automated; compliance often requires nuanced judgments that cannot be reduced to raw data. But to the extent that compliance *does* depend on regulated people and companies submitting raw data, it is incumbent upon Congress to help promote a modernized, streamlined approach to regulatory compliance that takes advantage of today's technology.

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[23] Philip E. Tetlock & Dan Gardner, *Superforecasting* (2015), p. (emphasis in original).
[24] *Id.* at 283.
[25] Hudson Hollister, Data Coalition, "Standard Business Reporting: Open Data to Cut Compliance Costs" (Dec. 3, 2016), at *https://www.datacoalition.org/standard-business-reporting-open-data-to-cut-compliance-costs/*.
[26] *See id.*

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Today's administrative agencies should use 21st century technology to administer 21st century statutes, not 1990s technology to administer 1930s statutes. Thank you for inviting me to testify today.

The CHAIRMAN. Thank you, Mr. White.

Professor Heinzerling.

**STATEMENT OF LISA HEINZERLING, JUSTICE WILLIAM J. BRENNAN, JR., PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER**

Ms. HEINZERLING. Thank you for the opportunity to testify before you today.

"Regulation" seems to have become a four-letter word in some political circles today, and it's a little hard to understand why. Regulation, after all, is just another word for "law," and law is, given humans' propensity to hurt each other in the absence of constraints on their behavior, a predicate for human freedom. To the extent that we cannot trust that the water we drink, the air we breathe, the cars we drive, the planes we fly, and the drugs we take are safe, we are less free.

Regulation promotes multiple and diverse human interests and prevents multiple and diverse human harms. Regulation saves consumers money, protects companies that sell safe and honestly marketed products from unfair competition from those that do not, prevents human illnesses, saves lives, and much more.

Yet discussions about regulation often ignore its benefits and fixate solely on its costs. To have a conversation about regulation, without talking about what regulation is for, is not very illuminating. To the extent the debates, like the ones today, over the scope and shape of the regulatory state ignore or dismiss the benefits of regulation, they lead us badly astray.

The problem is compounded by a marked tendency to overstate the costs of regulation. When it comes to individual regulations, costs estimated in advance of regulation are often overstated. Information about costs often comes from the regulated industry itself, which has an incentive to overstate costs in the hopes of preventing regulation. In addition, industry and regulators alike often underestimate the extent to which industry will innovate in the face of regulation, and that will lower the costs of regulation in operation.

When it comes to estimating the total costs of regulation to our society, the errors are even more glaring. One perennial favorite of those trying to make regulation look outlandishly expensive is a study that purports to estimate the total annual cost of regulation in this country. The study has most recently surfaced again as a report prepared for the National Association of Manufacturers. It estimates that regulation costs us $2 trillion a year. This report is, however, not a credible account of the costs of regulation in this country. There are many flaws in the report and its previous iterations, detailed in my written statement and its attachment.

I'll rest with one example here. For environmental regulation, the report tallies up the costs and benefits of major rules, as reported in annual reports issued by the Office of Management and Budget. The trouble is many of these rules do not exist. Many have been withdrawn. Some have been overturned by the courts. Some are decades old and fully implemented. The report, in other words, is simply not a reliable account of what we spend on regulation today. To the extent that critiques of the regulatory state rely on such flawed statistics, and they often do, they are not credible.

The practice of ignoring benefits and overstating costs has led to numerous proposals, as we've heard this morning, to fix the regulatory system. Some of these proposals would reform the regulatory process by piling on even more layers of analytical requirements to the already time-consuming and laborious process of developing a rule. It takes many years, often, to develop and issue a single rule. Adding to these procedures will add little in the way of illumination, but will certainly make it harder to issue the rules we need to protect us.

Other ideas are, to use the words of the Administrative Procedure Act itself, utterly arbitrary and capricious. If an agency itself announced that from here on out it would repeal two rules for every rule issued, I have little doubt that a court would find this policy arbitrary. This rigidly anti-regulatory policy makes the very mistake I've been criticizing here: it assumes that regulation is all costs with no benefits.

Thank you.

[The prepared statement of Ms. Heinzerling follows:]

PREPARED STATEMENT OF LISA HEINZERLING, JUSTICE WILLIAM J. BRENNAN, JR., PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Mr. Chairman and Members of the Committee, thank you for giving me the opportunity to testify before you today.

I am the Justice William J. Brennan, Jr., Professor of Law at the Georgetown University Law Center. My primary expertise is in administrative law and environmental law. My work in these fields includes four books and dozens of law review articles and book chapters. From January 2009 to December 2010, I took a leave of absence from Georgetown to serve first as Senior Climate Policy Counsel and then as head of the Office of Policy at the U.S. Environmental Protection Agency. I am a member scholar of the Center for Progressive Reform, a public member of the Administrative Conference of the United States, and the chair of the board of directors of the Center for Science in the Public Interest.

**I. Introduction**

No one in the public debate over the proper role of regulation in our society has argued in favor of a stagnant economy or "unnecessary regulatory burdens." Reasonable people can disagree about the appropriate scope, shape, and pace of regulation, and a debate on these issues is healthy. Unfortunately, however, the debate over regulation is often not framed in a reasonable or even honest way. All too often, in fact, the debate recklessly ignores the many benefits of regulation and inaccurately reports its costs. And all too often, the debate skips over the fundamental reasons why we turn to regulation in the first place. At such a moment, it is worthwhile to return to first principles: why do we regulate? My remarks begin with a review of the purposes and benefits of regulation and then turn to prominent examples of dissembling on the matter of regulatory costs. I conclude with observations about the regulatory process itself.

**II. The Benefits of Regulation** [1]

It is hard to improve upon James Madison's reminder about why we have both government and constraints on government: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." [2] Yet recent debates over the scope and shape of the regulatory state have fixed on the second insight in Madison's famous

[1] The discussion in this section draws heavily on an Issue Brief I wrote in November 2011 for the American Constitution Society; this Issue Brief is available at *https://www.acslaw.org/sites/default/files/Heinzerling_-_Missing_a_Teachable_Moment.pdf.*

[2] The Federalist No. 51 (1787).

passage while ignoring the first. Proposals to rein in administrative agencies—to slash their budgets, veto their rules, undo their legal authority, hamstring them with multiple new procedural requirements—are offered as though rules governing human behavior produce all costs and no gains. They proceed as if people will not hurt other people if government steps aside. People are angels, in other words, outside of government; they mostly just go about their business, not trying to hurt anybody. We gain nothing by constraining their behavior.

Lost in this rosy vision are three simple facts.

First, people are not angels. It is not just that people can be cruel and vindictive. It is also that they can be greedy, selfish, careless, and callous. Even when they do not set out to harm other people, they can end up doing so through greed and neglect. The financiers who helped bring the U.S. economy to its knees did not mean to hurt anyone; U.S. utilities would surely prefer that the pollution from their power plants did not kill thousands every year; the makers of small spherical magnets surely do not desire that children swallow them and suffer horrific internal injuries. A great deal of human suffering, in fact, has nothing to do with maliciousness and everything to do with avarice and indifference. But pursuing profit in the face of a known risk to others is not angelic.

Recent history gives us examples, moreover, of corporations and corporate officials deliberately choosing to pursue profits at the expense of the public good. Corporate officials who worked for the auto parts maker Takata have been criminally charged with fabricating safety test data to cover up a lethal defect in the airbags made by the company. Takata itself has paid $1 billion in fines and restitution arising out of these actions. The automaker Volkswagen will pay over $4 billion in criminal and civil penalties after pleading guilty to installing software in its vehicles in order to cheat Federal pollution limits for motor vehicles. Volkswagen executives have also been criminally charged. These events should give pause to anyone tempted to argue that we should leave public protection up to corporations and their executives.

Second, given that people are not angels, a basic purpose of government is to protect people from being hurt by other people. And, far from illegitimately constraining freedom, law actually promotes freedom when it protects people from being hurt by other people. As John Locke—whose views on the purposes of government greatly influenced this country's founding generation—put it: "Where there is no law, there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is no law." Discussants in current debates over the regulatory state seem to forget that "regulation" is just another word for "law," and that law is a predicate for human freedom.

Third, protecting people from being hurt by other people is also the predominant purpose of the kinds of regulation now subject to some of the most vociferous attacks—consumer, health, safety, and environmental regulation. Consider the example of the Clean Air Act, one of the most embattled sources of regulatory authority in government today. The terms "public health" and "public welfare" appear like mantras throughout the Act; at its core, the Act aims to protect people from dying or falling ill, or suffering other, welfare-based harms such as damage to water, soils, crops, and wildlife, due to air pollution. What is more, by targeting specific sources of pollution and by generally requiring that these sources do their level best to control their pollution, the Act aims to prevent the people in charge of these sources—the ones who choose and control the mechanisms of pollution—from hurting other people. Seen in this light, the Clean Air Act and other like modern laws follow in a direct line from the framers and their ambitions for government, by constraining human behavior in a way that promotes human freedom. Yet the Clean Air Act is one of the laws often held up as an example of the kind of regulation we would be better off without—even though careful retrospective studies of the costs and benefits of regulations issued under the Act have repeatedly shown that the Act returns up to 90 times more in quantified benefits than it imposes in costs.[3]

In explaining why we regulate and what regulation does for us, it is also important to describe the exact harms that will befall people if we do not regulate. That is, in addition to discussing the human role in creating these harms, we should also identify the harms themselves.

These harms are many and varied.

One category of harms avoided through regulatory intervention is an especially clear-cut counterpoint to the economic costs of regulation: sometimes, consumers and others directly lose money in the absence of regulation. Or, put another way, regulation sometimes *saves people money.* Fuel economy standards for motor vehi-

[3] EPA, The Benefits and Costs of the Clean Air Act from 1990 to 2020 (2011), available at *https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1990-2020-second-prospective-study.*

cles save consumers thousands of dollars in gasoline costs over the life of their vehicles.[4] When the Federal Trade Commission sued a marketer of dietary supplements for offering "free trials" of dietary supplements that came paired with recurring charges that were very difficult to avoid, it took aim at a problem that cost consumers over $30 million in one year alone; and this is just one of some 60 like cases brought by the FTC in the last decade.[5] Likewise, when the FTC cracked down on companies making false promises of employment and business success to people who were unemployed or otherwise falling behind in the economic downturn, it sought to control practices that also cost consumers tens of millions of dollars; the agency charged that one company alone had bilked consumers out of $40 million.[6] Rules issued in the last 20 or so years by the Department of Energy, setting efficiency standards for household appliances, will have saved consumers over $100 billion by 2030. Far from taking money out of consumers' pockets, these kinds of legal efforts put money back in them—or make sure it doesn't leave in the first place.

Regulation can also save people money more indirectly. When a person does not have to go to the hospital because a rule has reduced the air pollution that would have made her sick, or when she does not miss work for the same reason, the rule has saved her the expense of a hospital visit or wages lost due to missed work. Similarly, when a person does not have to go to the hospital or miss work because—although she has been in a car accident—a vehicle safety feature mandated by a rule protected her from serious injury, the rule has saved her money. Indeed, in examples too numerous to list here, rules that protect health and safety also protect pocketbooks, as they alleviate the costs of doctor's visits, medicines, hospital stays, lost work days, and other interventions and disruptions associated with ill health and inadequate safety.

Beyond saving money, directly and indirectly, regulation also protects people from harms that are not fully captured as "money saved." Cancers of all kinds, heart attacks, asthma attacks, and more are prevented by environmental rules. Occupational safety rules can help prevent people from being electrocuted or crushed by heavy equipment. Vehicle safety rules can help drivers not back over people (especially children) who are difficult to see in an ordinary rearview mirror. Rules on rail safety help prevent deadly or otherwise injurious train accidents. The full range of human illness and suffering alleviated by regulation is huge.

Regulation also, of course, often prevents (or at least forestalls) the ultimate adverse event, death. In this domain, it is especially important to remember the link between human behavior and human harm; our legal and ethical norms make proceeding in the face of known and avoidable risks of death an especially egregious form of behavior. Yet sometimes even large numbers of saved lives fail to persuade the anti-regulatory crowd that regulation is a good idea; some embattled rules, for example, are expected to save many thousands of lives every year, yet embattled they remain.

To summarize: regulation promotes multiple and diverse human interests and prevents multiple and diverse human harms. To the extent that current debates over the scope and shape of the regulatory state ignore these benefits of regulation, they will lead us badly astray.

### III. The False Narrative About Regulatory Costs[7]

Keeping regulation at bay requires hard work. Disastrous failures of regulation lie just beneath such spectacularly bad problems as the climate crisis, the financial breakdown, the Flint drinking water disaster, and more. It takes constant vigilance to prevent a public outcry for more and better regulation. It also often takes phony numbers.

Often, the phony numbers relate to regulatory costs. One of the favorite phony numbers circulated by the anti-regulatory crowd is the figure of $2 trillion—supposedly the amount we in the United States spend every year on Federal regulations. The figure on total regulatory costs has been widely cited and credulously accepted. It has been wheeled out both to try to defeat new regulatory initiatives and to scale back existing ones. It has also been deployed in the service of a legislative agenda aimed at thwarting the regulatory agencies responsible for these purportedly massive costs.

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[4] See, *e.g.,* Consumers Union, Consumer Savings from 2025 Corporate Average Fuel Economy Standards (CAFE) (2016), available at *http://consumersunion.org/research/cafe-2025-consumer-savings/.*

[5] FTC news release, available at *http://www.ftc.gov/opa/2010/08/acaicolon.shtm.*

[6] FTC news release, available at *http://www.ftc.gov/opa/2011/03/emptypromises.shtm.*

[7] The first part of this discussion is drawn from Lisa Heinzerling and Frank Ackerman, The $1.75 Trillion Lie, 1 Mich. J. Envtl. & Admin. Law 127 (2012). This article is provided as an attachment to this testimony.

The latest iteration of this number comes from a report prepared in 2014 for the National Association of Manufacturers (NAM).[8] Authored by Lafayette College economists Nicole V. Crain and W. Mark Crain, the report concludes that $2 trillion is the combined annual cost of complying with economic regulations, environmental regulations, the Federal tax code, occupational safety and health regulations, and homeland security regulations.

The Crain and Crain report is not, however, a credible account of the costs of regulation in this country. Several critiques of an earlier Crain and Crain report, which used similar methodologies, have pointed out that not only did that report completely omit discussion of the benefits of regulation—thus providing an entirely one-sided picture of regulatory consequences—it also used evidence not intended, nor suitable, for the purposes to which Crain and Crain put it.[9] It also explained away its own potential cost overestimation by asserting—contrary to existing evidence[10]—that regulatory agencies tend to underestimate regulatory costs.

The economist Frank Ackerman and I have taken another, even deeper plunge into Crain and Crain's earlier estimates of costs and have found equally troubling problems.[11] We focused on Crain and Crain's estimates of the costs of economic regulation, environmental regulation, and workplace safety and health regulation. Together, these categories accounted for approximately $1.6 trillion of Crain and Crain's earlier $1.75 trillion estimate.

Ackerman and I found numerous problems in Crain and Crain's earlier study, problems that continue in their more recent report written for NAM. For example, Crain and Crain's estimates of the costs of environmental regulation are deeply troubled. For environmental rules issued before 1988, they rely on a single study published in 1991 that uses a general equilibrium model to spin out a conjecture about a possible impact of early 1980s regulations as a whole: if regulatory costs raise prices in general, then real wages will drop; at lower real wages, textbook economics implies that workers will choose to work less, reducing output and incomes. For regulatory costs of environmental rules issued after 1988, Crain and Crain—among other mistakes—claim costs for regulations that no longer exist because the agency itself pulled them back; they include costs of rules that no longer exist because the courts overturned them; they double count by including sets of rules that all have the same regulatory end; and they include the costs of regulations issued many years, sometimes decades, ago, the current costs of which (if they still even exist) cannot be fairly attributed to regulatory programs.

In estimating the cost of workplace rules, Crain and Crain rely—indirectly, after laundering it through several more recent studies from marginally less partisan sources—on a study done in 1974 by the National Association of Manufacturers. Beyond reliance on an outdated and highly partisan source, Crain and Crain's estimates of the costs of workplace rules also suffer from the same flaws embodied in their estimates of the costs of environmental rules.

Added to the numerous flaws revealed by other commentators, the problems Frank Ackerman and I found with Crain and Crain's estimate of regulatory costs raised a disturbing possibility: the mistakes were so many, cut in only one direction so thoroughly, and could have been discovered by the authors so easily, that one is pressed to conclude that the study was *designed* to produce a really big number. The number is a rhetorical device, a talking point, a trope; it is not the product of sound analysis.

The development and wide circulation of misleading statistics, supposedly showing the foolishness of regulation, is not a new phenomenon. Previous periods of discontent with the scope and content of regulatory activity have also featured arresting statistics that, all by themselves, appear to make the case for regulatory reform: Federal regulations spend hundreds of millions, even billions, of dollars to save a single human life;[12] regulation "statistically murders" 60,000 people a year by directing limited resources to very expensive life-saving measures rather than to

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[8] W. Mark Crain and Nicole V. Crain, The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business (2014), available at *http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf.*

[9] For a detailed critique of the previous iteration of this study, see Sidney A. Shapiro *et al.,* Setting the Record Straight: The Crain and Crain Report on Regulatory Costs (2011), available at *http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf.*

[10] Shapiro *et al.,* at 7–9.

[11] Lisa Heinzerling and Frank Ackerman, The $1.75 Trillion Lie, 1 Mich. J. Envtl. & Admin. L. 127 (2012). This article is provided as an attachment to this testimony.

[12] John F. Morrall III, A Review of the Record, Regulation, Nov.-Dec. 1986, at 25, 30–31.

cheaper ones;[13] once a regulation costs more than a certain amount (estimates ranged from $3 to $50 million) to save a life, people are killed through this cost alone because it prevents spending money on other life-saving measures like health care.[14] Just as the $2 trillion figure has been served up as an exhibit in the case for regulatory reform, so these previous statistics were offered to prove that the regulatory system had gone badly awry. The trouble was, these statistics were no more reliable than the statistics offered by NAM's study on regulatory costs.[15]

Another charge that has been leveled against regulation in recent years is that it kills jobs. Indeed, the claim has become so prevalent that it sometimes seems that the word "regulation" simply must be preceded by the phrase "job-killing." Here, too, however, the actual evidence does not support this broad critique. In a 2011 briefing paper prepared for the Economic Policy Institute by Isaac Shapiro and John Irons, the authors reviewed the literature on the relationship between regulation and employment.[16] They began by reminding readers that regulation often is designed to prevent market failures that will themselves lead to unemployment, giving as their prime examples the financial crisis, the BP oil spill of 2010, and the market-reassuring provisions of the Food Safety Modernization Act. They then canvased the literature on regulation and employment, finding that economy-wide studies have "failed to find significant employment effects" and that "a surprising number" of industry-specific studies have shown that "regulations have a small positive net effect on employment" and that even studies showing some local employment effects "suggest that regulations regulations had either a close to neutral or small positive effect on employment levels."[17]

Shapiro and Irons also remind us of the spotty track record of regulatory opponents in estimating the economic effects of regulation. They report: "Claims by opponents of regulations that new rules will have significant and destructive effects on the economy and on jobs have often been exaggerated, sometimes dramatically so."[18] According to Shapiro and Irons, a notable cause of the overestimates of regulatory costs has been the underestimation of industry's own power to innovate.[19]

The specific numbers change from time to time, but the game remains the same: make regulation look outlandish by claiming costs and consequences for it that are not real. This is not a sound basis on which to evaluate the regulatory state.

**IV. The Regulatory Process**

One of the current critiques of regulation has it that regulations are the product of a slapdash, almost random process, in which regulators ignore the facts and law and come up with rules that simply reflect their political preferences. This is not true.

Regulations in this country emerge from a careful process of initial study, preliminary proposals, public comment, and final decisions, which explain the agency's reasoning process and its responses to the public's concerns. Producing a final rule can take years. One of the most ironic sources for showing the out-of-control nature of the regulatory state is the number of pages in the *Federal Register,* the publication that contains agencies' explanations of their proposals and rules.[20] In fact, this statistic reveals exactly the opposite of what its publicists contend: the *Federal Register* has grown in volume not because agencies are behaving arbitrarily or capriciously, but because they are making an effort to explain their decisions in reasoned terms.

[13] Tammy O. Tengs & John D. Graham, The Opportunity Costs of Haphazard Social Investments in Life-Saving, in Risks, Costs, and Lives Saved: Getting Better Results from Regulation 167, 172 (Robert W. Hahn ed., 1996).

[14] Randall Lutter *et al.,* The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations, 37 Econ. Inquiry 599 (1999); W. Kip Viscusi, Risk-Risk Analysis, 8 J. Risk & Uncertainty (Special Issue) 5 (1994).

[15] For previous critiques, see Frank Ackerman & Lisa Heinzerling, Priceless: On Knowing the Price of Everything and the Value of Nothing (The New Press 2004); Lisa Heinzerling, Five Hundred Life-Saving Interventions and Their Misuse in the Debate Over Regulatory Reform, 13 Risk, Safety & Env't 151 (2002); Lisa Heinzerling & Frank Ackerman, The Humbugs of the Anti-Regulatory Movement, 87 Cornell L. Rev. 648 (2002); Lisa Heinzerling, Regulatory Costs of Mythic Proportions, 107 Yale L.J. 1981 (1998).

[16] See Isaac Shapiro & John Irons, Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown (Economic Policy Institute, Briefing Paper No. 305, 2011), available at *http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf;* see also Frank Ackerman & Rachel Massey, Prospering with Precaution: Employment, Economics, and the Precautionary Principle (Global Dev. & Env't Inst., Working Paper, 2002), available at *http://www.healthytomorrow.org/attachments/prosper.pdf.*

[17] *Id.* at 3.

[18] Shapiro & Irons, at 24.

[19] *Id.*

[20] See, *e.g.,* Adam J. White, Republican Remedies for the Administrative State (2017), available at *http://www.nationalaffairs.com/docLib/20170111_Booklet2_chap1.pdf.*

The *Federal Register* could be a very short publication indeed if agencies did not do this.

Bills circulating in Congress, including S. 2006 in the Senate, would pile on even more obstacles to regulatory actions. S. 2006 would add new analytical requirements for agency rules, more elaborate hearing procedures, and substantive requirements that agencies adopt the "least burdensome" regulatory measures and that they show that the benefits of their rules justify the costs. Almost amusingly, S. 2006 also would require agencies—already straining to complete their analytical tasks within a reasonable time period—not only to add these time-consuming obstacles to their rulemaking process, but also to start all over if they cannot manage to complete the process within two years. Such procedural innovations threaten to delay and even block entirely the many benefits of regulation I have described here.

Attachment: Lisa Heinzerling and Frank Ackerman, The $1.75 Trillion Lie (2012)

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## The $1.75 Trillion Lie

Lisa Heinzerling*

Frank Ackerman**

*A 2010 study commissioned by the Office of Advocacy of the U.S. Small Business Administration claims that Federal regulations impose annual economic costs of $1.75 trillion. This estimate has been widely circulated, in everything from op-ed pages to Congressional testimony. But the estimate is not credible. For costs of economic regulations, the estimate reflects a calculation that rests on a misunderstanding of the definition of the relevant data, flunks an elementary question on the normal distribution, pads the analysis with several years of near-identical data, and fails to recognize the difference between correlation and causation. For costs of environmental regulation, the bulk of the estimate relies on decades-old studies of decades-old rules, suggesting that* voluntary *unemployment is the real culprit in today's regulatory environment. The remainder of it is filled with non-existent rules and other phantoms—as is the flawed estimate of the costs of workplace safety and health rules.*

*It would be bad enough if this were a private study, undertaken with private funds. Even then, the viral spread of the utterly unfounded $1.75 trillion estimate would be worrying enough. But this is a study requested, funded, reviewed, and edited by a government agency, the Small Business Administration's Office of Advocacy. The Office of Advocacy's sponsorship and official embrace of the study—including defense of the study in testimony before Congress even after it had been severely criticized—embroils this public agency in an unwholesome blend of ineptitude and bias. The Office of Advocacy should acknowledge the study's many failings and publicly disavow it.*



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**Introduction**

Keeping regulation at bay requires hard work. Disastrous failures of regulation lie just beneath such spectacularly bad problems as the financial breakdown,[1] the oil spill in the Gulf,[2] the nuclear meltdown in Japan,[3] the climate crisis,[4] and more.[5] It takes constant vigilance to prevent a public outcry for more and better regulation. It also often takes phony numbers.

The latest and biggest phony number being circulated by the anti-regulatory crowd is the figure of $1.75 trillion—supposedly the amount we in the United States spend every year on Federal regulations.[6] This figure has been widely cited and credulously accepted. It has been wheeled out both to try to defeat new regulatory initiatives and to scale back existing ones.[7] It has also been deployed in the service of a legislative agenda aimed at hamstringing the regulatory agencies responsible for these purportedly massive costs.[8] It has even become part of the rhetoric of the race for the presidency.[9]

The number comes from a report commissioned, reviewed, edited, and, despite withering criticisms of it, defended by the Office of Advocacy of the U.S. Small Business Administration (SBA). Authored by Lafayette College economists Nicole V. Crain and W. Mark Crain, the SBA-sponsored report concludes that $1.75 trillion is the combined annual cost of complying with economic regulations, environmental regulations, the Federal tax code, occupational safety and health regulations, and homeland security regulations.[10]

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[1] *See, e.g.,* Anthony Faiola *et al., What Went Wrong,* WASH. POST, Oct. 15, 2008, at A1.

[2] *See, e.g.,* John Wyeth Griggs, *BP Gulf of Mexico Oil Spill,* 32 ENERGY L.J. 57, 66, 79 (2011).

[3] *See, e.g.,* James Glanz & Norimitsu Onishi, *Japanese Rules for Nuclear Plants Relied on Old Science,* N.Y. TIMES, Mar. 27, 2011, at A1 (discussing underestimation of tsunami risk to nuclear reactors by Japanese regulators and industry); Daniel Kaufmann & Veronika Penciakova, *Preventing Nuclear Meltdown: Assessing Regulatory Failure in Japan and the United States,* BROOKINGS (Apr. 1, 2011), *http://www.brookings.edu/opinions/2011/0401_nuclear_meltdown_kaufmann.aspx.*

[4] *See, e.g.,* Lisa Heinzerling, *Health Regulation and Governance: Climate Change, Human Health, and the Post-Cautionary Principle,* 96 GEO. L.J. 445, 455–58 (2008) (discussing years of missed opportunities to act on climate change).

[5] SIDNEY SHAPIRO ET AL., SAVING LIVES, PRESERVING THE ENVIRONMENT, GROWING THE ECONOMY: THE TRUTH ABOUT REGULATION 7–9 (2011), available at *http://www.progressivereform.org/articles/RegBenefits_1109.pdf* (discussing the cost of various failures to regulate).

[6] NICOLE V. CRAIN & W. MARK CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS, at iv (2010). The study was developed under contract number SBAHQ–08–M–0466 for the Small Business Association's (SBA) Office of Advocacy.

[7] As the blog for the Center for Progressive Reform has observed, one recent congressional hearing prominently featured the $1.75 trillion figure. Ben Somberg, *Debunked SBA Regulatory Costs Study Front and Center at House Energy & Commerce Committee Hearing,* CPRBLOG (July 15, 2011), *http://www.progressivereform.org/CPRBlog.cfm?idBlog=2E0DC7E3-B914-9703-69CC0D539EF8EC34;* see also *The Views of the Administration on Regulatory Reform: Hearing Before the H. Comm. On the Energy and Commerce, Subcomm. On Oversight and Investigation,* 112th Cong. 3 (2011) (statement of the U.S. Chamber of Commerce by William L. Kovacs, Senior Vice President, Environment, Technology and Regulatory Affairs); Thomas M. Arnold & Jerry L. Stevens, *Mixed Agendas and Government Regulation of Business: Can We Clean Up The Mess?,* 45 U. RICH. L. REV. 1059, 1073 (2011); James L. Gattuso *et al., Red Tape Rising: Obama's Torrent of New Regulation,* HERITAGE FOUND. BACKGROUNDER, Oct. 26, 2010, at 1, available at *http://thf_media.s3.amazonaws.com/2010/pdf/bg2482.pdf;* Phil Kerpen, Op-Ed., *Regulatory State Needs More Than a Trim,* WASH. TIMES, Jan. 24, 2011, at B3; Mark R. Warner, Op-Ed., *Red-Tape Relief for a Sluggish Recovery,* WASH. POST, Dec. 13, 2010, at A19; Glenn Kessler, *Is Obama Bad for Business?,* WASH. POST (Jan. 14, 2011, 6:00 AM), *http://voices.washingtonpost.com/fact-checker/2011/01/is_obama_bad_for_business.html* (quoting Thomas Donohue, President of the U.S. Chamber of Commerce, and Rep. Darrell Issa (R-Calif.), Chairman of the House Oversight Committee, who both cite Crain and Crain's study).

[8] *See, e.g.,* Wayne Crews & Ryan Young, Op-Ed., *Regulation Without Representation,* INVESTOR'S BUS. DAILY, Feb. 9, 2011, at A13; Thomas A. Hemphill, *REINing in Regulation,* AM. ENTERPRISE INST. (Nov. 22, 2010), *http://www.american.com/archive/2010/november/reining-in-regulation.*

[9] *See, e.g.,* Mitt Romney, Op-Ed., *Romney: My Plan to Turn Around the U.S. Economy,* USA TODAY, Sept. 6, 2011, at A11 ("With scant regard for the costs imposed on consumers and businesses, President Obama has vastly expanded the regulatory reach of government. The Federal Government has estimated the price tag for its regulations at $1.75 trillion."); Tim Pawlenty, Former Governor of Minnesota and Former 2012 Presidential Candidate, Economic Policy Remarks at the University of Chicago: A Better Deal (June 7, 2011) (transcript available at *http://blogs.wsj.com/washwire/2011/06/07/text-of-pawlentys-speech-on-his-economic-plan/*) ("But the fact is—federal regulations will cost our economy 1.75 trillion dollars this year alone. It's a hidden tax on every American consumer. Built into the price of every good and service in the economy.").

[10] CRAIN & CRAIN, *supra* note 6, at iv, 5.

The Crain and Crain report is, as Obama regulatory czar Cass Sunstein put it in recent congressional testimony, "deeply flawed." [11] Several previous critiques of the report have pointed out that not only does the report completely omit discussion of the benefits of regulation—thus providing in entirely one-sided picture of regulatory consequences—it also uses evidence not intended, nor suitable, for the purposes to which Crain and Crain put it.[12] It also explains away its own potential cost overestimation by asserting—contrary to existing evidence [13]—that regulatory agencies tend to underestimate regulatory costs.[14] The nonpartisan Congressional Research Service (CRS) undertook its own regression analysis using almost the same data, but much sounder methods than those used by Crain and Crain, and found that, with those adjustments, a central component of Crain and Crain's analysis (the "regulatory quality index" developed by the World Bank for a different purpose) ceased having the effect Crain and Crain claimed for it.[15]

Our Article takes another, even deeper plunge into Crain and Crain's estimates of costs, and finds even more troubling problems. We focus on Crain and Crain's estimates of the costs of economic regulation, environmental regulation, and workplace safety and health regulation. Together, these categories account for approximately $1.6 trillion of Crain and Crain's $1.75 trillion estimate.[16]

For economic regulation, we find that Crain and Crain come up with a breathtaking $1.24 trillion in estimated aggregate costs—seventy percent of their entire numerical picture of regulatory burden—from a single, poorly designed equation which they built on a misinterpretation of a World Bank database. They take this equation as proof that better "regulatory quality" causes higher incomes; and they read the World Bank data quite incorrectly to say that there is a well-defined maximum for regulatory quality which the United States falls far below. We will identify four serious errors in the Crain and Crain treatment of economic costs; each of these errors alone is sufficient to invalidate their analysis.

Crain and Crain's estimates of the costs of environmental regulation are also deeply troubled. For environmental rules issued before 1988, they rely on a single study published in 1991 [17] that uses a general equilibrium model to spin out a tortuous conjecture about a possible impact of early 1980s regulations as a whole: if regulatory costs raise prices in general, then real wages will drop; at lower real wages, textbook economics implies that workers will choose to work less, reducing output and incomes. For regulatory costs of environmental rules issued after 1988, Crain and Crain—among other mistakes—claim costs for regulations that no longer exist because the agency itself pulled them back; they include costs of rules that no longer exist because the courts overturned them; they double count by including sets of rules that all have the same regulatory end; and they include the costs of regulations issued many years, sometimes decades, ago, the current costs of which (if they still even exist) cannot be fairly attributed to regulatory programs.

In estimating the cost of workplace rules, Crain and Crain rely—indirectly, after laundering it through several more recent studies from marginally less partisan sources—on a study done in 1974 by the National Association of Manufacturers.[18] Beyond reliance on an outdated and highly partisan source, Crain and Crain's esti-

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[11] *See, e.g.,* Jessica Randall, *OIRA Administrator Sunstein Calls Crain & Crain Report 'Deeply Flawed,'* OMB WATCH (June 23, 2011), *http://www.ombwatch.org/node/11742* (discussing the oral testimony given by Sunstein on June 23, 2011 at the hearing before the Senate Committee on Homeland Security and Governmental Affairs).

[12] *See, e.g.,* Austin Goolsbee, *A 21st Century Regulatory System,* WHITE HOUSE BLOG (June 23, 2011, 3:08 PM), *http://www.whitehouse.gov/blog/2011/06/23/21st-century-regulatory-system.* For a detailed critique making these and other points, see SIDNEY A. SHAPIRO ET AL., SETTING THE RECORD STRAIGHT: THE CRAIN AND CRAIN REPORT ON REGULATORY COSTS (2011), available at *http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf.*

[13] *See* SHAPIRO ET AL., *supra* note 12, at 7–9; ISAAC SHAPIRO & JOHN IRONS, REGULATION, EMPLOYMENT, AND THE ECONOMY: FEARS OF JOB LOSSES ARE OVERBLOWN 21–23 (2011), available at *http://www.epi.org/files/2011/BriefingPaper305.pdf.*

[14] CRAIN & CRAIN, *supra* note 6, at 27, 28 n.27.

[15] CURTIS W. COPELAND, CONG. RESEARCH SERV., R41763, ANALYSIS OF AN ESTIMATE OF THE TOTAL COSTS OF FEDERAL REGULATIONS 27–28 (2011).

[16] CRAIN & CRAIN, *supra* note 6, at 31 tbl.6.

[17] *Id.* at 25 (noting their reliance on Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis,* 8 YALE J. ON REG. 233 (1991) for cost estimates on environmental regulations).

[18] *Id.* at 30 n.29 (noting that they rely on Joseph M. Johnson, *A Review and Synthesis of the Cost of Workplace Regulations, in* CROSS-BORDER HUMAN RESOURCES, LABOR AND EMPLOYMENT ISSUES 433 (Andrew P. Morriss & Samuel Estreicher eds., 2005)). Johnson's study relies on HARVEY S. JAMES, JR., ESTIMATING OSHA COMPLIANCE COSTS (1996), a policy study conducted for the Center for the Study of American Business, which, finally, directly relies on the 1974 study by the National Association of Manufacturers.

mates of the costs of workplace rules also suffer from the same flaws embodied in their estimates of the costs of environmental rules.

Added to the numerous flaws already revealed by other commentators, the problems we have found with Crain and Crain's estimate of regulatory costs raise a disturbing possibility: the mistakes are so many, cut in only one direction so thoroughly, and could have been discovered by the authors so easily, that one is pressed to conclude that the study was *designed* to produce a really big number. The number is a rhetorical device, a talking point, a trope; it is not the product of sound analysis.

We have been here before. Previous periods of discontent with the scope and content of regulatory activity have also featured arresting statistics that, all by themselves, appear to make the case for regulatory reform: Federal regulations spend hundreds of millions, even billions, of dollars to save a single human life;[19] regulation "statistically murders" 60,000 people a year by directing limited resources to very expensive life-saving measures rather than to cheaper ones:[20] once a regulation costs more than a certain amount (estimates ranged from $3 to $50 million) to save a life, people are killed through this cost alone because it prevents spending money on other life-saving measures like health care.[21] Just as the $1.75 trillion figure is being served up now as Exhibit 1 in the case for regulatory reform,[22] so these previous statistics were offered to prove that the regulatory system had gone badly awry.

We have challenged the empirical basis for these previous numbers at length elsewhere,[23] and we will not repeat our criticisms here. It is worth noting, though, that in our long experience with fantastical numbers offered in the service of an anti-regulatory agenda, we have not seen anything quite like Crain and Crain's number. The new high figure for regulatory costs marks a new low in anti-regulatory analysis.

## II. Getting to No: How Crain and Crain Reach $1.75 Trillion

Before turning to our critique, we need to explain how Crain and Crain reached their estimates of regulatory costs.

Crain and Crain divide regulatory costs into several different categories (economic regulations, environmental regulations, the Federal tax code, occupational safety and health regulations, and homeland security regulations), and use several different methodologies, depending on the category, for estimating these costs.[24] We assess the estimates pertaining to economic regulations, environmental regulations, and occupational safety and health regulations. Together, these categories make up over ninety percent of Crain and Crain's overall estimate of annual United States regulatory costs.[25]

### *A. Economic Regulations*

The $1.24 trillion supposedly lost to economic regulations is described as an estimate of the costs of compliance, but no specific regulations are described in any detail, and no costs are presented for any actual compliance activities. Rather, the entire $1.24 trillion comes from a single equation formulated by Crain and Crain, using comparative international data on per capita incomes and a World Bank "regulatory quality index" (RQI), among other variables.[26] The equation finds a positive relationship between income per capita and the RQI. The United States received a very good, but not perfect, score on the RQI; if it had received a perfect score, the equation seems to imply that GDP would have been $1.24 trillion higher.

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[19] John F. Morrall III, *A Review of the Record,* REG., Nov.-Dec. 1986, at 25, 30–31.

[20] Tammy O. Tengs & John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Life-Saving, in* RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION 167, 172 (Robert W. Hahn ed., 1996).

[21] *E.g.,* Randall Lutter *et al., The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations,* 37 ECON. INQUIRY 599 (1999); W. Kip Viscusi, *Risk-Risk Analysis,* 8 J. RISK & UNCERTAINTY (SPECIAL ISSUE) 5 (1994).

[22] *See supra* note 7 and accompanying text.

[23] FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004); Lisa Heinzerling, *Five Hundred Life-Saving Interventions and Their Misuse in the Debate Over Regulatory Reform,* 13 RISK, SAFETY & ENV'T 151 (2002) [hereinafter *Five Hundred Life-Saving Interventions*]; Lisa Heinzerling, *Regulatory Costs of Mythic Proportions,* 107 YALE L.J. 1981 (1998); Lisa Heinzerling & Frank Ackerman, *The Humbugs of the Anti-Regulatory Movement,* 87 CORNELL L. REV. 648 (2002).

[24] CRAIN & CRAIN, *supra* note 6, at 31 tbl.6.

[25] *See id.*

[26] *See id.* at 21–22.

The RQI is one of six "governance indicators" calculated by World Bank researchers Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi.[27] They define "regulatory quality" as "capturing perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development."[28] The other five indicators are voice and accountability, political stability and absence of violence, government effectiveness, rule of law, and control of corruption. Values of these six indicators are available for more than 200 countries, starting in 1996 and appearing annually since 2002.[29]

As explained in their paper on methodology, Kaufmann, Kraay, and Mastruzzi collect information from thirty-one different data sources, including commercial business information providers, surveys, NGOs, and public sector sources.[30] Each individual observation is converted into a numerical score, with higher values for better outcomes.[31] The authors then make what they call the "innocuous" assumption that the true quality of governance in each area (the quality of regulation, for the RQI) is "a normally distributed random variable with mean zero and variance one. This means that the units of our aggregate governance indicators will also be those of a standard normal random variable, *i.e.,* with zero mean, unit standard deviation, and ranging approximately from –2.5 to 2.5."[32] The final portion of this quotation simply reflects a well-known mathematical result: about ninety-nine percent of the time, a random variable with a normal distribution falls within 2.5 standard deviations of the mean.

Crain and Crain evidently misread this statement; they reported that the RQI "is scaled to have values that range from –2.5 to 2.5."[33] Since they reported[34] that the United States had a RQI of 1.579 in 2008, it appeared to them that it would have been possible to improve our regulations up to a level that received a 2.5. Therefore, they constructed a regression analysis to estimate the economic benefit that would result from improving the U.S. RQI from 1.579 to 2.5.

The equation used in Crain and Crain's regression analysis expresses GDP per capita as a function of the RQI and several other variables: foreign trade as a share of GDP, total population, primary school enrollment as a share of the eligible population, and broadband subscribers as a share of the population. This selection of variables is explained only by the statement that they "are drawn from the empirical literature that examines differences in economic levels across countries and over time."[35] The equation is estimated using seven years of annual data, from 2002 through 2008, for twenty-five countries that belong to the Organization for Economic Cooperation and Development (OECD)—an organization whose membership is roughly, though no longer exactly, synonymous with high-income, developed countries.

The regression results show that GDP per capita is positively related to the RQI, to the share of foreign trade in GDP, and to the proportion of broadband subscribers in the population. It also shows that GDP per capita, in this data set, is significantly *negatively* related to the fraction of the population in primary education.[36] Thus if this regression were accurate, and if correlation always implied causation, GDP per capita could be increased by raising the RQI, the dependence on foreign trade, or the number of broadband subscribers, or by decreasing enrollment in primary education. Judging by Crain and Crain's regression results, the relationship between broadband connections and per capita income is by far the most reliable of these links.[37]

Using these regression results and holding all other data constant, Crain and Crain reported that an increase of 0.92 in the RQI (from 1.579 to 2.5) would cor-

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[27] *Worldwide Governance Indicators,* WORLD BANK GRP., *http://info.worldbank.org/governance/wgi/pdf/wgidataset.xls* (last visited Nov. 19, 2011).

[28] Daniel Kaufmann *et al., The Worldwide Governance Indicators: Methodology and Analytical Issues* 4 (World Bank Dev. Research Grp., Policy Research Working Paper No. 5430, 2010), available at *http://siteresources.worldbank.org/INTMACRO/Resources/WPS5430.pdf.*

[29] *Worldwide Governance Indicators, supra* note 27.

[30] Kaufmann *et al., supra* note 28, at 2.

[31] *Id.* at 8.

[32] *Id.* at 9.

[33] CRAIN & CRAIN, *supra* note 6, at 21.

[34] The World Bank Group updates RQI data from time to time; the United States' RQI for 2008 is now 1.550 per the data we downloaded in November 2011. *Worldwide Gov-ernance Indicators, supra* note 27.

[35] CRAIN & CRAIN, *supra* note 6, at 21–22.

[36] *Id.* at 23 tbl.2.

[37] Table 2 in Crain and Crain's report shows a *t* statistic of 8.89 for the relationship of broadband subscription rates to GDP per capita, far above any other *t* statistic in the table. *Id.* The *t* statistic is a measure of the statistical significance of a relationship: the larger the *t* statistic, the less likely it is that the observed relationship occurred by chance.

respond to an 8.7 percent increase in GDP per capita, or a $1.236 trillion increase in total U.S. GDP in 2008, measured in 2009 dollars.[38]

*B. Environmental Regulations*

Crain and Crain estimate the current annual cost of United States environmental regulation to be $281 billion.[39] To reach this number, Crain and Crain add up all of the costs presented in the Office of Management and Budget's (OMB) 2001 to 2009 reports on the costs and benefits of Federal regulations (and adjust them for inflation).[40] OMB's reports from 2002 through 2009 estimate the total costs and benefits of the previous year's regulations by compiling estimates—with some adjustments—from agencies' Regulatory Impact Analyses (RIA) for rules costing $100 million or more per year.

OMB's 2001 report, relied upon by Crain and Crain for the vast bulk of the costs they attribute to environmental regulation,[41] took a different tack. In this report, OMB estimated costs for rules issued from the beginning of the modern environmental era all the way through the first quarter of the year 2000.[42] For rules issued prior to 1989, OMB based its high-end estimate on a 1991 article by Robert Hahn and John Hird,[43] which itself relied on a 1990 study by Michael Hazilla and Raymond Kopp.[44] Almost half of Crain and Crain's estimate of the current annual costs of environmental regulation—$132 out of $281 billion—comes from Hahn and Hird's estimate of the costs of rules issued over twenty-five years ago.[45]

Hazilla and Kopp used general equilibrium analysis to estimate the costs of environmental regulation. They modeled the economy as it existed from 1958 to 1974 in order to establish a pre-regulation baseline. They then re-ran the model, this time incorporating the Environmental Protection Agency's (EPA) 1984 estimate of the costs of compliance with the Clean Air Act and the Clean Water Act, based on the regulations in place as of December 1982. In their analysis, the direct costs of regulation raise prices throughout the economy. Higher prices cause lower real wages, inducing workers to work less (in the language of economics, households choose to substitute leisure for labor). The reduction in labor decreases income, consumption, and savings, relative to the pre-regulation baseline. Lower savings means less investment, slowing the economy's rate of growth and causing decreases in production that are compounded over time. Simulating outcomes from 1981 through 1990, Hazilla and Kopp estimated that household labor supply would decrease by about 1 percent, and real (inflation-adjusted) gross national product would decrease by 2.4 percent in 1981, and 5.8 percent in 1990.[46]

For the environmental rules issued between 1989 and 2000, OMB's 2001 report (and, by extension, Crain and Crain) relied on OMB's 2000 report, which itself relied on a report OMB issued in 1996 (estimating costs for rules issued from 1987 to 1994), along with estimates of the costs of rules from 1995 to 1999.[47]

*C. Workplace Regulations*

Crain and Crain estimate costs of $64.313 billion for occupational safety and health regulations issued prior to 2001, and $471 million for such regulations issued between 2001 and 2008.[48] For the costs of rules issued before 2001, Crain and Crain rely on an analysis published in 2005 by Joseph M. Johnson.[49] Johnson estimated

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[38] *Id.* at 24. The actual calculation of $1.236 trillion is not well explained. Our attempt to reproduce it, using their assumptions, yielded $1.30 trillion.

[39] *Id.* at 31 tbl.6 (reporting costs in 2009 dollars).

[40] *Id.* at 26 tbl.3.

[41] *Id.* (reporting high-end cost estimates of almost $192 billion (in 2001 dollars) based on OMB's 2001 report; this is approximately $230 billion in 2009 dollars).

[42] OFFICE OF MGMT. & BUDGET, MAKING SENSE OF REGULATION: REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 10 n.7, 11 tbl.2 (2001) [hereinafter OMB 2001 REPORT]. OMB's 2001 report actually relies on OMB's 2000 report for this estimate. *Id.* at 11 tbl.2 (referring, in the source note, to OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS tbls.1, 2 & 3 (2000) [hereinafter OMB 2000 REPORT]).

[43] CRAIN & CRAIN, *supra* note 6, at 25; Hahn & Hird, *supra* note 17, at 256 tbl.2.

[44] Michael Hazilla & Raymond Kopp, *The Social Cost of Environmental Quality Regulations: A General Equilibrium Analysis,* 98 J. POL. ECON. 853, 865 tbl.2 (1990).

[45] *See* CRAIN & CRAIN, *supra* note 6, at 27 (utilizing the high end of the cost range provided in Hahn & Hird, *supra* note 17, at 256 tbl.2); OMB 2000 REPORT, *supra* note 42, at 20 tbl.1 (reporting a high-end cost estimate of $99 billion (in 1996 dollars) for environmental rules as of 1988 based on Hahn and Hird, *supra* note 17; in 2009 dollars, this is $132 billion); *infra* note 82 and accompanying text.

[46] Hazilla & Kopp, *supra* note 44, at 867 tbl.3.

[47] OMB 2001 REPORT, *supra* note 42, at 11 tbls.1 & 2.

[48] CRAIN & CRAIN, *supra* note 6, at 30 tbl.5 (reporting costs in 2009 dollars).

[49] *Id.*

the costs of workplace safety and health rules by multiplying earlier estimates of these costs by 5.55, based upon findings in a 1974 study conducted by the National Association of Manufacturers.[50] For the costs of rules issued between 2001 and 2008, Crain and Crain use an aggregate estimate provided in OMB's 2009 report on the costs and benefits of Federal regulation.[51] OMB's estimate is based on the RIA the Occupational Safety and Health Administration (OSHA) filed for major rules issued in the relevant years.

**II. The Many Shortcomings of Crain and Crain's Estimate**

Crain and Crain's study is littered with misunderstandings, mistakes, and double counting. At every step of the way, they choose data and assumptions that make the costs climb higher and higher. At every step of the way, they also make outright, objective errors that have the same effect. The result is a mix of apparent bias and ineptitude that make their estimate of $1.75 trillion wholly unreliable.

We begin by discussing the flaws in Crain and Crain's estimate of the costs of economic regulation, and then turn to the flaws in their estimates regarding environmental and workplace regulations.

*A. Economic Regulation*

Crain and Crain's one-equation analysis of economic regulation has at least four fatal flaws, any one of which would be enough to destroy its prediction of a $1.24 trillion loss. First, Crain and Crain have misunderstood the scale of the RQI and the meaning of the number they treat as a perfect score. Second, they have inappropriately lumped together seven years of extremely similar data in the same equation, creating a spurious appearance of statistical significance. Third, there is in fact no correlation between the RQI and per capita income among high-income countries. Fourth, correlation is not causation: if the RQI does show that the United States has a higher quality of regulations than some middle-income countries, this could mean either that better regulations create higher incomes, or that higher incomes allow the creation of better regulations.

1. Why Be Normal?

The normal distribution—also known as the Gaussian distribution or the bell curve—is one of the most familiar and frequently used distributions in statistics. As is well known, it has no maximum or minimum value; rather, values farther and farther away from the mean become less and less probable. Thus it is common to describe the probability of a normally distributed variable falling within a certain distance from the mean. For example, there is a ninety-five percent probability that a randomly chosen value of a normally distributed variable falls within 1.96 standard deviations of the mean. Or, in the example used by the authors of the RQI, there is a ninety-nine percent probability of such a variable falling within about 2.5 standard deviations of the mean.

Crain and Crain missed this elementary fact about distributions, and assumed that 2.5 standard deviations is an absolute upper limit and –2.5 is an absolute lower limit. They are wrong both in theory and in the empirical description of the RQI (which, as noted above, is defined as a normally distributed variable with a mean of zero and standard deviation of one). For the 207 countries for which the World Bank researchers reported an RQI value for 2008, the RQI ranged from –2.66 in Somalia to 1.98 in Hong Kong. The highest RQI on record is 2.23 for Singapore; since 2002, no country has received an RQI of 1.99 or higher.[52] If, instead of the arbitrary target of 2.5, Crain and Crain had assumed that the best the United States could do was to match the best existing performance on the RQI—reaching the state of regulatory nirvana achieved by Hong Kong—then the potential improvement, and hence the estimated costs of economic regulation, would have been cut roughly in half. That is, even if one accepted the rest of their methodology, about $600 billion of Crain and Crain's supposed costs of regulation would be eliminated, with no change in information about any United States regulations, simply by reading the international RQI data in a more measured and defensible manner.

More broadly, Crain and Crain use the RQI with little thought about its limitations. As two of the developers of the World Bank's governance indicators (including the RQI) have written, "Governance indicators can be used for regular cross-country comparisons . . . [but] they often remain blunt tools for monitoring governance and

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[50] Johnson, *supra* note 18, at 455 & n.37.
[51] CRAIN & CRAIN, *supra* note 6, at 30 tbl.5.
[52] *See Worldwide Governance Indicators, supra* note 27.

studying the causes and conse-quences of good governance at the country level."[53] They further caution users, noting:

> All governance indicators include measurement error and so should be thought of as imperfect proxies for the fundamentals of good governance. . . . Whenever possible, such margins of error should be explicitly acknowledged, as they are in the WGI [the database that includes the RQI], and taken seriously when the indicators are used to monitor progress on governance.[54]

The RQI estimates are published with standard errors, implying that the authors of the database believe that about two-thirds of the time, the true value will fall within one standard error of the reported value. For the United States in 2008, the RQI is 1.55 and the standard error is 0.22, implying that there is a two-thirds probability that the "true" United States

RQI is between 1.33 and 1.77.[55] Of the 207 countries with RQI values for 2008 reported in the World Bank database, there were only fourteen with RQI above the United States value of 1.55, and just six with RQI above 1.77, the upper limit of the United States confidence interval: Denmark, Hong Kong, Ireland, New Zealand, Singapore, and the United Kingdom.[56] The evidence is meager that the United States lags significantly behind other countries in the quality of its regulations as measured by the World Bank's RQI. Yet the unexplained hope for a great leap forward in the RQI, well beyond all worldwide experience to date, is the fulcrum for most of Crain and Crain's estimated regulatory costs.

The RQI is just one of the World Bank's regulatory indicators; another one, the "doing business indicator," is explicitly designed to measure how easy it is to set up and run a business in 183 countries around the world.[57] The doing business indicator confirms that the United States is close to the top, ranking fifth in the world behind Singapore, Hong Kong, New Zealand, and the United Kingdom.[58] The ranking is purely ordinal, with no theoretical maximum. The United States could aspire to be number one, but there is no way to tell what economic consequences, if any, might be associated with making it easier to do business here than in all 182 other countries in the database, rather than just 178. Thus a broader look at the World Bank's regulatory indicators provides no basis for Crain and Crain's presumption that measurable increases in the United States' regulatory quality could boost our rate of economic growth.

2. Padding the Evidence

Crain and Crain use seven years of data, annually from 2002 through 2008, on the RQI, per capita incomes, and other variables. This artificially boosts the reported significance of the results; it is a violation of standard statistical practice, which makes the regression results misleading.

To see why this matters, consider the results of a coin toss. Suppose that a penny is flipped once and lands heads up. This is clearly not a statistically significant result; it is a random event, expected to occur half the time. Now suppose that a penny is flipped seven times in succession, landing heads each time. In contrast to the single toss, seven identical tosses are very significant. The chance of getting seven heads in a row is one in 128; in other words, we are more than ninety-nine percent sure that seven successive tosses will not all be heads. Spend all day flipping pennies, and seven successive heads will probably happen at some point; but if it happens on the first seven flips, it might lead to questions about whether the penny is weighted or the experimenter is biasing the results.

Now imagine a research paper reporting seven separate observations of a single coin toss as if they were independent events. This would mislead-ingly convert an ordinary, random event—the single toss—into something that appears to be highly significant and unlikely to occur by chance alone.

Crain and Crain combine seven years of annual data for twenty-five OECD countries on GDP per capita, the RQI, and other variables. Both GDP per capita and the RQI, however, change very little from year to year. For the OECD countries, the correlation between GDP per capita in 2007 and 2008 has an adjusted $r^2$ of

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[53] Daniel Kaufmann & Aart Kraay, *Governance Indicators: Where Are We, Where Should We Be Going?,* 23 WORLD BANK RES. OBSERVER 1, 25 (2008).
[54] *Id.* at 26.
[55] *See supra* note 34 and accompanying text.
[56] *See Worldwide Governance Indicators, supra* note 27.
[57] The "doing business indicator" is a tool developed by the Doing Business Project and is available at DOING BUSINESS, *http://www.doingbusiness.org* (last visited Nov. 4, 2011).
[58] *Economy Rankings,* DOING BUSINESS, *http://www.doingbusiness.org/rankings* (last visited Sept. 19, 2011).

0.999;[59] even for the first and last years in the Crain and Crain sample, 2002 and 2008, the correlation between GDP per capita has an adjusted $r^2$ of 0.982. Thus, the seven years of data on GDP per capita, treated by Crain and Crain as separate observations, contain virtually identical information about the relative affluence of OECD countries. The RQI is also highly correlated from year to year: for the OECD countries, the correlation between the 2007 and 2008 RQIs has an adjusted $r^2$ of 0.944, falling to 0.815 for the RQIs of 2002 versus 2008.[60]

In short, the data used by Crain and Crain are much more like seven observations of the same coin toss, not seven independent observations of new information about the world. As a result, the correlation they report between RQI and GDP per capita is spuriously high.

There are econometric techniques designed for datasets like this with serial correlation between observations. Crain and Crain mention, with little explanation, that they included country fixed effect variables.[61] This might be part of an appropriate methodology, but it alone is far from suffi-cient. Readers interested in pursuing this question should consult the CRS study, which repeats the Crain and Crain analysis with a rigorous econo-metric methodology—and finds no significant relationship between GDP per capita and RQI.

3. Inside the OECD

Crain and Crain focus on countries in the OECD, which is often taken to be synonymous with high-income, industrialized countries. The organization, however, has diversified its membership to include a number of middle-income countries, including Turkey, Mexico, Chile, and several eastern European nations. Some of the middle-income OECD members, notably Turkey and Mexico, do have much lower RQI scores. Within the high-income OECD member countries, on the other hand, there is literally no relationship between income and RQI.

If we restrict our attention to the nineteen OECD countries with per capita GDP above $20,000 in 2008[62]—including northern and western Europe, Australia, Canada, Israel, Japan, and the United States—then the correlation between RQI and the logarithm of per capita GDP (the form of the data used by Crain and Crain) for 2008 has an adjusted $r^2$ of –0.06. This puzzling result means that there is less relationship between these two data series than would be expected by chance alone; the unadjusted $r^2$ 0.000003.[63]

A graph of the data, highlighting the position of the United States, is presented in Figure 1. The absence of a trend is visible in these data.

[59] In an ordinary regression analysis, $r^2$ measures how much of the variation in one variable (shown on the left-hand side of the equation) can be predicted by assuming a linear relationship with the other variables in the equation. The adjusted $r^2$ of 0.999 reported here means that 99.9 percent of the variation among OECD countries in GDP per capita in 2008 can be predicted from their GDP per capita in 2007.

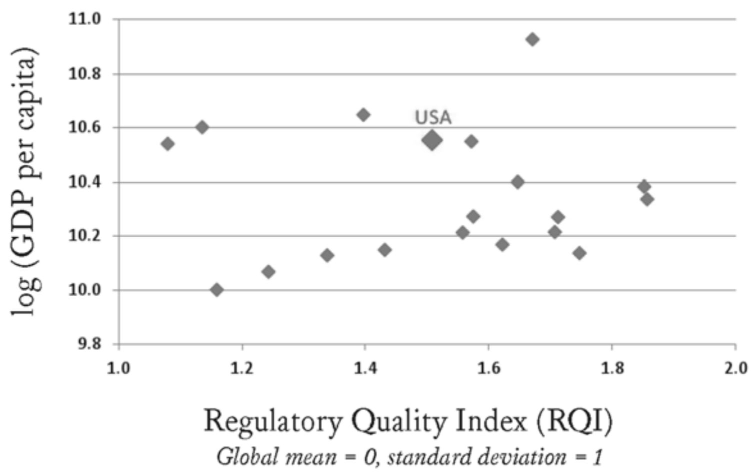
[60] These calculations are based on GDP per capita at market exchange rates downloaded from the World Bank website in January 2011 and RQI data downloaded in November 2011 for all thirty-four OECD member nations. *See Worldwide Governance Indicators, supra* note 27. Adjusted $r^2$, discussed *supra* note 59, is used here to adjust for a small sample size. The more familiar, unadjusted $r^2$ would be larger in every case.

[61] CRAIN & CRAIN, *supra* note 6, at 22.

[62] *See GDP per Capita (Current US$),* WORLD BANK, *http://data.worldbank.org/indicator/NY.GDP.PCAP.CD* (last visited Nov. 4, 2011).

[63] In the regression of *log* GDP per capita versus RQI for these countries, the slope has a $t$ statistic of –0.008 and a $p$ value of 0.99, implying there is an ninety-nine percent probability of getting a relationship at least this good by chance alone, *e.g.,* when comparing two series of random numbers. In general, a negative value for adjusted $r^2$ means that there is a better than fifty percent probability of getting a relationship this good by chance alone.

FIGURE 1 — GDP PER CAPITA VS RQI, 2008: HIGH-INCOME OECD COUNTRIES




4. Correlation Is Not Causation

A correlation can be found between RQI and income only by comparing countries at very different income levels;[64] we have seen that this relationship disappears within the world of countries above about half the United States' level of income.[65] Suppose, for the sake of the argument, that the RQI measures something meaningful about the quality of regulation (determining exactly what the RQI measures is an important issue which we do not address). Turkey and Mexico, two of the lowest-income members of the OECD, also have the lowest RQI scores in the OECD. This does not tell us that the quality of regulation makes a country richer or poorer; the reverse could equally well be true.

The United States is much richer than Turkey or Mexico, and, according to the RQI, has much better regulations. Does this mean that better regulation made the United States richer? Or does it mean that being richer enabled the United States to adopt better regulations? Or, since the RQI is based on the *perception* of regulatory quality by a number of observers, does the greater wealth of the United States lead to a perception that it has better regulations than Turkey or Mexico? Even if the Crain and Crain calculation was reliable and problem free (which it definitely is not, as seen above), it would founder on this shoal: their estimate of regulatory costs depends on the unstated premise that causation is all one way, from regulatory quality to income. If, instead, wealth creates better regulation, their entire argument sinks beneath the waves.

If correlation implied causation, in the manner assumed by Crain and Crain, then their curious finding of negative correlation between GDP per capita and primary school enrollment would suggest another low-cost route to wealth: throw kids out of school. We almost hesitate to mention this, given the viral spread of Crain and Crain's implausible conclusions throughout current political debates. We trust that

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[64] OECD membership now includes thirty-four countries at varying income levels. Crain and Crain used twenty-five of these countries in their analysis; the CRS study used thirty. *See* COPELAND, *supra* note 15, at 27; CRAIN & CRAIN, *supra* note 6, at 21. Neither study reported which countries they included. The previous section of this Article referred only to the nineteen highest-income OECD members—a group that corresponds, we believe, to the common (mis)understanding of OECD membership as a synonym for high income. This section discusses our exploration of the data for all thirty-four countries; it does not include the other explanatory variables used by Crain and Crain and by the CRS study, so it is not directly comparable to those results.

[65] United States GDP per capita was $38,345 in 2008, according to the World Bank. *GDP per Capita (Current US$), supra* note 62.

it is self-evident that the error lies in giving credence to Crain and Crain's calculations, not in the idea of educating children.[66]

*B. Environmental Regulation*

Crain and Crain's estimates of the costs of environmental regulations likewise suffer from several basic flaws. First, they are based on evidence—and regulations—so old as to be unreliable, as OMB itself has acknowledged.[67] Second, they rely heavily on an outdated version of general equilibrium analysis, analysis which, even if updated to reflect the current state of the art, would nonetheless remain deeply problematic in its assumptions. Third, these estimates contain objective errors, such as double counting of the same costs and inclusion of costs for rules that do not exist.

1. Old Data on Old Rules

Crain and Crain's estimates of the costs of environmental regulations come from OMB's 2001–2009 reports on Federal regulation. The earliest of these reports provide estimates of regulatory costs going back decades. In 2003, OMB stopped providing such estimates for the costs of regulations that had been issued more than ten years before, explaining that long-ago estimates were not reliable guides for current policy.[68] Several years before, OMB had explained that it was hard to justify continuing to debit such costs to the Federal Government's regulatory program, as it was unlikely that if the regulations were pulled, businesses would actually withdraw whatever protections they had installed in response to the relevant regulations.[69] In its 2002 report, moreover, OMB had cast a skeptical eye on aggregate cost estimates that attempted to announce an overall figure for the costs of old and new regulations, observing:

> We included these aggregate estimates in the appendix rather than the text to emphasize the quality differences in the two sets of estimates. The estimates of the costs and benefits of Federal regulations over the period of April 1, 1995, to March 31, 2001, are based on agency analyses subject to public notice and comments and OMB review under E.O. 12866. The estimates . . . for earlier regulations were based on studies of varying quality. Some are first-rate studies published in peer-reviewed journals. Others are non-random surveys of questionable methodology. And some esti-mates are based on studies completed 20 years ago for regulations issued over 30 years ago, whose precise costs and benefits today are unknown.[70]

By 2003, these older estimates had disappeared entirely from OMB's report, and they have not come back.

Despite OMB's admonition against using cost estimates that are over ten years old, Crain and Crain use OMB estimates of regulatory costs going back more than twenty years. In using Hazilla and Kopp's estimates for rules issued prior to 1988, they go back to the very beginning of United States environmental law. As OMB itself has observed, costs going back this far are unreliable.[71] The great bulk of Crain and Crain's estimate of the costs of environmental regulation comes from numbers generated so long ago that OMB does not now use them in its own calculations. Crain and Crain should not have used them either. If Crain and Crain had followed OMB's cautions about the unreliability of these old estimates, and eliminated them from their estimate, the total cost of environmental regulation would have fallen from $281 billion to $48 billion.[72]

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[66] Crain and Crain never precisely defined their educational enrollment variable, but they reportedly told CRS that their negative coefficient on educational enrollment could reflect "aging pyramid" effects. COPELAND, *supra* note 15, at 27. If lower-income OECD nations such as Turkey and Mexico have younger populations than other OECD members, then school-age children, and hence school enrollment, may be a larger percentage of the total population in the lower-income countries. This could create a negative correlation between educational enrollment and income per capita in the Crain and Crain dataset.

[67] *See* OFFICE OF MGMT. & BUDGET, STIMULATING SMARTER REGULATION: 2002 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 40 (2002) [hereinafter OMB 2002 REPORT] (describing plans for subsequent reports).

[68] *See id.; see also* COPELAND, *supra* note 15, at 21.

[69] COPELAND, *supra* note 15, at 24–25 (citing OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS (1997)).

[70] OMB 2002 REPORT, *supra* note 67, at 39.

[71] *Id.* at 40.

[72] This is based on converting Crain and Crain's estimate of costs "through 2000" to 2009 dollars. *See* CRAIN & CRAIN, *supra* note 6, at 26 tbl.3.

As we explain below, even this much smaller figure contains large errors.

2. Is Our Real Problem Voluntary Unemployment? Really?

Crain and Crain's calculations for rules adopted before 1988 relied on the Hazilla and Kopp study[73]—which is, strictly speaking, an estimate of potential economic consequences, from 1981 through 1990, of major environmental rules in effect in 1982. To make that estimate, Hazilla and Kopp applied a general equilibrium framework, familiar in textbook economics, in which economic changes are often governed by household responses to small price differentials, including the (voluntary) choice between leisure and labor.[74]

Even within the narrow field of abstract economic models of regulatory costs, Hazilla and Kopp's 1990 paper no longer represents the state of the art. Newer work has identified many subtleties in the modeling of environmental regulations, and leads to a surprisingly wide range of possible outcomes, including ones quite different from Hazilla and Kopp's estimates.[75] Nonetheless, Crain and Crain chose to rely on Hazilla and Kopp, not on newer work in this field.

Although the Hazilla and Kopp estimate of regulatory costs is driven by a decrease in employment, this is not involuntary unemployment, of the sort seen in recessions and all too well known in reality today. The general equilibrium framework used in economics typically assumes that all markets clear—that is, supply equals demand for every commodity and for factors of production such as labor.[76] Instead, the reduction in employment of interest to Hazilla and Kopp stems from a voluntary choice: looking at the higher prices, and consequently lower real wages, that result from environmental protection costs, households decide that they would prefer to reduce their aggregate hours of work by about one percent.[77] Leisure is presumably just as rewarding as ever, but labor is slightly less rewarding at the slightly lower real wages, so rational utility maximizers (the only species of human beings found in the model) choose to work slightly less. For someone working a forty-hour, fifty-week year, one percent less work is a reduction of twenty hours, or 2.5 days, per year. All the costs of pre-1989 regulations, for Crain and Crain, are consequences of this minor, voluntary adjustment in working hours.

Since it is a voluntary choice, why complain about workers choosing more leisure? The problem, for Hazilla and Kopp, is as old as the Protestant ethic: more work means more income, some of which is saved and can be invested in capital goods, leading to faster economic growth—but more leisure just means another 2.5 days at the beach. In the folkloric tradition of kingdoms lost for a nail, it is the imposition of environmental regulations—which raised prices, which lowered real wages, which made workers choose more leisure, which lowered incomes, which lowered savings, which lowered investment, which caused slower economic growth—which imposed such burdensome costs on the economy.

What's wrong with this long and winding tale of economic causation? One might well question the real-world relevance of a model of automatic full employment. In a world with business cycles and involuntary unemployment, it is quite possible that regulatory costs could lead to increased expenditures and employment.[78] Beyond

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[73] Hazilla & Kopp, *supra* note 44, at 856–57.

[74] Hazilla and Kopp's description of their model begins with a discussion of the importance and the challenge of modelling household preferences correctly, and cites numerous other economic models in a similar vein. *Id.* at 857–62. They observe that their model "is suitable for assessing long-run impacts of regulatory programs on neoclassical economic growth," *i.e.,* impacts on abstract economic models. *Id.* at 859.

[75] *See, e.g.,* Don Fullerton & Garth Heutel, *The General Equilibrium Incidence of Environmental Mandates,* AM. ECON. J.: ECON. POL'Y, Aug. 2010, at 64.

[76] Hazilla and Kopp are not explicit about their labor market assumptions. The paper they cite as the source of their model includes the possibility of involuntary unemployment, but does not discuss it. It does, however, highlight the household decision about voluntary leisure time. Edward A. Hudson & Dale W. Jorgenson, *U.S. Energy Policy and Economic Growth, 1975–2000,* 5 BELL J. ECON. & MGMT. SCI. 461 (1974).

For a discussion on the limitations of general equilibrium models for policy analysis, with an emphasis on trade policy, see Frank Ackerman & Kevin Gallagher, *The Shrinking Gains from Global Trade Liberalization in Computable General Equilibrium Models: A Critical Assessment,* 37 INT'L J. POL. ECON. 50 (2008). For a discussion on the limitations of the underlying economic theory, see Frank Ackerman, *Still Dead After All These Years: Interpreting the Failure of General Equilibrium Theory,* 9 J. ECON. METHODOLOGY 119 (2002).

[77] Labor supply in the environmental cost scenario is 0.84 percent lower than in the no-regulation baseline in 1981, and 1.18 percent lower in 1990. Hazilla & Kopp, *supra* note 44, at 867 tbl.3.

[78] When, as at present, businesses are earning significant profits but not investing them due to a lack of demand for their products, regulations could force businesses to spend some of those profits on pollution controls; that spending would create an economic stimulus.

such fundamental questions about general equilibrium modeling, there are several additional problems with the Hazilla and Kopp analysis.

For one thing, there is no sign of awareness of any possible benefits of regulation—to human health, to nature, or even to the economy. Hazilla and Kopp analyzed the economic impact of the earliest regulations adopted under the Clean Air Act and the Clean Water Act—rules that save thousands of people per year from dying of lung disease, prevent rivers from catching fire, and keep lead out of gasoline. Is the main economic impact of these sweeping changes in our conditions of life really a slight increase in prices that inspires workers to do one percent less work? Even in narrowly economic terms, healthier people, with fewer respiratory diseases, are more productive workers, and children growing up free of exposure to lead have, on average, higher IQs and higher lifetime earnings prospects.[79]

More broadly speaking, the benefits of clean air and clean water are immensely valuable, and widely valued. In EPA's retrospective cost-benefit analysis of the early stages of the Clean Air Act, the estimated value of the benefits is more than forty times the costs, and more than enough to outweigh Hazilla and Kopp's estimates of regulatory costs.[80] Crain and Crain, following in Hazilla and Kopp's footsteps, were happy to use calculations based on EPA's estimates of the costs of regulation, but entirely ignored EPA's much larger estimates of the benefits of the same rules.[81]

Another problem is that Hazilla and Kopp's projections of the costs of regulations grow rapidly over time, and should by now be vastly—but laughably—larger than Crain and Crain's estimate. The number used by Crain and Crain to represent the current costs of environmental regulations adopted before 1989 is in fact Hazilla and Kopp's estimate of costs as of 1985 (adjusted for inflation), mislabeled as the cost in 1988.[82] There is, however, no reason to stop in 1985: the Hazilla and Kopp cost estimate is much larger for 1990, the last year in their analysis, than for 1985[83]—and the logic of their model implies that the costs resulting from 1980s regulations should have continued to escalate, considerably faster than inflation, beyond 1990.

The rapid, ongoing escalation can be seen in a comparison of Hazilla and Kopp's social cost projections to EPA's estimates of direct compliance costs. The true social cost of early 1980s clean air and clean water rules, according to Hazilla and Kopp, was 67 percent of EPA's estimate of direct compliance costs in 1981, rising to 126 percent in 1985 and 258 percent in 1990.[84] Hazilla and Kopp's social costs were lower than direct compliance costs in 1981, the first year of the rules they analyzed, because they subtracted the assumed value of the increase in leisure. Yet, over time, the cumulative, dynamic effects of reduced labor become steadily more important. Every year that workers work less, thereby reducing income, savings, investment, and growth, the next year's GDP becomes smaller than it would have been. As time goes on, the reductions in income and growth are compounded, so the regulatory cost scenario falls farther and farther behind the no-regulation baseline. As a result, the social cost of regulation, defined as the gap between the baseline and regulatory cost scenarios, grows ever larger.

From 1981 to 1985, Hazilla and Kopp's social cost estimate, measured in constant (inflation-adjusted) dollars, grows by an average of 20.5 percent per year. From 1985 to 1990, the growth rate is only slightly slower, at 18.8 percent per year.[85] Nothing is said in the article (or in the subsequent articles citing it) about what growth rates to expect beyond 1990; two hypothetical examples, however, demonstrate the importance of this question. First, if the post-1985 rate of growth, 18.8 percent annually, continued into the future, then by 2009 the social cost of early-1980s environmental

[79] *E.g.,* SHAPIRO ET AL., *supra* note 5, at 11 (estimating that regulation saves $76 billion in child healthcare costs, $38 billion dollars in municipal charges, and thousands of lives); EPA, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT: 1990 TO 2010, at 75 (1999), available at *http://www.epa.gov/oar/sect812/1990-2010/chap1130.pdf* (estimating the benefits of Clean Air Act regulations to be $110 billion).

[80] *See Retrospective Study—Study Design and Summary of Results,* EPA, *http://www.epa.gov/air/sect812/retro.html* (last visited Nov. 4, 2011).

[81] The OMB reports on which Crain and Crain rely for their estimates of the costs of rules issued after 1988, CRAIN & CRAIN, *supra* note 6, at 26 tbl.3, themselves rely on EPA's estimates of costs as reflected in their RIAs for major rules. *Id.* at 25.

[82] The error in dates occurs in Hahn and Hird's treatment of the Hazilla and Kopp estimate. In the appendix explaining their numbers, Hahn and Hird recognized that they were using an inflation-adjusted version of Hazilla and Kopp's estimate for 1985. Hahn & Hird, *supra* note 17, at 272 & n.224 (explaining their $77.6 billion figure). In the body of their article, however, Hahn and Hird inserted the same number, without comment or adjustment, into a table of regulatory costs and benefits in 1988. *Id.* at 256 tbl.2.

[83] Hazilla and Kopp, *supra* note 44, at 865 tbl.2.

[84] Calculated from *id.*

[85] Calculated from the "Social Cost" estimates, *id.,* converted to constant dollars.

regulation would have reached $8.8 trillion, well over half of the GDP. Second, if the rate of growth continued to decline by 1.7 percentage points every five years, as it did from the early- to late-1980s in Hazilla and Kopp's analysis, then the social cost of early-1980s regulations would have been "only" $4.5 trillion by 2009, nearly one-third of the GDP.[86] Surely these numbers are large enough to fail the laugh test: they are humorously, absurdly wrong on their face. In order to make sensible, contemporary use of the Hazilla and Kopp estimates, it would be necessary to explain why their growth decelerates or stops—an explanation which is not present in Hazilla and Kopp, or in Crain and Crain.

Within the (limited, as we have seen) logic of this model, what prevents the costs of a fixed set of regulations from growing without limit? Hazilla and Kopp are not alone in having missed an obvious answer: high initial costs of regulatory compliance create an incentive for innovation, which lowers future costs. General equilibrium analyses frequently focus on the implications of consumers' and workers' responses to small price changes, such as the one percent reduction in working hours modeled by Hazilla and Kopp. Yet they typically omit the comparable response of engineers and entrepreneurs to regulations: if compliance costs are high enough, there are profits to be made by inventing cheaper alternative technologies. Why should entrepreneurs, who are in the business of seeking out new opportu-nities for profits, be less sensitive to price incentives than households? Innovation may seem less predictable than changes in consumer purchases or workers' desire to work—but the assumption that regulation creates an incentive for innovation makes sense out of the repeated empirical finding that regulatory costs turn out to be lower than predicted in advance.[87]

The argument that regulations create important incentives for innovation exists in economics literature. The "Porter hypothesis" claims that well-designed regulations can prompt enough innovation to increase the competitiveness of regulated firms.[88] This idea has been controversial among economists, since it implies that, prior to regulation, the firms were not maximizing profits. There is, however, extensive empirical evidence to support the hypothesis. At a macro level, Germany's large, longstanding trade surplus suggests that the country's famously strict regulations do not destroy competitiveness.[89]

The article introducing the Porter hypothesis cites Hazilla and Kopp as an example of a study that is biased against regulation by its failure to consider the incentives it creates (as well as the failure to evaluate any benefits of regulation).[90] A more empirically-grounded account of the economic impact of 1980s regulations, the subject of Hazilla and Kopp's analysis, would include, for example, the unexpectedly low cost to society of removing lead from gasoline, since the catalytic converters introduced by automobile manufacturers at about that time required unleaded gasoline.[91]

By the 1990s, unleaded gasoline had become the universal standard, and it was no longer meaningful to say that its costs were higher than the baseline (as assumed in the Hazilla and Kopp cost estimates). Once there was no longer any leaded fuel option available on the market, no one could save money by going back to

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[86] Calculated by applying the indicated growth rates to the Hazilla and Kopp estimate of social costs in 1990, *id.,* converted to 2009 dollars.

[87] *See e.g.,* SHAPIRO ET AL., *supra* note 5, at 2; Frank Ackerman, *The Unbearable Lightness of Regulatory Costs,* 33 FORDHAM URB. L.J. 1071, 1083 (2006); Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation,* 80 TEX. L. REV. 1997, 1998 (2002).

[88] Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Envi-ronment-Competitiveness Relationship,* 9 J. ECON. PERSP. 97, 97–98 (1995).

[89] For a historical analysis of Germany's institutional framework and its positive relationship to economic growth, see Wendy Carlin, *West German Growth and Institutions, in* ECONOMIC GROWTH IN EUROPE SINCE 1945, at 455 (Nicholas Crats & Gianni Toniolo eds., 1996). For an attempt at quantitative analysis of the effects of German regulations on economic growth, finding a positive effect on growth from environmental regulations and a negative effect from capital market regulations, see Helge Berger, *Regulation in Germany: Some Stylized Facts About its Time Path, Causes, and Consequences,* 118 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND SOZIALWISSENSCHAFTEN [J. APPLIED SOC. SCI. STUD.] 185 (1998) (Ger.).

Germany's trade surplus is documented in the numerous statistical reports available from the WORLD TRADE ORG., *http://www.wto.org* (last visited Nov. 19, 2011). For example, in 2009, Germany had a merchandise trade surplus of $188 billion, second only to China's $196 billion. *See* WORLD TRADE ORG., INTERNATIONAL TRADE STATISTICS 2010, at 13 tbl.I.8 (2010), available at *http://www.wto.org/english/res_e/statis_e/its2010_e/its2010_e.pdf.*

[90] Porter & van der Linde, *supra* note 88, at 108.

[91] *See e.g.,* Frank Ackerman *et al., Applying Cost-Benefit Analysis to Past Decisions: Was Environmental Protection Ever a Good Idea?,* 57 ADMIN. L. REV. 155, 164–65 (2005); Jamie Lincoln Kitman, *The Secret History of Lead,* NATION, Mar. 20, 2000, at 11.

it; the only baseline worth talking about was the new, healthier world of unleaded gasoline.[92]

Yet phony numbers have a life of their own; repetition of Hazilla and Kopp's estimate, passed from Hahn and Hird to OMB to Crain and Crain, continued even as the innovative processes of the real-world economy eliminated the costs that were estimated, so long ago, in such a biased manner.

3. Piling On: Crain and Crain's Use of OMB Reports on the Costs of Environmental Rules

In their tallies of total costs, Crain and Crain always use the high end of the range of OMB's cost estimates. They explain that agencies underestimate costs and that this justifies use of high-end estimates.[93] But the empirical evidence that exists on actual regulatory costs—limited though it may be—does not support Crain and Crain's assertion that agencies underestimate regulatory costs. Indeed, the evidence that exists tends to point in the opposite direction.[94] Although the refrain that agencies have an incentive to underestimate costs pervades discourse on the costs of regulation,[95] in fact at least EPA often has exactly the opposite incentive. Much environmental regulation stems from laws directing EPA to set limits based on the best available technology for pollution control.[96] A primary consideration in determining which technology is available is economic affordability.[97] In anticipating the inevitable legal challenge to a rule generated within this legal framework, EPA has an incentive to overestimate rather than underestimate the costs of the technology. If the technology is affordable even based on an overly-high cost estimate, then it should survive legal attack.[98] Whether EPA does more harm than good to itself when it deliberately highballs its estimates of costs, the fact remains that it does so, and this belies the claims that the agency aims at the low end in estimating costs.

It must be remembered, moreover, that the cost estimates in EPA's RIAs always go through OMB review.[99] OMB has no incentive to allow EPA to underestimate costs, and, indeed, OMB stands ready to direct the agency to change cost estimates in the RIAs that accompany major rules sent to OMB for review. OMB staff members are not shy about insisting on significant changes to RIAs as a condition of OMB clearance.[100] Thus, although the cost estimates in OMB's recent reports all come from the agency's own RIAs, those RIAs reflect OMB's prior input; they are not the work product of the agency alone.

Crain and Crain also justify the use of high-end estimates by emphasizing that OMB's annual reports count the costs only of major rules that cost $100 million or more per year, and exclude regulatory programs (like Superfund) that do not rely on rules as their predominant regulatory mechanism.[101] Crain and Crain are correct in saying that OMB's reports do not cover the regulatory waterfront. Insofar as OMB estimates only the costs and benefits of major rules, it does not capture the

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[92] The Clean Air Act banned the sale of leaded gasoline as of 1996, and other countries around the world took similar actions. As of June 2011, the only countries relying exclusively on leaded gasoline were Myanmar (Burma) and Afghanistan; the only other countries still selling any leaded gasoline for road use were Algeria, Iraq, North Korea, and Yemen. Robert Taylor & Zac Gethin-Damon, *Countries Where Leaded Petrol is Possibly Still Sold for Road Use as at 17th June 2011* [sic], THE LEAD GRP. (June 17, 2011), *http://www.lead.org.au/fs/fst27.html.*

California banned the sale of leaded gasoline in 1992, four years earlier than the Federal Government, and found that the initiative had no statistically significant effect on the price of gasoline in California. Hayley H. Chouinard & Jeffrey M. Perloff, *Gasoline Price Differences: Taxes, Pollution Regulations, Mergers, Market Power, and Market Conditions,* 7 B.E. J. ECON. ANALYSIS & POL'Y 1, 12, 20 tbl.5 (2007).

[93] CRAIN & CRAIN, *supra* note 6, at 27.

[94] *See, e.g.,* SHAPIRO ET AL., *supra* note 5, at 7; Ackerman, *supra* note 87, at 1083.

[95] *See, e.g.,* Morrall, *supra* note 19, at 29.

[96] *See, e.g.,* Cass R. Sunstein, *Administrative Substance,* 1991 DUKE L.J. 607, 627–31.

[97] *See, e.g.,* Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category, 74 Fed. Reg. 62,996, 63,002 (Dec. 1, 2009) (to be codified at 40 C.F.R. pt. 450); Effluent Limitations Guidelines and New Source Performance Standards for the Airport Deicing Category, 74 Fed. Reg. 44,676, 44,678 (Aug. 28, 2009) (to be codified at 40 C.F.R. pt. 449).

[98] SHAPIRO ET AL., *supra* note 12, at 7 (citing McGarity & Ruttenberg, *supra* note 87, at 2011, 2044–45).

[99] By definition, RIAs are done for economically significant rules, and OMB reviews economically significant rules.

[100] For a particularly dramatic example of changes made to an RIA during OMB review, see Sidney Shapiro, *Back to the Future: OMB Intervention in Coal Ash Rule Replicates the Bush Administration's Way of Doing Business,* CPRBLOG (Jan. 1, 2010), *http://www.progressivereform.org/CPRBlog.cfm?idBlog=1DDEA50F-E885-B550-C04BDE576F2C0B6E.*

[101] CRAIN & CRAIN, *supra* note 6, at 4, 26.

costs and benefits either of rules costing less than this or of regulatory programs that are not primarily implemented through rulemaking.

But OMB itself has concluded that major rules account for the "vast majority" of the total costs of Federal rules.[102] And Crain and Crain themselves tell only a tiny part of the story. As others have observed, they completely omit regulatory benefits, as if Federal regulatory programs cost money but give us nothing in return.[103] More subtly, they completely ignore the fact that many Federal programs in fact provide money to, rather than just taking money from, the very industries covered by the regulatory programs they criticize. Direct and indirect subsidies cost taxpayers billions of dollars every year, yet these costs do not figure at all in Crain and Crain's report.[104]

Then there are outright errors that further inflate Crain and Crain's figures on regulatory costs. Table 3 of the study reports the costs of rules issued "[through 2000, Q1" *and* the costs of rules issued from April 1999 to September 2001. This double counts the costs of rules issued between April 1, 1999 and March 31, 2000. It is difficult to know exactly how large a difference this double counting makes in Crain and Crain's estimates because the OMB reports from which Crain and Crain draw do not provide annualized costs for all of the rules issued in the period of overlap.[105] But we do know the difference is large. Just considering the costs of the rules for which OMB does provide annualized cost estimates, we can see that the costs Crain and Crain double count amount to over $3 billion (in 2009 dollars).[106] And this does not include two rules that together, several years out, were estimated to cost almost $10 billion.[107] For the period October 2003 to October 2004, Crain and Crain report the costs of *all* federal rules and not just EPA rules.[108] The cost of this mistake is just over $1 billion.[109] These errors together account for well over $4 billion of the annual costs Crain and Crain attribute to environmental rules for the ten-year period from 1999 through 2008.

Crain and Crain also include the costs of many rules that no longer exist. Some of these rules were never put into effect because EPA chose to reconsider them. These include air toxics rules on boilers[110] and plywood,[111] a New Source Performance Standard for petroleum refineries,[112] and the National Ambient Air Quality Standard (NAAQS) for ozone set in 2008.[113] In including rules that the agency itself

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[102] OMB 2002 REPORT, *supra* note 67, at 38.

[103] COPELAND, *supra* note 15, at 12–13; SHAPIRO ET AL., *supra* note 12, at 1–2, 6.

[104] *See, e.g.,* AUTUMN HANNA ET AL., GREEN SCISSORS 2011: CUTTING WASTEFUL AND ENVIRONMENTALLY HARMFUL GOVERNMENT SPENDING (2011), available at *http://heartland.org/sites/default/files/_Green_Scissors_2011_Web_(2)_pdf;* Lisa Heinzerling, *New Directions in Environmental Law: A Climate of Possibility,* 35 HARV. ENVTL. L. REV. 263, 268–69 (2011).

[105] OMB 2001 REPORT, *supra* note 42, at 22–28 tbl.4 (reporting costs of rules issued between April 1, 1999 and March 31, 2000, some annualized and some single-year).

[106] *See id.* (providing the costs of storm water discharges (phase II), handheld engines, and section 126 petitions for purposes of reducing interstate ozone transport). All of our subsequent estimates of the effect, in dollars, of double counting and other errors on Crain and Crain's total estimates are stated in 2009 dollars.

[107] *See id.* (noting the Tier 2/new motor vehicle emissions standards at a cost estimate of $5.3 billion per year (1997 dollars) in 2030 and the regional haze rule at a high-cost estimate of $4.4 billion per year (1990 dollars) in 2015).

[108] Crain and Crain report a high-cost estimate of just over $4 billion for this period. CRAIN & CRAIN, *supra* note 6, at 26 tbl.3. This is the same as OMB's estimate for the costs of all Federal regulations for this same period. OFFICE OF MGMT. AND BUDGET, VALIDATING REGULATORY ANALYSIS: 2005 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 12 tbl.1–3 (2005) [hereinafter OMB 2005 REPORT].

[109] $862 million in 2001 dollars.

[110] *See* National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters, 69 Fed. Reg. 55,218 (Sept. 13, 2004) (to be codified at 40 C.F.R. pt. 63); OMB 2005 REPORT, *supra* note 108, at 13 tbl.1–4 (noting a high-end cost estimate of $876 million in 2001 dollars).

[111] *See* National Emission Standards for Hazardous Air Pollutants: Plywood and Composite Wood Products; List of Hazardous Air Pollutants, Lesser Quantity Designations, Source Category List; Reconsideration, 70 Fed. Reg. 43,820 (July 29, 2005) (to be codified at 40 C.F.R. pt. 63); OMB 2005 REPORT, *supra* note 108, at 13 tbl.1–4 (noting a high-end cost estimate of $291 million in 2001 dollars).

[112] *See* Standards of Performance for Petroleum Refineries, 73 Fed. Reg. 55,751 (Sept. 26, 2008) (granting reconsideration and stay of the effective date); OFFICE OF MGMT. AND BUDGET, 2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 16 tbl.1–4 (2010) [hereinafter OMB 2009 REPORT] (noting a cost estimate of $7 million in 2001 dollars).

[113] *See* OMB 2009 REPORT, *supra* note 112, at 16 tbl.1–4 (noting a high-end cost estimate of $7.73 billion in 2001 dollars).

has pulled, Crain and Crain over-state actual regulatory costs for the relevant period by almost $11 billion.

Similarly, Crain and Crain also include rules that no longer exist because the courts have overturned them. Rules invalidated by the courts, yet embraced within Crain and Crain's estimates of today's regulatory costs, include the Bush administration's Clean Air Act rule governing mercury from power plants,[114] its Clean Water Act rules on concentrated animal feeding operations,[115] and rules on cooling water intake structures at power plants and other facilities.[116] The cost of including these rules in Crain and Crain's cost estimates is almost $6 billion. It is also worth noting that two of the rules most cited in industry complaints about the aggressiveness of the Obama EPA are do-overs of these two invalidated rules—the proposed new rules on air toxics from power plants and on cooling water intake structures.[117] Crain and Crain use defunct cost estimates associated with past, invalidated incarnations of these rules, and many observers have then taken Crain and Crain's flawed cost estimates as a reason to caution against the new rules in this administration—which include new versions of these very same rules.[118] If ever there was double counting, this surely is it.

Crain and Crain also double count by including rules that together aim at the same regulatory end point. They include the 2006 NAAQS for particulate matter[119] and the implementation plans for meeting these standards,[120] while at the same time including other rules that also target the same emissions of particulate matter.[121] Likewise, Crain and Crain include both the estimated costs of the 1997 ozone NAAQS[122] and rules designed to meet those very standards.[123] OMB, for its part, eschews this kind of double counting.[124] The cost of Crain and Crain's double counting here is well over $10 billion.

All told, these mistakes add up to over $30 billion out of the $48 billion Crain and Crain report for the costs of environmental regulation from 1999 to 2008.[125] And this only accounts for Crain and Crain's double counting and their inclusion of nonexistent rules, not for the likely overestimation of regulatory costs in RIAs[126] or for any other contestable part of their analysis. No one, we hope, would argue that it is acceptable to count the costs of the same rule more than once in estimating actual regulatory costs. Nor, we hope, would anyone argue that the costs of

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[114] *See* OFFICE OF MGMT. & BUDGET, 2006 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL AND TRIBAL ENTITIES 9 tbl.1–4 (2007) [hereinafter OMB 2006 REPORT] (noting a high-end cost estimate of $500 million).

[115] *See* OFFICE OF MGMT. & BUDGET, PROGRESS IN REGULATORY REFORM: 2004 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL AND TRIBAL ENTITIES 18 tbl.4 (2004) (noting a cost estimate of $360 million).

[116] *See* Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486 (2d Cir. 2009) (vacating rule); National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41,576 (July 9, 2004) (to be codified at 40 C.F.R. pts. 9, 122–125); OMB 2005 REPORT, *supra* note 108, at 13 tbl.1–4 (noting a high-end cost estimate of $383 million).

[117] *See, e.g.,* AM. LEGISLATIVE EXCH. COUNCIL, EPA'S REGULATORY TRAIN WRECK: STRATEGIES FOR STATE LEGISLATORS 12–13, 15 (2011), available at *http://timeopinions.files.wordpress.com/2011/10/epa-train-wreck-2011-final-full-printres.pdf.*

[118] *See supra* text accompanying notes 7–9.

[119] *See* National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,144 (Oct. 17, 2006) (to be codified at 40 C.F.R. pt. 50); OFFICE OF MGMT. & BUDGET, 2007 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 9 tbl.1–4 (2008) [hereinafter OMB 2007 REPORT] (noting a high-end cost estimate of $2.83 billion in 2001 dollars, equivalent to $3.42 billion in 2009 dollars).

[120] *See* OFFICE OF MGMT. & BUDGET, 2008 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 11 tbl.1–4 (2009) (noting a high-end cost estimate of $7.32 billion in 2001 dollars).

[121] Rules on regional haze, boilers, petroleum refineries, automobile emissions, and more: all share particulate matter emissions as one of their regulatory targets.

[122] *See* OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS 79 tbl.15 (1998) (noting a cost estimate of $4.5 billion in 1996 dollars, equivalent to over $6.1 billion in 2009 dollars).

[123] *See* OMB 2006 REPORT, *supra* note 114, at 8 tbl.1–4 (noting a cost estimate of $1.89 billion in 2001 dollars for the Clean Air Interstate Rule Formerly Titled: Interstate Air Quality Rule); OMB 2000 REPORT, *supra* note 42, at 38, 39 (noting a cost estimate of $1.7 billion in 1990 dollars for the $NO_X$ SIP Call).

[124] *See* OMB 2007 REPORT, *supra* note 119, at 36.

[125] The figures are converted from CRAIN & CRAIN, *supra* note 6, at 26 tbl.3, which were reported in 2001 dollars, to 2009 dollars based on the figures reported in CRAIN & CRAIN, *supra* note 6, at 31 tbl.6, which were reported in 2009 dollars.

[126] *See supra* text accompanying notes 94–100.

nonexistent rules should figure in estimates of actual regulatory costs. Taking out these phantom costs cuts Crain and Crain's estimate of the costs of environmental regulation post-2000 by two-thirds.

We have not toted up every single possible instance of double counting or of counting the costs of rules that are not in force. Once we discovered the magnitude of the errors in Crain and Crain's analysis, it seemed like overdoing it to chase after more double counted or miscounted millions when we had found so many double counted and miscounted billions.

But be assured: there are more millions, and even billions, to be found, and excised from Crain and Crain's estimates. For example: OMB's 1998 report estimates an annual cost of $17 billion in 1996 dollars for the 1997 particulate matter NAAQS ($23.28 billion in 2009 dollars). This estimate is carried over into Crain and Crain's estimates through their use of OMB's 2001 report. Yet Crain and Crain also include the costs of many rules that reduce particulate matter and are aimed in large part at attaining that 1997 standard. If the 1997 NAAQS rule is removed from Crain and Crain's aggregate cost estimate, that estimate declines by over $23 billion. And another example of many millions left on our cutting room floor: Crain and Crain's estimates surely include the costs of EPA's 1989 ban on asbestos—overturned in court almost twenty years ago.[127]

*C. Workplace Safety and Health*

Crain and Crain estimate costs of $64.3 billion for occupational safety and health regulations issued prior to 2001, and $471 million for such regulations issued between 2001 and 2008.[128] For the costs of rules issued before 2001, Crain and Crain rely on a book chapter published in 2005 by Joseph M. Johnson.[129] As Sidney Shapiro and his co-authors from the Center for Progressive Reform have tellingly observed, Johnson's figure has an exceptionally dubious provenance: Johnson aggregates cost estimates for occupational safety and health rules through 2001, then multiplies them by 5.55 based on a 1996 study[130] which itself relied on a 1974—*yes, 1974*—estimate of compliance costs ("unpublished and otherwise unavailable," Shapiro *et al.,* point out) by the National Association of Manufacturers.[131] Despite these awkward origins, Crain and Crain apparently think so highly of the Johnson estimate that they report they used the Johnson calculations "where possible, that is, until 2001."[132] Apart from showing a strange preference for calculations of dubious quality, Crain and Crain's suggestion that it was not possible to use the Johnson estimate for rules after 2001 betrays a lack of understanding of how that estimate was derived. All Crain and Crain had to do, if they really believed in the Johnson estimate as much as they appeared to, was to multiply the cost estimates for rules issued after 2001 by 5.55![133]

One of us has previously criticized this multiplier, which comes from a study by Harvey James:[134]

> Harvey James estimates the costs of compliance with 25 OSHA regulations as of 1993. But he also observes that the cost per firm was 5.5 times higher in a 1974 study of OSHA compliance costs done by the National Association of Manufacturers. James then simply asserts that the costs per firm could not be lower today than in 1974. On that basis, he multiplies his 1993 numbers by

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[127] These costs are included in OMB's 2001 report (incorporated by Crain and Crain) through use of estimates compiled in 1996 for major rules issued between 1987 and 1994. The asbestos ban was issued in 1989, Asbestos Ban and Phaseout Rule, 40 C.F.R. § 763 (1989), and estimated (on the high end, which is what Crain and Crain used) to cost approximately $62 million per year. If Crain and Crain's analysis is to be believed, we are still paying over $100 million a year (based on adjusting the $62 million figure for inflation, as Crain and Crain do) for this ban, which was overturned by the courts in 1991. *See* Corrosion Proof Fittings v. Envtl. Prot. Agency, 947 F.2d 1201 (5th Cir. 1991). For the anti-regulatory crowd, this defunct ban is certainly the gift that keeps on giving. *See Five Hundred Life-Saving Interventions, supra* note 23, at 156 (criticizing the invalidated asbestos ban in one-third of the environmental measures discussed).

[128] CRAIN & CRAIN, *supra* note 6, at 30 tbl.5 (reporting cost in 2009 dollars).

[129] *Id.* (citing Johnson, *supra* note 18).

[130] JAMES, *supra* note 18.

[131] SHAPIRO ET AL., *supra* note 12, at 9.

[132] CRAIN & CRAIN, *supra* note 6, at 31.

[133] Crain and Crain also are mistaken to say that the figure they report for OMB's estimates of the costs of OSHA rules run from 2001 to 2008. CRAIN & CRAIN, *supra* note 6, at 30 tbl.5. Actually, the OMB source they cite covers rules from 1998 to 2008. OMB 2009 REPORT, *supra* note 112, at 10–11 tbl.1–2.

[134] JAMES, *supra* note 18.

5.5—thereby eliminating all empirical content in his study of 1993 costs, and simply recycling a 1974 estimate by an anti-regulatory industry group.[135]

It is worth noting that James himself had more modest claims for his own study, cautioning that his cost calculations were "estimates only . . . and not measures of actual expenditures."[136] He emphasized that the rules he studied had been issued in "different time periods" and that "estimates of the compliance costs of OSHA do not take into account new rules, changes in existing regulations, or old rules no longer aggressively enforced by the agency."[137] None of these cautions reappears in Crain and Crain's wholesale adoption of James's estimates.[138]

Crain and Crain's estimate for the costs of rules on workplace safety and health regulation issued from 2001 to 2008 has the same basic flaw as many of their estimates of environmental regulatory costs: the estimate includes costs that do not exist.[139] To take one example, a good portion—$327 million out of $470 million—of the costs Crain and Crain report for workplace rules from 2001 to 2008 comes from just one rule: OSHA's rule setting limits for hexavalent chromium.[140] After this rule was issued, the parties challenging the rule agreed to significant changes in the rule to make it more flexible and less costly.[141] But Crain and Crain use the previ-ous version of the rule in their analysis.[142] Here, too, Crain and Crain report the costs of a rule that does not exist in the form they assume.

**Conclusion**

If statistical analysis required a driver's license, Crain and Crain could have theirs revoked for reckless and dangerous driving. On economic regulation, their one-equation calculation, worth $1.24 trillion in their fantasy of regulatory costs, rests on misunderstanding the definition of their data, flunking an elementary question on the normal distribution, padding the analysis with seven years of near-identical data, and failing to recognize the difference between correlation and causation. Their methods could just as easily be read as claiming that economic benefits would result from cutbacks in education as from cutbacks in regulation—yet, no one has argued that is a credible position.

On environmental regulation, Crain and Crain wheel out decades-old studies of decades-old rules. The bulk of their estimate rests on the idea that *voluntary* unemployment is the real culprit in today's regulatory environment. The remainder of it is filled to the brim with nonexistent rules and other phantoms—as is their flawed estimate of the costs of workplace safety and health rules.

It would be bad enough if this were a private study, undertaken with private funds, lacking any official imprimatur. Even then, the viral spread of the utterly unfounded $1.75 trillion estimate through the public sphere would be worrying enough. But this is a study requested, funded, reviewed, and edited by a government agency, the SBA's Office of Advocacy.[143] Taxpayers shelled out almost

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135 Ackerman, *supra* note 87, at 1085–86; *see also* SHAPIRO ET AL., *supra* note 12, at 9.

136 JAMES, *supra* note 18, at 10.

137 *Id.* at 5.

138 Nonexistent rules make an appearance here, too: Johnson (based on James) includes over $1 billion (in 2009 dollars) in costs for OSHA's air contaminants rule. Johnson, *supra* note 18, at 34 tbl.10. The rule was overturned almost twenty years ago in *AFL–CIO v. Occupational Safety & Health Admin.,* 965 F.2d 962 (11th Cir. 1992).

139 Crain and Crain also repeat here the error of double counting the costs of some years' regulatory output. Crain and Crain report that their estimates from OMB's annual reports cover the years 2001 to 2008. CRAIN & CRAIN, *supra* note 6, at 30 tbl.5. In fact, those reports cover the years 1998 to 2008 and thus overlap for three years with the period covered in the James study. OMB 2009 REPORT, *supra* note 112, at 10 tbl.1–2.

140 *See* OMB 2007 REPORT, *supra* note 119, at 9 tbl.1–4 (reporting a high-end cost estimate of $271 million in 2001 dollars for this rule, which works out to approximately $327 million after adjusting for inflation).

141 *See* Settlement Agreement, Surface Finishing Indus. Council v. Occupational Safety & Health Admin., No. 06–2272 and Pub. Citizen Health Research Grp. v. Occupational Safety & Health Admin., No. 06–1818 (3d Cir. Oct. 25, 2006), available at *http://www.osha.gov/SLTC/hexavalentchromium/elect_sign_steelworkers.html.*

142 Crain and Crain rely on OMB's 2007 estimate of the cost of this rule, which itself used OSHA's estimate of the cost of the original rule and not the rule as changed after settlement. *See* Occupational Exposure to Hexavalent Chromium, 71 Fed. Reg. 10,100, 10,263 (Feb. 28, 2006) (reporting a cost estimate of $288 million per year in 2003 dollars, which works out to OMB's cost of $271 million when 2001 dollars are used); OMB 2007 REPORT, *supra* note 119, at 9 tbl.1–4 (reporting a cost estimate of $271 million).

143 CRAIN & CRAIN, *supra* note 6, at cover page (stating that report was "reviewed and edited by officials of the Office of Advocacy," though hedging as to whether the "final conclusions" of the report reflected the views of that office).

$100,000 for this nonsense.[144] More fundamentally, the Office of Advocacy's sponsorship and official embrace of the study—running all the way from initially conceiving the study, funding it, reviewing it, and editing it, to officially defending the study in testimony before Congress even after it had been severely criticized[145]—embroils this public agency in an unwholesome blend of ineptitude and bias. Before funding any more anti-regulatory research that threatens to repeat the same sad story,[146] the Office of Advocacy should officially, emphatically, and loudly disown the methodology and findings of Crain and Crain's problematic report. "Advocacy" is not an excuse for phony numbers.

The CHAIRMAN. Thank you, Professor Heinzerling.

Let me just ask, and I'll direct this to Mr. White and Mr. Palmieri, could you speak to ways in which we could improve the implementation of the Regulatory Flexibility Act to better account for and address its impacts on small business?

Mr. PALMIERI. Thank you, Mr. Chairman. The Regulatory Flexibility Act, a bipartisan law passed in 1980, sponsored by a Democrat from Iowa, Senator Culver, and its amendments in 1996, have literally saved at a cost of somewhere around $130 billion in reduced regulatory costs for small businesses because of the process, and that's recorded by President Obama's SBA's Office of Advocacy, President Bush's, President Clinton's, and so forth.

The House has a proposal to close some of the loopholes which have prevented agencies from doing this type of analysis. A thoughtful paper in the Administrative Law Review by Connor Raso said that over a 5-year period, fewer than 8 percent of all the rules found in the regulatory agenda went through the Regulatory Flexibility Act Small Business Impact Analysis.

Closing some of these loopholes that prevent agencies from actually doing this analysis for rules that do impact small businesses, for example, the "Waters of the U.S." rule, the EPA claimed that it would not have a significant impact on a substantial number of small entities, which is the definition in the law.

So closing a variety of these loopholes, supporting legislation like the House's legislation I referenced in my opening statement, would go a long way toward improving analysis. And, again, it doesn't force the agency to take any particular action other than to think through the analysis. It was modeled on the National Environmental Policy Act, just a requirement for agencies to think through what it's doing.

As Cass Sunstein would say, look before you leap. What are you doing to small businesses? And I think that would be a very helpful reform.

The CHAIRMAN. Mr. White.

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[144] $99,500, to be exact. *See, e.g.,* Contract between U.S. Small Bus. Administration, Office of Procurement & Grants Mgmt., & Mark Crain for the *Impact of Regulatory Costs on Small Firms* (Sept. 24, 2008), *http://www.progressivereform.org/articles/Crain%20and%20Crain_20Contract.pdf.*

[145] *See Assessing The Impact Of Greenhouse Gas Regulations On Small Business (Part 2 of 2)* (House Oversight Committee broadcast Apr. 6, 2011, 1:03:33), available at *http://www.archive.org/details/gov.house.ogr.ra.20110406.2* (oral testimony by Claudia R. Rodgers, Deputy Chief Counsel for Advocacy, SBA Office of Advocacy). Rodgers defends the Office of Advocacy's failure to ask Crain and Crain to report on benefits of regulation, stating that the Office of Advocacy is "not required to ask for [the underlying] data" when it sponsors studies, defends the peer review process for the study, and defends the study as having the "exact same methodologies" as previous studies sponsored by the Office of Advocacy. *Id.*

[146] James Goodwin, *On Heels of Debunked Report, SBA's Office of Advocacy Solicits More Anti-Regulatory Research,* CPRBLOG (Aug. 16, 2011), *http://www.progressivereform.org/CPRBlog.cfm?idBlog=CF8517C8-C94D-590E-C7AD9962D431FB0A.*

Mr. WHITE. If I may briefly, I have two suggestions. The first is more searching judicial review of the agencies' analysis under the Regulatory Flexibility Act. I think it's always best that students not grade their own homework, and by the same token, I think it's best when agencies aren't the exclusive reviewers of their own work. To the extent that judicial review can shine a spotlight on the agencies' work—not micromanage it, but kick the tires—I think it would be useful.

Second, I think my earlier request for greater statutory requirements or retrospective review are important to teach the agencies better modesty. They treat these things, like the Regulatory Flexibility Act, as the caboose that just follows the policy that they've already predetermined.

The CHAIRMAN. Mr. Shapiro, you noted in your testimony that we've seen agencies issue guidance documents, directives, and memoranda that attempt to function like regulations. Unlike regulations, however, these guidance documents often do not provide analysis or opportunities for public comment, and they are not subject to the same transparency and review standards.

Have you seen any abuses in these types of agency guidance in your industries? And if so, what have been the effects? And if others on the panel would like to respond to that, please feel free to do so.

Mr. SHAPIRO. Well, the challenge of a guidance document, if it's prescriptive, is that it creates potential liability. It's catnip to trial lawyers. So when NHTSA went forward and said every device coming into a car that a driver could use should follow these rules, that was an invitation to trial lawyers to sue any device maker, and there was no notice and comment. There was not really any process at all, and it's clearly beyond their statutory authority. But it's not, I guess, beyond some right that they have to issue their opinion that this is the way it should be.

So I think it's dangerous for them to exceed it. I think they're creating potential liability, or at least creating the possibility of a lawsuit, and it's very unhealthy. And I would urge agencies to stay away from it. And so I think it's an appropriate role for Congress to ask them to stay away from going outside the normal administrative protections that we—that have served us for a very long time in terms of rulemakings.

The CHAIRMAN. Mr. Gerard, Mr. Palmieri, anything to add to that?

Mr. GERARD. I'll just add, Senator, I think this is an area where there needs to be more congressional oversight. For those of us who work day-to-day with entities, with agencies, who require us to seek permits, we're constantly seeking clarification. What does this mean? What does this require us to do?

So we don't want to stifle the interaction, we want to have collaboration in the regulatory process, but I think what Mr. Shapiro says, though, we've also got to be careful that you don't unintentionally empower a regulator to go off beyond their authority, and all of a sudden now you've got an entity with a mandate that has no, if you will, public review or oversight of. And I think that's an area we should look at closely and the interrelationship between the regulator and the regulated.

The CHAIRMAN. Mr. Shapiro, in a recent petition of the FCC, your organization said the agency's controversial 2016 privacy regulations, and I quote, "threaten to undermine the innovation and competition in the dynamic Internet ecosystem that has greatly benefited consumers and the U.S. economy." This Order, however, only applies to Internet service providers, not to the technology companies that you represent. But in your testimony, you noted CTA's concern that this rule may establish a dangerous precedent for the entire Internet ecosystem. Can you explain why CTA is so engaged on an issue that many assume is just a problem for broadband providers?

Mr. SHAPIRO. Well, full disclosure, I should reveal that some of the Internet service providers are members of ours as well. But nonetheless, look, the Federal Trade Commission has done an amazing job focusing on privacy. They actually focus on actual harm, and there's a give-and-take and a balance, and it's bipartisan. These are not contested issues between Republicans and Democrats, and they've done a great job by almost every account.

For the FCC to step in and bootstrap its authority off the Open Internet Order from the judge and say therefore we can control everything having to do with the content going over the broadband system is just confusing, it promotes uncertainty in the marketplace, and we see basically a war between an agency that has done a great job by every account versus one that wants to grab some authority and come in and do something in a very uncertain way at the very last minute of the Obama administration, throwing all sorts of things in there, not following any process, to leave its legacy for history? It's just wrong.

The CHAIRMAN. Senator Nelson.

Senator NELSON. Mr. Chairman, I'm going to yield to our Committee members so that they can have the first questions. I just want to say that, as we discuss this, there's a tendency to talk as if this is an either-or. It's not an either-or. We ought to be using common sense. Does anyone really suggest that we shouldn't have safety standards for the small mattress that took Garret Davis's life or that cribs shouldn't have mandatory safety standards? Of course not.

I can give you an example on the other side, though it's outside the jurisdiction of this Committee. Dodd-Frank was a reaction to huge excesses on Wall Street. Regulations applying to big banks became too burdensome when they were applied to community banks. So it's a question of balance and common sense.

And I want to particularly yield to Senator Udall, because he has got a commitment that he has to leave for.

The CHAIRMAN. OK.

**STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Thank you very much, Senator Nelson, for your courtesies there. And I couldn't agree more with what you've said. It's a matter of balance.

And I would like to go specifically to the heart of the issue here with Mr. Gerard. The industry is advocating, under the Congressional Review Act, that we repeal the Bureau of Land Management's Methane and Waste Prevention Rule, as you know. And in my look at this, there hasn't been, when almost exactly the same thing has been done at the state level, any loss of jobs.

Do you know how much taxpayer-owned natural gas has been wasted that has vented, flared, and leaked since 2009? I'll tell you the answer: 375 billion cubic feet, enough to provide energy for 5.1 million homes for one year. It has been totally wasted—released into the atmosphere, where it becomes pollution.

This right here, this photograph, is gas, as you know, being flared. So every bit that's being flared into the air is wasted. And when it goes into the air, it becomes pollution, and that's what the BLM methane rule is targeting. And I'll just give you an example in New Mexico. This happens on a yearly basis. In one year, $100 million are lost by the taxpayers of New Mexico.

So, in my view, the oil and gas operations should have clear Federal standards to minimize the waste of publicly-owned natural gas that is vented, flared, or leaked from the systems. And, as you know, two big oil and gas states, Wyoming and Colorado, have passed rules to reduce methane emissions and cut waste. In fact, the BLM rule is modeled to a great degree on Colorado's rule, Regulation 7. Wyoming's rule was adopted in 2015; Colorado's was adopted in 2014.

Do you have any published data—and this is what, Senator Nelson and Senator Thune, this is what we need to get down to—that you can share with this Committee about whether any jobs have been lost as a direct result of Wyoming and Colorado's waste prevention rules?

Mr. GERARD. I'll go back, Senator, and I'll provide all the data we have. There are a variety of points here. Can I respond to that generally, Senator?

Senator UDALL. Well, I want to know the hard data.

Mr. GERARD. OK.

Senator UDALL. That's because you all are in here telling us that these regulations are over the top and we're losing jobs. I'm picking a regulation. You tell me the hard data.

Mr. GERARD. OK. Let me——

Senator UDALL. If you have hard data, tell it now because I'm going to give you the hard data.

Mr. GERARD. OK. Let me give you a couple data points. The first——

Senator UDALL. Yes. The hard data on job losses.

Mr. GERARD. Yes. The one data point I'll give you is the revenue impact. This rule is estimated to cost us $400 million. Now, the reason that's so important is there is also an underlying EPA rule that does the same thing this rule does, as imposed by the BLM, which costs us $800 million.

Our point here, Senator, we might agree on this, in a state like yours, a big energy producer, you've now got three regulatory bodies looking at the same issue. You've got the state. You've got the EPA imposing a Federal standard, I might add something we collaborated with the agency on to develop best practices as they sought to regulate methane. They went further than we would recommend——

Senator UDALL. I'm going to interrupt you there because you're not giving me any hard data, and I only have a minute here left in my time. There is no evidence that there have been any job losses in Colorado as a result of Regulation 7. The *Colorado Business Review* in 2016 took a look at this issue and found that there weren't any job losses.

Mr. Chairman, I would like to enter into the record a letter that I am sending today with over 20 Senators to the Senate leadership and the Energy Committee Chair and Ranking Member. There is an aggressive industry lobbying campaign to do away with the BLM's methane rule, but repeal does not hold up under scrutiny. If the public interest is considered, erasing this rule would result in the waste of taxpayer resources and dollars, hinder job growth in a new and growing sector, and pose a public health hazard. And there is no evidence that this is a job destroyer. This, in fact, is a job creator, Mr. Gerard.

And so I think we need to look at these not in this big global way, as the witness at the end of this panel said, adding up a bunch of figures. But is it balanced, is it headed in the right direction, and is it doing something constructive?

I see my time is finished, and I thank Senator Nelson very much.

[The information referred to follows:]

United States Senate
WASHINGTON, DC 20510

February 1, 2017

The Honorable Mitch McConnell
Majority Leader
United States Senate
The Capitol, Room S-230
Washington, D.C. 20510

The Honorable Chuck Schumer
Democratic Leader
United States Senate
The Capitol, Room S-221
Washington, D.C. 20510

The Honorable Lisa Murkowski
Chairman
Committee on Energy & Natural Resources
United States Senate
Dirksen Senate Office Building, Room 304
Washington, D.C. 20510

The Honorable Maria Cantwell
Ranking Member
Committee on Energy & Natural Resources
United States Senate
Dirksen Senate Office Building, Room 304
Washington, D.C. 20510

Dear Leader McConnell, Leader Schumer, Chairman Murkowski and Ranking Member Cantwell:

As you know, the Department of the Interior finalized the Methane and Waste Prevention Rule to prevent the needless waste of federally owned natural gas resources in November of 2016. We, the undersigned Senators, urge you to protect the hundreds of millions of dollars in revenue due to American taxpayers for the development of publicly owned energy resources by ceasing efforts to dismantle this regulation using blunt instruments, such as the Congressional Review Act (CRA).

The Department of the Interior's Bureau of Land Management rule seeks to limit the waste of public and tribal natural gas resources currently estimated to total $330 million per year. In 2013 alone, the amount of federally owned natural gas wasted due to venting and flaring resulted in lost royalties to the nation and states, included nearly $4 million for Colorado, nearly $7.7 million for New Mexico, and more than $14.8 million in Wyoming. This is millions of dollars that could go to state infrastructure needs, schools, and emergency services. This rule revises decades-old regulations pursuant to the agency's statutory obligation under the Mineral Leasing Act to ensure "that the permittee or lessee will, in conducting his explorations and mining operations, use all reasonable precautions to prevent waste of oil or gas developed in the land." (Sec. 16 amended) Under the law, BLM has the obligation to conserve the oil and gas resource, prevent waste, and ensure that taxpayers receive a fair return on production from federal leases.

The Congressional Review Act is an exceedingly blunt tool for Congress to undertake to address any lingering concerns about commonsense revisions to an aging rule. In fact, in 2010 the non-partisan Government Accountability Office (GAO) called for the Department of the Interior to improve its data collection and address the limitations of its previous regulation, which is exactly what the new rule does. But the CRA would undo these waste minimization and taxpayer protection guidelines – and it would do so without public input, and in a way that would make it difficult to address GAO's good governance recommendations going forward. The CRA is an improper and radical way to address potential issues that some members may have with this particular regulation.

The provisions of the rule are based on recommendations from several independent government studies as well as stakeholder input at public forums in 2014. Over almost three years, the federal government undertook 8 public forums and read through more than 300,000 public comments. After receiving numerous requests from the public, the BLM extended the 60 day comment period on the proposed rule an additional 14 days. This has been a remarkably open, transparent process that has incorporated comments and suggestions from all stakeholders including state and local governments, industry, native nations and the public at large.

This regulation will help ensure taxpayers, state governments, and tribal nations receive every dollar due for the use of publicly owned resources at a reasonable cost to producers. The regulations are commonsense and cost effective, as ICF International also found that up to 40% of natural gas can be captured with a cost of just a penny per thousand cubic feet of natural gas produced. And, by phasing in requirements, the rules will enable producers to plan for an orderly transition to ultimately cut flaring in half at oil wells on public and tribal lands.

In addition, this regulation will support a rapidly expanding segment of the oil and gas industry specializing in methane waste mitigation. Manufacturing, development and outfitting of oil and gas wells with these technologies is a vibrant and growing American business already located in 46 states throughout the country. This burgeoning industry needs the certainty that comes with a common baseline standard across the West to invest in growth. The Methane and Waste Prevention Rule would also encourage significant infrastructure investments to move recoverable natural gas to plants and refineries.

Finally, leaked natural gas imposes stark public health risks. High levels of smog can harm everyone, but children, senior citizens, and people with asthma are particularly at risk of heart attacks, hospitalization, and lower quality of life. Natural gas releases frequently include other toxic chemicals that impact health, such as hydrogen sulfide, toluene, xylene, benzene and formaldehyde. These toxic air pollutants increase the chance of cancer, respiratory, neurological, reproductive, developmental and other serious health problems.

At a minimum, we believe that the public deserves full consideration of this measure on the floor to ensure we are fully protecting the health and interests of the American taxpayer and minimizing preventable waste of federal resources because the American people see a fair return on the investment of their resources. Thank you.

Sincerely,

Tom Udall

Tom Udall

Ron Wyden

Ron Wyden

Michael F. Bennet

Patty Murray

Edward J. Markey

Debbie Stabenow

Elizabeth Warren

Richard Blumenthal

Benjamin L. Cardin

Patrick Leahy

Cory A. Booker

Dianne Feinstein

Brian Schatz

Sheldon Whitehouse

Al Franken

Mazie K. Hirono

Martin Heinrich

Tammy Baldwin

Kirsten Gillibrand

Jeanne Shaheen

Chris Van Hollen

Chris Coons

The CHAIRMAN. Thank you, Senator Udall. And we'll make sure that letter gets in the record.

I have Senator Blumenthal up next.

**STATEMENT OF HON. RICHARD BLUMENTHAL, U.S. SENATOR FROM CONNECTICUT**

Senator BLUMENTHAL. Thanks, Mr. Chairman. Does anyone here have a figure on the number of jobs lost in Connecticut as a result of any regulation in particular?

[Witnesses shaking their heads.]

Senator BLUMENTHAL. The record should reflect that all the witnesses are shaking their heads.

Does anyone here have a figure for the Nation as to how many jobs were lost?

[Witnesses shaking their heads.]

Senator BLUMENTHAL. The record should reflect they're shaking their heads.

Mr. GERARD. Lost as a result of what, Senator? Generally?

Senator BLUMENTHAL. As a result of regulation, a total number.

Mr. GERARD. We've got lots of data. I don't have it with me, Senator——

Senator BLUMENTHAL. I know you have lots of data and——

Mr. GERARD. And I'll—and I'll——

Senator BLUMENTHAL. And I'm going to interrupt you again because my time is limited.

Mr. GERARD. I'll get it to you.

Senator BLUMENTHAL. So if nobody has a number, I think the record should reflect that fact.

Now, I'd like to ask whether you believe that the existing regulation that requires consideration of costs, issued first by President Reagan, takes account of cost-benefits?

Professor?

Ms. HEINZERLING. Yes. It's famously strict on consideration of costs of major rules by agencies, and rules will not pass unless an agency does that.

Senator BLUMENTHAL. So instead of the blunderbuss, draconian, mindless approach of simply eliminating two rules for every new one, the existing approach actually seeks to take account of cost versus benefit. Is that correct?

Ms. HEINZERLING. That's correct.

Senator BLUMENTHAL. Thank you. You know, I would just like to offer one example as a microcosm of the difficulty of assessing costs when human life is at stake. For years, consumer advocates have been trying to make cords and window blinds safer. And the example is one young life cut short on July 11, 2012. Brianna is pictured here. She was three years old when she died by strangulation. I'm willing to bet that the vast majority of people in this room have no idea about the danger of blinds on windows and the cords that strangle an average of 12 children every year, one per month. Brianna was one of them. Her grandfather is with us today, I believe, if he would please stand.

[Grandfather standing.]

Senator BLUMENTHAL. I'm going to quote you sir. "No business has the right to sell a product that can kill children and destroy their families. If these businesses will not listen to our cries for help, there must be regulation, there must be restraint, there must be controls to keep these big businesses from destroying lives so needlessly."

Mr. Palmieri, how do you measure the cost of Brianna's life?

Mr. PALMIERI. In the wake of any tragedy, I don't think there is almost anything that can be said that can set right the death or injury to a child from any product.

Senator BLUMENTHAL. Wouldn't you agree that some rule or standard—nobody likes the word "regulation" these days—that could help save children's lives ought to be implemented?

Mr. PALMIERI. And it's my understanding that that's exactly what the CPSC and industry and consumer groups are all working toward.

Senator BLUMENTHAL. Right. We are working toward it, but over the opposition of the industry. And that's why I am sending today a letter to the CPSC and the WCMA asking that they finally, finally implement a standard that will save children's lives, literally 12 per year, at absolutely minimal cost.

I don't know whether any of our witnesses here today have a better answer than Mr. Palmieri's.

Mr. White?

Mr. WHITE. I don't know if it's a better answer, but if I may offer one. I mean, to be clear, all life is precious. I have four daughters and a son. All their lives are precious. And by the same token, just as hard as it is to value the lives of all——

Senator BLUMENTHAL. If you came home, as Brianna's mother did—by the way, her mother, Christi, is an Iraq war veteran who has served two deployments and who found her daughter in the family living room hanging by a window blind. If you were told that there's a very simple fix, which is to eliminate the cords, that would save 12 lives every year and prevent countless injuries, wouldn't you agree it's worth doing?

Mr. WHITE. I can't begin to imagine what that was like. And, of course, we need to take measures to protect human life. By the same token, lost economic growth, lost life-saving and life-extending technologies, they also—the absence of those technologies cost lives as well and they're just as invaluable and just as precious.

Senator BLUMENTHAL. I know that you're offering that answer in good faith. It's an abstract, abstruse answer that frankly I find equally unsatisfactory as a Senator and as a human being. And I am in no way being dismissive or critical of your concern for jobs and economic growth. I share those concerns. But there is a better way to achieve both—product safety and economic growth and jobs—than simply to abolish two regulations whenever a new standard like this one that would save lives is instituted.

Mr. Chairman, I apologize that I've gone over my time. Thank you.

Senator NELSON. It's called common sense and balance.

The CHAIRMAN. Thank you, Senator Blumenthal.

Senator Schatz.

## STATEMENT OF HON. BRIAN SCHATZ, U.S. SENATOR FROM HAWAII

Senator SCHATZ. Thank you, Mr. Chairman. I want to talk about the most economically significant new regulation that was established since January 20. On Friday at 8 p.m., President Trump signed an Executive Order banning refugees and anyone from seven Muslim majority countries from entering the United States. This impacted at least 90,000 individuals. It has impacts in tourism, aviation, certainly labor, and higher education. Countrywide there are impacts.

Several members of the National Association of Manufacturers have made statements expressing their opposition to the ban. For example, General Electric's CEO, Jeff Immelt, weighed in. Because the company has many employees from the countries named in the ban, and GE does business all over the region, he stated, "These employees and customers are critical to our success and they are our friends and our partners, and GE will stand with them."

There were also statements by companies such as Merck, Allergan, Ford, and Microsoft. These companies have employees who may be impacted, and they are committing resources to provide legal assistance to those employees. And they are worried about their ability to attract new talent going forward.

A tweet from the CEO of Allergan said, "We are strong and bold because of our diversity. We oppose policy that puts limitations on our ability to attract the best and diverse talent."

I also want to note that around $20 billion worth of Boeing's commercial aircraft orders are at risk and may be canceled.

And so my question, Mr. Palmieri, is do you think this ban is good for business?

Mr. PALMIERI. So I hope Mr. Shapiro also participates in the answer to this question. I'm not our immigration expert, but what I would say is that the NAM has long been a supporter of a comprehensive immigration reform proposal.

Senator SCHATZ. Do you think the ban is good for business? Has the organization taken a position or just your member organizations? Where are you in this process?

It seems to me that in addition to dealing with rules and regulations and the CPSC and all the rest of it, that this is the elephant in the room when it comes to America's business reputation, when it comes to our core values, when it comes to your members. It's odd to me that you either haven't taken a position or don't yet want to articulate it.

Mr. PALMIERI. And, again, I just—I can't speak to it, but I'm happy to get your answer.

Senator SCHATZ. Why not?

Mr. PALMIERI. Simply because that's not an area that I specialize in and can't tell you.

Senator SCHATZ. Let me ask you a question. How does the National Association of Manufacturers come to a decision on a policy issue? Do you have a policy committee? Is it staff driven?

Mr. PALMIERI. Sure. Of course.

Senator SCHATZ. So where are you on that?

Mr. PALMIERI. Our Board of Directors sets the policy, reviews it consistently over time. We have policy committees made up of our members that recommend what rule——

Senator SCHATZ. Sorry, I just want to drill down in terms of the way your organization works. Do you send out a staff recommendation, and then the Board of Directors approves the staff recommendation?

Mr. PALMIERI. The Board of Directors meets in person. Our Policy Committee meet in person.

Senator SCHATZ. How often?

Mr. PALMIERI. Our Board of Directors meets twice a year. Our policy committees meet multiple times throughout the year.

Senator SCHATZ. Do you think this is an appropriate issue for the Board of Directors to consider?

Mr. PALMIERI. And all I can tell you is that I'm happy to get back to you with an answer. I'm just not the person who has the answer for you.

Senator SCHATZ. Who is the person that would have an answer?

Mr. PALMIERI. Any one——

Senator SCHATZ. I mean, you're the Vice President for Labor. That seems to have pretty serious labor implications.

Mr. PALMIERI. And my colleague who handles human resources policy and covers immigration might have that answer for you.

Senator SCHATZ. Might?

Mr. PALMIERI. Honestly, sir, I just don't know.

Senator SCHATZ. Why not? No, I'm serious. Why don't you know? I mean, it seems to me that this is "the" thing happening to the American economy right now. And the National Association of Manufacturers has no position on this matter?

Mr. PALMIERI. All I can say is that we didn't issue a statement on it. We might have a policy. We might be having conversations. I'm not the person who can give you that answer. And I'll—we'll get back to you.

Senator SCHATZ. Mr. Shapiro, is this good for business?

Mr. SHAPIRO. No, it is not, sir. America's strategy for years has been to attract the best and the brightest, and we are a nation that doesn't rely upon old buildings and thousands of years of history to define ourselves. We are an immigrant country, and we are—our strength is our diversity. And we've sent a message to the world which is very strong, that the welcome mat is being pulled away.

Now, I am not—I do not have access to what President Trump has to in regards to security concerns, and it is his job foremost to protect us and make decisions that do protect us. But for this—and it's not only the technology industry, the meetings industry is—worldwide repercussions about events coming to the U.S. that are pulling out. Other—it's just not technology, it's automobiles. Every business in America has immigrants. Twenty percent of the workforce are immigrants.

Senator SCHATZ. Thank you, Mr. Shapiro. I'll just add that Mr. Palmieri and the entire panel—and actually to the entire private sector community—we're going to need your leadership, too, on this issue. Some of these questions are now intersecting. The moral questions, the national security questions, the homeland security questions, and the business questions are intersecting. There is not going to be a safe space where you can hide and say we want to repeal regulations, however, this big regulation we don't want to touch because it's politically hot. We're going to need your leadership in this space.

And I thank the Chairman for the additional minute.

The CHAIRMAN. Thank you, Senator Schatz.

Senator Blunt.

**STATEMENT OF HON. ROY BLUNT, U.S. SENATOR FROM MISSOURI**

Senator BLUNT. Thank you, Chairman.

To get back to the regulations that really are designed to impact what you all do every day, I think, Mr. Shapiro, your group joined a pretty broad coalition of associations that were critical of the FCC, their regulations on privacy, data security, and breach notification. Give us a summary of the concerns that you all had about those FCC regulations.

Mr. SHAPIRO. Well, we and just about everyone else has been working with the Federal Trade Commission for many, many years, and they take a case-by-case approach. They have broad authority in this area, and they focus on actual consumer harm.

Now, privacy is something we all care about. We got together, the manufacturers of devices, in our world, wireless fitness devices, and we agreed as an industry about how our obligation to the consumer to have clear language about what we're doing, to allow consumers to opt out of anything, to be—to disclose, to not sell to third parties, and that has been a standard.

And, in fact, most of the things which happen, and this goes to the bigger regulatory discussion, and I agree with what Senator Nelson says, it's about balance, because most of the regulations and rules in this country are really coming from industry themselves, they're self-regulating, they're creating standards, they're creating certification schemes, they're doing all sorts of things. It's how Alexis de Tocqueville envisioned America, that we are a country where people get together voluntarily and do things that are right.

Senator BLUNT. So do you think the FTC is a better regulator of those issues than the FCC?

Mr. SHAPIRO. It doesn't even come close. Yes, the FTC is much better because they have a history of bipartisan cooperation, of focusing on actual harm. They don't go thinking about the whole big future, about everything, and cutting off levels of innovation. And they're known as a very effective agency.

The FCC obviously has much more tenuous authority. They've reached out on a basically bootstrap authority that they got through a court decision involving the Open Internet Order, and they've issued something very quickly and it was just recent in the last 30 or 40 days or so.

So I would say that they have definitely caused confusion because there are two different agencies now, the Federal Government saying two different things, and that's not healthy for business.

And so my point in being up here is not to say that regulation is bad. Regulation is really good. And I would say, going to some of the questions we had earlier, when you're involving health and safety, there is more of a bias towards regulation than when you're dealing with some of the other economic issues and some less harm. It is a balance. But I think generally industry should be given the opportunity to come up with its own way of regulating because we're also facing the prospect of litigation.

Senator BLUNT. Beyond the different regulations between the FCC and the Federal Trade Commission, the other issue we've been trying to deal with on data breach standards would be to have a single, consistent standard rather than to have what currently would be about 51 different standards. Now, there are areas where many of us think the state is a much better regulator than the Federal Government, but there are other areas where it's just impossible to comply with 50 or 51 standards on that topic of data breach and data security. Is there merit for us to try to establish one standard rather than have the states all develop their own standards?

Mr. SHAPIRO. I think there's a merit in new areas for this potential. For example, I don't think anyone even disputes on a partisan basis that cars should be regulated nationally, nor that drugs should be regulated nationally. There is greater expertise centrally, and to sell efficiently and have lower costs for consumers, you need national regulation when you're talking about safety and health.

When you're talking about data breach, you have an area of new technology, and it's the same type of thing, though. If you have a national standard, for example, what Congress did with credit cards about 45 or 50 years ago, it was a national standard and it changed how we do business, it changed convenience, and it worked really well, and it protected consumers.

So having national regulation makes sense when there's new technology and there's also—or there is danger of physical harm. So in terms of data breach, obviously it would be more comfortable for everyone doing business to say, "Here's the national standard and we'll follow it." It's much more expensive to follow 50 different standards, and it requires a lot of lawyers and a lot more work and a lot more cost to consumers ultimately.

Senator BLUNT. And it's a lot more likely that you won't meet all the standards because somebody has changed one or they're at variance with each other. This is an area I think we have to get much more focused on as we look at cyber theft and all of our cyber concerns—to have one standard.

Mr. White, do you want to weigh in on that topic? And then I think my time will be gone.

Mr. WHITE. I was only going to say between the FCC and the FTC, I would suggest that ultimately we should be agnostic as to which agency it is. I'm in favor of this being regulated by the agency that has been vested with power from you, clear direction on the policy to carry out Congress's intent. Whether it's the FCC or the FTC ultimately doesn't matter.

Senator BLUNT. But it does matter if there is more than one agency trying to do the regulating?

Mr. WHITE. Absolutely.

Senator BLUNT. OK. Thank you, Chairman.

The CHAIRMAN. Thank you, Senator Blunt.

Senator Markey and then Senator Inhofe.

## STATEMENT OF HON. EDWARD MARKEY, U.S. SENATOR FROM MASSACHUSETTS

Senator MARKEY. Thank you, Mr. Chairman, very much.

I would like to just begin by responding to a comment made by Mr. Shapiro earlier and say that the FCC's privacy rules are important protections that safeguard sensitive personal information of tens of millions of Americans who use broadband in our country. Furthermore, it was completely within the jurisdiction of the FCC to put these essential rules on our books. And I will fight any efforts in Congress, whether by the CRA or otherwise, to roll back these pro-consumer rules.

We can talk about cybersecurity and foreign nations and other entities trying to crack into the privacy of Americans in our country, and that's important. And we should work together on a bipartisan basis to make sure that no one does crack into the privacy of our country. Vladimir Putin is teaching us a great lesson, but the same thing is true for American companies or foreign companies. When they get ahold of the privacy information of Americans, they, too, should be bound by what they can do with that information; they, too, should not be able to use it for their own commercial purposes without the permission of those consumers. There's no difference from a consumer's perspective who is cracking into their information. They want their privacy.

These rules on the books are very important. And everything that we learn about the international hacking of our country once again reinforces the need for Americans to be given the privacy protections that we need. That's what the FCC did.

Mr. Gerard, I know that Senator Schatz asked Mr. Shapiro and Mr. Palmieri the question about the Muslim ban and whether or not it was good for business, whether or not you support, as an organization, the Muslim ban. How does the Muslim ban affect the petroleum industry, Mr. Gerard?

Mr. GERARD. It has had some impact on some of our companies, and I think you've seen that in some of the public reports. As the API, we don't deal with immigration policy, so we haven't taken a position on it, but you've seen some of the public reports of individuals getting held up in various areas. Obviously, we're a global industry, we travel globally, we have a lot of individuals around the world moving, so there has been some impact on our sector.

Senator MARKEY. And how has that impacted you?

Mr. GERARD. It's hard to tell to date how big that impact is. Like I said, I've read one or two press reports. Other than that, I'm not sure, Senator, how big it is.

Senator MARKEY. Many of the countries within which the American Petroleum Institute's members work are obviously Muslim majority countries. And so the travel that would occur between the United States and those countries has a real role in whether or not our companies are able to conduct their business in the most effective way possible consistent with national security, but not sending a signal that, from my perspective, is unconstitutional, immoral, and un-American, that we're creating a suspect category of Muslims. That absolutely, in my opinion, will create a chilling effect.

So I would urge you, Mr. Gerard, that if this is bad for business, that your industry stand up and your industry make it clear that it is bad for business and it could hurt your industry.

Professor Heinzerling, I would like to talk a little bit, if I could, about fuel economy standards. It was my law in 2007, which passed, that lifted the fuel economy standards and created a new mandate that the Department of Transportation move forward. It was at least 35 miles per gallon by the year 2020, and it has moved beyond that now to 54.5 miles per gallon by the year 2025.

In your written testimony, you pointed out that these regulations are a good example of how regulations can, in fact, comport with national security. We still import five million barrels of oil a day into the United States. We import three million of those barrels from OPEC countries—from Saudi Arabia, from Algeria, from Iraq—and so that clearly is something that we want to reduce and eliminate, especially as we export young men and women over there to defend those shipments of oil coming into our country.

Can you talk about the importance of those regulations?

Ms. HEINZERLING. These are a great example of the kinds of regulations I was talking about that create multiple and diverse benefits. Consumers save money because they pay less in gasoline costs. The environment is helped by a reduction in air pollution. The climate is helped by a reduction in greenhouse gases. And so there are all sorts of ways. There are the national security concerns that you talk about. And so there's not just one dimension along which these regulations operate, but multiple dimensions along which they operate, and can actually save people money rather than, as we are talking about today, cost them.

Senator MARKEY. And the industry was not increasing fuel economy standards until those regulations were passed.

Ms. HEINZERLING. The industry was, I would say, almost at war against fuel economy standards for a long time.

Senator MARKEY. So meaning they were at war against our breaking our dependence upon imported oil, against doing anything about climate change, or reducing costs for consumers by having more efficient vehicles. So, from my perspective, those regulations broke a 40-year logjam from 1975 until 2009, where there had been no change in the regulations, and as a result, no change in the average fleet economy standards. So I agree with you, and I thank you for your testimony.

I yield back the balance of my time. Thank you.

The CHAIRMAN. Thank you, Senator Markey.

Senator Inhofe.

**STATEMENT OF HON. JIM INHOFE, U.S. SENATOR FROM OKLAHOMA**

Senator INHOFE. Thank you, Mr. Chairman. For the benefit of our distinguished panel and anyone who may be in the audience, the reason the Republicans are in and out is because simultaneously we are having the Environment and Public Works Committee, which I chaired for a number of years, and they are considering the nomination of Scott Pruitt. So this isn't the only place things are happening right now. So I do apologize for that.

I want to mention that while I was chairing that committee, I kind of felt that most of the overregulations really come from that committee because they have jurisdiction over the Environmental Protection Agency, and things like the water issue, the WOTUS, the Clean Power Plan, those were in that particular committee. However, there are several other overregulations that we need to deal with.

One actually came from Dodd-Frank. Section 1504 in the Dodd-Frank legislation, or rules, require U.S. publicly listed energy companies to report project level payments to foreign governments opening our best companies' playbooks for information that can be highly confidential. For example, if we have our oil and gas industry competing with a national company from China for a project in Tanzania, they would have the advantage of knowing what we—what went into our bid and our calculation.

So, Mr. Gerard, this does affect a lot of companies that you deal with on a regular basis. Kind of give us an idea how the CRA that I'm introducing on Section 1504 of the Dodd-Frank rule would affect our companies.

Mr. GERARD. Well, thank you, Senator. This is another example where, as well-intentioned as it may be, it's having adverse impacts. As you pointed out, as part of Dodd-Frank, why it was in Dodd-Frank, I assume that was the vehicle that was available at the time, they passed a provision that requires us to disclose—requires publicly traded companies to disclose our payments to foreign governments.

Now, the issue here to keep in mind, 75 percent of all oil reserves around the world are controlled by what we call NOCs, national oil companies, or foreign governments. They are not publicly traded. So the net effect of this rule requires our American companies, if you will, to disclose the details, the terms and conditions, of their relationships to bid on projects, so their competitors can take that information and compete against them in an unfair way from our perspective.

So what happened when the SEC first proposed the rule, a Federal court threw it out and said they didn't address the issues, it required the public release of this information they shouldn't have, and said their activities were arbitrary and capricious. We have worked with the SEC trying to fix this. We've developed a model. We support transparency, the industry does.

So what your CRA approach effectively does is it sets aside this rule, it doesn't change the statute, it sets aside this rule, and allows us to work with the SEC to develop a rule to accomplish their purposes without putting us at an unfair competitive disadvantage in the global marketplace.

Senator INHOFE. Yes.

Mr. GERARD. So we thank you for your leadership. A perfect example of where a regulator overstepped their bounds, even inconsistent with the statute, and your oversight and your action will help us get this back on track.

Senator INHOFE. I appreciate it. That's a very articulate answer. That's much better than I did on the floor. Thank you.

[Laughter.]

Mr. GERARD. You're kind, Senator.

Senator INHOFE. Mr. Shapiro, let me—I understand that while we were off in the other committee that you had some statements made about cost-benefit analysis and you didn't have an opportunity to respond. If you would like to have some time to respond to that, I would be very happy to give you this time.

Mr. SHAPIRO. Thank you very much. I greatly appreciate that. According to the National Association of Manufacturers, there are 297—696 restrictions on manufacturers on their operations from Federal regulations. That's 297,000.

So one of the questions was about jobs per state, and obviously that translates to jobs. It will be an imperfect analysis, but those restrictions cost money to comply to. A lot of them are probably very good and safety related, but a lot of them probably should not be on the books anymore. It is expensive to just try to comply with all the rules that are out there.

So there are jobs that are being lost, and whether you could come up with some numbers per state, I'm sure you could. They won't be precise, and they will be estimates.

The other way of looking at cost-benefit analysis and jobs is to focus—is to try to come up with numbers you can't come up with. What are the areas of innovation you don't go in? Where are the estimates that you can't—the new projects that are never started?

I was very much involved in the Supreme Court case involving the legitimacy of the Sony Betamax. If that case had gone the other way, and it was a 5–4 decision, frankly, we wouldn't have a lot of the technology we enjoy today. And when we try to say what—if one vote had made such a difference, how could we have projected where the Internet had gone and camcorders and the MP3 players and smartphones and things like that, all which relied on this one Supreme Court decision? You can't estimate the billions and trillions of dollars which put the U.S. ahead of the rest of the world because of one court decision, our Magna Carta.

So when we say that jobs are lost, of course jobs are being lost. We have to be reasonable, as Senator Nelson has said, we have to use our best judgment. And we're losing jobs all over the place because of simply the Federal rules that are out there.

You talked about Dodd-Frank. The compliance costs of one provision of Dodd-Frank having to do with conflict minerals, which is irrelevant to the whole bill, frankly, but was thrown in there because there was concern about what was happening in the Congo. And it said basically that every publicly traded company that makes anything has to trace back all these different minerals that are used in building something to the source so it's not from the Congo. That's like tracing water. That's cost hundreds of millions of dollars, actually, billions of dollars, in annual compliance costs for companies, and it was thrown at the SEC, which is totally incapable of dealing with it.

So when we talk about this form of regulatory sequestration, which was raised earlier, of two for one, which President Trump has proposed, it is a blunt instrument. On the other hand, it's going to force a review that is necessary and long overdue of a lot of rules which just shouldn't be on the books among those 298,000 or so.

Senator INHOFE. Yes, well, thank you for that explanation, Mr. Shapiro.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Inhofe.

Senator Nelson.

Senator NELSON. Mr. Chairman, since I deferred my questions to the Members, I'm going to get into a number of things. First, some housekeeping. I ask consent to enter these letters of concern into the record from consumer groups and other organizations regarding reforms targeting health and safety regulation. They include statements from Joyce Davis, the mother of Garret, and Tim Frink, the grandfather of Brianna.

The CHAIRMAN. Without objection.

[The information referred to follows:]

ENVIRONMENTAL DEFENSE ACTION FUND
*January 3, 2017*

Dear Representative:

The Environmental Defense Action Fund strongly opposes the Regulations from the Executive in Need of Scrutiny Act of 2017 (REINS Act) and the Midnight Rules Relief Act of 2017, both expected to be on the House floor for a vote this week.

The REINS Act and the Midnight Rules Relief Act are direct and radical threats to public health and the environment and would have broad overreaching implications and unintended consequences.

The REINS Act would prevent the Federal Government from carrying out actions mandated by Congress, including laws with strong bipartisan support, resulting in the failure to implement critical public health and safety protections. The Act would require both houses of Congress to approve a major rule within a 70-day window. If one or both chambers failed to approve that rule, the rule would not take effect and would be tabled until the next congressional session. Congress would, by taking no action, prevent existing laws from being carried out, resulting in gridlock at an unprecedented scale. This would effectively give one chamber of Congress veto power over any new significant public health and safety protection, no matter how non-controversial or sensible it may be.

The REINS Act would result in the rehashing of old congressional debates, reopen hard fought compromises, waste time and money, and paralyze agencies that employ scientific and technical experts. It would give special interests even more influence over the regulatory process.

The Midnight Rules Relief Act, which would allow disapproval of multiple rules finalized near the end of a presidential term, is based on the flawed premise that regulations finalized during the last months of an administration are rushed and inadequately vetted. Yet in reality, rules promulgated during the transition period have taken longer to complete—an average 3.6 years compared to the 2.8 years for all other rules. Thus, numerous carefully crafted public safeguards could be permanently blocked by a single vote.

Furthermore, bundling multiple rules together will prevent each rule from being carefully considered on its own merits, with Members forced to vote on a package even if they have differing opinions on each individual rule.

Congress should be searching for ways to ensure that Federal agencies work efficiently to reasonably enforce laws designed to protect our health and safety from the food we eat to the water we drink to the air we breathe. Instead, the REINS Act and the Midnight Rules Relief Act throw up unprecedented and dangerous roadblocks and delays to sensible safeguards that protect the American people. For these reasons, we strongly urge you to oppose the REINS Act and the Midnight Rules Relief Act.

Sincerely,

ELIZABETH B. THOMPSON,
*President,*
Environmental Defense Action Fund.

AFL–CIO

LEGISLATIVE ALERT

*January 3, 2017*

Dear Representative:

I am writing to express the strong opposition of the AFL–CIO to the Regulations from the Executive in Need of Scrutiny Act of 2017 (the REINS Act), which is scheduled to be voted on by the House of Representatives this week. This is an extreme measure that would make it virtually impossible for agencies to issue any meaningful rules, threatening the health and safety of workers and the public. I urge you to vote against this legislation.

The REINS Act would radically alter the regulatory process by requiring Congress to vote to approve all major rules before they can go into effect. Rules not affirmatively acted on by both the House and the Senate within 70 legislative days would die. Under the REINS Act, politics not scientific judgement or expertise would dictate all regulatory actions. Corporate opposition and influence would swap the public's interest and block needed protections.

The REINS Act would cripple a regulatory process that already causes excessive delays in the issuance of crucial worker and public protections. For example, the 2010 Occupational Safety and Health Administration's (OSHA's) construction safety standard on cranes and derricks took 10 years to finalize, even though this rule had unanimous support from industry and labor. OSHA's 2016 silica standard, which will protect workers from deadly silica dust and prevent 700 deaths a year, took nearly 19 years. Under REINS, Congressional inaction could simply kill such commons sense life-saving rules.

The legislation is impractical, unworkable and unnecessary. Congress has neither the time nor expertise to consider and act on detailed, technical and scientific issues. Moreover, the Congress already has the authority to disapprove rules through the Congressional Review Act or block the implementation by withholding funding.

The REINS Act represents a grave threat to our government's ability to protect workers and the public from harm. The AFL–CIO urges you to oppose this dangerous bill.

Sincerely,

WILLIAM SAMUEL,
*Director,*
Government Affairs Department.

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AFSCME
*January 3, 2017*

Dear Representative:

I am writing on behalf of 1.3 million working and retired members of the American Federation of State, County, and Municipal Employees to urge you to oppose the Midnight Rules Relief Act of 2017. The legislation would amend the Congressional Review Act to allow blanket disapproval of all regulations finalized near the end of presidential terms.

The proposed legislation is based on a dangerously flawed idea—that regulations which are proposed or finalized during the so-called "midnight" rulemaking period are rushed and inadequately vetted. In fact, the very opposite is true. There are currently dozens of public health and safety regulations that have been in the regulatory process for years or decades, including many that date from the Obama administration's first term or implement laws passed in the first term. And many of these regulations are mandated by Congress and have missed rulemaking deadlines prescribed by Congress. Referring to regulations that have been under consideration by Federal agencies for years, and in some instances decades, as "rushed" is misleading and false.

At risk in this legislation is the Obama administration overtime rule. Congress must stand to protect the health and safety of American workers. AFSCME urges you to OPPOSE the Midnight Rules Relief Act of 2017.

Sincerely,

SCOTT FREY,
*Director of Federal Government Affairs.*

SF:KS:rf

AMERICAN LUNG ASSOCIATION
*January 3, 2017*

Dear Representative;

The American Lung Association urges you to oppose the REINS Act. The bill is a dangerous attack on critical public health protections, including for lung health.

The REINS Act would delay or stop meaningful oversight of tobacco products. When the Congress acted in a bipartisan fashion in 2009 to give the Food and Drug Administration oversight over tobacco products, it did so to empower FDA to implement commonsense safeguards to protect children from predatory tobacco industry marketing, to set meaningful product standards, and—for the first time—to provide oversight of tobacco products.

Congress should not create new barriers to saving lives from tobacco, but rather should permit FDA to act to implement the Family Smoking Prevention and Tobacco Control Act with the urgency that Congress recognized is necessary to address the cancer, heart disease, chronic obstructive pulmonary disease, and health care costs caused by tobacco use in America.

The REINS Act would also block critical clean air protections. Air pollution can harm anyone's health, but children, seniors, and people living with lung and heart disease are especially vulnerable. Air pollution can even kill. The U.S. Environmental Protection Agency has a track record of cost-effectively saving lives and improving public health under the Clean Air Act. The REINS Act would block or delay critical dean air protections against deadly pollutants, as well as the pollution that causes climate change.

In fact, the REINS Act would permanently weaken every Federal agency's ability to implement and enforce the law to protect public health. The current regulatory process is transparent, deliberate, based on independent expertise, and responsive to public input. It currently takes years for federal agencies to propose and finalize rules required by law, even non-controversial rules. By requiring positive votes in Congress to approve of every single major rule, the REINS Act would grind the legally required, lifesaving work of Federal agencies to a halt, resulting in premature deaths and health problems that could have been prevented.

We urge you to oppose this sweeping, damaging attack on lifesaving public health protections.

Sincerely,

HAROLD P. WIMMER,
*National President and CEO,*
American Lung Association.

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AMERICAN PUBLIC HEALTH ASSOCIATION
*Washington, DC, January 3, 2017*

U.S. House of Representatives
Washington, DC.

Dear Representative:

On behalf of the American Public Health Association, a diverse community of public health professionals who champion the health of all people and communities, I write in strong opposition to the Regulations from the Executive in Need of Scrutiny (REINS) Act and the Midnight Rules Relief Act. These ill-conceived bills would allow Congress to ignore scientific evidence and permanently block or delay important health and safety regulations intended to improve the health of the American public.

The REINS Act would require congressional approval of all new major rules, without any changes, within 70 days. Failure to approve the rule within the time limit would prevent the rule from taking effect. Most rulemaking is directly tied to legislation already enacted by Congress, so this legislation would essentially give Congress veto power over laws enacted in the past without members of Congress having to cast a single vote to repeal those laws. For example, this bill would allow Congress to block important rules under the Clean Air Act that protect the public's health from dangerous air pollution. A rigorous, peer reviewed analysis, *The Benefits and Costs of the Clean Air Act from 1990 to 2020,* conducted by the U.S. Environmental Protection Agency, found that the air quality improvements under the Clean Air Act will save $2 trillion by 2020 and prevent at least 230,000 deaths annually. The REINS Act would also allow Congress to block other future major public health rules including those intended to protect the Nation's food supply, ensure worker safety and protect the public from toxic substances.

The Midnight Rules Relief Act would also threaten public health by allowing Congress to use the Congressional Review Act to disapprove multiple rules finalized near the end of a presidential term at once. The bill falsely assumes that regulations finalized toward the end of an administration have been rushed through the regulatory process, when in fact, regard less of when a rule is finalized, it has likely been in the regulatory process for a number of years, with multiple opportunities for public input along the way. Important rules intended to protect the public's health and safety could all be at risk. Congress recently used the CRA to try to overturn the Clean Power Plan which will reduce deadly air pollution from power plants and greenhouse gas emissions that contribute to climate change. Expanding the use of the CRA to disapprove multiple rules at once would significantly undermine efforts to protect the public from serious health threats.

Protecting the health of American families is one of the most basic responsibilities of government, including members of Congress. The REINS Act and the Midnight Rules Relief Act would not only create roadblocks to our ability to move forward in protecting public health, but would also unravel years of progress. We urge you to stand up for the health of American families and oppose these bills.

Sincerely,

GEORGES C. BENJAMIN, MD,
*Executive Director.*

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COALITION FOR SENSIBLE SAFEGUARDS
*January 3, 2017*

RE: Floor vote of the Midnight Rules Relief Act of 2017

The Coalition for Sensible Safeguards (CSS), which includes more than 150 diverse labor, environmental, consumer, public health, food safety, financial reform, faith, and scientific integrity groups representing millions of Americans, *strongly opposes the Midnight Rules Relief Act of 2017* (MRRA).

MRRA would amend the Congressional Review Act to allow disapproval *en banc* of all regulations finalized near the end of presidential terms.

The proposed legislation is based on a fatally flawed premise—namely, that regulations which are proposed or finalized during the so-called "midnight" rulemaking period are rushed and inadequately vetted. In fact, the very opposite is true. There are currently dozens of public health and safety regulations that have been in the regulatory process for years or decades, including many that date from the Obama Administration's first term or implement laws passed in the first term. Some even predate the Obama Administration entirely.

In July 2016, Public Citizen released a report [1] that compared rulemaking lengths for rules finalized in the "midnight" or presidential transition period to those that were finalized outside of this period. The results were noteworthy. The report found that rules issued during the presidential transition period spent *even more time* in the rulemaking process and received *even more extensive vetting* than other rules.

After examining all economically significant rulemakings that have been finalized since 1999, Public Citizen's report found that rules issued during the transition period took on average 3.6 years to complete—almost an entire presidential term—compared to 2.8 years for all other rules. Likewise, the time it took the U.S. Office of Information and Regulatory Affairs (OIRA) to review midnight rules was no shorter, and in some cases longer, than non-midnight rules.

In addition, many of these regulations are mandated by Congress and have missed rulemaking dead lines prescribed by Congress. Referring to regulations that have been under consideration by Federal agencies for years, and in some instances decades, as "rushed" is misleading and false.

Prominent administrative law experts have also concluded that the concerns regarding these regulations are not borne out by the evidence. For example, in 2012 the Administrative Conference of the United States (ACUS) conducted an extensive study of regulations finalized near the end of previous presidential terms and found that many "midnight regulations" were "relatively routine matters not implicating new policy initiatives by incumbent administrations." [2]

[1] PUBLIC CITIZEN, SHINING A LIGHT ON THE "MIDNIGHT RULE" BOOGEYMAN: AN ANALYSIS OF ECONOMICALLY SIGNIFICANT RULES REVIEWED BY OIRA, (July, 2016), *http://citizen.org/documents/Midnight-Regs-Myth.pdf*

[2] Administrative Conference Recommendation 2012–2, Midnight Rules, Adopted June 14, 2012, pp. 1–2, at *http://www.acus.gov/wp-content/uploads/downloads/2012/06/Final-Recommendation-2012-2-Midnight-Rules.pdf*

ACUS also found that the "majority of the rules appear to be the result of finishing tasks that were initiated before. the Presidential transition period or the result of deadlines outside the agency's control (such as year-end statutory or court ordered deadlines)." ACUS concluded that "the perception of midnight rulemaking as an unseemly practice is worse than the reality."

Indeed, opponents of midnight regulations have not presented any persuasive empirical evidence supporting claims that regulations finalized near the end of presidential terms were rushed or did not involve diligent compliance with mandated rulemaking procedures. Instead, those opponents make unsubstantiated claims based solely on when a regulation was finalized, ignoring the marathon rulemaking process that those rules underwent.

In reality, compliance with the current lengthy regulatory process prevents agencies from finalizing new regulations efficiently, and thus earlier in presidential terms. This is because many of the regulations that Congress intended to provide the greatest benefits to the public's health, safety, financial security, and the environment currently take several years,[3] decades in some instances, for agencies to implement due to the extensive and, in many cases, redundant procedural and analytical requirements that comprise the rulemaking process.

Indeed, CSS maintains that the inherent inefficiency of the current regulatory process, leading to regulatory delays and paralysis across agencies, is the primary area in most of need of urgent attention and reform by this Congress.

In the end, it is difficult to overlook the tragic irony at the heart of MRRA. The bill would empower Congress to use the Congressional Review Act (CRA) a process that is rushed and nontransparent and that discourages informed decision making to block at the 11th hour rules that have completed the journey through the onerous rulemaking process.

Unlike the CRA's expedited procedures, agency rules are subjected to myriad accountability mechanisms, and, for each rule, the agency must articulate a policy rationale that is supported by the rulemaking record and consistent with the requirements of the authorizing statute. In contrast, members of Congress do not have to articulate a valid policy rationale—or any rationale at all—in support of CRA resolutions of disapproval. Quite simply, they can be, and often are, an act of pure politics.

MRRA would make the situation even worse. It would, in effect, demand that all members of Congress have adequate expertise on all of the rules that would be targeted by a single *en banc* disapproval resolution. Such a scenario would be highly unlikely.

It would also risk encouraging members to engage in "horse trading" to add still more rules to the *en banc* disapproval resolution until enough votes have been gathered to ensure the resolution's passage. Surely, this approach to policymaking cannot be defended as superior to that undertaken by regulatory agencies.

The Obama Administration ends on January 20, 2017. It is incumbent on them to do their constitutional duty to implement the laws of Congress until that date. CSS urges members to reject both the bill and false and misleading rhetoric that bears no reality to the real problems of excessive and systemic delay in the regulatory process.

We strongly urge opposition to Midnight Rules Relief Act of 2017.

Sincerely,

ROBERT WEISSMAN,
*President,*
Public Citizen,
*Chair,*
Coalition for Sensible Safeguards.

*The Coalition for Sensible Safeguards is an alliance of consumer, labor, scientific, research, good government, faith, community. health, environmental. and public interest groups, as well as concerned individuals, 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.*

[3] PUBLIC CITIZEN, UNSAFE DELAYS: AN EMPIRICAL ANALYSIS SHOWS THAT FEDERAL RULEMAKINGS TO PROTECT THE PUBLIC ARE TAKING LONGER THAN EVER (June, 2016), *http://www.citizcn.org/documents/Unsafe-Delays-Report.pdf*

UNION OF CONCERNED SCIENTISTS
*January 3, 2017*

Dear Representative:

The Union of Concerned Scientists, with more than 500,000 members and supporters throughout the country, strongly opposes H.R. 21, the Midnight Rules Relief Act of 2017. The proposed legislation would hasten the already rushed procedures in the Congressional Review Act (CRA) to enable Congress to block science-based public health, safety, and environmental safeguards finalized near the end of presidential terms *en banc,* with zero accountability.

H.R. 21 is the CRA on steroids. If passed, H.R. 21 would allow Congress to further circumvent legislative procedure and diminish the capacity of Federal agencies to create much needed regulations that safeguard public health and the environment while undermining robust scientific research and data in the process.

What H.R. 21 does do is perpetuate the disproven myth of "midnight regulations,"[1] or the idea that rules finalized near the end of presidential terms are being rushed to completion and are therefore inadequately vetted. Contrary to what the proposal would suggest, the majority of regulations are not expedited at the end of an administration.

A recent report[2] found empirical evidence that significant regulations finalized near the end of an administration spent more than three years on average in Federal rulemaking pipeline, including going through a public comment period that allows for all impacted stakeholders to provide feedback to agencies, before being finalized. Referring to these safeguards as "midnight regulations" is a false narrative not rooted in reality.

H.R. 21 is a rad ical proposal that provides another opportunity to allow regulated industries to drown out the voices of the people who will be hurt the most by rolling back these vital science-based public health, safety, and environmental protections. If H.R. 21 were to pass, many science-based regulations vital to protecting the health and safety of Americans, especially black and Latino communities who often face the biggest public health and environmental threats could be dismantled.

Instead of addressing the real problem—the extensive procedural hurdles that Federal agencies face to develop and finalize congressionally-mandated and science-based public health, safety, and environmental protections without delay—H.R. 21 is a dangerous solution in search of a nonexistent problem.

H.R. 21 could undermine years of progress on science-based public health protections, worker safety, and environmental stewardship. It fails to put the health and safety of communities ahead of narrow corporate or ideological interests. This is not just an attack on the regulatory process, but an attack on transparent, science informed policymaking. We strongly urge you to vote 'no' on H.R. 21.

Sincerely,

ANDREW A. ROSENBERG, PH.D.,
*Director, Center for Science and Democracy,*
Union of Concerned Scientists.

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UNION OF CONCERNED SCIENTISTS
*January 3, 2017*

Dear Representative:

The Union of Concerned Scientists, representing more than 500,000 members and supporters across the country, strongly opposes H.R. 26, the Regulations From the Executive in Need of Scrutiny Act of 2017 ("REINS" Act).

This bill is a radical threat to the integrity of the Federal regulatory process and would eviscerate the ability of Federal agencies to use science to protect public health, safety, and the environment. In reality, H.R. 26 is a one-way ticket to failing to protect Americans from public health and safety dangers, and simply a recipe for stymieing regulatory action.

H.R. 26 would politicize the regulatory process by requiring any major science-based public health, safety, and environmental safeguard to be approved by both houses of Congress within a narrow timeline of 70 legislative days. If both houses of Congress failed to approve, the rule would not only be prevented from taking effect, but also tabled until the next congressional session, no matter how vital it was to protecting public health, safety, and the environment.

[1] *http://www.politico.com/agenda/story/2016/08/the-myth-of-midnight-regulations-000194*
[2] *http://citizen.org/documents/Midnight-Regs-Myth.pdf*

Congress writes the laws to ensure access to clean air and water, safe consumer products, and untainted food and drugs. However, Federal agencies are responsible for using scientific and technical expertise to develop regulations to implement those mandates. Congress does not have near the capacity to adequately review hundreds of science-based safeguards within such a tight deadline. And under this proposal, by doing nothing, Congress would prevent millions of Americans, especially the most vulnerable populations who face the gravest health and environmental threats, from getting the protection afforded to them by existing laws.

Further, Congress already has significant authority when it comes to agency rulemaking, making this proposal even more illogical. Federal agencies only act to implement laws passed by Congress. In addition, Congress can at any time block implementation of a regulation by passing a resolution of disapproval under the procedures set forth in the Congressional Review Act. H.R. 26 is merely an attempt to add yet another roadblock in using science to protect the public. It is a solution in search of a problem.

Currently, Federal agencies propose regulations that are based on independent science and are subject to an extensive multi-year review process with several opportunities for public comment for all stakeholders. And while this process is far from perfect, H.R. 26 would override the entire process by imposing a Congressional review with no articulated standards or goals.

The ill-advised H.R. 26 would jeopardize the public interest and radically alter the separation of powers. It would block agencies from using the best available science to safeguard public health, safety, and the environment as mandated by the laws Congress has passed. Furthermore, the bill would increase uncertainty in the rulemaking process by highly politicizing what should be science-based decisions.

In sum, H.R. 26 does not improve or even streamline the regulatory system. Rather, it rigs the rules to provide Congress an opportunity to undermine its own landmark public health, safety, and environmental laws in favor of industry interests. The protections afforded to us by our popular science-based laws such as the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and others, would all be targeted under this absurd proposal. This is why we strongly urge a no vote on H.R. 26.

Sincerely,

ANDREW A. ROSENBERG, PH.D.,
*Director, Center for Science and Democracy,*
Union of Concerned Scientists.

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CONSUMER FEDERATION OF AMERICA
*Washington, DC, January 3, 2017*

*RE: Oppose the Midnight Rules Relief Act of 2017 that will Undermine Crucial Consumer Protections*

Dear Representative:

The Consumer Federation of America (CFA)[1] writes to express our strong opposition to a bill that will undermine important consumer protections and that will be voted on this week. The Midnight Rules Relief Act of 2017 (MRRA) would undercut the ability of Federal agencies to protect consumers from unsafe food, predatory financial products and schemes, and dangerous consumer products. The Federal rulemaking process is already lengthy and difficult. This bill will make it even more difficult and burdensome for Federal agencies to implement consumer protection measures. The end result will be harm to American consumers.

The MRRA would amend the Congressional Review Act to allow disapproval of a number of regulations, all at once, finalized near the end of presidential terms.

This bill seeks to solve a problem that does not actually exist: that rules finalized at the end of an administration are hurried and not appropriately evaluated. According to both the Administrative Conference of the United States (ACUS) and Public Citizen, however, this is not the case. ACUS found, in a 2012 study[2] that

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[1] CFA is an association of more than 250 non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy and education. Member organizations include local, state, and national consumer advocacy groups, senior citizen associations, consumer cooperatives, trade unions and food safety organizations.

[2] Administrative Conference Recommendation 2012–2,Midnight Rules, Adopted June 14, 2012, pp. 1–2, at *http://www.acus.gov/wp-content/uploads/downloads/2012/06/Final-Recommendation-2012-2-Midnight-Rules.pdf.*

regulations that were finalized during the end of presidential terms were "relatively routine matters not implicating new policy initiatives by incumbent administrations" and that "the majority of the rules appear to be the result of finishing tasks that were initiated before the Presidential transition period or the result of deadlines outside the agency's control (such as year-end statutory or court-ordered deadlines." In a July 2016 study, Public Citizen released a report[3] that found that rules issued during the end of a Presidential term took an average of 3.6 years to complete compared to 2.8 years for other rules. Thus, these studies found that these "midnight rules" are not rushed nor the result of a non deliberative rulemaking process.

The MRRA seeks to bundle numerous Congressional Review Act disapprovals in one resolution. In one sweeping measure, Congress could usurp the expertise, knowledge, and deliberative process of many agencies to entirely stop sensible safeguards that Americans expect and depend upon to keep their families safe and secure, their privacy protected, and their financial services fair and transparent. Ironically, this bill would enable Congress to use a rushed, non-deliberative process to upend critical necessary protections.

Congress already has numerous methods for holding agencies accountable for their actions. The Midnight Rules Relief Act of 2017 would further thwart the rulemaking process, waste Federal resources, minimize the ability of Federal agencies to do their jobs to protect the public and ultimately harm American consumers.

We strongly urge you to oppose this harmful bill.

Sincerely,

RACHEL WEINTRAUB,
*Legislative Director and General Counsel.*

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CONSUMER FEDERATION OF AMERICA
*Washington, DC, January 3, 2017*

RE: Oppose The Regulations from the Executive in Need of Scrutiny Act (REINS Act), Legislation that will Undermine Crucial Consumer Protection Regulations

Dear Representative:

The Consumer Federation of America (CFA)[1] writes to express our strong opposition to a bill that will undermine impm1ant consumer protections and that will be voted on this week. The Regulations from the Executive in Need of Scrutiny Act (REINS Act) would undercut the ability of Federal agencies to protect consumers from unsafe food, predatory financial products and schemes, and dangerous consumer products. The Federal rulemaking process is already lengthy and difficult. This bill will make it even more time-consuming, expensive, and burdensome for Federal agencies to implement consumer protection measures. The end result will be harm to American consumers.

The REINS Act would require that any agency that issues a rule with an economic impact of $100 million or more must obtain approval from both Houses of Congress of the entire rule without changes, within 70 legislative days of the rule being received by Congress. This would affect all major rules; even the many that are not controversial. With few exceptions, if Congress fails to act in the allotted time, the rule could not be brought up again until the next Congress and would not be implemented.

This hurdle would be virtually impossible for important consumer protection rules to overcome. The bill strips away the authority of Federal agencies that Congress created to develop expertise on how to protect American consumers from dangerous products, tainted food and deceptive financial services products. If an agency does persist in its efforts, it faces the prospect of squandering enormous resources to research, write and evaluate an important consumer protection rule, because opponents of the effort have been able to bottle it up in a single House of Congress over a short period of time.

Congress already has numerous methods for holding agencies accountable for their actions. The REINS Act would further delay the rulemaking process, waste

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[3] PUBLIC CITIZEN, SHINING A LIGHT ON THE "MIDNIGHT RULE" BOOGEYMAN: AN ANALYSIS OF ECONOMICALLY SIGNIFICANT RULES REVIEWED BY OIRA, (July, 2016), *http://citizen.org/documents/Midnight-Regs-Myth.pdf.*

[1] CF A is an association of more than 250 non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy and education. Member organizations include local, state, and national consumer advocacy groups, senior citizen associations, consumer cooperatives, trade unions and food safety organizations.

Federal resources, minimize the ability of Federal agencies to do their jobs to protect the public and ultimately harm American consumers.

We strongly urge you to oppose this harmful bill.

Sincerely,

RACHEL WEINTRAUB,
*Legislative Director and General Counsel.*

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CONSUMER REPORTS™
*January 3, 2017*

U.S. House of Representatives
Washington, DC

Dear Representative:

Consumer Reports and its policy and mobilization arm, Consumers Union, strongly urge you to vote no on H.R. 21, the so-called "Midnight Rules Relief Act." This bill would severely undermine accountability to the public regarding important protections and safeguards.

Although the rules targeted by this legislation were finalized relatively recently, many have been under development for several years. Consumers Union has provided public comment on several of these regulations that were designed to protect consumers against unsafe products, dishonest business dealings, and other hazards in the marketplace that place their health, safety, or well-being at risk. Agency experts carefully examined these hazards and considered various alternative approaches to address them. They sought input and guidance from businesses, consumer organizations, outside scientific and legal experts, and the public at large, and ultimately developed final rules, explaining publicly the basis and rationale for the adopted approach.

The Federal law known as the Congressional Review Act (CRA) already permits a regulation carefully developed over many years to be erased by Congress, in a rushed process that does riot reflect the same level of expertise or careful consideration. Congress could even rescind a rule for reasons that might be based not on any broader interests of the public, but on the narrower, private special interests of those seeking to avoid having appropriate obligations imposed on their profit-making activities.

The potential for the CRA to be employed in the service of special interests is at least somewhat held in check by the fact that the law currently requires separate congressional action for erasing each regulation. A regulation considered for erasure under the CRA must be brought to the House and Senate in its own separate resolution, given its own debate and vote, and sent to the President for its own signature or veto. All officials involved in considering whether to erase the regulation and its protections are thus put on record, and can be held accountable for their positions and the consequences. Perhaps for this reason, there has only been one regulation rescinded under the CRA in its 20-year history.

This important accountability check would be removed under the "Midnight Rules Relief Act." By allowing erasure of multiple regulations en bloc, this bill would enable Members of Congress and the President to evade public accountability for what could be ill-considered, politically motivated decisions that result in devastating consequences. Under the bill, no Member would ever have to be on record regarding any specific regulation being erased. In fact, any Member who actually wants to cast a more selective vote, to erase certain regulations but not others, would be unable to do so.

We are somewhat encouraged that the House Majority, after initially acting behind closed doors to weaken the Office of Congressional Ethics, has reversed course in light of major concerns raised about the impact on congressional accountability. We urge all Members to also recognize the damaging effects that this bill would have on accountability and on the ability of the American public to trust their elected representatives. We strongly urge you to vote no on the "Midnight Rules Relief Act."

Sincerely,

LAURA MACCLEERY,
*Vice President,*
Consumer Policy and Mobilization,
Consumer Reports.

GEORGE P. SLOVER,
*Senior Policy Counsel,*
Consumers Union.

WILLIAM C. WALLACE,
*Policy Analyst,*
Consumers Union.

NATIONAL CONSUMER LAW CENTER
*January 3, 2017*

RE: Oppose H.R. 26, the Regulations from the Executive in Need of Scrutiny Act (REINS Act)

Dear Representative:

The National Consumer Law Center® (NCLC®), on behalf of its low income clients, strongly opposes H.R. 26, the Regulations from the Executive in Need of Scrutiny Act (REINS Act). Since 1969, the nonprofit NCLC has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training.

The REINS Act is a radical threat to the government's ability to protect the public from harm in areas ranging from financial services to health to safety. The bill would spread congressional paralysis to Federal agencies. allowing politics, partisanship, inaction and arbitrary and capricious opinions to trump scientific expertise and careful rulemaking, even on noncontroversial bipartisan matters. The bill would require both houses of Congress to approve a major rule, with no alterations, within a 70 day window. If both chambers are unable to approve a major rule, it would not take effect and would be tabled until the next congressional session. In other words, *by doing nothing,* Congress would prevent existing laws from being effectively implemented. It would stop all major rules, including the large number of non controversial rules agencies produce every year, from going through.

Currently, it takes years for a Federal agency to produce the rules necessary to implement and enforce public safeguards and protections. The Administrative Procedures Act and other legislation require agencies to carefully consider facts, evidence, costs, benefits, and viewpoints from a wide range of the public before implementing a rule. These procedures take time and effort but they create transparency, prevent arbitrary and capricious actions, and give the public input.

For example, the recently implemented EPA standards on greenhouse gas emissions and fuel economy for light vehicles took years of development—despite being supported by both environmental groups and the auto industry—before Federal regulators finally got a rule on the books. REINS would allow congressional inaction to block such common-sense, non controversial rules.

Congress already has the first and last word when it comes to agency rulemaking, making the REINS Act needless and redundant. Agencies can only exercise authority that has been delegated by Congress in authorizing legislation. Any agency attempt to overstep these bounds is likely to result in judicial scrutiny and reversal of the agency action. And under the Congressional Review Act, Congress already has the authority to review and nullify a rule by passing a resolution of disapproval. The REINS Act would force Congress to refight its previous debates, wasting time and money and paralyzing agencies and Congress itself.

The REINS Act would inappropriately—but deliberately—inject political considerations into a regulatory process that is supposed to be based on objective agency science and expertise. Federal agencies employ personnel with policy, scientific, and technical expertise to produce smart and sensible regulations. Allowing Congress to have the final say on regulations would give lobbyists, special interest groups, and those who provide legislators with campaign contributions even more influence in shaping a rule.

Simply put, the REINS Act would make the dysfunction and obstructionism that plague our political process even worse by giving one chamber of Congress veto power over any new significant public health and safety protection, no matter how non-controversial or sensible it maybe.

Congress should be searching for ways to ensure that Federal agencies enforce Jaws designed to protect our food supply, water, air quality, financial security and much more, not throwing up roadblocks to sensible safeguards that protect the American people. For these reasons, we strongly urge you to oppose the REINS Act.

Sincerely,

LAUREN SAUNDERS,
*Associate Director.*

AMERICANS FOR FINANCIAL REFORM
*January 4, 2017*

Dear Representative,

On behalf of Americans for Financial Reform (AFR), we are writing to strongly oppose I–IR 26, the "Regulations from the Executive In Need of Scrutiny Act of 2017," also known as the REINS Act.[1]

The REINS Act is radical legislation that would upend decades of administrative law practices dating back to the New Deal era in the 1930s. The bill requires explicit approval of any "major regulation" by both the House and Senate within 70 days in order for that rule to take effect This requirement would create crippling barriers to administrative actions necessary to protect the public and implement the law.

The REINS Act would affect the full range of Federal regulations, including rules that ensure consumer products are safe for children, rules that protect worker safety in coal mines, environmental rules that protect the safety of our air and water, financial regulations, and many more. However, AFR's major focus is on rules that safeguard the financial system and financial consumers. The crisis of 2008 demonstrated that a failure to properly regulate Wall Street can result in trillions of dollars of economic damages and the loss of millions of jobs. The continuing series of scandals since that time, ranging from manipulation of markets to consumer fraud at Wells Fargo, further demonstrates the need for strong rules governing the financial system.

If the REINS Act passes, significant rules governing the financial sector will not go into effect unless both Houses of Congress vote again to approve each individual rule and the President once again approves the rule even though the laws authorizing these rules have already been passed by Congress and the President. Administrative rules are necessary to give laws actual effect. This massive presumption against actually putting rules in place will be an enormous barrier to agency actions that protect the public from irresponsible or exploitative behavior by financial institutions.

Congress already has the power to overturn any agency rule, or to repeal the legislation that authorizes the rule. The additional REINS Act requirement that Congress must specifically approve each individual rule passed in implementing a law is a transparent effort to sabotage the ability of government to stand up for the public and against big banks. If the REINS Act passes, in order to take action in areas such as reforming Wall Street, it will be necessary to both pass a law and to return to Congress for the approval of both houses for each individual regulatory step in implementing the law. The entire process could be halted at any point by Congressional inaction.

The process of rulemaking under our current system is already far too slow and cumbersome, involving administrative procedures that take years and frequent court challenges. The REINS Act would bring that process to an effective halt and further empower business interests to block any rule that impacted their profits, even if it brought far larger benefits to the public.

No one who believes in protecting the public from the effects of dangerous and irresponsible corporate misbehavior should vote for this bill. We urge you to oppose it.

Sincerely,

AMERICANS FOR FINANCIAL REFORM.

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AMERICAN LUNG ASSOCIATION
*January 4, 2017*

Dear Representative:

The American Lung Association urges you to oppose H.R. 21, the so called Midnight Rules Relief Act of 2017. Under this bill, Congress could permanently block multiple critical public health protections with a single vote.

H.R. 21 is based on a misguided perception that rules finalized toward the end of a presidential administration have not been fully formed or vetted. The reality

[1] Americans for Financial Reform is an unprecedented coalition of more than 200 national, state and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, faith based and business groups. A list of coalition members is available at ***http://ourfinancialsecurity.org/about/our-coalition/***

is that these rules, many of which protect public health, are often the product of years of work and public input.

H.R. 21 would expand the Congressional Review Act to allow *en bloc* disapproval of all regulations finalized near the end of a president's term. The CRA is an extreme tool—it allows Congress to, with a vote of disapproval, not only erase a regulation, but also prevent the Federal Government from issuing any rule that is "substantially the same" in the future. Allowing an *en bloc* vote to permanently block a group of regulations is reckless and extreme.

If it became law, H.R. 21 could be used to block lifesaving public health protections that prevent death and disease caused by air pollution and tobacco.

We urge you to oppose this attack on lifesaving public health protections.

Sincerely,

HAROLD P. WIMMER,
*National President and CEO,*
American Lung Association.

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*January 4, 2017*

RE: Floor vote of the Midnight Rules Relief Act of 2017

We, the undersigned consumer, small business, labor, good government, financial protection, community, health, environmental, civil rights and public interest groups, strongly urge you to oppose the Midnight Rules Relief Act of 2017 (MRRA).

H.R. would amend the Congressional Review Act (CRA) to allow en bloc disapproval of all regulations finalized near the end of presidential terms. This bill would jeopardize public protections affecting public health, safety, and the environment that often are years, if not decades, in the making.

The proposed legislation is based on a flawed premise—namely, that regulations which are being finalized during the so-called "midnight" rulemaking period are rushed and inadequately vetted.

In fact, the opposite is generally the case. The vast majority of the public health and safety regulations this bill would target have been in the regulatory process for years or decades, including many that date from the Obama Administration's first term or that implement laws passed in the first term. Some even predate the Obama Administration entirely.

In addition, many of these regulations are mandated by Congress and have missed rulemaking deadlines prescribed by Congress. Referring to regulations that have been under consideration by Federal agencies for years, and in some instances decades, as "rushed" is misleading and inaccurate.

More generally, opponents of midnight regulations have not presented any persuasive empirical evidence supporting claims that regulations finalized near the end of previous presidential terms were rushed or did not involve diligent compliance with mandated rulemaking procedures. Instead, those opponents make unsubstantiated claims based solely on when a regulation was finalized, ignoring the marathon rulemaking process that those rules likely underwent.

In reality, compliance with the current lengthy regulatory process prevents agencies from finalizing new regulations efficiently, earlier in presidential terms. This is because many of the regulations that Congress intended to provide the greatest benefits to the public's health, safety, financial security, and the environment currently take several years, decades in some instances, for agencies to implement due to the extensive and, in many cases, redundant procedural and analytical requirements that comprise the rulemaking process.

It is difficult to overlook the tragic irony at the heart of MRRA. The bill would empower Congress to use the CRA—a process that is rushed, nontransparent, and discourages informed decision-making—to block, at the 11th hour, rules that have completed the journey through the onerous rulemaking process.

Unlike the CRA's expedited procedures, agency rules are subjected to a myriad of accountability mechanisms, and, for each rule, the agency must articulate a policy rationale that is supported by the rulemaking record and consistent with the requirements of the authorizing statute. In contrast, members of Congress do not have to articulate a valid policy rationale—or any rationale at all—in support of CRA resolutions of disapproval.

A small sampling of long-delayed but now finalized public protections that could be blocked by MRRA illustrates what kind of important public protections are at stake:

- Environmental Protection Agency's truck greenhouse gas emissions rule will make tomorrow's trucks run cleaner and go farther on a gallon of fuel

- Department of Labor's fair pay and safe workplaces protection rule helps to eradicate all forms of discrimination in the workplace and promote good jobs for women
- Health and Human Services' nursing home standard banning the use of forced arbitration in contracts will improve the care and safety for nearly 1.5 million Americans in long-term care facilities
- Department of Education's gainful employment rule will protect student borrowers against misleading and predatory practices by shoddy postsecondary institutions and clarify a process for loan forgiveness in cases of institutional misconduct
- Environmental Protection Agency's Risk Management Program regulations for chemical facilities will reduce the likelihood of accidental releases at these sites and improve emergency response activities

This bill would throw all these protections into jeopardy. It would, in effect, presume that all members of Congress have adequate expertise on the complexities of all of the rules that would be targeted by a single en bloc disapproval resolution on which they would be voting. Such a scenario would be highly unlikely.

The bill would also risk encouraging members of Congress to engage in "horse trading" to add still more rules to the *en bloc* disapproval resolution until enough votes have been gathered to ensure the resolution's passage. Surely, this approach to policymaking cannot be defended as superior to the careful process undertaken by regulatory agencies for each separate rule.

It is also crucial to underscore the far-reaching and negative consequences that such *en bloc* disapproval resolutions would have. According to the CRA, resolutions of disapproval not only nullify the regulation in question, but also prohibit a Federal agency from issuing another regulation that is "substantially the same" in the future, unless specifically authorized to do so by a future act of Congress. Accordingly, broad *en bloc* disapproval resolutions could significantly curtail agencies' ability to address pressing public threats, indefinitely, potentially forever. That would be a drastic consequence from an act of Congress that is sure to be highly politicized and unlikely to receive appropriately careful consideration.

This Administration ends on January 20, 2017. It is incumbent on Administration officials to do their constitutional duty to exercise their authority to execute the laws as entrusted by Congress until that date.

We strongly urge you to oppose the Midnight Rules Relief Act and to reject the false and misleading rhetoric behind it, which bears no relation to the real problems of excessive and systemic delay in the regulatory process.

We strongly urge opposition to the Midnight Rules Relief Act of 2017.

AFL–CIO
AFSCME
Alaska Public Interest Research Group
Alliance for Justice
American Association for Justice
Americans for Financial Reform
Asbestos Disease Awareness Organization (ADAO)
Center for Food Safety
Center for Justice & Democracy
Center for Progressive Reform
Clean Water Action
Connecticut Council on Occupational Safety and Health (ConnectiCOSH)
Consumer Federation of America
Consumers for Auto Reliability and Safety
Consumers Union
Daily Kos
Earthjustice
Economic Policy Institute
Greenpeace
Homeowners Against Deficient Dwellings
Institute for Agriculture and Trade Policy
International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)
League of Conservation Voters
Massachusetts Consumers Council
MassCOSH
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
National Council for Occupational Safety and Health (COSH)
National Council of Jewish Women
National Council of La Raza
National Employment Law Project
National Employment Lawyers Association
National Women's Law Center
Natural Resources Defense Council
NETWORK Lobby for Catholic Social Justice
Project On Government Oversight (POGO)
Public Citizen
Public Justice Center
Public Knowledge
SafeWork Washington

U.S. PIRG
Union of Concerned Scientists
Virginia Citizens Consumer Council
Women's Voices for the Earth
Worksafe

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BLUEGREEN ALLIANCE
*January 4, 2017*

Dear Representative:

As a coalition of the Nation's largest labor and environmental groups, collectively representing millions of members and supporters, we urge you to oppose H.R. 21, the "Midnight Rules Relief Act of 2017" and H.R. 26, the "Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017." These bills would fundamentally gut the Federal regulatory process as well as rules meant to protect public health, the environment, consumer and worker safety, and good jobs across the country.

The Midnight Rules Relief Act of 2017 would amend the Congressional Review Act to make an already extreme act even more disastrous. This bill would allow Congress to bundle together all regulations promulgated by Federal agencies within the last 60 legislative days of a President's final term and vote to disapprove of them all at once. This would enable Congress to—in one vote—overturn many of the critical public health and worker safety standards finalized towards the end of the Obama administration. This includes a number of standards that were under development for years that will not only protect the environment and improve public health, but also create quality jobs in American manufacturing and low carbon and clean energy technologies. Furthermore, this bill would undermine the stability that American businesses have come to rel y on. Passage of this bill would facilitate politics at its worst—allowing political score—settling at the expense of the American public.

The REINS Act of 2017 would require any rule with an impact of $100 million or more on the economy to be approved by Congress within 70 legislative days, without alterations, in order to take effect. This process would empower Congress to be the gatekeeper on Federal protections and allow politics to play a heavy hand in determining which regulations see it through to implementation, rather than science, law, or public interest. The REINS Act would fundamentally undermine the Federal Government's ability to set standards of all kinds. This includes those that protect public health, the environment and worker safety, many of which also have a long track record of creating quality jobs and boosting economic growth.

These bills are dangerous proposals for public health, workers, and the environment. Under the guise of streamlining the regulatory process, they would undermine bedrock environmental and public safety laws that protect communities and workers across the country and overturn protections that American people—and the economy—depend on.

We strongly urge you to oppose the Midnight Rules Relief Act of 2017 and the Regulations from the Executive in Need of Scrutiny Act of 2017.

Sincerely,

KIM GLAS,
*Executive Director,*
BlueGreen Alliance.

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CONSUMER REPORTS™
*January 4, 2017*

U.S. House of Representatives
Washington, DC

Dear Representative:

Consumer Reports and its policy and mobilization arm, Consumers Union, strongly urge you to *vote no* on H.R. 26, the Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017. This bill would hamstring Federal agencies in their work to protect consumers from dangers such as tainted food, dirty air and water, invasions of privacy, and predatory financial schemes. It would recklessly undermine existing laws and further paralyze the government.

H.R. 26 would require all "major rules" to receive the approval of both the House and Senate within 70 legislative days in order to take effect. With few exceptions, if Congress failed to act in time, the rule could not be brought up again until the next Congress. This requirement would delay or halt the implementation of existing

Federal statutes simply through congressional inaction. It would unjustifiably obstruct the President's constitutional duty to "take care that the laws be faithfully executed." Federal agencies issuing rules responsibly follow numerous procedural requirements established by Congress and the Constitution, exercising authority Congress has already granted them. This bill would create gridlock and dysfunction on a scale unprecedented in our country in modern times.

H.R. 26 would empower either chamber to unilaterally and silently stop a rule, no matter how sensible, important, urgent, or non-controversial it is. A rule could be indefinitely placed on hold even if Congress had required the agency to issue that particular rule. Under REINS, science and expertise would not be the driver of regulatory outcomes, and congressional gridlock could waste important resources that should be used in performing an agency's mission.

H.R. 26 is a dangerous proposal that would tie up the regulatory process and work against the interests of consumers. We strongly urge you to stand up for critical public protections and vote no on the bill.

Sincerely,

LAURA MACCLEERY,
*Vice President,*
Consumer Policy and Mobilization,
Consumer Reports.

GEORGE P. SLOVER,
*Senior Policy Counsel,*
Consumers Union.

WILLIAM C. WALLACE,
*Policy Analyst,*
Consumers Union.

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LEAGUE OF CONSERVATION VOTERS
*Washington, DC, January 4, 2017*

United States House
Washington, DC

Re: Oppose H.R. 21 & 26—Radical Attacks on Public Protections

Dear Representative:

On behalf of our millions of members, the league of Conservation Voters (LCV) works to turn environmental values into national, state, and local priorities. Each year, LCV publishes the *National Environmental Scorecard,* which details the voting records of members of Congress on environmental legislation. The *Scorecard* is distributed to LCV members, concerned voters nationwide, and the media.

*LCV urges you to vote NO on H.R. 21, the Midnight Rules Relief Act and H.R. 26, the REINS Act.* LCV joins our partners in the Coalition for Sensible Safeguards—an alliance of consumer, public health, labor, good government, environmental, and scientific groups—in strongly opposing this pair of extreme bills that have far-reaching and damaging consequences for vital public health and environmental safeguards.

H.R. 26, the REINS Act,requires both houses of Congress to affirmatively approve all significant new public protections before they take effect. This is nothing more than a tool for polluters to scuttle new health and environmental safeguards. Furthermore, the REINS Act is redundant and unnecessary, given that Congress already has the first and last word on agency rulemaking. The REINS Act would effectively delay or even shut down the implementation of existing laws, which could mean more premature deaths, illnesses, and other health impacts on the American people at the hands of polluters dumping toxins into our air and water.

H.R. 21, the Midnight Rules Relief Act would allow *en bloc* disapproval of all regulations finalized near the end of presidential terms. This bill is based on the unfounded premise that these rules are somehow rushed or not vetted, when in reality these rulemakings are often years in the making and involve extensive public input by the responsible Federal agencies. By contrast, H.R. 21 would allow a multitude of rules to be overturned using an expedited legislative process under the Congressional Review Act that by its design is rushed, lacks transparency, and has limited debate.

*LCV urges you to REJECT H.R. 21 & 26 and will strongly consider including votes on these bills in the 2017 Scorecard.* If you need more information, please call my office at (202) 785–8683 and ask to speak with a member of our Government Relations team.

Sincerely,

GENE KARPINSKI,
*President.*

NATIONAL CONSUMER LAW CENTER
*January 4, 2017*

Representative
U.S. House of Representatives
Washington, DC

RE: Oppose Midnight Rules Act, H.R. 21

Dear Representative,

The National Consumer Law Center® (NCLC®), on behalf of its low income clients, strongly opposes H.R. 21, the Midnight Rules Relief Act (MRRA), which would amend the Congressional Review Act (CRA) to allow disapproval *en masse* of all regulations finalized near the end of presidential terms. Since 1969, the nonprofit NCLC has worked for consumer justice and economic security for low income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training.

The MRRA is based on a fatally flawed premise—namely, that regulations which are proposed or finalized during the so-called "midnight" rulemaking period are rushed and inadequately vetted. In fact, the very opposite is true. There are currently dozens of public health and safety regulations that have been in the regulatory process for years or decades, including many that date from the Obama Administration's first term or implement laws passed in the first term. Some even predate this Administration entirely.

A Public Citizen report [1] found that rules issued during the presidential transition period spent *even more time* in the rulemaking process and received *even more extensive vetting* than other rules. After examining all economically significant rulemakings that have been finalized since 1999, Public Citizen's report found that rules issued during the transition period took on average 3.6 years to complete—almost an entire presidential term—compared to 2.8 years for all other rules. Likewise, the time it took the U.S. Office of Information and Regulatory Affairs (OIRA) to review midnight rules was no shorter, and in some cases longer, than non-midnight rules.

In addition, many of these regulations are mandated by Congress and have missed rulemaking deadlines prescribed by Congress. Referring to regulations that have been under consideration by Federal agencies for years, and in some instances decades, as "rushed" is misleading and false.

Prominent administrative law experts have also concluded that the concerns regarding these regulations are not borne out by the evidence. For example, in 2012 the Administrative Conference of the United States (ACUS) conducted an extensive study of regulations finalized near the end of previous presidential terms and found that many "midnight regulations" were "relatively routine matters not implicating new policy initiatives by incumbent administrations." [2]

ACUS also found that the "majority of the rules appear to be the result of finishing tasks that were initiated before the Presidential transition period or the result of deadlines outside the agency's control (such as year-end statutory or court-ordered deadlines)." ACUS concluded that "the perception of midnight rulemaking as an unseemly practice is worse that the reality."

Indeed, opponents of midnight regulations have not presented any persuasive empirical evidence supporting claims that regulations finalized near the end of presidential terms were rushed or did not involve diligent compliance with mandated rulemaking procedures. Instead, those opponents make unsubstantiated claims based solely on when a regulation was finalized, ignoring the marathon rulemaking process that those rules likely underwent.

In reality, compliance with the current lengthy regulatory process prevents agencies from finalizing new regulations efficiently, and thus earlier in presidential terms. This is because many of the regulations that Congress intended to provide the greatest benefits to the public's health, safety, financial security, and the environment currently take several years,[3] decades in some instances, for agencies to

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[1] Public Citizen, Shining A Light On The "Midnight Rule" Boogeyman: An Analysis Of Economically Significant Rules Reviewed By OIRA (July, 2016), *http://citizen.org/documents/Midnight-Regs-Myth.pdf.*

[2] Administrative Conference Recommendation 2012–2, Midnight Rules, Adopted June 14, 2012, pp. 1–2, at *http://www.acus.gov/wp-content/uploads/downloads/2012/06/Final-Recommendation-2012-2-Midnight-Rules.pdf*

[3] Public Citizen, Unsafe Delays: An Empirical Analysis Shows That Federal Rulemakings To Protect The Public Are Taking Longer Than Ever (June 2016), *http://www.citizen.org/documents/Unsafe-Delays-Report.pdf.*

implement due to the extensive and, in many cases, redundant procedural and analytical requirements that comprise the rulemaking process.

In the end, it is difficult to overlook the tragic irony at the heart of the MRRA. The bill would empower Congress to use the rushed and nontransparent CRA process to block at the 11th hour rules that have completed the journey through the onerous rulemaking process.

Unlike the CRA's expedited procedures, agency rules are subjected to myriad accountability mechanisms, and, for each rule, the agency must articulate a policy rationale that is supported by the rulemaking record and consistent with the requirements of the authorizing statute. In contrast, members of Congress do not have to articulate a valid policy rationaler any rationale at all-in support of CRA resolutions of disapproval. Quite simply, they can be, and often are, an act of pure politics.

The MRRA would make the situation even worse. It would, in effect, demand that all members of Congress have adequate expertise on all of the rules that would be targeted by a single *en masse* disapproval resolution. Such a scenario would be highly unlikely.

It would also risk encouraging members to engage in "horse trading" to add still more rules to the *en masse* disapproval resolution until enough votes have been gathered to ensure the resolution's passage. Surely, this approach to policymaking cannot be defended as superior to that undertaken by regulatory agencies.

We strongly urge opposition to the Midnight Rules Relief Act.

Sincerely,

LAUREN SAUNDERS,
*Associate Director.*

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NATIONAL CENTER FOR LESBIAN RIGHTS
*January 4, 2017*

Hon. NANCY PELOSI,
U.S. House of Representatives,
Washington, DC.

Hon. STENY HOYER,
U.S. House of Representatives,
Washington, DC.

RE: Floor vote of the Midnight Rules Relief Act of 2017 (H.R. 21)

Dear Democratic Leader Pelosi and Democratic Whip Hoyer:

The undersigned lesbian, gay, bisexual, transgender, and queer (LGBTQ) and allied organizations, *strongly oppose H.R. 21, the Midnight Rules Relief Act of 2017,* which is being voted on in the House today.

H.R. 21 would amend the Congressional Review Act to allow disapproval *en banc* of all regulations finalized near the end of presidential terms.

The proposed legislation is based on a fatally flawed premise-namely, that regulations which are proposed or finalized during the so-called "midnight" rulemaking period are rushed and inadequately vetted. In fact, the very opposite is true. There are currently dozens of public health and safety regulations that have been in the regulatory process for years or decades, including many that date from the Obama Administration's first term or implement laws passed in the first term. Some even predate the Obama Administration entirely.

In July 2016, Public Citizen released a report [1] that compared rulemaking lengths for rules finalized in the "midnight" or presidential transition period to those that were finalized outside of this period. The results were noteworthy. The report found that rules issued during the presidential transition period spent *even more time* in the rulemaking process and received *even more extensive vetting* than other rules.

After examining all economically significant rulemakings that have been finalized since 1999, Public Citizen's report found that rules issued during the transition period took on average 3.6 years to complete—almost an entire presidential term—compared to 2.8 years for all other rules. Likewise, the time it took the U.S. Office of Information and Regulatory Affairs (OIRA) to review midnight rules was no shorter, and in some cases longer, than non-midnight rules.

In addition, many of these regulations are mandated by Congress and have missed rulemaking dead lines prescribed by Congress. Referring to regulations that have been under consideration by Federal agencies for years, and in some instances decades, as "rushed" is misleading and false.

Prominent administrative law experts have also concluded that the concerns regarding these regulations are not borne out by the evidence. For example, in 2012

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[1] PUBLIC CITIZEN, SHINING A LIGHT ON THE "MIDNIGHT RULE" BOOGEYMAN: AN ANALYSIS OF ECONOMICALLY SIGNIFICANT RULES REVIEWED BY OIRA, (July, 2016), *http://citizen.org/documents/Midnight-Regs-Myth.pdf*

the Administrative Conference of the United States (ACUS) conducted an extensive study of regulations finalized near the end of previous presidential terms and found that many "midnight regulations" were "relatively routine matters not implicating new policy initiatives by incumbent administrations." [2]

ACUS also found that the "majority of the rules appear to be the result of finishing tasks that were initiated before the Presidential transition period or the result of deadlines outside the agency's control (such as year end statutory or court-ordered deadlines)." ACUS concluded that "the perception of midnight rulemaking as an unseemly practice is worse than the reality."

Indeed, opponents of midnight regulations have not presented any persuasive empirical evidence supporting claims that regulations finalized near the end of presidential terms were rushed or did not involve diligent compliance with mandated rulemaking procedures. Instead, those opponents make unsubstantiated claims based solely on when a regulation was finalized, ignoring the marathon rulemaking process that those rules underwent.

In reality, compliance with the current lengthy regulatory process prevents agencies from finalizing new regulations efficiently, and thus earlier in presidential terms. This is because many of the regulations that Congress intended to provide the greatest benefits to the public's health, safety, financial security, and the environment currently take several years,[3] decades in some instances, for agencies to implement due to the extensive and, in many cases, redundant procedural and analytical requirements that comprise the rulemaking process.

Indeed, we maintain that the inherent inefficiency of the current regulatory process, leading to regulatory delays and paralysis across agencies, is the primary area in most of need of urgent attention and reform by this Congress.

In the end, it is difficult to overlook the tragic irony at the heart of H.R. 21. The bill would empower Congress to use the Congressional Review Act (CRA) a process that is rushed and nontransparent and that discourages informed decisionmaking to block at the 11th hour rules, such as the Department of Labor rule protecting employees of Federal contractors and subcontractors from discrimination based on their sexual orientation or gender identity, that have completed the journey through the onerous rulemaking process.

Unlike the CRA's expedited procedures, agency rules are subjected to myriad accountability mechanisms, including the requirements to notify the public about potential rulemaking and provide the public with an opportunity to comment. Also, for each rule the agency must articulate a policy rationale that is supported by the rulemaking record and consistent with the requirements of the authorizing statute. In contrast, members of Congress do not have to articulate a valid policy rationale—or any rationale at all in support of CRA resolutions of disapproval. Quite simply, they can be, and often are, an act of pure politics.

H.R. 21 would make the situation even worse. It would, in effect, demand that all members of Congress have adequate expertise on all of the rules that would be targeted by a single *en banc* disapproval resolution. Such a scenario would be highly unlikely.

It would also risk encouraging members to engage in "horse trading" to add still more rules to the *en banc* disapproval resolution until enough votes have been gathered to ensure the resolution's passage. Surely, this approach to policymaking cannot be defended as superior to that undertaken by regulatory agencies.

The Obama Administration ends on January 20, 2017. It is incumbent on them to do their constitutional duty to implement the laws of Congress until that date. We urge members to reject both the bill and false and misleading rhetoric that bears no reality to the real problems of excessive and systemic delay in the regulatory process.

We strongly urge opposition to H.R. 21, the Midnight Rules Relief Act of 2017.

Sincerely,

Family Equality Council
GLSEN
Lambda Legal
National Asian Pacific American Women's Forum
National Center for Lesbian Rights
National Center for Transgender Rights
National Coalition for LGBT Health
National Health Law Program (NHeLP)

[2] Administrative Conference Recommendation 2012 2,Midnight Rules, Adopted June 14, 2012, pp. l–2, at *http://www.acus.gov/wp-content/uploads/downloads/2012/06/Finai-Recommendation-2012-2-Midnight-Rules.pdf*

[3] PUBLIC CITIZEN, UNSAFE DELAYS: AN EMPIRICAL ANALYSIS SHOWS THAT FEDERAL RULEMAKINGS TO PROTECT THE PUBLIC ARE TAKING LONGER THAN EVER (June, 2016), *http://www.citizen.org/documents/Unsafe-Delays-Report.pdf*

National LGBTQ Task Force Action Fund
Pride at Work
Sexuality Information and Education Council of the U.S. (SIECUS)
The Trevor Project
Witness to Mass Incarceration

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*January 4, 2017*

Dear Representative,

On behalf of our 2.4 million members and activists, we strongly urge you to oppose the so called Midnight Rules Relief Act of 2017. This bill is designed to make it easier to repeal public safeguards put in place by the Obama Administration. It would amend the Congressional Review Act (CRA) to enable Congress to repeal many regulations at once by packaging them in a single resolution that would get expedited consideration and require only a majority of votes for passage in the Senate.

The bill would allow Congress to block crucial public health, environmental, safety, consumer and financial safeguards without due consideration. Its goal is not to address last minute regulations. It is to dismantle reasonable and effective public protections for the benefit of narrow special interests.

The Midnight Rules Relief Act is based on several faulty premises, starting with its name. First, the bill applies to any action an Administration has taken during its *entire last year* in office. The bill is not targeted at any last-minute actions but seeks to deny the President the authority he was elected to use for an entire year, in effect reducing his term to three years—just as the Senate did by blocking consideration of Merrick Garland for the Supreme Court.

Second, even regulations issued in the last months of a term are not last minute exercises, but the culmination of years of work and public process. Often, they did not become final until recently because of review or discussion of comments submitted by industry. An extensive body of statutes already avoids hasty rulemaking and requires transparency and public participation. These laws include the Administrative Procedure Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Paperwork Reduction Act. These laws along with longstanding executive orders require that agency actions meet a very high threshold of due diligence and complex analysis. In fact, those regulations that are issued late in an administration are often those that have received the most preparation and analysis.

*The term "midnight regulation" is simply an effort to cast a stigma on public protections from the past year that have gone through a process that is no different from that for any other safeguard.*

Moreover, the bill is simply an effort to actually reduce—not enhance scrutiny of rules. The CRA has many problems but at least it requires regulations to be considered individually. This is important given the CRA's expedited procedures, its inflexibility—rules can only be repealed in their entirety, not altered and its potential implications—passage of a CRA repeal prevents an agency from ever doing something "substantially the same" ever again.

This bill would throw such caution to the winds. An unlimited number of disparate regulations could be packaged together, making focus on any specific regulation difficult, if not impossible, and trying to lure Congress into voting down many regulations if they want to repeal any single measure in the package. This is the very type of "omnibus" legislating that conservatives and the Republican leadership often decry.

Midnight Rules Relief Act is the opposite of a "good government reform" bill. It would make it easier to repeal protections the public supports by making it harder for Congress to consider—and easier for Congress to hide—the impacts of its actions. We urge you to oppose the Midnight Rules Relief Act and reject the false premise behind it.

Sincerely,

SCOTT SLESINGER,
*Legislative Director,*
Natural Resources Defense Council.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA—UAW
*Washington, DC, January 4, 2017*

Dear Representative,

On behalf of the more than one million active and retired members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, we strongly urge you to oppose the *Regulations from the Executive in Need of Scrutiny* (REINS) Act of 2017 (H.R. 26). The REINS Act is an extremely egregious bill that would effectively prevent the Federal Government from doing its job to protect the public interest.

The REINS Act would make it nearly impossible to ensure the health and safety of the American public. Americans have an expectation that their government works for them and will protect them from toxic food, air, water and products that they use in their daily lives. If the REINS Act becomes law, It would absolve Congress of some of its constitutional duties and responsibilities AND put the public at risk.

Under this bill, major regulation would not take effect unless it were approved by both chambers of Congress within a limited period oft"1me, thus amending every existing regulatory statute, including those that we know protect the water that we drink and the very air that we breathe.

The updated version of this draconian bill cynically adds a one-year delay that would all but ensure that REINS could not get in the way of vigorous efforts to repeal regulations that help workers and consumers.

UAW urges you to vote NO on this misguided bill and instead work to strengthen worker and consumer protections. Thank you for considering our views on this matter.

Sincerely,

JOSH NASSAR,
*Legislative Director.*

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*January 4, 2017*

VIA E-MAIL
U.S. House of Representatives
Washington, DC

Dear Representative:

Welcome to the 115th Congress. In this first week of session, on behalf of the members of the United Steelworkers union (USW), I write in opposition to the *Regulations from the Executive in Need of Scrutiny Act of 2017 ("REINS Act") and the Midnight Rules Relief Act of 2017.*

Regulations are indispensable for protecting public health, welfare, safety, and our environment. For our members, regulations allow them to work and live in safer, cleaner, more prosperous communities across the country. In most cases, the benefit of regulations outweigh the costs.

Congress has granted Federal agencies authority to promulgate and enforce regulations using agency policy, scientific, and technical expertise. In some cases, Congress has required agencies to issue certain rules. The rulemaking process already requires extensive review, public input, and scrutiny over several years to finalize a regulation.

However, the *REINS Act* would obstruct the ability of Federal agencies to enact rules by inappropriately injecting Congress and political considerations into the regulatory process. The REINS Act would require both houses of Congress to approve every major regulation within 70 days before it can take effect. By doing nothing or through partisan gridlock, Congress could stop all major regulations from being finalized, including those that are not controversial.

The *Midnight Rules Act* is based on the flawed premise that regulations finalized at the end of an Administration are rushed and inadequately vetted. In fact, regulations take many years to complete—on average 3.6 years for economically significant rules. This bill would amend the Congressional Review Act to allow disapproval *en banc* of all regulations finalized near the end of presidential term without regard for the merits of individual rules.

The American people and American businesses need smart and sensible regulation, not rash political decisions. Congress should be acting to improve the regulatory system rather than working to dismantle it. The REINS Act and the Midnight Rules Act will benefit only those who oppose all regulation at all costs. Our union urges you to *vote "NO" on the REINS Act and the Midnight Rules Relief Act.*

Sincerely,

LEO W. GERARD,
*International President.*

LWG/cdk

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*January 5, 2017*

Dear Representative:

Our organizations write to you today to oppose so-called regulatory reform legislation including H.R. 26, the Regulations from the Executive in Need of Scrutiny Act of 2017 and H.R. 5, the Regulatory Accountability Act. These bills could block or weaken commonsense safeguards that protect our nation's health from the dangers of tobacco.

The burden caused by tobacco use is staggering. Each day about 400 teens and children become regular, daily smokers; half will die prematurely as a result. And each year, almost half a million Americans die from tobacco, costing our economy and health care system approximately $170 billion annually. Productivity losses from premature death caused by tobacco total an additional $150 billion annually, with another $5.6 billion in productivity losses due to secondhand smoke exposure.

These bills would result in redundant reviews, analyses or processes that would tie the hands of Federal agencies, including the Food and Drug Administration (FDA), leaving the agencies unable to effectively implement the law and thereby creating opportunities for tobacco industry lobbyists to influence and stall much-needed rules to protect our Nation from the dangers of tobacco use.

- H.R. 26, the REINS Act, would require all new economically significant regulations to be approved within a narrow window of time by both chambers of Congress before taking effect. Congressional inaction would constitute a legislative "veto" of any important new regulation or safeguard.
- H.R. 5, the Regulatory Accountability Act, would add more than 80 burdensome and time consuming hurdles to the Federal rule-making process—paralyzing FDA and other agencies and limiting their ability to respond to public health threats. It would eliminate the historic deference the courts have given to technical experts at Federal agencies.

In 2009, an overwhelming bipartisan majority in Congress passed the Family Smoking Prevention and Tobacco Control Act of 2009 to curb the leading preventable cause of death—tobacco use. With passage of this law, Congress empowered FDA to implement commonsense safeguards to protect children from predatory tobacco industry marketing, to set meaningful product standards, and, for the first time, to provide oversight over all tobacco products.

Current law requires Federal agencies to carefully consider all relevant information and to address public comments before finalizing a new rule. The process is transparent and open and permits participation and comments from all stakeholders—the public, scientific and public interest, and public health organizations, as well as industry. Congress should not create new barriers to saving lives from tobacco, but rather should permit the FDA to act to implement the Family Smoking Prevention and Tobacco Control Act with the urgency that Congress recognized is necessary to address the cancer, heart disease, chronic obstructive pulmonary disease, and health care costs caused by tobacco use in America.

Our organizations ask you to oppose H.R. 26 and H.R. 5 and any other legislation that would delay or halt meaningful oversight of tobacco products and other critical public health regulations, including the implementation of the Family Smoking Prevention and Tobacco Control Act.

Sincerely,

American Heart Association
American Lung Association
Campaign for Tobacco-Free Kids

AMERICAN SUSTAINABLE BUSINESS COUNCIL
*Washington, DC, January 5, 2017*

Dear Representative:

I write to urge you to *vote* no on the Regulations from the Executive In Need of Scrutiny (REINS) Act of 2017 (H.R. 26). The passage of REINS would unnecessarily complicate the development of common sense marketplace rules that businesses need and will allow Congress to delay the creation of Federal standards and safeguards which promote a healthy environment for responsible businesses to succeed.

The anti-regulatory policy this bill represents constitutes a shift away from 40 years of regulatory precedent that protects the public against a range of market imperfections. The bill would have the unintended consequence of shifting the burden of proof for environmental, health and safety issues back to taxpayers and away from powerful corporate interests. Eroding the operational capacity of regulatory agencies to do their jobs, as this bill appears designed to do, would not foster productive growth among small and mid-sized firms. Instead these actions would allow the largest firms to further dominate the marketplace.

The American Sustainable Business Council (ASBC) is a growing national coalition of businesses and business organizations committed to advancing policies that support a vibrant and sustainable economy. ASBC, through its partner organizations, represents over 200,000 businesses and more than 325,000 business professionals, including industry associations, local and state chambers of commerce, micro-enterprise, social enterprise, green and sustainable business, local living economy groups, woman and minority business leaders, and investor networks.

As I have written before, ASBC has a different view than some inside the Beltway who claim that regulations are holding back our economic recovery. ASBC, along with other small business organizations, released a national, scientific poll of small business owners, which found that small businesses don't see regulations as a major concern.

The polling confirmed that small business owners value regulations if they am well-constructed and fairly enforced. It is important to note that the majority of those polled were Republican, further emphasizing that this is more about what is fair and good for all business

- Small business owners believe certain government regulations play an important role.
- 86 percent believe some regulation is necessary for a modern economy and 93 percent of respondents believe their business can live with some regulation if it is fair and manageable.
- 78 percent of small employers agree regulations are important in protecting small businesses from unfair competition and to level the playing field with big business.
- 79 percent of small business owners support having dean air and water in their community in order to keep their family, employees and customers healthy.
- 61 percent support standards that move the country towards energy efficiency and clean energy.

Supporting the ASBC poll is a Wells Fargo/Gallup poll of small businesses conducted October 2014, which found that only seven percent mentioned regulations as being an important challenge.

The REINS Act goes too far and undermines the Federal regulatory process. By giving Congress authority to invalidate rules it doesn't like undercuts the integrity of the process that relies on subject matter experts and public comment.

Blocking, weakening or delaying critical standards and safeguards for political reasons will only worsen the uneven economic playing field that leaves many responsible businesses at a competitive disadvantage. It also inhibits innovation in new technologies that can create good, sustainable jobs and create safer products, workplaces and communities. I urge you to vote against H.R. 26.

Sincerely,

DAVID LEVINE,
*CEO and Co-founder.*

AFL–CIO
*January 10, 2017*

LEGISLATIVE ALERT

Dear Representative:

On behalf of the AFL CIO, I am writing to express our strong opposition to H.R. 5, the Regulatory Accountability Act of 2017. This sweeping bill, which packages six anti-regulatory measures passed by the House in the last Congress, would upend 40 years of labor, health, safety and environmental laws, threaten new needed protections leaving workers and the public in danger. The AFL CIO urges you to oppose this harmful legislation.

The Regulatory Accountability Act (RAA) is drafted as an amendment to the Administrative Procedure Act (APA), but it goes far beyond establishing procedures for rulemaking. The RAA acts as a "super mandate" overriding the requirements of landmark legislation such as the Occupational Safety and Health Act and Mine Safety and Health Act. The bill would require agencies to adopt the least costly rule, instead of the most protective rule as is now required by the OSH Act and MSH Act. It would make protecting workers and the public secondary to limiting costs and impacts on businesses and corporations.

The RAA will not improve the regulatory process; it will cripple it. The bill adds dozens of new analytical and procedural requirements to the rulemaking process, adding years to an already slow process. The development of major workplace safety rules already takes 810 years or more, even for rules where there is broad agreement between employers and unions on the measures that are needed to improve protections. OSHA's silica standard to protect workers from deadly silica dust took nearly 19 years and the beryllium standard 15 years. The RAA will fm1her delay needed rules and cost workers their lives.

The RAA substitutes formal rulemaking for the current procedures for public participation for high impact rules and other major rules upon request. These formal rulemaking procedures will make it more difficult for workers and members of the public to participate, and give greater access and influence to business groups that have the resources to hire lawyers and lobbyists to participate in this complex process. For agencies that already provide for public hearings, such as OSHA and MSHA, the bill would substitute formal rulemaking for the development of all new rules, overriding the effective public participation processes conducted by these agencies.

H.R. 5 would subject all agencies—including independent agencies like the Securities and Exchange Commission, the National Labor Relations Board (NLRB), Consumer Product Safety Commission (CPSC), and the Consumer Financial Protection Bureau (CFPB) to these new analytical and procedural requirements. It would be much more difficult for agencies to develop and issue new financial reform rules and consumer protection rules required under recently enacted legislation.

This radical legislation doesn't just apply to regulations; it would also require agencies to analyze the costs and benefits of major guidance documents, even though these documents are non-binding and have no legal force. Guidance documents are an important tool for agencies to disseminate information on significant issues and hazards quickly in order to protect the public and workers. For example, in response to the Ebola virus threat, the Centers for Disease Control (CDC) issued critical guidance documents in order to prevent the spread of disease, including recommendations for infection control and protections for healthcare workers and emergency responders. Similar guidance was issued was issued to prevent transmission of the Zika virus. Under the RAA's provisions, CDC would be required to assess the costs and benefits of these major guidance documents, making it virtually impossible to provide information and recommendations in a timely manner.

H.R. 5 also includes a grab bag of other harmful anti-regulatory measures that thwart, weaken and undermine protections. The Separation of Powers Restoration Act abolishes judicial deference to agencies' statutory interpretations in rulemaking requiring a court to decide all relevant questions of law *de novo,* allowing courts to substitute their own policy judgements for the agencies' expert policy determinations. The Small Business Regulatory Flexibility Improvements Act (SBRFIA) imposes numerous unnecessary new analytical and procedural requirements on all agencies. It gives the Chief Counsel of the Small Business Administration's (SBA) Office of Advocacy, which in practice operates largely as a mouthpiece for large business interests, new broad powers to second guess and challenge agency rules. The Require Evaluation before Implementing Executive Wish lists Act (REVIEW Act) would automatically stay the implementation of any rule with an estimated annual cost of$1 billion that has been challenged, precluding courts from making this decision, and delaying protections. Other titles add even more unnecessary requirements to the rulemaking process.

The Regulatory Accountability Act would gut the Nation's safety, health and environmental laws, stripping away protections from workers and the public. It would tilt the regulatory process solidly in favor of business groups and others who want to stop regulations and make it virtually impossible for the government to issue needed safeguards. The AFL–CIO strongly opposes H.R. 5 and urges you to vote against this dangerous legislation.

Sincerely,

WILLIAM SAMUEL,
*Director,*
Government Affairs Department.

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AMERICAN LUNG ASSOCIATION
*January 10, 2017*

Dear Representative:

The American Lung Association urges you to oppose H.R. 5, the Regulatory Accountability Act of 2017. Despite its name, the bill does not ensure regulatory accountability; rather, it represents a sweeping attack on the Federal Government's ability to set lifesaving public health protections.

**Standard of Least Costly for Industry Jeopardizes Health of Americans**

H.R. 5 directs Federal agencies to default to adopting the least costly standard for industry—not the standard that best protects health, even though existing statues require the tatter. This is a dangerous giveaway to polluters and the tobacco industry that penalizes the American people.

Costs are already appropriately addressed in the Clean Air Act. Forty seven years ago, Congress intentionally wrote requirements in the Clean Air Act for the U.S. Environmental Protection Agency (EPA) to set standards that indicate what level of pollution is harmful to human health, based solely on health and medical science. Congress required that EPA work with states to implement cost effective cleanup measures to meet those standards. H.R. 5 would distort this process and could force EPA to prioritize costs to the industry over scientific evidence.

With the Family Smoking Prevention and Tobacco Control Act, Congress tasked the Food and Drug Administration (FDA) with protecting the public from the proven dangers of tobacco use, including death from lung disease, cancer and heart disease, based on what is appropriate for the protection of the public health—not the tobacco industry. H.R. 5 could force FDA to make decisions based on the cost to the tobacco industry instead of the public health—ignoring the tremendous human and economic toll tobacco inflicts on our Nation each year.

**Additional Unnecessary Requirements Delay Health Protections**

H.R. 5 would also impose dozens of procedural requirements that would increase costs of critical safeguards, or worse, delay or completely block lifesaving protections. Federal rules already go through extensive review, expert input, and public comment before they are finalized. The numerous additional analysis, reporting, and planning requirements imposed by this bill duplicate many existing requirements and amount to red tape that will hinder agencies from setting safeguards under the law to protect the public.

H.R. 5 would also automatically halt enforcement of "high impact" rules until all litigation on them is resolved. This unnecessary provision could delay lifesaving health protections, including against tobacco and outdoor air pollution, for years.

The courts already have the ability to stay a rule being litigated if they determine that the party opposing the rule is likely to succeed on the merits. Automatically staying enforcement of all "high impact" rules creates an incentive for frivolous lawsuits, even if the suit is unlikely to succeed, to avoid having to comply with the rule—potentially for years.

**Repeal of Judicial Deference to Agency Expertise**

H.R. 5 would also reverse a longstanding and well-established court decision, additionally delaying critical health protections for the public. When Congress writes a statute with unmistakable terms that reflect a dear policy intent, Executive Branch agencies are required to follow those terms and intent exactly. However, sometimes Congress intentionally writes a statute to be flexible or ambiguous, recognizing that it does not have the expertise to anticipate or address every contingency—especially for a statute that is designed to be flexible and effective over time, with changing circumstances. Agencies have extensive experience with the statutes they administer, as well as superior expertise on the scientific and technical matters that are at the heart of the actions carried out by the agencies.

In 1984, the United States Supreme Court upheld this approach, confirming that when Congress is silent or ambiguous, deference is given to agencies for administrative interpretations.[1] HR 5 would abandon this longstanding and well-established framework by mandating that the courts give less judicial deference to agencies with the relevant subject matter expertise. The bill would require a de novo standard of review—allowing the court to substitute its own judgement—for all relevant questions of Jaw, including the interpretation of constitutional and statutory provisions, and rules made by agencies.

For example, FDA's Center for Tobacco Products has hundreds of scientists, epidemiologists, public health professionals, communications experts and others on staff to implement the Family Smoking Prevention and Tobacco Control Act FDA has been directed by Congress to make science based decisions that are "appropriate for the protection of the public health," Inherent in the standards established by Congress, public health expertise is both necessary and required in order to carry out the law over time—expertise that the judicial branch is unlikely to possess in almost all cases.

In the Clean Air Act, Congress intentionally directed the EPA to set limits on specific air pollutants so that the limits "protect public health with an adequate margin of safety." EPA has established a multi-year process to review the thousands of health and medical studies that must inform that decision. During that process, EPA produces detailed analyses of the science and policy implications, which are reviewed multiple times by an independent panel of outside scientists and physicians. EPA further incorporates public comment on these analyses as scores of EPA researchers and, ultimately, the Administrator makes the final determination.

If passed, this bill would require judges to make decisions far outside their areas of expertise and with limited access to information, rather than continue to defer to the professional and informed decisions of scientists, physicians, economists, engineers, and other professional experts that work within these agencies. This is an unprecedented and dangerous move away from traditional judicial deference that has been successful and effective for more than three decades.

We urge you to oppose H.R. 5. This bill would make it harder to protect the health of Americans from the dangers of unhealthy air and tobacco by imposing years of delays, rejecting science, and burying Federal agencies in unnecessary red tape.

Sincerely,

HAROLD P. WIMMER,
*National President and CEO,*
American Lung Association.

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UNION OF CONCERNED SCIENTISTS
*January 10, 2017*

Dear Representative:

The Center for Science and Democracy at the Union of Concerned Scientists, representing more than 500,000 members and supporters across the country, *strongly opposes H.R. 5,* the Regulatory Accountability Act of 2017. H.R. 5 should be named the Regulatory Impossibility Act, as it would bring our science-based system of protecting the public from health, safety, and environmental dangers to a grinding halt.

H.R. 5 resurrects and combines a number of ill-advised and radical proposals that would together create excessive delays and extreme hurdles in the regulatory process, discouraging or preventing agencies from developing and finalizing crucial public protections. It is irresponsible and undemocratic to rush through, in the second week of a new Congress, a complicated and radical legislative proposal without giving any new members the opportunity to evaluate what they are voting on.

At the center of H.R. 5 is a version of the Regulatory Accountability Act (RAA) of 2015. This title will impose at least 70 new burdensome and time consuming procedural requirements on resource-strapped agencies. These onerous requirements not only fail to make any real improvements or efficiencies in the regulatory system, but they would inevitably lead to significant delays to a rulemaking process that is already cumbersome and lengthy. This result, which seems to be the real intention of the RAA, leads to ever more procedural requirements that add no new informa-

[1] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984).

tion or perspective but simply requires agencies to jump through needless additional hoops to protect the public.

Furthermore, the RAA provision would force agencies to ignore science by requiring them to finalize rules that are the least costly to industry. This means that agencies would be required by law to protect your constituents from dangerous chemicals based on *what is least costly to industry instead of what doctors determine adequately protects the American people.*

The Union of Concerned Scientists is particularly concerned about the impact H.R. 5 would have on how science informs the policymaking process. Because the legislation allows for limitless delays through repetitive and redundant comment and response requirements, we are concerned that fundamental public health and safety protections will be delayed or abandoned. Last year, Congress overwhelmingly voted to remove similar language from a law that paralyzed the ability of Federal agencies to regulate known carcinogens. If this language were to be applied to all agency rulemaking, agencies would be compromised from protecting the public, despite clear scientific evidence of major health risks for decades.

Overall, the RAA proposes changes to the rulemaking process that would further stack the deck in favor of regulated industries, which already enjoy significant influence over the rulemaking process, and give wealthy corporations increased leverage to challenge and undermine science-based safeguards during rulemaking and in court.

Other provisions in H.R. 5 that would paralyze the development of science-based safeguards include:

- A provision that would abolish agency deference, a well-established framework under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*[1] which allows Federal agencies that have sufficient scientific and technical expertise to interpret and administer laws passed by Congress. Not only would judges would be given the authority to override scientific expertise and the administrative record and substitute their own inexpert view, but agencies would be hamstrung waiting for interpretive clarity before moving forward with urgently needed health, safety and environmental protections. Courts should defer to agency technical experts for landmark health, safety, and environmental laws to be implemented effectively.
- A provision that would require a court reviewing a "high-impact" rule to automatically block its enforcement until litigation is resolved. This tactic could extend implement crucial public health safeguards by years, encouraging more litigation and needlessly exposing the public to threats. It is notable that this is a one-sided requirement. It would not prevent a polluter or other regulated entity from moving forward with their plans until all litigation is resolved.

H.R. 5 is particularly harmful because of its impact on science-based, bipartisan laws, such as the Clean Water Act and Clean Air Act which enjoy widespread public support. These laws direct Federal agencies to uphold core national values such as ensuring access to clean air and drinking water. If Congress wants to roll back these laws, it should do so directly, not through deceptively named "regulatory reform" legislation.

Science-based regulations are vital to protecting the health and safety of all Americans, but especially African American and Latino communities, which often face disproportionate public health and environmental threats. The legislation would therefore exacerbate existing racial disparities. Many of these communities, often on the "fenceline" of major industrial facilities, have been waiting for decades to address major health and safety issues. The changes proposed in H.R. 5 will inevitably extend those delays even further, with no relief in sight.

Do not be fooled. H.R. 5 does not improve our regulatory system. It would cripple the ability of Federal agencies protect the public, making it nearly impossible for the Federal Government to implement strong, science based safeguards. This bill puts constraints on Federal science and would essentially nullify popular, longstanding laws. It would shift the burden of dealing with public health and environmental threats from those who create them to American taxpayers. For all of these reasons, *we strongly urge you to vote no on H.R. 5.*

Sincerely,

ANDREW A. ROSENBERG, PH.D.,
*Director, Center for Science & Democracy,*
Union of Concerned Scientists.

[1] 467 U.S. 837 (1984)

CONSUMER REPORTS™
*January 10, 2017*

U.S. House of Representatives
Washington, DC

Dear Representative:

Consumer Reports and its policy and mobilization arm, Consumers Union, urge you to *vote no* on H.R. 5, the Regulatory Accountability Act of 2017. This dangerous proposal would do severe damage to protections consumers depend on for health, safety, and honest treatment.

Congress has charged Federal agencies with protecting the public from threats such as tainted food, hazardous products, dirty air and water, and predatory financial schemes. It established these agencies, such as the Food and Drug Administration, Consumer Product Safety Commission, Environmental Protection Agency, and Consumer Financial Protection Bureau, so that public protections could be overseen by professional civil servants with specific technical and scientific expertise. In developing regulations, agencies must act in accordance with the statute and with established rulemaking procedures that require transparency and full opportunity for public input, including input from the industry that will be subject to the regulation.

We agree that the regulatory process can certainly be improved. We stand ready to support constructive efforts to reduce delays and costs while preserving important protections.

However, rather than streamlining and improving the regulatory process, the Regulatory Accountability Act of 2017 would make current problems even worse. Under H.R. 5, agencies would be required to undertake numerous costly and unnecessary additional analyses for each rulemaking, which could grind proposed rules to a halt while wasting agencies' resources. Collectively, these measures would create significant regulatory and legal uncertainty for businesses, increase costs to taxpayers and businesses alike, and prevent the Executive Branch from keeping regulations up to date with the rapidly changing modern economy.

One of the most damaging effects of H.R. 5 is that it would, with only limited exceptions, require Federal agencies to identify and adopt the "least costly" alternative of a rule it is considering. Currently, landmark laws like the Clean Air Act, Consumer Product Safety Act, and Securities Exchange Act require implementing agencies to put top priority on the public interest. H.R. 5 would reverse this priority by requiring agencies to value the bottom line profits of the regulated industry over their mission to protect consumers and a fair, well-functioning marketplace.

H.R. 5 also includes several other damaging measures that have not been included previously as part of the Regulatory Accountability Act. These measures would add unjustifiable costs and unce11ainty to the rulemaking process, and greatly impair regulatory agencies' work.

Contrary to its name, the "Separation of Powers Restoration Act" (Title II of H.R. 5) would disrupt the carefully developed constitutional balance between the legislative, executive, and judicial branches. Courts giving appropriate deference to reasonable agency interpretations of their own statutes, as reflected in *Chevron U.S.A., Inc., v. NRDC,* 467 U.S. 837 (1984), is a well-settled approach that promotes sound and efficient agency enforcement, with effective judicial review. Under the *Chevron* doctrine, courts retain full judicial power to review agency legal interpretations, but do not simply substitute their own judgment for an agency's. *Chevron* recognizes that agencies accumulate uniquely valuable expertise in the laws they administer, which makes deference from reviewing courts-which do not have that expertise appropriate.

Overturning this approach would lead to disaster. It would severely hamper effective regulatory agency enforcement of critical protections on which consumers depend. As the Supreme Court stated in *City of Arlington, Tex. v. F.C.C.* C., 133 S. Ct. 1863, 1874 (2013): "Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron.* The excessive agency power that the dissent fears would be replaced by chaos." Such a move also would needlessly force the courts to repeatedly second-guess agency decisions that the courts have already concluded the agency is in the best position to make.

The REVIEW Act and the ALERT Act (Titles IV and V of H.R. 5) would cause additional needless and damaging delays to public protections. The REVIEW Act—which would block "high-impact" rules until every industry legal challenge has run its full course—would tie up agencies in court indefinitely, potentially making it impossible to address pressing national problems. The ALERT Act would subject most new rules to a delay of at least six months, and require agencies to waste resources complying with repetitive reporting requirements.

Like the bill's proponents, we believe regulations should be smart, clear, and cost effective. However, H.R. 5 does not accomplish this objective. Instead of improving the regulatory process, the Regulatory Accountability Act of 2017 would make it dramatically slower, more costly to the nation, and far less effective at protecting health, safety, and other essential consumer priorities.

We strongly urge you to stand up for critical public protections and *vote no* on H.R. 5.

Sincerely,

LAURA MACCLEERY,
*Vice President,*
Consumer Policy and Mobilization,
Consumer Reports.

GEORGE P. SLOVER,
*Senior Policy Counsel,*
Consumers Union.

WILLIAM C. WALLACE,
*Policy Analyst,*
Consumers Union.

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CONSUMER FEDERATION OF AMERICA
*Washington, DC, January 10, 2017*

RE: OPPOSE LEGISLATION ON HOUSE FLOOR TO UNDERMINE CRUCIAL CONSUMER PROTECTIONS: H.R. 5

Dear Representative:

The Regulatory Accountability Act of 2017 (H.R. 5) would handcuff all Federal agencies in their efforts to protect consumers. H.R. 5 is a vastly expanded version of previous versions of the Regulatory Accountability Act (RAA). H.R. 5 not only significantly and problematically amends the Administrative Procedures Act (APA) which has guided Federal agencies for many decades but also now incorporates five additional bills that thwart the regulatory process: the Small Business Regulatory Flexibility Improvement Act; the Require Evaluation before Implementing Executive Wishlists Act (REVIEW Act); the All Economic Regulations are Transparent Act (ALERT Act); the Separation of Powers Restoration Act; and the Providing Accountability Through Transparency Act. These titles make an already damaging bill even worse.

Specifically, the RAA would require all agencies, regardless of their statutorily mandated missions, to adopt the least costly rule, without consideration of the impact on public health and safety or the impact on our financial marketplace. As such, the RAA would override important bipartisan laws that have been in effect for years, as well as more recently enacted laws to protect consumers from unfair and deceptive financial services, unsafe food and unsafe consumer products.

For example, the RAA would likely have prevented the Federal Reserve from adopting popular credit card rules under the Truth in Lending Act in 2008 that prevented card companies from unjustifiably increasing interest rates and fees on consumers. This is because these far reaching changes to abusive practices that were widespread in the marketplace were not the "least costly" options that were considered, although they were arguably the most cost-effective.

The RAA would have a chilling impact on the continued promulgation of important consumer protections. Had it been in effect, for example, the RAA would have severely hampered the implementation of essential and long-standing food safety regulations, such as those requiring companies to prevent contamination of meat and poultry products with deadly food borne pathogens. In fact, the Centers for Disease Control and Prevention has credited the implementation of regulations prohibiting contamination of ground beef with *E. coli* 0157:H7 as one of the factors contributing to the recent success in reducing *E. coli* illnesses among U.S. consumers.[1] But such benefits are impossible to quantify before a rule is enacted.

Further, had the RAA been in effect the necessary child safety protections required by the Consumer Product Safety Improvement Act of 2008 (CPSIA) may have never been implemented. For example, between 2007 and 2011 the Consumer Product Safety Commission (CPSC) recalled 11 million dangerous cribs. These recalls followed 3,584 reports of crib incidents, which resulted in 1,703 injuries and 153 deaths.[2] As a direct result of the CPSIA, CPSC promulgated an effective mandatory crib standard that requires stronger mattress supports, more durable hardware, rigorous safety testing, and stopped the manufacture and sale of drop side cribs. If the

[1] *http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6022a5.htm?s_cid-mm6Q22a5_w*
[2] *http://www.consumerfed.org/pdf/crib-standards-press-release-6-28-11.pdf*

RAA were implemented, such a life saving rule could have been delayed for years or never promulgated at all, at countless human and financial cost.

The RAA also would add dozens of additional substantive and procedural analyses, as well as judicial review to the rulemaking process for every major rule. It would: expand the kind of rules that must go through a fonnal rulemaking process; require agencies to determine "indirect costs" without defining the term; require an impossible-to-conduct estimation of a rule's impact on jobs, economic growth, and innovation while ignoring public health and safety benefits; and expand the powers of the White House's Office of Management and Budget's Office of Information and Regulatory Affairs to throw up numerous rulemaking roadblocks, including requiring them to establish guidelines for conducting cost-benefit analysis. This would further delay or prevent the promulgation of much needed consumer protections.

The new titles of H.R. 5 also add numerous roadblocks to the promulgation of necessary consumer protections. The Separation of Powers Restoration Act (Title II) eliminates judicial deference that agencies are granted when rules are challenged in court. This allows judicial activism and political considerations to trump agency expertise. The Small Business Regulatory Flexibility Improvement Act (Title III) would increase regulatory delays and create new opportunities for court challenge to regulations. The Require Evaluation before Implementing Executive Wishlists Act (REVIEW Act) (Title IV) would encourage frivolous legal challenges and infuse the regulatory process with years of delay by requiring eou11s reviewing "high impact" regulations to automatically "stay" or block the enforcement of such regulations until all litigation is resolved. The All Economic Regulations are Transparent Act (ALERT Act) (Title V) would also blatantly and purposefully lengthen the regulatory process by requiring a six-month delay in the development of regulations.

We urge you to oppose this significant threat to consumer protection, a fair marketplace, health, and safety posed by H.R. 5. If adopted, this proposal would waste Federal resources, minimize the ability of Federal agencies to do their jobs, grind the regulatory process to a halt, and infuse the regulatory process with roadblocks preventing the protection of the public and ultimately putting American consumers at risk.

We strongly urge you to oppose this harmful bill.

Sincerely,

RACHEL WEINTRAUB,
*Legislative Director and General Counsel,*
Consumer Federation of America.

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COALITION FOR SENSIBLE SAFEGUARDS
*January 10, 2017*

RE: Floor vote of H.R. 5, the Regulatory Accountability Act of 2017

Dear Representative;

The Coalition for Sensible Safeguards (CSS), an alliance of over 150 labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, strongly opposes H.R. 5, the Regulatory Accountability Act of 2017 (RAA), which will be voted on this week.

H.R. 5 is a compilation of radical and harmful legislative proposals that will permanently cripple the government's ability to protect the public by rigging the regulatory process against new regulatory safeguards in favor of deregulation or regulatory inaction. The bill is just as dangerous and extreme as the REINS Act (H.R. 26) and the Midnight Rules Relief Act (H.R. 21).

All of these bills are designed to make it as difficult as possible for Federal agencies to implement existing or new laws that ensure our access to clean air and water, safe workplaces, untainted food and drugs, safe toys and consumer goods, and a stable financial system free of Wall Street recklessness. On the other hand, deregulatory actions that repeal existing rules are exempt by virtue of the legislation's myopic focus on "costs" to corporate special interests instead of "benefits" to the public. In short, the legislation will create a double standard in our regulatory system that systematically favors deregulation over new public protections and "fast tracks" the repeal of rules while paralyzing the creation of new ones.

The new version of the RAA, introduced in this Congress, takes the previous RAA legislation and folds in several destructive pieces of other so-called regulatory reform bills including: the misleadingly named Small Business Regulatory Flexibility Improvements Act, the Require Evaluation before Implementing Executive Wishlists Act (REVIEW Act), the All Economic Regulations are Transparent Act (ALERT Act), the Separation of Powers Restoration Act and the Providing Accountability Through

Transparency Act. These pieces of other bills seek to worsen an already destructive bill and add several more corrosive layers intending to dismantle our public protections.

The current rulemaking process is already plagued with lengthy delays, undue influence by regulated industries, and convoluted court challenges. If passed, Title I of this bill would make each of these problems substantially worse and *would undermine our public protections and jeopardize public health by threatening the safeguards that ensure our access to clean air and water, safe workplaces, untainted food and drugs, and safe toys and consumer goods.*

Rather than enhancing protections, it does the exact opposite. It adds 80 new analytical requirements to the Administrative Procedure Act and requires Federal agencies to conduct estimates of all the "indirect" costs and benefits of proposed rules and all potential alternatives without providing any definition of what constitutes, or more importantly, does not constitute an indirect cost. The legislation would significantly increase the demands on already constrained agency resources to produce the analyses and findings that would be required to finalize any new rule. Thus, *the RAA is designed to further obstruct and delay rulemaking rather than improve the regulatory process.*

This legislation creates even more hoops for "major" or "high impact" rules—*i.e.,* rules that provide society with the largest health and safety benefits. It would allow any interested person to petition the agency to hold a public hearing on any "genuinely disputed" scientific or factual conclusions underlying the proposed rule. This provision would give regulated industries multiple opportunities to challenge agency data and science and thus further stretch out the already lengthy rulemaking process.

H.R. 5 would also create a restrictive mandate of a "one-size fits all" directive that every Federal agency adopt the "least costly" alternative. This is a profound change *and effectively creates a "super mandate" for all major regulatory actions of executive and independent agencies which overrides twenty-five existing statutes, including the Clean Air Act, the Clean Water Act, the Occupational Safety and Health Act, and the Consumer Product Safety Improvement Act.* These laws prioritize public health, safety, and economic security, not the cost concerns of regulated entities.

Title II of H.R. 5 is the Separation of Powers Restoration Act piece which seeks to destroy the *Chevron* deference principal. It would remove the judicial deference that agencies are granted when their regulations are challenged in court. This would be a radical change that upends one of the fundamental principles in administrative law, namely that courts should not second guess scientific and technical expertise at Federal agencies. Overly intrusive judicial review is one of the primary reasons for regulatory delay and paralysis and this legislation would make those problems much worse.

The misleadingly named Small Business Regulatory Flexibility Improvements Act (Title III) is a Trojan horse that would expand the reach and scope of regulatory review panels, increase unnecessary regulatory delays, increase undue influence by regulated industries and encourage convoluted court challenges—all in the name of helping "small business," but so expansively applied that mostly big businesses would benefit. Because the bill mandates that these panels look at 'indirect costs,' which are defined very broadly, it could be applied to virtually any agency action to develop public protections.

The REVIEW Act (Title IV) would make our system of regulatory safeguards weaker by requiring courts reviewing "high impact" regulations to automatically "stay" or block the enforcement of such regulations until all litigation is resolved, a process that takes many years to complete. It would add several years of delay to an already glacially slow rulemaking process, invite more rather than less litigation, and rob the American people of many critical upgrades to science based public protections, especially those that ensure clean air and water, safe food and consumer products, safe workplaces, and a stable, prosperous economy.

The ALERT Act (Title V) is designed to impede the government's ability to implement critical new public health and safety protections by adding a six month delay. This amounts to a six month regulatory moratorium, even after the often lengthy period required for developing and finalizing these regulations. Such delays could extend well beyond that initial six month period should the OIRA Administrator fail to post the required information in a timely manner.

This new version of the RAA would override and threaten decades of public protections. The innocuous sounding act is, in reality, the biggest threat to public health standards, workplace safety rules, environmental safeguards, and financial reform regulations to appear in decades. It acts as a "super mandate," rewriting the requirements of landmark legislation such as the Clean Air Act and the Occupational Safety and Health Act and distorting their protective focus to instead prioritize compliance costs.

*We strongly urge opposition to H.R. 5, the Regulatory Accountability Act of 2017.*

Sincerely,

ROBERT WEISSMAN,
*President,*
Public Citizen,
*Chair,*
Coalition for Sensible Safeguards.

*The Coalition for Sensible Safeguards is an alliance of consumer, labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, as well as concerned individuals, 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.*

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NATIONAL CONSUMER LAW CENTER
*January 10, 2017*

Representative
U.S. House of Representatives
Washington, DC

RE: H.R. 5, the Regulatory Accountability Act of 2017 (oppose)

Dear Representative:

The National Consumer Law Center® (NCLC®), on behalf of its low income clients, strongly opposes H.R. 5, the Regulatory Accountability Act of 2017 (RAA), which will be voted on this week. Since 1969, the nonprofit NCLC has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training.

H.R. 5 is a compilation of radical and harmful legislative proposals that will permanently cripple Congress' ability to protect the public. The bill rigs the system against new safeguards in favor of paralysis and elimination of important protections. The bill is just as dangerous and extreme as the REINS Act (H.R. 26) and the Midnight Rules Relief Act (H.R. 21), which we also oppose.

All of these bills are designed to make it as difficult as possible for Federal agencies to implement existing or new laws to protect the public from dangerous financial products, pollutants in our air and water, hazards in the workplace, tainted food and drugs, or unsafe toys and consumer goods. On the other hand, deregulatory actions that repeal existing protections are exempt by virtue of the legislation's myopic focus on "costs" to corporate special interests instead of "benefits" to the public. In short, the legislation will create a double standard in our system that favors industry calls for deregulation over new public protections, "fast-tracking" the repeal of rules while paralyzing the creation of new ones.

The new version of the RAA, introduced in this Congress, takes the previous RAA legislation and folds in several destructive pieces of other so-called regulatory reform bills including: the misnamed Small Business Regulatory Flexibility Act, the Require Evaluation before Implementing Executive Wishlists Act (REVIEW Act), the All Economic Regulations are Transparent Act (ALERT Act), the Separation of Powers Restoration Act and the Providing Accountability Through Transparency Act. These pieces of other bills seek to worsen an already destructive bill and add several more corrosive layers seeking to dismantle our public protections. TI1e current rulemaking process is already plagued with lengthy delays, undue influence by regulated industries, and convoluted court challenges.

Title I of this bill would make each of these problems substantially worse. It adds 74 new bureaucratic analytical requirements to the Administrative Procedure Act and requires Federal agencies to conduct estimates of all the "indirect" costs and benefits of proposed rules and all potential alternatives without providing any definition of what constitutes, or more importantly, does not constitute an indirect cost. The legislation would significantly increase the demands on already constrained agency resources to produce the analyses and findings that would be required to finalize any new rule. Thus, the RAA is designed to further obstruct and delay rulemaking rather than improve the regulatory process.

This legislation creates even more hoops for "major" or "high-impact" rules—*i.e.,* rules that provide society with the largest health and safety benefits. It would allow any interested person to petition the agency to hold a public hearing on any "genuinely disputed" scientific or factual conclusions underlying the proposed rule. This provision would give regulated industries multiple opportunities to challenge agency data and science and thus further stretch out the already lengthy rulemaking process.

H.R. 5 would also create a restrictive mandate of a "one-size-fits-all" presumption that every Federal agency must adopt the "least costly" alternative. This is a profound change that prevents agencies from adopting the most effective and appropriate way of protecting the public.

Title II of H.R. 5 is the Separation of Powers Restoration Act piece which seeks to destroy the Chevron deference principal. It would remove the judicial deference that agencies are granted when their regulations are challenged in court. This would be a radical change that upends one of the fundamental principles in administrative law, namely that courts should not second-guess agency expe1tise. Overly intrusive judicial review is one of the primary reasons for regulatory delay and paralysis and this legislation would make those problems much worse.

The misnamed Small Business Regulatory Flexibility Improvements Act piece of H.R. 5 (Title III) is a Trojan horse that would expand the reach and scope of regulatory review panels, increase unnecessary regulatory delays, increase undue influence by regulated industries and encourage convoluted court challenges—all in the name of helping "small business," but so expansively applied that mostly big businesses would benefit. Because the bill mandates that these panels look at 'indirect costs,' which are defined very broadly, it could be applied to virtually any agency action to develop public protections.

The REVIEW Act segment of H.R. 5 (Title IV) would make our system of regulatory safeguards weaker by requiring courts reviewing "high-impact" regulations to automatically "stay" or block the enforcement of such regulations until all litigation is resolved, a process that takes many years to complete. It would add several years of delay to an already glacially slow rulemaking process, invite more rather than Jess litigation, and rob the American people of many critical upgrades to science-based public protections, especially those that ensure clean air and water, safe food and consumer products, safe workplaces, and a stable, prosperous economy.

The ALERT Act portion of H.R. 5 (Title V) is designed to impede the government's ability to implement critical new public health and safety protections by adding a six-month delay. This amounts to a six month regulatory moratorium, even after the often lengthy period required for developing and finalizing these regulations. Such delays could extend well beyond that initial six-month period should the OIRA Administrator fail to post the required information in a timely manner.

This new version of the RAA would override and threaten decades of public protections. The innocuous sounding act is, in reality, the biggest threat to financial reform regulations, environmental standards, workplace safety rules and public health to appear in decades.

We strongly urge opposition to H.R. 5, the Regulatory Accountability Act of 2017.

Sincerely,

LAUREN SAUNDERS,
*Associate Director.*

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AMERICANS FOR FINANCIAL REFORM
*January 11, 2017*

Dear Representative:

This week the House is voting on three pieces of legislation—HR 5 (the Regulatory Accountability Act), HR 78 (the SEC Regulatory Accountability Act), and HR 238 (the Commodity End User Relief Act)—that would severely damage the capacity of the Federal Government to protect the public. This legislation would disastrously weaken oversight of major Wall Street institutions and financial markets. Proper oversight of big banks and financial markets is crucial to the economic well-being of workers, families, and communities.

On behalf of the twenty-one undersigned organizations, representing millions of Americans, we urge you to vote against all of these bills.

The *Regulatory Accountability Act* would have a crippling impact on the ability of any Federal regulatory agency to pass a significant rule or guidance. This legislation would impose dozens of additional analytic requirements before an agency could take action to protect the public. Any disagreement by a regulated entity with agency findings related to any of these requirements could be the basis for a lawsuit that would halt or overturn the rule. Courts would not be required to defer to agency judgement in any way in deciding these lawsuits. The barriers to agency action in the Regulatory Accountability Act are so extensive and so open to manipulation that they would give regulated businesses effective veto power over government rules that affect them, even if such rules were authorized by statute and justified to protect the public.

The *SEC Regulatory Accountability Act* would mandate that the Securities and Exchange Commission identify every "available alternative" to a proposed regulation or agency action and quantitatively measure the costs and benefits of each such alternative prior to taking action. Since there are always numerous possible alternatives to any course of action, this requirement alone could force the SEC to complete dozens of additional analyses before passing a rule or guidance, any of which could be the basis for a lawsuit. The SEC would also be required to review every single regulation in effect within one year after the passage of this Act, and again every five years thereafter, with an eye to weakening or eliminating such regulations.

The *Commodity End User Relief Act* would freeze the funding of the Commodity Futures Trading Commission (CFTC) at its current inadequate level of $250 million annually for the next five years. Such a funding freeze would greatly weaken the CFTC's ability to carry out its responsibilities, which range from regulation of hundreds of trillions of dollars in complex financial derivatives to oversight of commodity markets that determine prices of everyday goods ranging from gasoline to groceries. The legislation also imposes numerous additional cost benefit requirements on the agency, in addition to the extensive analytic requirements that already apply to CFTC rulemaking. HR 238 would also restrict agency discretion in a number of critical areas, including by sharply limiting the ability of the CFTC to regulate risky derivatives activities conducted by foreign affiliates of major Wall Street banks. Such foreign subsidiary activities were a significant contributor to the financial crisis of 2008.

The 2008 financial crisis demonstrated beyond doubt that the well-being of America's working families is dependent on strong and effective regulation of Wall Street financial markets. These three pieces of legislation would cripple the capacity to properly regulate such markets. We urge you to reject all three.

Sincerely,

AFL–CIO
Americans for Financial Reform
California Reinvestment Coalition
Center for Popular Democracy CPD Action
Center for Responsible Lending
Communications Workers of America
Consumer Action
Consumer Federation of America
Corporation for Enterprise Development
Institute for Agriculture and Trade Policy
Interfaith Center on Corporate Responsibility
Main Street Alliance
Massachusetts Community Action Network
Michael Greenberger, University of Maryland School of Law
NAACP
National Association of Consumer Advocates
National Consumer Law Center (On behalf of its low income clients)
National Consumers League
National Fair Housing Alliance
Public Citizen
Public Investors Arbitration Bar Association
U.S. PIRG

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AMERICANS FOR FINANCIAL REFORM
*January 11, 2017*

Dear Representative:

On behalf of Americans for Financial Reform (AFR), we are writing to urge you to oppose HR 5, the "Regulatory Accountability Act of 2017", or RAA.[1]

This legislation could instead be entitled the "End Wall Street Accountability Act of 2017", since this would be one of its major effects. This legislation would require regulatory agencies, including those charged with oversight of our largest Wall Street banks and most critical financial markets, to comply with a host of additional bureaucratic and procedural requirements that would make effective action virtually

[1] *Americans for Financial Reform* is an unprecedented coalition of over 250 national, state and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, religious and business groups. A list of AFR coalition members is available at *http:1/ourfinancialsecurity.org/about/our-coalition/*.

impossible. By doing so it would tilt the playing field still further in the direction of powerful Wall Street banks, and against the public interest. It would paralyze the ability of regulators to protect consumers from financial exploitation and prevent another catastrophic financial crisis.

There is overwhelming agreement that the lack of adequate regulation of the financial markets has cost the U.S. economy millions of jobs and many trillions of dollars in bst wealth. While Wall Street profits have recovered, many Americans are still struggling. Support for this legislation is support for eliminating the ability of regulators to prevent the next financial crisis.

This legislation would burden financial regulators with over 70 new procedural and analytical requirements that must be completed before they could pass significant rules or guidance. For example, the legislation requires agencies to identify and analyze any theoretical alternative to imposing a regulation, and analyze the costs and benefits of each alternative in detail. Since there are always numerous possible alternatives to any course of action, this requirement alone could force agencies to complete dozens of additional analyses prior to proposing a regulation. The bill also includes an unprecedented mandate on agencies to determine all “indirect” costs from their proposed regulation, with no guidance to agencies as what counts as an “indirect” cost.

Should any of the mandated analyses be found to be inadequate by a court, the court could then overturn the regulation. Furthermore, Title 2 of the bill specifies that the court would not be required to defer to the agency in any way, and could freely substitute its own judgement for that of agency experts. Thus, even if an agency manages to satisfy the dozens of additional requirements imposed by this legislation and publish a final rule, the courts would have effectively unlimited opportunities to second-guess and overturn the agency’s decision.

Even if the agency could run the gauntlet of procedural mandates and court challenges, any regulated company could force agencies to engage in a formal adversarial hearing process. This process would require agencies to formally demonstrate that their chosen rule had lower net costs than any alternative proposed by private industry. Such a demonstration would also be subject to judicial review, without any requirement for the court to defer to the agency’s professional judgment. This formal hearing process would amount to a de facto Wall Street veto of regulatory oversight. Any bank would simply have to propose that the agency analyze an additional regulatory option in order to freeze the regulatory process in place, send the agency back to the drawing board, and gain a new opportunity to overturn agency rules in court.

Adding to the devastating impact of this legislation, Title IV of the bill would require courts to stay enforcement of a regulation until all litigation challenging the regulation was completed. When combined with the almost limitless opportunities for litigation created by the rest of HR 5, this provision would ensure that it was effectively impossible to enforce rules opposed by industry interests.

The misguided premise of this legislation is that regulations are inevitably costly to the economy, while regulatory inaction is not. Yet analyses have shown that basic health, safety, and environmental regulations typically bring far greater economic benefits than costs. It is clear that the costs of failing to provide adequate oversight of Wall Street are enormous. The financial crisis of 2008 cost the U.S. economy trillions of dollars and millions of jobs, and led to millions of families losing their homes. Nonpartisan experts have estimated the costs of the crisis to the U.S. as $6 to $14 trillion in lost economic output alone.[2]

In the face of the overwhelming costs of regulatory inaction, we cannot afford to hamstring our financial regulatory agencies. The needless litigation and delay that will result from enactment of this bill will serve only to halt critical safeguards for our economy and the public. According to recent polling data, 78 percent of Americans favor tougher rules and enforcement for big Wall Street banks.[3] This legislation would cripple the ability of regulators to institute any new oversight on our largest banks, and it must be rejected.

Sincerely,

Americans for Financial Reform.

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[2] The costs of the 2008 financial crisis are analyzed in an AFR briefing paper available at *http://ourfinancialsecurity.org/wp-content/uploads/2012/09/Costs-of-The-Financial-Crisjs-September-20142.pdf*

[3] See response to Question 2 in CRL/AFR Poll of 1000 Likely Voters, June 25–30, 2014, available at *http://ourfinancialsecurjty.org/blogs/wp-content/ourfinancialsecurity.org/uploads/2014/07/toplines.AFR.public.071714.pdf.*

*January 11, 2017*

Dear Representative:

The undersigned public health and medical organizations urge you to oppose H.R. 5, the Regulatory Accountability Act of 2017. The bill is a sweeping attack on the Federal Government's ability to set lifesaving public health protections.

H.R. 5 would undermine proven public health protections by requiring Federal standards to be based on industry cost estimates, not what best protects the public. For example, H.R. 5 would force EPA and FDA to prioritize the historically overstated estimates of costs to industry over scientific evidence and public health.

- Under the Clean Air Act, Congress required the U.S. Environmental Protection Agency (EPA) to set standards that indicate what level of pollution is harmful to human health, based solely on health and medical science, and then work with states to implement cost effective cleanup measures to meet those standards.
- With the Family Smoking Prevention and Tobacco Control Act, Congress tasked the Food and Drug Administration (FDA) with protecting the public from the proven dangers of tobacco use, including death from lung disease, cancer and heart disease, based on what is appropriate for the protection of the public health—not the costs to the tobacco industry.

H.R. 5 would also impose dozens of procedural requirements that would increase costs of critical safeguards, or worse, delay or completely block lifesaving protections before they can be implemented. Federal rules already go through extensive review, expert input, and public comment before they are finalized. The numerous additional analysis, reporting, and planning requirements imposed by this bill, some of which duplicate existing requirements, would hinder agencies from setting safeguards under the law to protect the public.

H.R. 5 would also automatically halt enforcement of "high-impact" rules until all litigation on them is resolved. The courts already have the ability to stay a rule in litigation if they determine that the party opposing the rule is likely to succeed on the merits. Automatically staying enforcement of all "high-impact" rules creates an incentive for frivolous lawsuits simply to avoid having to comply with the rule—potentially for years. The result Americans would suffer illnesses and premature deaths that could have been prevented, and communities and industry that seek certainty to know how to proceed would be left in unnecessary limbo for far too long.

H.R. 5 would also reverse a longstanding court decision that recognizes the unique experience Federal agencies have with these often-complex issues. Sometimes Congress intentionally writes a statute to be flexible or ambiguous, recognizing that it does not have the expertise to anticipate or address every contingency. Federal agencies have extensive experience with the statutes they administer, as well as superior expertise on the scientific and technical matters that are at the heart of the actions carried out by the agencies.

H.R. 5 would mandate that the courts give less judicial deference to agencies with the relevant subject matter expertise. If passed, this bill would require judges to make decisions far outside their areas of expertise and with limited access to information, rather than continue to defer to the professional and informed decisions of scientists, physicians, economists, engineers, and other professional experts that work within these agencies. This unprecedented and dangerous move reverses traditional judicial deference that has been successful and effective for more than three decades.

Our organizations urge you to oppose H.R. 5. This bill would make it harder to protect the health of Americans from the dangers of air pollution and tobacco by allowing polluters and the tobacco industry to influence and delay critical health safeguards.

Sincerely,

Allergy & Asthma Network
Alliance of Nurses for Healthy Environments
American Heart Association
American Lung Association
American Public Health Association
American Thoracic Society
Asthma and Allergy Foundation of America
Health Care Without Harm
National Association of County & City Health Officials
Physicians for Social Responsibility
Public Health Institute
Trust for America's Health

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA—UAW
*Washington, DC, January 11, 2017*

Dear Representative,

On behalf of the more than 1 million active and retired members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, I am writing to urge you to vote against the *Regulatory Accountability Act* (RAA), H.R. 5. The RAA is a compilation of radical and harmful provisions that would hinder the Federal Government's ability to do their job and protect the public interest. This misguided bill would benefit powerful special interest groups at the expense of working people.

The dangerous bill would override and threaten decades of hard-fought protections that have saved lives and improved the quality of life for millions of Americans. For example, workplace safety rules, clean water requirements, and regulations to reign in reckless lending practices on Wall Street would all be threatened by this harmful bill.

H.R. 5 acts as a "super-mandate," rewriting the requirements of landmark legislation such as the Clean Air Act and the Occupational Safety and Health Act to prioritize compliance costs instead of protecting workers and consumers. It would also create a restrictive mandate of a "one-size-fits-all" presumption that every Federal agency adopt the "least costly" alternative. This is a profound change in that the financial costs of compliance would be given a higher priority than protecting the public's safety and health.

We all know that our rulemaking process does not move swiftly and is vulnerable to an array of well-known delay tactics. Sadly, passage of the RAA would make this problem much worse by adding 74 new analytical requirements to the Administrative Procedure Act. The bill requires Federal agencies to conduct estimates of all the "indirect" costs and benefits of proposed rules and all potential alternatives without providing any definition of what constitutes or, more importantly, does not constitute an indirect cost.

UAW urges you to vote NO on the RAA and instead work to strengthen worker and consumer protections. Thank you for considering our views.

Sincerely,

JOSH NASSAR,
*Legislative Director.*

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*January 30, 2017*

RE: Use of the Congressional Review Act to repeal public protections

Dear Senator,

We, the undersigned consumer, small business, labor, good government, financial protection, community, health, environmental, civil rights and public interest groups urge you strongly to oppose the use of the Congressional Review Act (CRA) to repeal public protections that are critical to the public's health and safety, the environment, and a stable financial system that works for Main Street and not Wall Street.

The CRA is an unreasonably blunt instrument that threatens to deny consumers tens of billions of dollars in pocketbook savings over the next few decades from rules that were fully vetted and considered over a long period of time. These rules enjoyed substantial support across all stakeholder communities.

By promising to use the CRA to indiscriminately block a variety of crucial public safeguards, the leadership of the 115th Congress has made clear that catering to special interests take precedence over public protections to ensure:

- clean air, water and climate change action,
- much-needed reforms to Wall Street to prevent the next financial crisis,
- banks are held accountable when they deceive customers,
- workplaces are safe from toxic chemicals,
- non-discrimination and fair pay are guaranteed for all,
- affordable access to broadband and secure communications,
- natural resource revenues are used to benefit citizens,
- heavy duty truck rule and air conditioner rule that increase efficiency and save consumers money,

- common-sense gun control measures for individuals with severe and disabling mental health issues,
- people can see the health care provider of their choice,
- paid sick days for employees of Federal contractors, and
- schools are held accountable for fraud and students are not left stuck under mountains of debt when schools defraud them or abruptly close.

It is irresponsible for Congress to use the CRA to repeal important public protections that are supported by bipartisan majorities of the public.[1] The CRA allows Congress to overturn a recently finalized rule major or otherwise-through an expedited process called a Resolution of Disapproval. In the U.S. Senate, these resolutions only require a simple majority vote to adopt and then cannot be filibustered or amended.

Once a rule is overturned, it may be difficult for an agency to advance the objectives of the overturned rule in the future. The CRA allows agencies to finalize a rule in the future, but only if that rule is not "substantially similar" to the one that was disapproved. Because the scope of the "substantially similar" language has not yet been tested in any meaningful way, we have massive uncertainty around necessary future regulations that implement laws passed by Congress and address pressing health, safety, financial and environmental risks to consumers and the public.

If Congress decides to use the CRA to repeal public protections that save lives, protect our environment, prevent discrimination or put money back into the pocket of consumers, those who voted for repeal in Congress will be responsible for the consequences to their constituents. In the absence of strong and effective public protections, Congress will revert back to a system of "self-regulation," which shifts costs on to the public. As a result, regular Americans wind up paying the price.

Those in Congress pushing to use the CRA rely on two demonstrably false claims. First, critics of public protections claim that potential CRA challenges in the beginning of the 115th Congress will only apply to "midnight" regulations that were rushed at the end of the Obama administration. The truth is that virtually all of these standards are better characterized as "marathon" regulations since they were under development for years, if not decades, and are thus the very opposite of rushed. Rules issued at the end of administrations take longer to finish than rules issued outside of this period.[2] Such rules also underwent longer, not shorter, review by the U.S. Office of Information and Regulatory Affairs (OIRA).

Additionally, critics claim that regulations cost jobs and repealing them will create jobs. The truth is that all studies which linked new regulations to job loss claims have been debunked by independent experts and none of the numerous assertions in the past about job losses due to regulations have come true. For example, the recently finalized U.S. Department of Interior's (DOI) stream protection rule is crucial to making sure streams around coal mining projects are not impacted by toxic coal waste that can then pollute downstream water sources. Critics of the rule, including U.S. Sen. Mitch McConnell (R–Ky.), have claimed it will lead to job losses in the coal industry. Yet, even Sen. McConnell conceded that repeal of regulations such as the stream protection rule will not bring back coal jobs because market forces are pushing the energy industry away from coal.[3]

Voters in thjs election did not vote for deregulation of Wall Street, more polluted air and water, inaction on climate change, unsafe workplaces, fewer protections against discrimination and unequal pay, more food safety scandals, the gutting of consumer protections, and more. In fact, this election was a referendum on the need to hold big interests accountable. Unfortunately, using the blunt instrument of the CRA rejects the electoral message and moves in the wrong direction by rolling back and undermining public protections.

We strongly urge you to reject the use of the CRA to undermine critical consumer, public and environmental protections. Please do not repeal rules that enforce the law and protect public health, safety, financial security and our environment.

Thank you,

9to5, National Association of Working Women
Action on Smoking & Health
AFL–CIO
AFSCME
Alaska Wilderness League
Alliance for Appalachia
American Association for Justice
American Association of University Women (AAUW)
American Family Voices
American Federation of Teachers

[1] *http://www.epi.org/files/2016/LRP-EWG%20Messaging%20Handout.f19-Dec-16.pdf*
[2] *http://www.citizen.org/documents/Midnight-Regs-Myth.pdf*
[3] *http://www.kentucky.com/news/politics-government/article114197923.html*

American Forests
Americans for Democratic Action (ADA)
Americans for Financial Reform
Arkansans Against Abusive Payday Lending
Asbestos Disease Awareness Organization (ADAO)
Catskill Citizens for Safe Energy
Center for Biological Diversity
Center for Digital Democracy
Center for Economic Integrity
Center for Justice & Democracy
Center for Large Landscape Conservation
Center for Media Justice
Center for Progressive Reform
Center for Responsible Lending
Center for Science in the Public Interest
Civil Justice, Inc.
Clean Air Task Force
Clean Water Action
Connecticut Association for Human Services
Consumer Action
Consumer Federation of America
Consumer Federation of California
Consumer Law Office of William E. Kennedy
Consumers for Auto Reliability and Safety
Corporate Accountability International
Corporation for Enterprise Development (CFED)
Daily Kos
Dann Law Firm
Demand Progress
Donovan Litigation Group, LLC
Earthjustice
EarthRights International
Earthworks
Economic Policy Institute Policy Center
Environment America
Environmental Integrity Project
Equal Rights Advocates
Equal Rights Advocates
Florida Alliance for Consumer Protection
Floyd W. Bybee, BYBEE LAW CENTER, PLC
Food & Water Watch
Free Press Action Fund
GLMA: Health Professionals Advancing LGBT Equality
Global Witness
GOLDSMITH & ASSOCIATES, LLC
Green America
Greenpeace
Health Justice Project
Higher Ed, Not Debt and Generation Progress
Housing and Economic Rights Advocates (HERA)
Indiana Consumer Law Group
Institute for Agriculture and Trade Policy
Interfaith Center on Corporate Responsibility
International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)
Janelle Mason Mikac, J. Hegg Law, PLLC
Jared M. Hartman, Esq., Hartman Law Officesm Inc., Semnar & Hartmen, LLP
The Leadership Conference on Civil and Human Rights
League of Conservation Voters
League of Women Voters of the United States
Leonard Gryskewicz, Jr., Sabatini Law Firm, LLC
Lyons Law Finn, P.A.
Main Street Alliance
Mark F. Anderson / Anderson, Ogilvie & Brewer LLP
MFY Legal Services, Inc.
Micah S. Adkins, The Adkins Firm
National Association for College Admission Counseling
National Association of Consumer Advocates
National Black Justice Coalition
National Center for Law and Economic Justice
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition Against Domestic Violence
National Coalition for the Homeless
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
National Council of Jewish Women
National Council of La Raza
National Employment Law Project
National Employment Lawyers Association
National Fair Housing Alliance
National Law Center on Homelessness & Poverty
National LGBTQ Task Force Action Fund
National Parks Conservation Association
National Partnership for Women & Families
National Women's Law Center
Natural Resources Defense Council
Nature Abounds
New America's Open Technology Institute
North Carolina Justice Center
Oceana
People's Action Institute
Physicians for Social Responsibility
Planned Parenthood Federation of America
Progressive Congress Action Fund
Public Citizen
Public Knowledge
Publish What You Pay—United States
River Network
Secular Human Rights Worldwide

SEIU
Tennessee Citizen Action
The Greenlining Institute
The National Consumer Voice for Quality Long-Term Care
The Wilderness Society
TURN-The Utility Reform Network
Union of Concerned Scientists
United Church of Christ, OC Inc.
US PIRG
Virginia Citizens Consumer Council
Voices for Progress
West Virginia Center on Budget and Policy
Western Environmental Law Center
Women Employed
Woodstock Institute

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SOFTWARE & INFORMATION INDUSTRY ASSOCIATION
*Washington, DC, January 31, 2017*

Hon. JOHN THUNE,
Chairman, Commerce Committee,
United States Senate,
Washington, DC.

Hon. BILL NELSON,
Ranking Member, Commerce Committee,
United States Senate,
Washington, DC.

RE: SIIA Supports Focus on Regulatory Reform, Impact on Innovation

Dear Chairman Thune and Ranking Member Nelson,

On behalf of the Software & Information Industry Association (SIIA), thank you for holding the upcoming hearing, "A Growth Agenda: Reducing Unnecessary Regulatory Burdens." SIIA shares your concern about the unforeseen negative impact of various regulations on businesses and the economy. This is not only the case for the industrial and manufacturing sectors, but also for the technology sector, which is a major economic growth engine of the future.

SIIA is the principal trade association for the software and digital information industries. The more than 800 software companies, data and analytics firms, information service companies, and digital publishers that make up our membership serve nearly every segment of society, including business, education, government, healthcare and consumers. As leaders in the global market for software and information products and services, they are drivers of innovation and economic strength—software alone contributes $425 billion to the U.S. economy and directly employs 2.5 million workers and supports millions of other jobs.

SIIA has written about the tremendous opportunities of *Data-Driven Innovation* and the *Internet of Things (IoT)*.[1] Economic benefit from the IoT ranges from $4 trillion to $11 trillion through 2025.[2] Businesses will be the top adopter of IoT solutions, leading the three key positive impacts on economic activity: (1) lowering operating costs; (2) increasing productivity; and (3) expanding to new markets or developing new product offerings.[3]

However, in this era of rapid technological development, ill-suited or outdated regulations can in some cases have a chilling effect on innovation and economic production. To maximize economic growth throughout the 21st Century, policymakers must not only be prudent about creating new regulations, but also conduct a thorough review of existing regulations. Many of the regulations governing industry today derive from statutes that are more than a decade old. In these cases, regulations either suffer from being outdated, or they have been revised by agencies to retrofit the evolution of technology, without clear guidance from Congress.

Therefore, regulatory reform should focus not only on ill-conceived regulations adopted in recent years, but also those that are well intended but no longer can be applied effectively to the 21st Century technology landscape. To create an environment better suited to economic and job growth, a rigorous cost-benefit analysis should be applied in the assessment of current and proposed regulations. The benefit of regulations must outweigh the limits to innovation and potential economic or consumer welfare that can be derived from new products and services.

As this Committee, as well as other congressional committees and the Trump Administration, assesses the impact of regulations on economic growth and job creation, we appreciate the focus on technology innovation by U.S. businesses, particularly small and medium-sized businesses that often disproportionately suffer from cumbersome regulations. We look forward to working with you to balance the need

[1] SIIA white papers on *Data-Driven Innovation* and the *Internet of Things.*
[2] McKinsey & Company. "*Unlocking the Potential of the Internet of Things.*" June 2015
[3] Business Insider. "*How the 'Internet of Things' will impact consumers businesses, and governments in 2016 and beyond.*" John Greenough; July 2016.

for regulations to continue protecting consumers, workers and the environment, while also maximizing innovation in a hyper-innovative loT environment.

Sincerely,

KEN WASCH,
*President.*

cc: Members of the U.S. Senate Committee on Commerce

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American Academy of Pediatrics
DEDICATED TO THE HEALTH OF ALL CHILDREN®

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**Reply to**
**Department of Federal Affairs**
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Washington, DC 20005
Phone: 202/347-8600
Fax: 202/393-6137
E-mail: kids1st@aap.org



February 1, 2017

| | |
|---|---|
| The Honorable Mitch McConnell | The Honorable Charles Schumer |
| Majority Leader | Minority Leader |
| U.S. Senate | U.S. Senate |

Dear Majority Leader McConnell and Minority Leader Schumer:

On behalf of the American Academy of Pediatrics (AAP), a non-profit professional organization of 66,000 primary care pediatricians, pediatric medical sub-specialists, and pediatric surgical specialists dedicated to the health, safety and well-being of infants, children, adolescents, and young adults, we write to express our opposition to the *Regulatory Accountability Act* (H.R. 5), which the U.S. House approved earlier this month.

The AAP opposes this legislation because it would curtail the ability of executive branch agencies to carry out critical public health and health services work. This legislation would require unnecessary and duplicative federal agency considerations in promulgating regulations. It would undermine many public health standards that are based on what is most protective of health. Limiting the ability of the federal government to administer critical health programs would negatively affect children's health.

Federal protections of children's health are wide ranging, including clean air assurances, access to vaccines and other needed preventive services, ensuring safe and effective medicines, protecting children from the harms of tobacco, and improved safety standards for children's products. These protections are a cornerstone of the children's public health achievements of the past several decades, and continuing their legacy is essential work. We urge you not to advance the *Regulatory Accountability Act* in the Senate and negate that progress.

We look forward to working collaboratively with you on these and other critical child health issues in the 115th Congress. If you have any questions, please do not hesitate to contact Ami Gadhia in our Washington, D.C. office at 202/347-8600 or agadhia@aap.org.

Sincerely,

Fernando Stein, MD, FAAP
President
FS/zml

*Feb. 1, 2017*

PREPARED STATEMENT OF JOYCE DAVIS (MOTHER OF GARRET)

Thank you, Senator Thune, and the esteemed members of the Senate Committee on Commerce, Science, and Transportation for convening this full committee hearing about Reducing Unnecessary burdensome regulations.

My name is Joyce Davis and I am here as a real life example that *not all* regulations are burdensome, especially those regulations that focus on unsafe baby products that can kill babies.

Allow me a brief moment to tell my story. Sixteen years ago, in the year 2000, I put my four month old baby boy, Garret, to sleep in a portable crib with a supplemental mattress. While sleeping, Garret rolled over and wedged face down between the side of the supplemental mattress and the soft side of the portable crib. He suffocated in his sleep. Needless to say, my life and that of my family drastically changed.

From this tragedy, I founded Keeping Babies Safe (KBS for short), a non-profit organization that fights to keep dangerous baby products off the market and to advocate for safe sleep education for infants.

Of particular concern to KBS, is the availability of supplemental mattresses in the market. *Yes, the same supplemental mattress that killed my son*—and many other babies—*remains available for sale in the market today.* The industry—via the ASTM—has adopted required warning labels to warn parents NEVER to use any other mattress other than the original mattress provided with the portable crib.

Yet, in spite of warning labels on portable cribs to not use a supplemental mattress, manufacturers and retailers continue to manufacture, market and sell these deadly mattresses for use with a portable crib . . . *And, why do they do this you ask??* They do this . . . because they can. They do this for pure profit. *They do this because there's no regulation saying they can't!* Until regulations (or a ban in this case) are adopted by legislatures, manufacturers and retailers *will* continue to manufacture and sell these mattresses and babies will continue to die.

Currently, the U.S. Consumer Products Safety Commission has docketed our petition for a ban of the sale of supplemental mattresses and we anxiously await its regulatory decision. But we know from the CPSC's website and public statements that—and I'll quote—*Only use the mattress pad provided with the play yard.*

But we can't—in good conscious—sit and wait for the necessary Federal regulation to ban supplemental mattresses—and watch while other families go through the same tragedy we experienced. Instead, we at KBS have been steadfast in fighting for the removal of this dangerous product from every store shelf in America by directly reaching out to retailers to warn them that they are selling a product that is being used against industry warning labels. We have been successful, to a point, with responsible corporate citizens such as retailers like Target, Toys R Us, Sears, Kmart, buy buy Baby and Wayfair—agreeing to stop selling supplemental mattresses. However, other major retailers—like Amazon and Walmart—still continue to sell supplemental mattresses for portable cribs, in spite of the warning labels not to use them on the very product they are sold to be used with.

Without a Federal regulation banning the supplemental mattress, KBS is left to try to work with each of the 50 States, to try to obtain state bans on this product. KBS has started with its home State—New Jersey and we have been successful lobbying the legislature on a bill to ban supplemental mattresses in New Jersey. I am proud to say that our bill has so far received unanimous bi-lateral support in the legislature. However, even if we are successful, the ban would only apply to sales of supplemental mattresses in New Jersey.

KBS has very limited resources and trying to obtain a ban state by state will be extremely difficult. A Federal regulation on the issue would not only be efficient but more importantly—a Federal ban would save lives.

This is why Federal regulations are so critical. Federal regulations can do what our small organization cannot do.

It is my hope that my appearance here today helps further raise awareness that regulations are a critical piece of protecting the public from death and injury.

Thank you.

PREPARED STATEMENT OF TIMOTHY FRINK (GRANDFATHER OF BRIANNA)

BRIANNA JONES

March 27, 2009–July 10, 2012

My daughter Christianna met Christopher Jones in the Army military police training school in early summer of 2008. They had both been in the military before joining the Army. Christopher was a Marine but then transferred to the Army and served a tour in. Christianna served 2 deployments as a medical technician in the Air Force and had helped take care of wounded soldiers transported from Iraq to Germany and in the Hurricane Katrina evacuation effort.

Their first daughter, Brianna Jones, was born on March 27, 2009, where they were stationed in El Paso, Texas. Her little sister, Alexis Jones, was born 14 months later in May, 2010. Shortly afterwards they were transferred to Fort Campbell Kentucky. When Christi and Christopher got orders to go back to Iraq in February, 2011, we all agreed to have their children stay with Christi's mother's family and with us for the nine months they would be gone.

At first I couldn't believe they wanted to leave their precious little girls with us and go off to war together rather than having one parent go away and the other take care of the children. But they thought it would be the least stressful on their marriage and their children to serve their tours at the same time have us grandparents take care of the girls. It turned out to be one of the greatest years of our lives, a year we will never forget.

Parenting young grandchildren can be a very challenging experience as some of you may already know. Their energy, their emotions, their challenges can really stretch grandparents to the limit. But reliving the early years with our own girls, and experiencing the joys and the delights that you can have with these precious little children is beyond imagination.

Here are a few entries from my journal in that first year when they lived with us. I share them to help you see how extraordinary a little girl Brianna Jones truly was.

"Brianna, when you first came to Maryland you were just 23 months old and your sister nine months old. I used to come home early from work and watch you for two hours till your grandmother picked you up. I would hold you and read you stories and take you up to the school to play. You amazed me with your strength and agility as you climbed the monkey bars like a big kid. You could even go across the monkey bars rung by rung with a little help from Grandpa."

"You loved the big bad wolf story and the two little kids. Whenever we played big bad wolf in our playground fort you'd say, "Don't be afraid big bad wolf; don't be afraid!" when you were the one half terrified."

"You were only two years old, but you loved to fly a kite. I remember when we went to Leonardtown after Hurricane Irene and the wind was blowing so strong. You wanted to fly my kite because you were a big girL You took that string and ran and ran and ran across that huge, long field and watched in utter delight as the kite soared behind you, while I chased after you calling, "Brianna come back." You never look back once you were captivated by that kite."

"You were so good with words and expressing yourself at such a young age. You always amazed us with your delightful expressions. I'll never forget the first time we were driving to the top of the bridge to Solomon's Island and you first looked and beheld the beautiful view of the Patuxent River and the Chesapeake Bay. From the back seat we heard your joyful exclamation as you threw your arms out and proclaimed "It's amazing." I remember one time we were playing cards and you held out a handful of cards and you said "pick a card, any card" as though you were professional card shark in Las Vegas."

You were wise beyond your years and so mature. I remember the time you were disappointed that we couldn't go swimming at the pool, even though you said, "but I love swimming", and then we couldn't go to the playground and you said, "but I love playgrounds", and finally we didn't have time to go shopping, and you said, "but I love shopping." Instead of throwing a temper tantrum like a normal 2 year old who is utterly frustrated you sat quietly in the backseat and I heard you say, "I am so mad, I feel like hitting the car!!"

You loved to ride on the top of my shoulders and shout out with glee, "Look how high my are." You loved to play games and have fun, and dance like a princess. I remember at your Aunt Katie's wedding that you danced non-stop for almost 2 hours, even joining the bride and groom for their special dance. You were a bright ray of sunshine, giving us joy and delight. Whenever I see a golden butterfly, I think of you, because you loved our flower garden and the multitude of butterflies that were there that magical summer."

When Christi and Chris returned from Iraq in December, 2011, we were so thankful for their safe return. The family was reunited for seven months and lived in Clarksville, Tennessee, where they were stationed at Fort Campbell. On July 10, 2012, while I was in Houston Texas on a business conference I received horrible news that my granddaughter Brianna Jones had been strangled to death by a blind cord in the upstairs den.

Here is what occurred in Christi's home that day. She and Chris awoke to another day of military service and caring for Brianna, 3, and Alexis, 2. Brianna put on her bride costume and coaxed Daddy into marrying her with Mommy officiating, one of her favorite pretend games. Then Daddy went off to the base, and Mommy had the day off to spend with the girls. Later that day, Christi was in the kitchen with Alexis doing some mother-daughter baking. Brianna was just at the top of the stairs in the family den watching her favorite TV show. When Christi hadn't heard any jumping or singing for a while, she headed up the stairs to investigate what Brianna might have gotten into.

You cannot imagine the shock and horror my daughter felt when she went upstairs to check on Brianna and discovered her limp body hanging there strangled to death by a blind cord? Christi, having military training in rescue and CPR grabbed my precious granddaughter and began life-saving procedures, all the time knowing it was too late. She called Chris and he raced home just in time to see the ambulance take his new little bride away forevermore.

Here is an entry for my journal that night after I had just got the call about Brianna's death. "No, no, no, no, no!!!! This can't be real. She can't be dead. Brianna Jones, my precious granddaughter, my delight is gone. Why, why, why, why??? My heart is broken, my head hurts from so many tears I can't hardly think. Poor Christi, poor Chris. I hurt so bad for them, for their loss, for their pain. I can't imagine the hell they are experiencing right now. If my soul is crushed beyond words how sad, forlorn and desperate they must be. A crushing grief like the blackest night takes my breath away. Oh God, why have you taken my precious grandbaby away???"


We survived this horrible experience and have gone on with our lives. You see we not only lost our granddaughter, but we felt like we lost our own child. However the impact upon our kids was devastating beyond words; you never fully recover from the sudden death of a child, or even of a grandchild. Christopher retired on disability from the Army due to PTSD and very serious injuries suffered in Iraq to both knees. Christiana suffered from severe PTSD from her war experiences and the devastating loss of her precious little princess. She too lost her Army career and is now retired on disability, and four years later she still walks with her emotional scars and deep pain in her soul. They were extremely fortunate that their love and commitment to each other was so strong that they didn't lose their marriage also like almost all families that have lost young children.

Our family will never be the same. We all have been broken by one of the most heart-wrenching experiences any family can experience. We are heartsick that companies continue to make window blinds with cords that kill and maim precious little children. There are so many other products on the market that are safer and have no life threatening cords.

I agree with Vice President Mike Pence; I am a Christian first, I am a conservative second, and finally a Republican. I am strongly prolife and I am very pleased that President Trump is also committed to the lives of unborn babies. I strongly urge that actions are taken to save the lives of all children whether born or not yet born.

I am for limited government regulation of our personal lives and business. But no business has the right to sell a product that can kill children and destroy their families. If these businesses will not listen to our cries for help, there must be regulation, there must be restraint, there must be controls to keep these big businesses from destroying lives so needlessly. Please help us and save the lives of dozens of children in years to come.

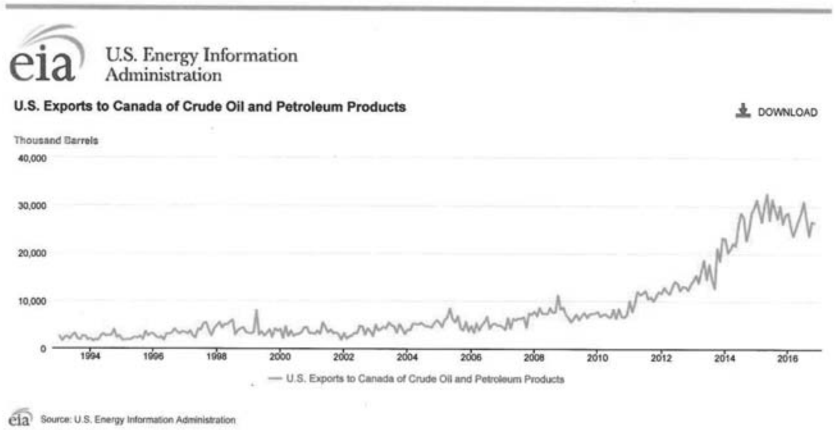
Sincerely,

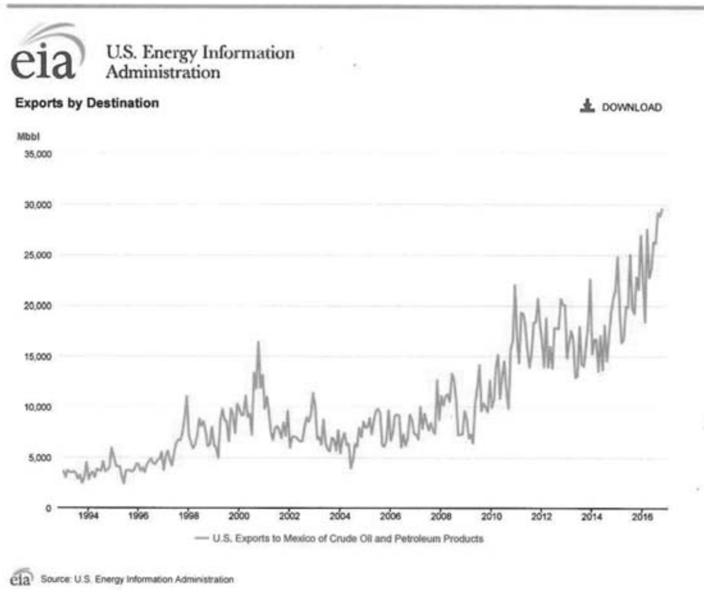
TIMOTHY FRINK

Senator NELSON. And, Mr. Chairman, also I would like to enter information from the Energy Information Administration on oil exports into the record.

The CHAIRMAN. Without objection.

[The information referred to follows:]



eia U.S. Energy Information Administration

# PETROLEUM & OTHER LIQUIDS

OVERVIEW | DATA | ANALYSIS & PROJECTIONS | GLOSSARY › | FAQS ›

## Exports by Destination

**Product:** Total Crude Oil and Products **Period-Unit:** Monthly-Thousand Barrels

| Show Data By: Destination / Product | Graph Clear | May-16 | Jun-16 | Jul-16 | Aug-16 | Sep-16 | Oct-16 | View History |
|---|---|---|---|---|---|---|---|---|
| **Total All Countries** | | 175,388 | 157,194 | 161,473 | 158,545 | 157,501 | 153,208 | 1981-2016 |
| Afghanistan | | 0 | 0 | 0 | 0 | 0 | 0 | 1997-2016 |
| Albania | | | | | 55 | | 0 | 1996-2016 |
| Algeria | | 331 | 349 | 0 | | 1 | 470 | 1996-2016 |
| Andora | | | | | | | | 2005-2015 |
| Angola | | 1 | 0 | 1 | 0 | 1 | 0 | 1995-2016 |
| Anguilla | | 0 | 1 | 0 | 0 | 0 | 0 | 2005-2016 |
| Antigua and Barbuda | | 187 | 129 | 1 | 207 | 6 | 127 | 1995-2016 |
| Argentina | | 2,723 | 4,089 | 1,868 | 1,663 | 1,146 | 594 | 1993-2016 |
| Armenia | | | 0 | | | | 0 | 2005-2016 |
| Aruba | | 678 | 285 | 850 | 1,113 | 569 | 1,829 | 2005-2016 |
| Australia | | 614 | 633 | 843 | 248 | 163 | 157 | 1993-2016 |
| Austria | | 0 | 0 | 0 | 1 | 0 | 0 | 1995-2016 |
| Azerbaijan | | 0 | 1 | 1 | 1 | | 1 | 1995-2016 |
| Bangladesh | | 0 | 0 | | 0 | 0 | 0 | 2010-2016 |
| Bahama Islands | | 2,100 | 744 | 1,142 | 1,142 | 804 | 1,137 | 1993-2016 |
| Bahrain | | 0 | 1 | 1 | 0 | 2 | 1 | 1993-2016 |
| Barbados | | 47 | 39 | 40 | 1 | 1 | 1 | 1995-2016 |
| Belarus | | | | | | | | 2004-2015 |
| Belgium | | 1,518 | 770 | 439 | 1,005 | 1,263 | 1,100 | 1993-2016 |
| Belize | | 1 | 1 | 34 | 1 | 29 | 2 | 1995-2016 |
| Benin | | | 90 | | | | | 1998-2016 |
| Bolivia | | 2 | 231 | 4 | 2 | 2 | 3 | 1995-2016 |
| Bosnia and Herzegovina | | | | | 0 | | 0 | 2006-2016 |
| Brazil | | 7,177 | 7,540 | 10,497 | 10,048 | 6,874 | 8,178 | 1993-2016 |
| Brunei | | | 0 | 0 | 0 | | 0 | 2004-2016 |
| Bulgaria | | 11 | 0 | 0 | 0 | 0 | 0 | 1999-2016 |
| Burkina Faso | | | 0 | | | | | 2010-2016 |
| Burma | | 0 | 0 | 1 | 0 | 0 | 0 | 2004-2016 |
| Bermuda | | 2 | 57 | 108 | 69 | 95 | 12 | 1995-2016 |
| Cambodia | | 283 | 0 | 0 | 0 | 0 | 1 | 2004-2016 |
| Cameroon | | 0 | 1 | 0 | 1 | | 0 | 1995-2016 |
| Canada | | 27,039 | 28,567 | 30,883 | 27,204 | 23,723 | 26,736 | 1993-2016 |
| Cayman Islands | | 688 | 123 | 116 | 176 | 122 | 52 | 1995-2016 |
| Chad | | | 0 | | 0 | | | 1998-2016 |
| Chile | | 4,557 | 6,468 | 5,215 | 4,333 | 4,130 | 4,069 | 1993-2016 |
| China | | 6,611 | 2,737 | 5,948 | 2,818 | 3,055 | 8,117 | 1993-2016 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Cocos (Keeling) Islands | | | | | | | | 2015-2015 |
| Colombia | | 4,352 | 4,379 | 4,402 | 4,370 | 5,420 | 3,978 | 1993-2016 |
| Comoros | | | | | | | 0 | 2016-2016 |
| Congo (Brazzaville) | | | 0 | 0 | | 0 | | 1995-2016 |
| Congo (Kinshasa) | | 0 | | | 0 | 0 | | 1995-2016 |
| Costa Rica | | 2,134 | 1,083 | 1,585 | 2,261 | 1,379 | 1,561 | 1993-2016 |
| Croatia | | 0 | 61 | 0 | | 82 | 0 | 2005-2016 |
| Curacao | | 2,090 | 525 | 4 | 526 | 513 | 8 | 2011-2016 |
| Cyprus | | 0 | 111 | | 0 | | 6 | 1995-2016 |
| Czech Republic | | 0 | 0 | 0 | 0 | 0 | 0 | 1997-2016 |
| Denmark | | 301 | 177 | 258 | 286 | 393 | 0 | 1993-2016 |
| Djbouti | | | 0 | 0 | 0 | | 0 | 2005-2016 |
| Dominica | | 0 | 0 | 0 | 1 | | 0 | 2005-2016 |
| Dominican Republic | | 1,931 | 1,741 | 2,521 | 2,879 | 3,270 | 2,293 | 1995-2016 |
| Ecuador | | 2,656 | 2,983 | 3,094 | 3,428 | 2,816 | 3,013 | 1993-2016 |
| Egypt | | 586 | 2,342 | 510 | 972 | 807 | 1,084 | 1995-2016 |
| El Salvador | | 1,313 | 724 | 1,062 | 700 | 733 | 1,203 | 1993-2016 |
| Equatorial Guinea | | | 0 | 1 | 0 | 0 | 0 | 1997-2016 |
| Eritrea | | | | | | | | 2005-2012 |
| Estonia | | | 0 | 0 | | | 0 | 1995-2016 |
| Ethiopia | | 0 | 0 | | 0 | 0 | | 2005-2016 |
| Falkland Islands | | | | | | | | 2012-2015 |
| Fiji | | | | | | 0 | | 1996-2016 |
| Finland | | 9 | 2 | 1 | 0 | 1 | 1 | 1993-2016 |
| France | | 2,817 | 3,617 | 2,681 | 3,334 | 1,825 | 2,988 | 1993-2016 |
| French Guiana | | | | | | | | 1997-2015 |
| French Pacific Islands | | | | 0 | 0 | 0 | 0 | 1993-2016 |
| Gabon | | 0 | | | | 0 | | 1995-2016 |
| Gambia | | | | | | | | 2001-2016 |
| Georgia, Republic of | | 0 | 0 | 0 | 0 | 0 | 0 | 2005-2016 |
| Germany | | 377 | 83 | 367 | 574 | 80 | 113 | 1994-2016 |
| Ghana | | 74 | 112 | 215 | 0 | 326 | 399 | 1993-2016 |
| Gibraltar | | 3,634 | 1,224 | 2,205 | 1,051 | 1,707 | 1,626 | 1995-2016 |
| Greece | | 254 | 578 | 0 | 276 | 919 | 0 | 1993-2016 |
| Greenland | | | | | | | 0 | 1996-2016 |
| Grenada | | 0 | 0 | 0 | 0 | 0 | 0 | 2005-2016 |
| Guadeloupe | | | 5 | 11 | 0 | | 0 | 1995-2016 |
| Guatemala | | 4,046 | 2,377 | 2,767 | 2,685 | 1,729 | 1,579 | 1993-2016 |
| Guinea | | 0 | | 1 | 0 | | | 1995-2016 |
| Guinea-Bissau | | | | 0 | | | | 2010-2016 |
| Guyana | | 3 | 3 | 4 | 4 | 3 | 5 | 1995-2016 |
| Haiti | | 128 | 116 | 81 | 221 | 287 | 3 | 1995-2016 |
| Honduras | | 1,853 | 1,895 | 937 | 1,867 | 1,659 | 1,392 | 1993-2016 |
| Hong Kong | | 4 | 3 | 2 | 5 | 11 | 4 | 1993-2016 |
| Hungary | | 0 | 0 | 0 | 1 | 0 | 0 | 1995-2016 |
| Iceland | | 348 | 28 | | 341 | 122 | 28 | 1995-2016 |
| India | | 6,167 | 5,412 | 6,330 | 4,095 | 4,141 | 4,114 | 1993-2016 |
| Indonesia | | 568 | 4 | 3 | 9 | 8 | 20 | 1993-2016 |
| Iran | | | | | | | | 2013-2014 |
| Iraq | | 2 | 2 | 1 | 2 | 1 | 1 | 2004-2016 |
| Ireland | | 0 | 0 | 150 | 193 | 0 | 165 | 1993-2016 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Israel | 337 | 338 | 17 | 642 | 3 | 615 | 1993-2016 |
| Italy | 1,226 | 1,211 | 540 | 1,587 | 3,993 | 1,373 | 1993-2016 |
| Ivory Coast | 1 | 43 | 0 | 300 | 1 | 1 | 1995-2016 |
| Jamaica | 479 | 527 | 985 | 896 | 801 | 232 | 1993-2016 |
| Japan | 11,119 | 6,253 | 6,059 | 4,658 | 8,905 | 6,887 | 1993-2016 |
| Jordan | 1 | 2 | 1 | 4 | 191 | 1 | 1995-2016 |
| Kazakhstan | 1 | 1 | 1 | 1 | | 1 | 2005-2016 |
| Kenya | | 0 | 0 | | 0 | | 1995-2016 |
| Kiribati | | | 0 | | | | 2011-2016 |
| Korea, South | 5,026 | 3,688 | 2,831 | 2,843 | 3,492 | 3,066 | 1993-2016 |
| Korea, North | | | | | | | 1995-1995 |
| Kyrgyzstan | 0 | 0 | 0 | 0 | | 0 | 2006-2016 |
| Kutubu | | | | | | | 2012-2013 |
| Kuwait | 0 | 0 | 1 | 1 | 1 | 5 | 1995-2016 |
| Laos | | 0 | | 0 | | 0 | 2010-2016 |
| Latvia | 0 | 0 | 0 | 0 | 0 | 1 | 1995-2016 |
| Lebanon | 313 | 645 | 515 | 790 | 536 | 938 | 1995-2016 |
| Liberia | 0 | 4 | 0 | 452 | | 0 | 1995-2016 |
| Libya | 0 | 0 | 260 | | 0 | 0 | 2005-2016 |
| Lithuania | | 0 | | | 0 | 0 | 1995-2016 |
| Luxembourg | | | | | | | 2011-2015 |
| Macau S.A.R. | 0 | 0 | 0 | | | 1 | 2001-2016 |
| Macedonia | | | | | | | 2005-2015 |
| Madagascar | | | | | | | 2001-2016 |
| Malaysia | 372 | 2 | 9 | 608 | 776 | 98 | 1993-2016 |
| Maldives | 0 | 0 | | | | 0 | 2005-2016 |
| Mali | 0 | | | | | | 2006-2016 |
| Malta | 642 | 686 | | 69 | 295 | | 1997-2016 |
| Marshall Islands | | 1 | 0 | 5 | 5 | 23 | 2005-2016 |
| Martinique | 50 | 190 | 17 | 0 | 0 | 15 | 2010-2016 |
| Mauritania | 0 | | 0 | 0 | 0 | 0 | 2003-2016 |
| Mauritius | 0 | | 0 | | | | 1995-2016 |
| Mexico | 23,538 | 28,237 | 28,120 | 29,131 | 28,789 | 29,525 | 1993-2016 |
| Micronesia, Federated States of | 0 | 0 | 0 | 0 | 0 | 0 | 2005-2016 |
| Midway Islands | | | | | | | 2005-2009 |
| Moldova | | | | | | | 1997-2015 |
| Monaco | | | | | | | 2004-2015 |
| Mongolia | | 0 | 0 | 0 | 0 | | 1997-2016 |
| Montenegro | | | | | | 0 | 2010-2016 |
| Montserrat | | | 0 | | | 0 | 2005-2016 |
| Morocco | 476 | 514 | 1,539 | 279 | 1,521 | 91 | 1995-2016 |
| Mozambique | 656 | 37 | 62 | 116 | 52 | 241 | 2000-2016 |
| Namibia | 300 | 297 | | | | | 1997-2016 |
| Nepal | | | | | | | 2004-2016 |
| Netherlands | 11,823 | 9,503 | 10,961 | 12,083 | 6,525 | 6,914 | 1993-2016 |
| Netherlands/Antilles | | | | | | | 1993-2011 |
| New Caledonia | | | | | | | 2005-2016 |
| New Zealand | 1 | 89 | 57 | 46 | 2 | 57 | 1993-2016 |
| Nicaragua | 678 | 406 | 54 | 192 | 337 | 4 | 1995-2016 |
| Niger | | 0 | 0 | | | | 2010-2016 |
| Nigeria | 1 | 37 | 2 | 298 | 1 | 85 | 1993-2016 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Niue | | | | | | | | 2007-2009 |
| Norway | | 1,129 | 571 | 863 | 1,527 | 1,764 | 103 | 1993-2016 |
| Oman | | 2 | 62 | 63 | 116 | 62 | 0 | 1995-2016 |
| Pakistan | | 1 | 2 | 1 | 1 | 3 | 303 | 1995-2016 |
| Palau | | 0 | | | | | 0 | 1995-2016 |
| Panama | | 3,657 | 3,277 | 2,753 | 3,059 | 2,902 | 3,481 | 1993-2016 |
| Papau New Guinea | | | | | | | | 2000-2016 |
| Paracel Islands | | | | | | | | 2004-2009 |
| Paraguay | | 8 | 328 | 492 | 144 | 191 | 287 | 1995-2016 |
| Peru | | 2,675 | 3,167 | 2,092 | 3,073 | 3,216 | 3,519 | 1993-2016 |
| Philippines | | 3 | 99 | 250 | 95 | 251 | 154 | 1993-2016 |
| Poland | | 1 | 1 | 1 | 0 | 0 | 0 | 1993-2016 |
| Portugal | | 523 | 357 | 0 | 477 | 0 | | 1993-2016 |
| Puerto Rico | | 15 | 17 | 19 | 18 | 24 | 21 | 1993-2016 |
| Qatar | | 0 | 0 | 0 | 0 | 2 | 0 | 1995-2016 |
| Romania | | 0 | 302 | 116 | 91 | 309 | 260 | 1995-2016 |
| Russia | | 4 | 3 | 4 | 2 | 4 | 3 | 1995-2016 |
| St. Kitts and Nevis | | 1 | 0 | 1 | 0 | 1 | 2 | 2005-2016 |
| St. Lucia | | 338 | 0 | 165 | 292 | 396 | 399 | 2005-2016 |
| St. Pierre and Miquelon | | | | | | | | 2009-2009 |
| St. Vincent and the Grenadines | | 0 | 1 | 1 | 0 | 1 | 0 | 2005-2016 |
| Samoa | | 0 | 0 | 0 | 0 | 0 | 1 | 1999-2016 |
| San Marino | | | | | | | | 2005-2007 |
| Saudi Arabia | | 9 | 96 | 59 | 166 | 15 | 584 | 1993-2016 |
| Senegal | | | | 0 | | 294 | 346 | 1997-2016 |
| Serbia and Montenegro | | | | | | | | 2005-2006 |
| Seychelles | | | | | | | | 2004-2015 |
| Sierra Leone | | 0 | 0 | 0 | 0 | | 0 | 1998-2016 |
| Singapore | | 5,037 | 3,135 | 3,033 | 2,332 | 6,530 | 3,216 | 1993-2016 |
| Sint Maarten | | 1 | 0 | 1 | 1 | 1 | 1 | 2011-2016 |
| Slovakia | | 0 | 0 | 0 | 0 | | | 2005-2016 |
| Slovenia | | | | 777 | 638 | | 0 | 2005-2016 |
| Soloman Islands | | | | | | | | 2002-2002 |
| South Africa | | 493 | 95 | 87 | 554 | 9 | 777 | 1993-2016 |
| Spain | | 3,972 | 2,467 | 2,279 | 1,113 | 3,821 | 1,747 | 1993-2016 |
| Spratly Islands | | | | | | | | 2005-2009 |
| Sri Lanka | | 0 | 0 | 0 | 0 | 0 | 0 | 2000-2016 |
| Sudan | | | | | | | | 1995-1996 |
| Suriname | | 2 | 6 | 6 | 4 | 6 | 7 | 1993-2016 |
| Swaziland | | | | | | | | 2006-2016 |
| Sweden | | 34 | 574 | 1 | 477 | 299 | 1 | 1993-2016 |
| Switzerland | | 1,030 | 20 | 440 | 767 | 1,203 | 463 | 1993-2016 |
| Syria | | | | | | | | 1995-2010 |
| Taiwan | | 26 | 7 | 5 | 7 | 52 | 586 | 1993-2016 |
| Tanzania | | 0 | 0 | 270 | 5 | 0 | 0 | 1995-2016 |
| Thailand | | 608 | 13 | 6 | 6 | 257 | 161 | 1993-2016 |
| Tonga | | | 0 | | 0 | 0 | 0 | 2006-2016 |
| Togo | | | 390 | | 0 | | | 2003-2016 |
| Trinidad and Tobago | | 3 | 27 | 17 | 6 | 5 | 6 | 1993-2016 |
| Tunisia | | 169 | 276 | | 0 | 75 | 0 | 1995-2016 |
| Turkey | | 1,636 | 2,519 | 2,257 | 1,748 | 1,120 | 2,435 | 1993-2016 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Turkmenistan | | | 0 | | | | 2005-2016 |
| Turks and Caicos Islands | 27 | 28 | 28 | 28 | 18 | 22 | 1995-2016 |
| Uganda | | | 0 | | | | 2000-2016 |
| Ukraine | 55 | 0 | 0 | 1 | 0 | 0 | 2005-2016 |
| United Arab Emirates | 310 | 4 | 1,254 | 32 | 1,239 | 508 | 1993-2016 |
| United Kingdom | 3,278 | 3,944 | 2,744 | 3,518 | 4,125 | 2,316 | 1993-2016 |
| Uruguay | 3 | 239 | 363 | 98 | 4 | 42 | 1993-2016 |
| Uzbekistan | | | | | | | 2005-2015 |
| Vanuatu | | | | | | 0 | 2006-2016 |
| Venezuela | 2,989 | 1,017 | 2,761 | 2,323 | 1,753 | 2,050 | 1993-2016 |
| Vietnam | 2 | 6 | 3 | 150 | 1 | 2 | 1995-2016 |
| Virgin Islands (British) | 2 | 0 | 0 | 0 | 0 | 247 | 2005-2016 |
| Virgin Islands (U.S.) | 81 | 984 | 1,043 | 502 | 1,099 | 806 | 1993-2016 |
| Yemen | 2 | 2 | 0 | 1 | | 3 | 1995-2016 |
| Yugoslavia | | | | | | | 1993-2004 |
| Zambia | | | | | | | 2000-2000 |

Click on the source key icon to learn how to download series into Excel, or to embed a chart or map on your website.

- = No Data Reported; — = Not Applicable; **NA** = Not Available; **W** = Withheld to avoid disclosure of individual company data.

**Notes:** On December 18, 2015, the U.S. enacted legislation authorizing the export of U.S. crude oil without a license. Exports to embargoed or sanctioned countries continue to require authorization. Prior to December 2015, crude oil exports were restricted to: (1) crude oil derived from fields under the State waters of Cook Inlet of Alaska; (2) Alaskan North Slope crude oil; (3) certain domestically produced crude oil destined for Canada; (4) shipments to U.S. territories; and (5) California crude oil to Pacific Rim countries. Totals may not equal sum of components due to independent rounding. See Definitions, Sources, and Notes link above for more information on this table.

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Next Release Date: 1/31/2017

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Senator NELSON. And because of that, Mr. Gerard, one thing in your testimony that you didn't mention that does affect your members in the American Petroleum Institute is that, since 1994, exports of crude and petroleum products from the United States to Mexico have increased by a factor of six, and exports to Canada have increased even more. So as you discuss your concern about the talk of tariffs or other trade barriers, that could definitely negatively impact the members of your institute. Isn't that right?

Mr. GERARD. Yes. There are implications on our members who operate in a global setting. I will add, Senator, just for clarification, the crude oil export ban was only lifted a year ago. Prior to that, we had restrictions on our ability to export that product.

Senator NELSON. But now there's a proposal to do a tariff on any import from Mexico and others. That's not going to sit too well with, I would assume, your members, given the history that we have.

Now, Senator Blumenthal applied the label of "mindless" to the President's Executive Order signed Monday that says that two rules ought to be repealed for every new rule implemented. Maybe in the President's mind that might be good politics, but, that Executive Order says that agencies can only take into account the cost to industry of a new rule. What about the benefits?

So, Professor, does that make sense?

Ms. HEINZERLING. No, sir, I don't think it does make any sense. I think the number two to one is pulled out of a hat. I think it makes a better sound bite than a regulatory plan. The Executive Order, as you say, speaks only about costs, and so one could have a marvelously beneficial rule that is also costly. Often costs and benefits run together that way, and if that's right, an agency could simply decide to repeal that very beneficial rule on account of the costs that it imposes. There is nothing in the Executive Order that requires or even, frankly, allows an agency to do anything different.

Senator NELSON. Does anybody want to object to the idea that when you're considering cost, you ought to also consider benefits? I don't want any long speeches because I have additional questions. Anybody agree? I see. Let the record show Mr. White is shaking his head. OK.

All right. Mr. Palmieri, you were very critical of changes the CPSC is considering to the rule that governs its ability to disclose information about product defects to the public. The requirement, Section 6(b), essentially requires that the Commission get clearance from a company before disclosing any information about one of its products to the public.

Now, Mr. Palmieri, your written statement indicates that you even oppose efforts to modify this rule so that the Commission can talk about product safety incidents that are already being discussed on the Internet. So, for example, it seems that if the CPSC discovered a lithium-ion battery on the Internet that was catching on fire and could injure someone or even bring an airplane down, you would make the CPSC wait for clearance from the company before reporting that information to the public?

Mr. PALMIERI. So the Section 6(b) protections that you mentioned are part of the delicate balance that Congress struck to make sure that companies, retailers, everybody in the supply chain, turn over every bit of information, including confidential business information, as quickly as possible. And to be able to do that, there was a requirement that there be some confidence that the agency not distribute that information without some notice.

Now, I think that the objections from the CPSC are really overwrought. I think they have not had trouble speaking about true risks and problems with a range of products.

Senator NELSON. Let me just——

Mr. PALMIERI. Yes, please.

Senator NELSON. Don't you see the ridiculousness of this? Again, we get polarized in the extremes and we lose sight of what we're doing. And I've already given you examples on both sides, so I'm trying to be balanced in my approach.

Mr. PALMIERI. Absolutely.

Senator NELSON. All right. Let me ask Mr. Gerard. I can't help but note that your testimony reminds me of things that you said just before the Deepwater Horizon rig exploded. Now, I get a little intense when it comes to this because it had a rather considerable effect on the part of the country that I represent, not to speak of the 11 lives that were lost and fouling one of the most productive ecosystems in a pretty large oil disaster.

Now, you said in March 2010 that the oil and natural gas industry has a proven track record of safe oil and natural gas development. A year prior, the Montara drill rig had a blowout on a well in the East Timor Sea, and it was the worst oil disaster in that region of the world. And then 20 days after your assertion about the safety of offshore oil drilling, the *Deepwater Horizon* incident happened off of Louisiana.

Several of your organization's members' companies were involved. So in the last eight years, two of the worst oil drilling disasters in history have threatened all of the things that we've enumerated.

Now, I'm not sure that the API industry standards that you claim to promote of safety and reliability were successful. And so I want to say that I strongly disagree—and I said I'm intense about this because of the effect that I've seen in my part of the world—I strongly disagree with you that the oil and gas industry has a proven track record of safety. And from this Senator's perspective, leaving the oil industry to police its own safety is going to result only in all of the consequences that we've seen.

And may I remind everyone, thank goodness the wind stopped blowing toward the east. The oil got as far as Pensacola Beach, which was blackened. It got to Destin's beaches. But the tar balls only got as far east as Panama City Beach. But what it did, it shut down the tourism industry of the entire Gulf Coast of Florida, all the way down to Marco Island in the south for an entire season because people thought that oil was on the beaches, not even to speak of the fishery closures, and the tragic consequences for humans.

So what is a reasonable amount of time without an oil spill for API to prove that drilling is safe?

Mr. GERARD. Well, Senator, I think you see it demonstrated in our actions as an industry. First, our goal and objective is zero incidents. We produce hundreds of millions of barrels on a daily basis, as you know. Today, we provide over 60 percent of the energy that fuels our entire economy. So as we work together and collaborate, and to your point, and I appreciate the spirit of your earlier comment, that we need to find ways to harmonize or to balance the regimes as we move forward.

As it relates to the API, we've done a number of things. In fact, our standards setting organization has been around since 1924, is the most cited standards in the world to constantly improve our practices and to focus on safety.

As a result of the tragic incidents you've cited, Senator, we've set up an independent center for offshore safety now where we bring in third-party auditors to look at our operations in the Gulf of Mexico.

So we learned from our incidents, but we are committed to zero incidents. We take safety as a top priority. We've developed safety management systems. We just developed another one for pipelines in this country, that the regulators working with us, our processes that are accredited by outside sources, tell us we have some of the best in the country, and we bring in academics, we bring in critics, we bring in environmentalists and others to do these. So we are constantly pushing to do better, Senator, and I will commit to you that's the goal and objective of our industry, to always be safe in our operations.

Senator NELSON. I'll just close, Mr. Chairman, by saying that way down below the surface, because that cutoff mechanism did not work, almost 5 million barrels spilled into the Gulf. And, oh, everything was working fine, everything was working fine. No, it was only 1,000 barrels a day until this Senator got the video of what was happening way below the surface of the Earth. And once this Senator put it up on his website so that people could see in real-time how much oil was coming out, suddenly the amount of oil spilling was escalated.

It's a part of being truthful and balanced and using some common sense. And if we're ever going to get to the question of, "What's the right amount of regulations?" you've got to inject that into the record.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Nelson.

Senator Hassan and Senator Wicker.

**STATEMENT OF HON. MAGGIE HASSAN, U.S. SENATOR FROM NEW HAMPSHIRE**

Senator HASSAN. Well, thank you very much, Mr. Chair, and thank you to all the panelists for being here today. And I'm sorry to be a late arrival, and I'm going to have to leave in just a couple of minutes.

So I wanted to focus my single question here on the importance of government being nimble as we go through a regulatory framework or partnership.

And so, Professor Heinzerling, this is really, I think, a question for you. We often hear that government moves too slowly and causes problems for our people, our entrepreneurs, and our businesses. In an age of really rapid technological innovation, I believe it's really critical to ensure that government can keep pace and that regulations are effective so entrepreneurs aren't burdened by outdated ones.

It's also essential that we can respond quickly and effectively to emergency situations. So, for example, in my home state, something I worked on and focused on every day in New Hampshire was our heroin and opioid crisis. It is our top public safety and public health concern, and it's actually impacting our economy and our businesses. Our employers are finding it difficult to hire people. So it has been a real source of concern.

And so in response to the heroin and opioid crisis, and in response to requests from Governors and advocates and families, the United States Department of Health and Human Services recently changed its rules to allow doctors to provide certain medication-assisted treatments to a greater number of patients. And delaying that rule change could have cost lives.

So are you concerned, Professor, that by slowing down the process for making these kinds of changes, we risk making government responses slower and impeding our ability to appropriately respond to changing circumstances?

Ms. HEINZERLING. Yes, absolutely. The process, as I mentioned, is already lengthy and labor intensive, it can take years, and to add to it is just going to slow down the kinds of responses, as you say, make us less nimble. I'm always surprised when people complain about delays and bureaucracy in government, and then the first response is to pile on delays and bureaucracy. So, yes, I am concerned about that. And I will say that that worry is not helped by starving agencies of resources to do their jobs.

Senator HASSAN. Well, thank you very much. I appreciate that. And thank you, Mr. Chair.

The CHAIRMAN. Thank you, Senator Hassan.

Senator Wicker.

## STATEMENT OF HON. ROGER F. WICKER, U.S. SENATOR FROM MISSISSIPPI

Senator WICKER. Mr. Shapiro, let me ask you about the net neutrality regulation. You know, net neutrality sounds so sensible and harmless, and yet actually what it means is that instead of the light touch approach to FCC regulation of broadband that we had before 2015, under net neutrality, it's now reclassified under an outdated Title II regime more like a utility or a telecommunications service.

The advocates of so-called net neutrality rules say that this is necessary to advance Internet openness. Give us your views on this, and how can we advance this openness without relying on Title II regulation?

Mr. SHAPIRO. Thank you for that question, Senator Wicker. I've been engaged on this issue a long time as a request of the FCC to develop principles encouraging broadband investment and broadband competition, and that was the status quo for many, many years. I believe it was under Chairman Powell at the FCC, and said here's what we're trying to accomplish; we're not issuing a rule; we're not doing anything; but this is generally good principles that folks follow. And it was followed, and there was no real harm done that anyone could talk about.

And then I think Candidate Obama made a promise, and his appointed FCC Chair felt obliged to follow up on it. And it ended up in, frankly, 8 years of a lot of lobbying and political capital.

But I think the goal really here is a shared goal of everyone. We want to promote innovation. We want our consumers to get service in broadband. We want competition in broadband. You know, we have great broadband in the United States, but the fact is in Europe they have lower prices because they have a lot more competition than we do.

So how do we get companies to invest in broadband? Well, that requires some legal certainty, it requires a return on investment, and it requires as much competition as possible.

To me, the whole issue of net neutrality will go away if we have multiple broadband providers, they say what they're going to do, consumers can get out of their contracts if they change what they're doing, and there's real competition. And that should be our goal as a nation: fast broadband, competition, lower prices. And that's something I think that that should be the national goal, because otherwise we're going to have a very divisive battle over net neutrality when basically people understand—agree on the results, which is consumers having access to what they want to have access to on the Internet.

Senator WICKER. What can we learn from our European friends in this regard?

Mr. SHAPIRO. You know, they have lower broadband prices because they have a lot more competition, and I think that's—I think we need competition among broadband providers, frankly. It was great when Verizon came into the market with Fios. It's great that we have, in a sense, the smartphone itself is a form of broadband competition. And WiFi is the best thing that's ever happened. That was a—that came out from industry, it used unlicensed spectrum, and it has been a safety valve for everything we do in broadband, and it's allowed us to all enjoy the Internet.

So you could also have broadband over power line, you could have it obviously over cable, and certainly you could even do it with broadcasts and satellite dishes. So the more broadband, the more competition, the better, and I think that's a goal we can all work on.

Senator WICKER. Thank you very much.

Mr. Gerard, you touched on commercial Vessel Incidental Discharge, VIDA, in your testimony. Can you expound on how ballast water discharge regulations impact your industry and impact the economy?

Mr. GERARD. Well, thank you, Senator, for the question. And let me thank the Committee on a bipartisan basis for your leadership on this issue. This is, in our mind, a perfect example of ways we need to oversee the regulatory processes.

Under the Vessel Incidental Discharge, as you know, we had two Federal entities. We had a global international standard and 20 different state standards. So until the Committee intervened in this process, we were trying to comply with all. You can imagine in our business trying to ship product all around the country and all around the world. We're moving throughout these jurisdictions almost on a daily basis, so anytime we enter a new one and the rules change, it impacts our ability in foreign commerce or even in domestic commerce.

So your efforts to consolidate that to make the U.S. Coast Guard the lead on this to push other agencies like the EPA to work with the Coast Guard in a single uniform standard is critically important because it does impede commerce, it has direct impacts on our ability to bring energy to the marketplace, like I say, both domestically and internationally.

Thank you for your leadership.

Senator WICKER. Thank you.

And thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Wicker.

Senator Cruz is up next.

**STATEMENT OF HON. TED CRUZ, U.S. SENATOR FROM TEXAS**

Senator CRUZ. Thank you, Mr. Chairman. Thank you to each of the witnesses for testifying on this very important topic.

Mr. Gerard, I would like to start with you. Having the privilege of representing the state of Texas, I know firsthand the incredible potential energy has, the incredible number of jobs that our energy sector produces. And I would ask you to share with this Committee, in your views, what can we look forward to over the next 4 years if we have a Federal Government that reduces the burdens on energy? What potential is there for economic growth, for jobs, for wages rising, for manufacturing jobs increasing? What can developing the energy resources we have in this country do for working men and women in America?

Mr. GERARD. Thank you, Senator. A quick brief history I think puts it all in context. Ten years ago, I don't think anybody here or even in our industry would have predicted we would be where we are today. The U.S. is now the world's number one oil producer, number one natural gas producer, and number one refiner of product.

We now have, in addition to assisting bringing the manufacturing community back, when you talk to the manufacturers and others, they will tell you the number one driver in bringing those jobs back to America is energy costs. And if you look across the front, you look at the American people today, it's estimated that the average family now saves $1,300 a year in their energy costs, an additional $550 a year just at the gas pump.

So with that brief bit of history, we just need to project that forward now and say, what is the potential? The potential is huge. As I commented earlier, one of the parting efforts of the previous administration was to take 94 percent of our Outer Continental Shelf and make it off limits to any energy not only development but to understanding of what's there. The Atlantic coast, we haven't looked into with modern technologies for 40 years as to what our capacity is. We're the only developed country in the world that does that.

My simple point is economic analysis shows that we could create 800,000 new jobs—I might add, as you know, in Texas, our jobs pay somewhere between 50 and 100 percent more than the average job in the country—800,000 new jobs, an additional $200 billion in revenue to the Federal coffers. But the things we don't often think about, think about poverty, think about income and equality.

We talk about a good standard of living. Experts will tell you by 2040, over 60 percent of our energy will still be oil and gas. We can produce that domestically, put downward pressure on price. It benefits all of us and makes us nationally secure.

Senator CRUZ. Well, thank you, Mr. Gerard. As someone who grew up with my parents as small business owners owning a small seismic data processing company, I've grown up firsthand seeing the benefits of a robust energy economy, and I very much hope that the issue you highlighted of the Administration's abuse of its power, taking the vast majority of offshore resources offline from even seismic exploration, I hope that those policies will be reviewed and reversed by the new Administration, and I look forward to working with you to help that happen.

Let me shift to one of the most burdensome regulations that was promulgated by the prior Administration, which was the so-called Clean Power Act, which has been estimated to impose $7.2 billion in annual costs, which is north of $70 billion, if my math is right, over 10 years, which is an enormous regulatory cost.

Last year, I chaired a hearing in a subcommittee of this full Committee focusing on the burdens of overregulation on minority communities. And in particular, the National Black Chamber of Commerce testified about the Clean Power Plan, that it would impose severe and disproportionate economic burdens on poor families, especially minorities, and, in particular, the proposed rule would impose the most harm on residents of seven states with the highest concentrations of African Americans and Hispanics, and, indeed, the National Black Chamber of Commerce estimated that just this one EPA rule would increase African American poverty by 23 percent, Hispanic poverty by 26 percent, and by the year 2035, if fully implemented, would result in job losses of 7 million African Americans losing their jobs, and nearly 12 million Hispanics losing their jobs.

Do you agree with the assessments about the harm that this overburdensome regulation could cause?

Mr. GERARD. Absolutely, Senator. In fact, the unfortunate thing we often forget about, those on fixed income, those who can afford it the least, are the most impacted because energy is something we all use every day, in everything we do. It's part of our clothing, our materials, and our energy efficiency. It all comes, by and large, from petroleum products.

The other thing I would just note here on your question is when you look at the Clean Power Plan, today, the United States has reduced our carbon emissions, we're at 25-year lows. The Clean Power Plan is not in effect yet. We accomplished that because we're producing vast amounts of clean-burning natural gas that's being consumed, that brought the price of gas down so all of our consumers benefit from that. We've already accomplished a significant portion of what the Clean Power Plan was intended to do.

And this is an area we need to look at. If you've got government regulators out there driving an agenda—and I wasn't given an opportunity earlier to address Senator Udall's question, but methane is a perfect example. We've got three regulatory bodies now imposing the same standard, yet each one of them brings added cost. We can regulate thoughtfully, to Senator Nelson's point, in a commonsense, smart fashion without adding these extra costs. Why? Because they impact people, they impact Americans. And unfortunately, it impacts job creation and our opportunity to have affordable, reliable energy.

Senator CRUZ. Thank you.

The CHAIRMAN. Thank you, Senator Cruz.

And before I go to Senator Moran quickly, with respect to what Senator Cruz, his line of questioning, earlier today I think many of you were asked by Senator Blumenthal about figures regarding possible job losses attributable to unnecessary regulations, and I think you wisely declined to speculate about the numbers, but if you would like to supplement your answers, as you have an opportunity to review the data for the record, you certainly would be encouraged to do that.

Senator Moran.

## STATEMENT OF HON. JERRY MORAN, U.S. SENATOR FROM KANSAS

Senator MORAN. Mr. Chairman, thank you. And in that regard, and perhaps following up on what Mr. Gerard said, one of the things I've discovered in my time in Congress is those who claim to be the most caring among—about the poorest among us often are the ones who promote the policies that are the most damaging financially to the poorest among us. And it is something to keep in mind about the consequences are disparate in the way they affect people.

Let me turn to Mr. Palmieri. I chair the Subcommittee on Consumer Protection, and we've been paying attention here at the end of 2016 to CPSC and what their regulations might be as the administration comes to an end. I was pleased in a conversation I had with Chairman Kaye that he informed me that in December that he would not be pursuing the Voluntary Recall Rule for the duration of his term. It doesn't appear, however, that Chairman Kaye is departing from the CPSC, and I look forward to having him in front of our Subcommittee in the near future so that we can hear from him as to what his agenda might be.

But I wondered if you would tell me what actions you believe that CPSC should take or Congress could or should take that will help spur job creation at the same time as protecting consumer safety.

Mr. PALMIERI. Sure. We appreciate your work and leadership in this area. It's critically important. We also appreciate the commitment you've gotten from Chairman Kaye about the Voluntary Recall Rule, although it's still in the operating plan, and one of the commissioners has still made it one of his most important priorities and had suggested that he was bringing forth a proposal soon. So I hope that commitment continues to be honored.

We also think that Chairman Kaye, like his colleague at the SEC and the FCC, should step aside and let the Vice Chair take over, and this Committee should promptly confirm a new Chair, once nominated.

I think one of the things that we think is most important to do and that Congress has directed the CPSC to do multiple times is to engage stakeholders in a really robust process. I talked about the kind of cooperation that manufacturers in the CPSC have had for decades, and we want that to continue. The only way that we're going to continue to innovate and quickly and rapidly continuously improve the safety standards and design of all of our products is if we're working together hand-in-hand, and unfortunately too often that's not been the case with the current makeup of the Commission.

Senator MORAN. Chairman Kaye indicated to me that when he testified last before our Subcommittee, which was I think about 15 months ago now, that efforts would be increased to have shareholder, stakeholder input. That hasn't happened from your point of view?

Mr. PALMIERI. No, sir.

Senator MORAN. OK. We'll follow up.

Let me go to Mr. Shapiro. The National Highway Traffic Safety Administration has the authority to regulate technology devices, I want to say—let me rephrase that. Do you believe they have the authority to regulate those devices just because they happen to be in vehicles? And if NHTSA can regulate mobile phones, can it also regulate other consumer electronics that might be brought into the vehicle?

Mr. SHAPIRO. Thank you, Senator, for that question. I do not believe they have authority to regulate products unless those products happen to be cars or other vehicles. And the position they've taken, though, is that they can regulate anything that goes into the vehicle, at least any device, and so that means that they have taken—asserted jurisdiction over everything from smartphones to tablets to wearable devices. And they have issued guidelines saying how these devices should be built, as well as their——

Senator MORAN. Do you have concern about that?

Mr. SHAPIRO. I have grave concern about it. I think they've ignored the fact that—first of all, like all regulators, they mean well. Driver distraction does kill people, and it's bad, and we should do everything we can. There's a whole range of products in the marketplace to help on that, and certainly, the quicker we get to self-driving cars, the better off—we'll solve that problem. So this is a temporary period of obviously many years, but it's still temporary, before we get to a much lower death rate and accident rate, where 35,000 people are dying a year.

But on the other hand, I think these devices have purposes. For example, if you're a parent with a babysitter or you're a doctor on call, you need to be able to get information in your car today. And it's also difficult to distinguish the driver's device from other people's device. And, frankly, I think they've been a little negligent because drunken driving could have been regulated by technology years ago, and it never has been, and that type of technology which either locks down a car, it doesn't work, or gives you a test or whatever before you get into it, that's out there, and drunken driving has killed a lot of people over the years.

So I think they're just picking and choosing, and I don't think it's responsible, and they're doing something they have no authority to do.

Senator MORAN. Thank you, Mr. Shapiro.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Moran. And let me just say, too, in follow-up, that every loss of life is tragic, and if there are things that we can do and smart regulations to prevent that, we want to do it. And you noted the 35,000 or so that are killed on America's highways every year. This Committee has under its jurisdiction those issues, those safety issues. And so we're constantly looking at ways in which technology can help prevent those tragedies. And obviously as we look at those issues, we want to look at them in a way that is sensible, is reasonable, is balanced, and leads to not only protection of people's health and safety, but also hopefully regulations that are easier to comply with, that make sense, and that don't wreck the economy at the same time, and that's I think the balance we're trying to achieve.

Senator Sullivan.

**STATEMENT OF HON. DAN SULLIVAN, U.S. SENATOR FROM ALASKA**

Senator SULLIVAN. Thank you, Mr. Chairman.

And, Mr. Gerard, I really want to let you know how much I appreciate your testimony, all the witnesses here, but in particular I think it's so important what you're laying out in terms of what the oil and gas industry, what the energy industry does in terms of the benefits to middle class families, to manufacturing, to jobs, to national security, to greenhouse gas emissions. I mean, it's not always out there, it's certainly not out here enough, I think, in the Congress. You mentioned in your testimony, is it 10 million direct jobs or is that direct and indirect jobs?

Mr. GERARD. Direct and indirect, it's about 9.8 million.

Senator SULLIVAN. OK. And close to—you said about 8 percent GDP for the——

Mr. GERARD. Yes.

Senator SULLIVAN. And we anticipate that to rise probably, hopefully, if we're increasing our—and those are good jobs, aren't they?

Mr. GERARD. Absolutely. If you look on a national scale, Senator Sullivan, I look at various states as we go, and your state is a good example of that, that the median wage we pay or average wages overall are significantly higher than what median wages are in other industries. The reason I point that out is because it comes to the broader question of how we benefit the middle class——

Senator SULLIVAN. Right.

Mr. GERARD.—how we grow society. We work a lot with the organized labor folks, as a Senator pointed out earlier, Senator Cruz did. We're reaching out. We have relationships with the Hispanic community, African American community, and others because our workforce, about 50 percent of it, is going to turn over in the next 10 years.

Senator SULLIVAN. Let me just give you an opportunity to kind of talk a little bit more about the jobs and the people in your industry because I've been in the Senate for 2 years, and one of the most surprising things that I've seen is how much some of my colleagues, particularly on the other side of the aisle, love to vilify the oil and gas industry. I mean, you name it, right? "You're polluters," "You're bad actors."

I represent thousands, thousands of people in the oil and gas industry, Democrats, and Republicans. These are really, really good, hard-working people who are producing an incredibly important service to our country. Can you talk a little bit about these? Are they bad actors? Are they evil people? Are they polluters? Are they—I mean, this—look, you hear it every darn day. I'm sorry, but it's the truth.

Mr. GERARD. Well, it's really unfortunate, Senator, that we stoop to those levels of conversation and we don't keep it at the high ground and talk about the reality. The reality is today that over 60 percent of all the energy we consume in the United States is oil and natural gas, and it's literally in everything we do. It's the makeup of our society, it's the makeup of our economy.

Senator SULLIVAN. But the people in the industry, what are they like? You represent them.

Mr. GERARD. The people in the industry are fabulous, as you know. They're Democrats, they're Republicans, they're independents, they're Little League coaches, they're local pastors in the churches, they're just like all others——

Senator SULLIVAN. I just think it's helpful here to when we hear our colleagues do their shtick, not all of them, but some of them, it's important to push back. These are Americans, these are great Americans, and they represent all elements of the political spectrum. And in my experience, 2 years in the Senate, there is just too much vilification of people in an industry that really, really help the country.

Let me mention another area where I think it's not often known where this industry does help the country. You talk about the offshore that's been taken off the table by the former Obama administration, 840,000 potential jobs. As you know, a lot of that was off the coast of my state.

Mr. GERARD. Yes.

Senator SULLIVAN. The Chukchi and Beaufort Seas. But I think most people would agree the Arctic is going to be developed. Would you agree with that?

Mr. GERARD. Oh, absolutely. It's already being developed.

Senator SULLIVAN. So it's either going to be in jurisdictions like Alaska, that have the highest environmental standards in the world. I guarantee you, there is more oil dripped in the parking lots in Walmart in L.A. every day than there is oil dripped on the North Slope of Alaska. It's a very, very environmentally responsible place to develop oil and gas.

So when we take it off the table, not we, when the Obama administration takes all that development off the table in the jurisdictions with the highest standards in the world, are we protecting the environment? Aren't we just shifting investment and production, oil production, in the Arctic to places like Russia, which, with all due respect to the Russians, maybe not due respect because in some ways they don't deserve due respect, but their environmental standards and their ability to enforce them are much, much less than ours, aren't they?

Aren't we harming the environment by driving investment to the jurisdictions that have the least environmental standards as opposed to encouraging development in the jurisdictions that have the highest environmental standards?

Mr. GERARD. Senator, here's the reality, and this is the most recent economic analysis done by the Obama administration prior to departure. By the year 2040, close to 70 percent of all of our energy will still be oil and natural gas. If you look at it on a global scale, it's over 78 percent will still be oil and natural gas. The question becomes, Who's going to provide that?

One of the great things this Congress did was lift the crude oil export ban to allow us to create American jobs under the toughest environmental standards in the world, put that product into the global marketplace, and I will add, as many of you know, from a foreign relations perspective, you have people clamoring, particularly for our natural gas. Those in Eastern Europe would love to have an alternative to their current provider of natural gas.

If you look at it from an environmental perspective, I believe one of the great things we missed when we went to Paris is we didn't go over and talk about the American vision, the American accomplishment, in lowering our greenhouse gas emissions by using and consuming clean-burning natural gas.

These are all realities, and unless we're trying to drive up the cost to consumers, which I don't think we are, we need to be thoughtful and mindful about our own domestic resource, how we put our people to work, we benefit our own society, our own people, and at the same time, we can benefit the global world through free trade.

Senator SULLIVAN. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Sullivan.

Senator Peters.

**STATEMENT OF HON. GARY PETERS, U.S. SENATOR FROM MICHIGAN**

Senator PETERS. Thank you. Thank you, Mr. Chairman. Thank you to all of our panelists. Interesting testimony, and I appreciate you being here as we try to sort through this issue and try to find balance between protecting the public and making sure that we're streamlining operations as well and operating efficiently.

And I'm going to pick up on some of the comments that the Chairman, and Mr. Moran as well, made about the auto industry, and Mr. Moran as well, given that's a very important industry in my state of Michigan.

And as all of you know, the auto industry is certainly a regulated industry. The industry builds vehicles according to the Federal Automotive Vehicle Safety Standards set by NHTSA through a notice and comment rulemaking process, and then the automakers self-certify that those vehicles comply with the standards, and then their vehicles enter the stream of commerce as a result of that.

I believe and hope that all of you would agree that these regulations provide certainty, not just for the companies, but for their consumers, so that they know that the car that they're driving with their children in the back seat will be safe and they'll be able to get to their destination safely. And from my work with the auto companies, they are all committed to that goal as well and work on a cooperative basis with regulators to make sure regulations are working in a way to keep their customers and passengers in their cars safe.

The one issue that this Committee will be working a great deal on, and one that I personally have been focusing a great deal on, is the new technology that will radically transform the auto industry in ways as big as when Henry Ford had the first car come off of the assembly line. The move to self-driving vehicles will substantially reduce accidents and, in fact, could potentially eliminate most all accidents on the roadway through connected and automotive vehicles.

However, the current regulatory scheme that we have for automobiles doesn't really fit with these new technologies. The current rules require steering wheels and brake pedals and other things that will not be part of a self-driving vehicle.

Mr. Shapiro, I know that you have spent some time working and thinking about these issues. Do you believe there needs to be a new Federal motor vehicle safety standard promulgated by NHTSA for these new technologies developed by your membership as well as others? And what sort of thoughts do you have on how we find that and strike that balance?

Mr. SHAPIRO. Thank you, Senator Peters, for your thoughtful leadership on this. Obviously, Michigan, where I also live, is a wonderful state for car manufacturing, and I'm impressed, even though manufacturers have been around a while, the industry, and you particularly, have grabbed the issue and said we are going to the future, we're not going to fight it as a legacy industry.

It's a great example of an older industry responding to amazing change in innovation, and with great benefits, not only to the 35,000 people a year who we could avoid their deaths, but also to elderly, to the disabled, it frees up. It's green, there will be less energy used, sorry. But it's something which will change how we go about work and empower people, and I think it's a very worthy goal for this country to have. But it does require a change because all our laws are based on this four-tire car that has a driver and a steering column.

And when Mark Fields, of Ford, announced that we're going to go—they're going to go forward and eliminate the—by 2021, eliminate the driver's column, produce cheaper fleet cars at least, and have them self-driving, it was very, very forelooking.

It does require a change in the law. I know that you are circulating a draft bill, and that bill really talks about taking the necessary steps for NHTSA and others so that we could test these vehicles so they could exempt certain vehicles, and even so suppliers can test the vehicles, which is very important, in a very reasonable way. And we look forward to working with you in that process.

One of the things we are interested in is getting there as quickly as possible, not only with the auto industry, but with after-market products, because the sooner we get to self-driving cars, the more lives we save, the more injuries we avoid, the quicker people are empowered who are elderly or disabled.

Senator PETERS. Well, I appreciate those comments. I think you're right. We do have to get there quicker. We have to get to what they call Stage 4 and 5 automobiles that really do drive themselves. As you know, there are some automobiles on the road that I think as a result of perhaps some marketing are making some promises that are not really achievable by the technology that currently is in those vehicles. And accidents occur, and that could result in pushback from consumers who believe they may have a self-driving car when in reality it's not.

So it's important for us to get to that stage. The most dangerous part is the part between where you are in full command of your automobile. You have some equipment that takes over some parts of it, and then the driver thinks that they don't have to pay attention anymore, and then that can be catastrophic. So that's why we need legislation, to your point, that moves us as quickly as possible into that Stage 4 and 5 there to make sure we have the consumer's acceptance for this technology, and knowing when that occurs, we're going to save tens of thousands of lives.

Mr. SHAPIRO. I agree with everything you said. I would only add that we cannot make the perfect the enemy of the great.

Senator PETERS. Right.

Mr. SHAPIRO. Any system for many years will not be perfect, and there will be accidents, there will be weather situations, there will be sudden ditches, but we are quickly getting—already today there is active collision avoidance systems which are being put in many cars, and we're going to get there very, very quickly, but there will be accidents along the way, and there will be a tragic loss of life, but we have to look at all the lives we're saving by going there, even today already.

Senator PETERS. Right. And I agree. And I appreciate it. Thank you for your testimony.

The CHAIRMAN. Thank you, Senator Peters. And I would point out, of that 35,000 or so accidents that happen every year, 90 percent are caused by human error in some fashion, distracted driving, driving under the influence. And so I think we can do considerably better than that, and I believe, in the long term at least, that the technologies are going to get us there.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman. And I appreciate your being so generous with your time. And I want to thank the witnesses for your time in being here today. I recognize that we're dealing here with a very serious topic where we need to strike a balance and preserve public health and safety, but at the same time, be mindful about the effects on employment and avoid excessive or unnecessary regulation, which I prefer to call standards or rules rather than regulation.

And I think we can all agree, I hope we can agree, that accurate disclosure, truth-telling, is common ground. Nobody can disagree with that point. And so when companies like Takata or VW lie to consumers or to the United States, it ought to be punished. I don't think anybody would disagree with that point, especially since there are such humongous costs to that nondisclosure or misrepresentation. And that's the reason that executives in those companies are being prosecuted criminally, and they should be.

But the results of that nondisclosure and of action taken also, by the way, can create jobs. Takata airbags have to be replaced. More people will be working to manufacture the products to replace those airbags, particularly if Takata shares its proprietary information with other manufacturers, which I have long advocated. VW cars can be returned and replaced or repaired so that the defect in the emissions system can be corrected. Correcting those defects are job creators, correct? I don't think anybody is disagreeing.

Yes, sir?

Mr. SHAPIRO. I wouldn't use that as a model for job creation, so I'm reluctant to keep shaking my head as you're talking, but nothing you've said I totally disagree with.

Senator BLUMENTHAL. Right. It's not the best way to create jobs, but the point is that enforcement of rules and standards does not necessarily destroy jobs. In fact, a report from the Bureau of Labor Statistics found that 2.3 million individuals were laid off and claimed unemployment insurance in 2012. According to a survey of employers themselves, less than .3 percent of layoffs are due to, "government regulations or intervention." Employers reported that lack of business demand, "business demand," actually accounted for nearly 39 percent of the workers laid off. It makes sense—doesn't it?—that consumer demand is more important and impactful because of employment or non-employment than regulation.

So when we measure the costs of regulation, and I asked you earlier about the costs of death, and I think you answered as best you could. There really is no good answer to that kind of question. So you did the best you could, and I respect you for trying to answer it. But regulations that prevent fraud can save consumers money, can prevent economic crisis, as during the financial meltdown, when distortion, misrepresentation, or lies in effect impacted the entire economy. Industry innovation ought to be lauded for its public benefit, and so should job creation, and I think we can work together to require more truth, more accuracy, so that defects in products are disclosed and injuries and death prevented. I think we can all agree on that point.

And in terms of just accuracy, Mr. Palmieri, I've been through the report that your organization prepared, and just to be clear, the 297,696 regulations or restrictions included—did they not?—guides and guidelines, for example, guides against deceptive pricing, guides for the advertising of warranties and guarantees, guidelines on discrimination. Guides and guidelines are included, are they not?

Mr. PALMIERI. It only included items published in the Code of Federal Regulations. And so most guidance is not published in the CFR, but some are.

Senator BLUMENTHAL. And so you counted those guides and——

Mr. PALMIERI. Absolutely. And just to be clear, there is nothing about that number that says that's the wrong number, there's nothing about any number we've ever produced on the cost of regulation that says it's too much. It's just an evaluation of what the cumulative current burden of regulation and restrictions are on manufacturing.

And so it doesn't carry with it the secondary value judgment that some of those critical protections, as I mentioned in my opening statement, should be repealed or removed. It is simply to say here is the starting point when we add that next incremental burden, and just to help us talk about it and think through it, other than just by pure anecdote.

Senator BLUMENTHAL. So you're not saying in effect that there is some magic number of regulations——

Mr. PALMIERI. No, sir.

Senator BLUMENTHAL. And so when President Trump says let's cut two regulations every time we create a new one, that kind of rule really has no basis in common sense or fact, does it?

Mr. PALMIERI. I think I would just say because we've counted before on the concept of regulatory budgeting, that there is some sense that often government agencies with zero constraints are not getting the balance right on those unnecessary burdens that we can all agree should be eliminated.

Senator BLUMENTHAL. But I think we can all agree that the number of regulations is not itself a goal, it's the wisdom and efficacy of those regulations.

Mr. PALMIERI. Absolutely.

Mr. SHAPIRO. I'm sorry. I don't want to be part of the "we can all agree."

Senator BLUMENTHAL. Oh, OK. Sorry.

Mr. SHAPIRO. When you have 297,000 restrictions, when we have more lawyers than any other country in the world, and those are jobs, I don't think those are good jobs. We are overemployed with lawyers here. We should ship them to Iraq, frankly, if we want to change what we're doing because we are an overlawyered country, and we keep creating more rules and more rules.

And the number one complaint I hear from my members is that they can't even spend the time to figure out how many rules there are without hiring bunches of lawyers. It's a barrier to entry for competition. It's not the biggest issue for the large companies, but it is for the smaller, the startups, and others, because you're always violating some law, and you don't even know what it is.

So, yes, we have too many. And I applaud President Trump for coming up with a forced triage system for Federal rulemaking. It smells a little bit like rulemaking sequestration, and it is coarse, but it does force you to focus on, as an agency, what is really important to accomplish their mission.

Senator BLUMENTHAL. OK. Thank you for your comment. I'm surprised you didn't quote Shakespeare, first kill the lawyers. I think that was his comment, but I won't take it personally. And we do have some lawyers on the Committee.

[Laughter.]

Senator BLUMENTHAL. But let me just ask, just for clarification, Mr. Palmieri, guides and guidelines do not have the force of law, do they?

Mr. PALMIERI. No, but too often agencies attempt to do rulemakings that have the equivalent force of law through guidance, and that's a problem we talked about earlier on this panel as well.

Senator BLUMENTHAL. And when you reached that number, you counted as units for purposes of reaching 297,000-plus rules and regulations, each part of any regulation. So, as you know, the CFR divides regulations into chapters, subchapters, parts, subparts, and sections. You counted every part of those regulations as a separate unit of analysis, correct?

Mr. PALMIERI. Absolutely. What we asked our author and researcher to do was to go through the entire manufacturing process from the sourcing of raw materials to the transportation of finished goods, to go through the entire Code of Federal Regulations and identify each of those restrictions on manufacturing. And just to be helpful, even more coarse than that, it's about the restrictive language in each one of those parts and sections. And so, again, it is not in any way to indicate what the right number is, it's just to establish a baseline or a starting point from where we are.

The CHAIRMAN. Senator, we need to move on.

Senator BLUMENTHAL. Yes, I apologize, Mr. Chairman. I'm way over my time. And I——

The CHAIRMAN. You're not way over; you're way, way over.

[Laughter.]

Senator BLUMENTHAL. Well, I hope I'm not sent to Iraq as a result.

[Laughter.]

The CHAIRMAN. Let me just point out quickly, because it has gotten a lot of discussion here today, two observations really before we go to Senator Young, about the Executive Order. One, it does build in flexibility for OMB; there's waiver authority included in that. And I think, second, as has been pointed out by members of this panel, it's animated by a desire to ensure that agencies regularly review the impact of these past regulations.

And perhaps it does sound like a blunt instrument, but it is—that's got to happen. And President Obama said that's got to happen. Cass Sunstein said that's got to happen, and that it doesn't happen.

So, you know, sometimes it takes something that really gets people's attention in order to facilitate what probably should have been happening anyway.

Senator Young.

**STATEMENT OF HON. TODD YOUNG, U.S. SENATOR FROM INDIANA**

Senator YOUNG. I thank the Chairman for holding this hearing. I represent the state of Indiana. As I travel around the state, I talk about job creation and concerns about wage growth with small businesses, large businesses, and, more importantly, rank-and-file Hoosiers, and one of the things I hear most often from business owners and managers is that even though they may have half their profits taxed away through our current less-than-optimal tax code, it's actually the unseen taxations, the regulatory burdens, that are of greater concern to them, and surveys from the NFIB and others sort of bear that out.

So oftentimes, it's bad process that leads to a bad work product, and I think that's definitely the case with respect to our regulatory atmosphere.

And so with respect to process, Mr. White, in keeping with your book, *Policy Reforms for an Accountable Administrative State,* where you present prescriptions to reform the administrative state, you propose continuing Chevron deference. This is a topic which is quite timely right now on account of the announcement of a new Supreme Court nominee, who has spoken out quite forcefully on this topic.

But you indicate that you believe that under certain limited circumstances, I don't want to mischaracterize your position, I'll give you an opportunity to clarify if so, but there should be some continuance of this deference to administrative interpretation of the laws that we pass.

And I just want to know why you believe it's important to retain that Chevron deference. And is there something that perhaps we could do moving forward to make sure that we follow the law, as written, which I know is what the nominee's emphasis is, but effect the sort of policy goals that you're concerned about?

Mr. WHITE. Well, thank you. Thank you very much. And thank you for mentioning the book. I hate to lawyer—I'm afraid to lawyer this up, I may be sent out of the country now.

[Laughter.]

Mr. WHITE. But just to clarify the position, Chevron deference, the doctrine, has had benefits and it has drawbacks, drawbacks that are ever clearer.

In our book, our first proposal is to increase the procedural requirements on agencies, the Regulatory Accountability Act.

The main criticism of the Regulatory Accountability Act is that agencies, when faced with these increased burdens, these procedural burdens, will try to just evade rulemaking.

So our proposal in this book is to use Chevron deference as a tool to incentivize agencies to go through the notice and comment process.

That is, Congress should make Chevron deference available for agency interpretations that come out of the notice and comment process. They should prohibit it in all other contexts, interpretations and guidance, in agency adjudications, other agency vehicles that didn't go through notice and comment. And that way, Chevron deference becomes a tool to incentivize the agencies to go through a better process at the front end. That's our proposal.

Senator YOUNG. You'll be encouraged, I'm going to continue on the topic of your book and some of the things you discuss. So you discuss the flaws of the Administrative Procedure Act in modern times by agencies adopting rules without procedural requirements on the front end.

You proceed to discuss a need for Congress to impart cease the delegation of power to regulatory agencies through legislation such as the REINS Act. The REINS Act is a piece of legislation I introduced in the last couple of Congresses in the House of Representatives. I look forward to working with Senator Paul to hopefully get it passed out of the Senate.

Could you please speak to the impact you believe that the REINS Act would have on how government employees develop rules if they knew that congressional consent would ultimately be required at the end of the process to implement those rules?

Mr. WHITE. Well, thank you. Studies have shown that agency personnel are very aware of the administrative law that surrounds their own regulation writing, just as Members of Congress and congressional staff are well aware of a lot of these rules when they draft legislation.

I think the REINS Act is one of several productive ways to reform delegations of rulemaking power to the agencies. You can either narrow the substantive acts themselves, such as the Clean Air Act: you can narrow them, further specify them, reform them, or, in addition to that, you can make a preemptive withdrawal of rulemaking authority for rules above a certain cost level. I think it's a great way to focus responsibility back in Congress, but also, as you said, to properly align the incentives of the agency personnel themselves.

Senator YOUNG. My bias, of course, would be toward a systemic change with respect to how we make rules that would impact the incentives of the rule drafters and the legislators alike. I think we too frequently delegate the very difficult decisionmaking in the sweeping bills we pass to the administrative branch as opposed to making those decisions on the front end as the people's branch of government.

I think if we knew in the end we would have to vote in a standalone way on some of these more controversial measures, which is exactly what would happen under a REINS Act regime, we would end up with better law in the end. So thank you very much for your testimony.

I yield back.

The CHAIRMAN. Thank you, Senator Young.

I think we're ready to wrap up. I do want to submit for the record some letters and some testimony that we received that was not submitted orally obviously today, but from the Power Tool Institute, the Association of American Railroads, the American Chemistry Council, the Software Information Industry Association, and the CPSC Commissioner Joe Mohorovic concerning his thoughts for improving the regulatory process at independent agencies. So we'll include those without objection.

[The information referred to follows:]

PREPARED STATEMENT OF SUSAN YOUNG, EXECUTIVE MANAGER, POWER TOOL INSTITUTE

Chairman Thune, Ranking Member Nelson, thank you for the opportunity to submit testimony to the United States Senate Committee on Commerce, Science and Transportation. My name is Susan Young and I serve as the Executive Manager of the Power Tool Institute (PTI). PTI is a voluntary trade organization representing major manufacturers of portable and stationary power tools. PTI has nine member companies, which employ over 13,000 people with facilities in 40 states and employees in all 50 states. PTI and its members are dedicated to the safe use of power tools. As such, PTI is heavily involved in the voluntary standards process with UL, and PTI serves as secretariat of the IEC committee for power tools, which is the international standards setting organization. Our members adhere to rigorous safety standards and contribute extensive resources to educating consumers on the safe use of power tools.

Since the hearing today is focusing on burdensome regulations and how they impact a healthy manufacturing base, I would like to share with you PTI's most recent interaction with the U.S. Consumer Product Safety Commission in regards to its table saw rulemaking. On January 17, 2017, just days before the inauguration, CPSC Staff released a briefing package on table saws recommending the Commission issue a notice of proposed rulemaking (NPR). A Staff briefing and Commission vote are now pending in early to mid-February. Since 2003, one company (SawStop) has attempted to persuade the CPSC to mandate its patented technology on all table saws. It is our belief that such a mandate remains unjustified and is detrimental to industry and consumers, and that CPSC is expediting the rulemaking now for political reasons.

As it stands, the briefing package and proposed rule would mandate injury mitigation requirements on all table saws within 3 years. The package mentions multiple technological solutions, which have not been invented, as possibly being able to meet a mandatory rule, however this is not now the case and will not be the case in the next three years. Additionally, the briefing package selectively uses statistics and data, and omits studies, information and data that do not support CPSC staff's findings. Finally, the package relies on injury data that does not fully account for more recent table saw guard safety enhancements that are now part of the effective voluntary safety standard, acknowledges that recent incident studies compiled by CPSC have problematic methodologies, and fails to adequately address the possibility that only the petitioning company's patented technology will be able to comply with the rule, thereby creating a monopoly in the table saw market.

Shockingly, the briefing package acknowledges the following:

- SawStop, the company that petitioned the CPSC to adopt a mandatory rule, could have a monopoly due to its patents, and has not licensed its technology to other table saw manufacturers
- It is possible that any injury mitigation system may infringe on these patents
- The rule may result in $30–35 million annual royalties to patent holders
- Many manufacturers may have to exit the table saw market
- The price of table saws will increase significantly
- There will be significant impacts on cost, utility and availability of table saws
- There will be a likely decline in sales following promulgation of the rule
- The number of table saws sold annually could decrease by 90–250,000 units

- The impact of increasing table saw production costs on consumers would be considerable
- Small manufacturers would reduce table saw offerings or exit the market
- Firms might reduce or eliminate offerings of table saws to the U.S. market
- The rule may result in lost production, lost sales and loss of employment
- The costs of the proposed rule would be $140–290 million annually.

Despite the above, and the previously noted request of the new administration to reduce the regulatory burden on industry, the CPSC staff is still recommending the rule to the Commission. Throughout this rulemaking process, PTI has worked extensively with CPSC, responding to the 2003 petition and 2011 Advanced Notice of Proposed Rulemaking (ANPR), meeting multiple times with the Commissioners and Staff to educate them on our efforts and concerns with the petition. In the meantime, PTI continued work on the voluntary standards process and organized joint ventures to conduct research and development, all with the ultimate goal of improving table saw safety. The costs of the proposed rule are in addition to the hundreds of millions of dollars already spent by the industry on these issues, which have now spanned nearly 20 years.

While this work was occurring, SawStop's owner, Dr. Stephen Gass, who himself is a patent attorney, filed over 140 U.S. patent applications and now has over 100 issued U.S. patents which pertain to the SawStop technology. Dr. Gass has told the CPSC that they should assume no manufacturer will be able to introduce injury mitigation technology that does not infringe his patents. In the absence of a government mandate, Dr. Gass has stated he is unwilling to provide a license.

In addition to the petition filed with CPSC, Dr. Gass has attempted to introduce legislation in the state of California, served as an expert witness in hundreds of product liability cases, filed a lawsuit against the USPTO, filed an unsuccessful antitrust case against the power tool manufacturers, filed a complaint against a manufacturer with the U.S. ITC seeking to bar entry of a competitive saw into the United States, and filed a patent infringement complaint in Oregon seeking a permanent injunction and damages. Many of these issues are ongoing and the complexities in this case will not be resolved by a mandatory CPSC action. In addition, the International Body of Experts has evaluated whether injury mitigation technology should be included in the IEC standard but determined it should not be included as a mandatory requirement. Therefore a mandatory CPSC rule would put U.S. consumers and industry at a competitive disadvantage to other countries.

It should be clear that due to patent concerns, as well as deficiencies in the briefing package, a decision by the CPSC to move forward with the rulemaking would be reckless and damaging. The Commission received an unprecedented 1,600 public comments to the ANPR on this matter, and under 2 percent of these comments were in support of the rule. Instead, the Commission heard from manufactures from all across the country that voiced concern over how overregulation would lead to their companies being forced out of business.

Job loss, a reduction of choice in the marketplace, price increases, and a government mandated monopoly are all very real concerns of a mandatory table saw rulemaking moving forward. As this hearing seeks to highlight ways in which burdensome regulations can have dire consequences for our manufacturing sector and the American economy as a whole, we hope the Senators will remember that the otherwise thriving power tool industry is currently at risk of this exact situation. We urge the Senate Committee to direct the CPSC to halt or delay the upcoming Commission vote and continue to work with industry and the voluntary standards process to address table saw safety.

Thank you for your time and consideration.

*February 1, 2017*

Hon. JOHN THUNE,
Chairman,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Dear Chairman Thune and Ranking Member Nelson:

Thank you for taking the time to address the critical topic of regulatory reform today. On behalf of the freight rail industry, I write you to offer our perspective on this important debate. As one of America's oldest industries, the freight railroads especially understand the proper balance between government oversight and ineffective intervention.

The world today is much different than it was even five years ago, and disruptive innovation will only accelerate greater change. This is especially clear in the transportation and logistics sectors, where industry, in cooperation with the Federal Government, nears deployment of autonomous highway vehicles that can talk with each other and to infrastructure.

For our part, railroads are installing Positive Train Control (PTC) technology, which will essentially automate certain safety-critical train operations. But we are also developing and using other innovative technologies—like wayside detectors that can hear flat spots on wheels as they go by or sense an overheated wheel, and ultrasonic rail inspection machines that can see defects in a steel rail too small for the human eye—to spot issues before they become problems and enhance safety and efficiency on the network. Today's railroads are in the technology business.

Such a dynamic environment requires a nimble and flexible regulatory structure. We cannot continue to strangle innovation with regulation.

As policymakers reform regulations, freight railroads propose the following broad principles for consideration:

- Regulations should be based on a *demonstrated need,* as reflected in *current and complete data and sound science.* They should have a well-defined and measurable objective, and be regularly evaluated as to their effectiveness in achieving it.
- All components of an agency's decision-making should be *transparent* to the public and *subject to meaningful analysis and comment* before the rule is finalized.
- Non-prescriptive regulatory tools, like *performance-based regulations,* should be deployed wherever possible to align the interests of the regulator and the industry, and to foster and facilitate innovation to achieve well-defined policy goals.
- Regulations should *provide benefits outweighing their costs,* and the *cumulative impact* with other regulations should be considered in every rulemaking.
- Use of "guidance" should be *limited to appropriate situations* and time periods.
- *Waivers and pilot programs should be a viable path* for industry to innovate without being tied down by archaic and outdated rules currently on the books.

Sincerely,

EDWARD R. HAMBERGER,
*President and CEO,*
Association of American Railroads.

AMERICAN CHEMISTRY COUNCIL
*February 1, 2017*

Hon. JOHN THUNE,
Chairman,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

RE: Committee Hearing, "A Growth Agenda: Reducing Unnecessary Regulatory Burdens"

Dear Chairman Thune and Ranking Member Nelson,

Thank you for convening this important hearing on regulatory burdens. The American Chemistry Council appreciates the opportunity to submit information for the record on issues impacting our member companies. This submission focuses on regulatory actions related to the transportation of chemical products.

ACC and its members are committed to the safe transportation of both hazardous and non-hazardous materials. Our member companies devote significant resources toward emergency response training and tank car safety. We support the Federal Government's comprehensive regulatory framework to mitigate safety and security risks. By working with carriers, policy makers and emergency responders, we have been able to help reduce the number of accidents and their impacts.

ACC has identified a number of regulatory actions by the Department of Transportation (DOT) that add unnecessary regulatory burdens without advancing safety. These actions include regulatory provisions as well as DOT interpretations and enforcement policies. The attached document outlines these specific concerns and suggests potential reforms.

Again, we commend the Committee for conducting this hearing. We look forward to working with the committee to further address a broad range of regulatory burdens facing our industry.

Sincerely,

CAL DOOLEY,
*President and CEO,*
American Chemistry Council.

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SOFTWARE & INFORMATION INDUSTRY ASSOCIATION
*Washington, DC, January 31, 2017*

Hon. JOHN THUNE,
Chairman, Commerce Committee,
United States Senate,
Washington, DC.

Hon. BILL NELSON,
Ranking Member, Commerce Committee,
United States Senate,
Washington, DC.

RE: SIIA Supports Focus on Regulatory Reform, Impact on Innovation

Dear Chairman Thune and Ranking Member Nelson,

On behalf of the Software & Information Industry Association (SIIA), thank you for holding the upcoming hearing, "A Growth Agenda: Reducing Unnecessary Regulatory Burdens." SIIA shares your concern about the unforeseen negative impact of various regulations on businesses and the economy. This is not only the case for the industrial and manufacturing sectors, but also for the technology sector, which is a major economic growth engine of the future.

SIIA is the principal trade association for the software and digital information industries. The more than 800 software companies, data and analytics firms, information service companies, and digital publishers that make up our membership serve nearly every segment of society, including business, education, government, healthcare and consumers. As leaders in the global market for software and information products and services, they are drivers of innovation and economic strength—software alone *contributes* $425 billion to the U.S. economy and directly employs 2.5 million workers and supports millions of other jobs.

SIIA has written about the tremendous opportunities of *Data-Driven Innovation* and the *Internet of Things (IoT).*[1] Economic benefit from the IoT ranges from $4 tril-

[1] SIIA white papers on *Data-Driven Innovation* and the *Internet of Things.*

lion to $11 trillion through 2025.[2] Businesses will be the top adopter of IoT solutions, leading the three key positive impacts on economic activity: (1) lowering operating costs; (2) increasing productivity; and (3) expanding to new markets or developing new product offerings.[3]

However, in this era of rapid technological development, ill-suited or outdated regulations can in some cases have a chilling effect on innovation and economic production. To maximize economic growth throughout the 21st Century, policymakers must not only be prudent about creating new regulations, but also conduct a thorough review of existing regulations. Many of the regulations governing industry today derive from statutes that are more than a decade old. In these cases, regulations either suffer from being outdated, or they have been revised by agencies to retrofit the evolution of technology, without clear guidance from Congress.

Therefore, regulatory reform should focus not only on ill-conceived regulations adopted in recent years, but also those that are well intended but no longer can be applied effectively to the 21st Century technology landscape. To create an environment better suited to economic and job growth, a rigorous cost-benefit analysis should be applied in the assessment of current and proposed regulations. The benefit of regulations must outweigh the limits to innovation and potential economic or consumer welfare that can be derived from new products and services.

As this Committee, as well as other congressional committees and the Trump Administration, assesses the impact of regulations on economic growth and job creation, we appreciate the focus on technology innovation by U.S. businesses, particularly small and medium-sized businesses that often disproportionately suffer from cumbersome regulations. We look forward to working with you to balance the need for regulations to continue protecting consumers, workers and the environment, while also maximizing innovation in a hyper-innovative IoT environment.

Sincerely,

KEN WASCH,
*President.*

cc: Members of the U.S. Senate Committee on Commerce

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U.S. CONSUMER PRODUCT SAFETY COMMISSION
*Bethesda, MD, January 30, 2017*

ESSAY REGARDING REGULATORY REFORM

*This essay was published on January 9 and 10, 2017, at www.regblog.org (a publication of the University of Pennsylvania Program on Regulation).*

As a Commissioner of the *U.S. Consumer Product Safety Commission* (CPSC), I have found that we could greatly improve the Agency's functioning by adopting several rulemaking procedures. Some of these procedures, like the publication of a regulatory agenda, are time-honored principles espoused by a long line of executive orders, while others, such as pay-go requirements that force agencies to consider the collective economic costs of their rules, are emerging practices used in other countries. Four key procedural steps could greatly improve rulemaking at CPSC and other independent agencies.

First, independent agencies like CPSC should be expected to improve the accuracy and timeliness of their regulatory agendas. The regulatory agenda concept began with *Executive Order 12044, issued* by President *Jimmy Carter* in 1978. Its plainly stated purpose *was* "to give the public adequate notice" of how agencies would be spending their time in the near term, which would *allow* for and encourage meaningful public participation in the regulatory process. The *Regulatory Flexibility Act* (RFA) extended the regulatory agenda requirement to all agencies, including independent agencies.

President *Ronald Reagan's Executive Order 12291* retained the agenda requirement and broadened it from significant rules to all rules. President *Bill Clinton's Executive Order 12866* added a requirement for the issuance of a regulatory plan, which would *highlight* "the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year." Most recently, President *Barack Obama's Executive Order 13563* expressly reaffirmed the principles and requirements of Executive Order 12866.

Despite a forty-year history of presidents and Congress uniformly endorsing the principle behind regulatory agendas so interested parties can plan their participa-

[2] McKinsey & Company. "*Unlocking the Potential of the Internet of Things.*" June 2015

[3] Business Insider. "*How the 'Internet of Things' will impact consumers, businesses, and governments in 2016 and beyond.*" John Greenough; July 2016.

tion in the regulatory process, CPSC appears not to have endorsed that principle. CPSC's *regulatory agenda* contains regulatory projects that have been entirely stagnant for years—some that have been around for decades. It also includes proposals that have been described as not being among the Agency's priorities, yet our attempts to align the agenda with the Agency's actual work have too often been summarily rebuffed. As a result, stakeholders must piece together disparate, and sometimes conflicting, statements from a variety of sources, rather than simply relying on the Agency's regulatory agenda to identify the Agency's priorities. The Agency's outdated agendas run the risk of not only under-informing the public, but also actively misleading them as to what projects the Agency will spend its time on in the coming year.

Second, in addition to issuing more accurate regulatory agendas, independent agencies' proposed rules should be subjected to external review. Executive orders have established that the *Office of Information and Regulatory Affairs* (OIRA) must *review* all of Executive Branch agencies' significant regulatory proposals—which are generally those that have an annual economic impact of $100 million or more. This external review requirement currently does not extend to independent agencies. However, some legislative *proposals* would provide for independent agencies to submit some or all of their proposed rules to OIRA for review.

Such legislation is needed because the principles that support external review of executive agencies' proposed rules also apply to independent agencies. For example, CPSC's proposed *revisions* to its *Certificates of Compliance rule* have been the target of substantial criticism in part because of assumptions surrounding the rule's regulatory burden. If OIRA or another external reviewer had vetted the proposal, that reviewer might have identified problems with those assumptions and allowed us to present a sounder proposal.

This is not to suggest that CPSC or any other agency is sloppy in its work. To the contrary, talented, dedicated public servants draft CPSC's rules that staff believe are in citizens' best interests. However, even experts with the best intentions can make mistakes. CPSC does not have a monopoly on good ideas, and we should seek wisdom wherever we can find it.

Moreover, on occasion I have seen staff's analysis function less as the objective opinion of experts and more as a *post hoc* justification of a decision that had already been made based on political considerations. Independent review will help ensure that CPSC's decisions are based on career technical staff's expertise, not on politics.

Review by an outside entity can also provide a more holistic view of the regulatory landscape by incorporating views of other parts of government. As former OIRA Administrator *Cass Sunstein* has written, OIRA *serves* as "an information aggregator." Particularly in an area like product importation—where CPSC shares the regulatory space with dozens of partner agencies that are led by *U.S. Customs and Border Protection*—OIRA's administrative omniscience can ensure we neither duplicate nor contradict the messages stakeholders receive from other agencies.

Third, CPSC and other independent agencies should do a better job implementing best practices for public participation in the rulemaking process. Too often, CPSC has failed to go beyond the minimum requirement for public participation established under the notice-and-comment structure in the *Administrative Procedure Act* (APA). As a result, CPSC has forsaken opportunities to obtain critical public input that could have greatly enhanced regulatory decision-making.

For example, the *advisory panel report* underlying CPSC's proposed *rule* on phthalates in some children's products only underwent a closed, invitation-only peer review, rather than public peer review of the kind that for some instances is expressly *recommended* in the *Office of Management and Budget's* (OMB) *Final Information Quality Bulletin for Peer Review.* OMB's recommendations, of course, do not apply to independent agencies like CPSC, but their lack of legal or administrative force does not diminish their wisdom.

In the phthalates rulemaking, the result was that the advisory panel's failure to consider vital data was repeated in the Agency's notice of proposed rulemaking, forcing the Chairman to direct staff to fill in that data gap and *re-open* the comment period. Thanks to the Chairman's intervention, we were able to develop the record with public comment on *all* the data. However, earlier public participation—such as the kind of public peer review recommended by OMB—could have spared the Agency embarrassment and improved the quality of our work.

Finally, in addition to deploying best practices for regulatory agendas, external review, and public participation, both executive and independent agencies should consider the use of an emerging regulatory practice known as "pay as you go." Colloquially shortened to "pay-go," this requirement would force agencies to view regulation-imposed economic costs as a finite resource and thoughtfully consider how they use that resource. A pay-go requirement would demand that agencies remove commensurate cost burdens from their books for each additional cost burden they create through a new rule. A related concept of a "regulatory budget" would set a maximum amount of economic costs that could be imposed through regulation.

Pay-go and regulatory budgets could be applied either at an agency or government-wide level. For example, in an agency-level pay-go model, before promulgating a new rule, CPSC would have to repeal a current rule or rules that impose a comparable economic burden. A government-wide model would allow the repeal of a rule promulgated by another agency to offset the costs of a new CPSC mandate. Under either model, agencies—either individually or collectively—would have to prioritize their activities and decide where they want to allocate their finite burden resources.

The pay-go model has been resoundingly successful in the United Kingdom. What began as a "One-in, One-out" program evolved to "One-in, Two-out," which "*meant* that for every pound of cost that new domestic regulation imposed on business, two pounds of cost had to be removed through deregulation." As a result of this program, "the Government has *reduced* the annual cost to business of domestic regulation by almost £2.2 billion." Moreover, the reforms have improved not just the economic climate but the economic mood as well, as the percentage of businesses that find government regulation "fair and proportionate" has *risen* from under 40 to over 60 percent over the course of seven years. In fact, this program has been so successful, that the UK has now moved to "*One-in, Three-out.*"

It remains to be seen whether the precise structure of "One-in, Two-out"—or any pay-go model—is appropriate for the American regulatory state. However, the United Kingdom's experience demonstrates that when agencies face the same kinds of constraints their constituents face, they will do what their constituents must do: adapt and survive.

Codifying the four reforms proposed here would go a long way toward improving the rulemaking process at independent agencies and helping ensure that the public can be better protected and the economy less burdened. However, as CPSC's failure to use its Regulatory Agenda for its intended purpose underscores, the codification of new procedures will not be enough. The RFA already imposes a statutory obligation for CPSC to issue regulatory agendas, but this has not been enough to compel CPSC's full obedience with the spirit of that requirement. Even if every reform I have described in this essay is enacted, they will remain paper reforms unless supported by the continued attention of a watchful Congress.

When conducting the analysis needed to inform sound regulatory decision-making, independent agencies could benefit from following key analytical standards that over the years have been imposed on Executive Branch agencies by executive orders. As a Commissioner of the *U.S. Consumer Product Safety Commission* (CPSC), too often I have seen my Agency depart from these analytical best practices, which then can lead to misinformed and even unnecessary regulations. Regulatory decision-making at independent agencies like CPSC would benefit from adherence to four main analytic requirements contained in executive orders.

First, independent agencies should be required to identify a market failure before promulgating a new regulation. Currently, *Executive Order 12866,* which applies to executive but not independent agencies, provides that regulation can be justified on the basis of "material failures of private markets to protect or improve the health and safety of the public." CPSC's authorizing legislation does state that the Agency can only issue mandatory product safety standards if either no voluntary standard addresses a detected risk or if industry fails to comply with an existing standard. However, this legislation does not expressly limit the Agency to stepping in only where private markets have failed.

Too often, CPSC focuses on regulation in the absence of a demonstrated market failure. For example, many have *called on* CPSC to address the significant number of hand and finger injuries among users of table saws. Those advocates want us to mandate the use of Active Injury Mitigation (AIM) technology to prevent many of these serious injuries. This technology, they argue, is already on the market, with versions from two different manufacturers, so compliance with a future mandate would be feasible.

However, the fact that two companies already make AIM-equipped saws actually suggests that we do not need a rule: The market has not failed. Consumers are well aware of the risk that a spinning blade poses, and they can already choose an AIM-equipped saw to mitigate that risk. If they do not choose such a saw—whether because they do not like the technology or because they do not believe that the benefits justify the added cost—their informed choice is part of a functioning market, not a failed one.

If CPSC were to require AIM technology on all saws, we would not be repairing the market but rather *im*pairing it. We would be favoring two firms over their competitors, imposing a cost that informed consumers can presently choose to avoid. If the "market failure" language of *Executive Order 12866* applied to CPSC by statute, we would have to demonstrate that the consumers were being harmed because they lacked the information to make a choice, not just that consumers are making choices we do not like.

Second, the kind of cost-benefit analysis required of Executive Branch agencies would lead to better rules at CPSC and other independent agencies. For example, starting in 1981, *Executive Order 12291* called for executive agencies "to maximize the net benefits to society." Although this order was subsequently replaced by *Executive Order 12866,* which was later supplemented with *Executive Order 13563,* these more current orders also state that agencies should choose regulations that "maximize net benefits." A similar concept is Executive Order 12866's principle *that* "each agency . . . tailor its regulations to impose the least burden on society," a principle that *Executive Order 13563* retains.

When developing product-specific safety standards, CPSC already operates under even clearer mandates than these executive orders provide. Under Section 9 of the *Consumer Product Safety Act* (CPSA), in order to mandate a safety standard for a particular product or product category, CPSC must *analyze* the costs and benefits of the proposed standard, must *explore* any alternatives, must *ensure* the costs bear a reasonable relationship to the benefits, and must *select* the least burdensome option.

The value of Section 9 is not just that it provides an analytical framework, but also that it allows for judicial review, as we saw recently in the *10th Circuit's decision* to strike our magnet rule because of uncertainty in our cost-benefit analysis. Although having a rule thrown out is not pleasant for the agency, if we take to heart this reminder of the importance of the Section 9 analysis, our future rules will be better and sounder for the effort.

For any of our rules that are not product safety standards, however, no similar requirement for cost-benefit analysis applies.

As a result, CPSC fell short of standard cost-benefit principles in developing its rule detailing the testing that children's product manufacturers must *undertake* to certify that their products comply with applicable safety standards. The *Consumer Product Safety Improvement Act* (CPSIA) required such testing and certification, and it required the Agency to issue a rule *setting* forth the "protocols and standards" for the testing. The Agency dutifully issued a testing *rule,* but it pointedly did not undertake a full cost-benefit analysis. Indeed, in response to comments suggesting cost-benefit analysis, the Agency flatly refused, *noting* that because the rule was not a safety standard under Section 9 of the CPSA the Agency was not required to complete a cost-benefit analysis.

Even if a law does not require cost-benefit analysis, it is still prudent for an agency to undertake one. CPSC's testing rule would have been better informed by analyzing manufacturers' compliance costs and the benefits consumers would get in exchange. We owe it to consumers to ensure that regulations will maximize their best interests. Even if a full cost-benefit analysis would have only supported the Agency's testing rule, we would still have had the benefit of added confidence in our decision.

Third, agencies—whether executive or independent—should be expected to assemble the best available scientific evidence to inform their regulatory decisions. Executive Orders 13563 and 12866 recognize this principle, *observing* that "our regulatory system . . . must be based on the best available science." Executive Order 12866 *calls* upon agencies to ground their decisions on the "best reasonably obtainable scientific, technical, economic, and other information." During his first term, President *Barack Obama* also issued a *memorandum* requiring that executive agencies put in place rules and procedures that ensure the use of the highest quality science in regulatory development.

At CPSC, the *Chronic Hazard Advisory Panel* (CHAP) report on phthalate exposure is an example of the desire for new regulations that do not reflect current science. Despite the availability of data on the current state of phthalate usage by manufacturers, the CHAP chose to use data that were nearly a decade old. An outside review *found* that "the CHAP report is not a systematic review of the available scientific evidence and, as such, is of questionable reliability and validity, lacking in the objectivity and transparency generally recognized as critical by the scientific community."

CPSC staff, at the Chairman's direction, have accepted this criticism and undertaken an internal review using more recent data; however, other problems remain. The final rule may go beyond our statutory mandate by using a novel, unproven cumulative risk assessment as a way to justify banning certain phthalates. Mere novelty is, of course, not a reason to disregard an analytical method or its conclusions. However, when novel concepts form the core of a regulatory effort, agencies should take extra care to ensure those methods bear the hallmarks of scientific validity.

Unfortunately, the sound science requirements contained in the *Information Quality Act* do not "explicitly *provide* for judicial review." Codifying the best sound science practices found in executive orders and in President Obama's memorandum on scientific integrity, along with providing for more robust judicial review of agencies' scientific analysis, would help ensure independent agencies like CPSC use the best available data and methods when crafting new rules.

Finally, President Obama's *Executive Order 13610* calls for executive agencies to engage in retrospective review of existing regulations and report on their progress to the White House *Office of Information and Regulatory Affairs.* No matter how thoughtful an agency's promulgation of a rule may be, there will always be potential for improvements. Agencies' vision can be obscured by market complexities, unquantifiable forces, or emerging trends. Although human beings may be naturally inclined both to resist change and to prefer the allure of solving a new problem instead of revisiting their solution to an old problem, agencies need to set those inclinations aside if they wish to ensure their regulations function properly as a whole.

CPSC has had a mixed history with retrospective review. Even prior to the issuance of President Barack Obama's call for retrospective review, CPSC had *conducted* its own retrospective examinations. However, the resource demands of the myriad rules required under the CPSIA diverted the Agency's focus, and its retrospective review program *was* dormant for several years. Spurred by the Obama Administration's emphasis on retrospective review, the Agency *sought* to revive its retrospective review efforts, but the Commissioners were initially *unable* to reach consensus on how to proceed. Recently, CPSC unanimously *adopted* an important *plan* that does comply with the spirit of *Executive Order 13610.* That plan includes additional elements of an institutional culture of review, such as calling for the Agency to *incorporate* "retrospective review provisions in new rulemakings." I hope CPSC can become a leader in this regard as it puts its retrospective review plan into action.

Overall, independent agencies would do well to adopt all four requirements currently applicable to Executive Branch agencies. They should be expected to make a threshold finding of market failure before proposing new regulations, conduct robust cost-benefit analysis of new rules, take steps to rely only on the best available science, and put in place plans to undertake serious retrospective review of existing regulations. In these ways, agencies like CPSC can better ensure that their regulations are truly working to serve the public's best interests.

JOSEPH P. MOHOROVIC,
*Commissioner.*

The CHAIRMAN. I just want to point out in closing, too, because of a lot of discussion about this today, and I don't think this needs to be, and shouldn't be, a Republican versus Democrat or big government versus small government argument; this ought to be about smart regulation and doing things that make sense.

And I just want to say again, President Obama's Cass Sunstein, he was the top overseer of Federal regulations for much of the Obama administration, he wrote in January of last year about agency compliance with this requirement that's been in place for a long time, going back to President Reagan. He said, and I quote, "Agencies don't always obey them, and sometimes they aren't transparent enough about the costs and benefits of new rules." And I think that's something that we ought to take as a cautionary note from someone who was in a position to know.

And then he went on to say that he recommended requiring every regulatory agency, by statute, to produce an annual report on its progress in cutting regulatory costs. And, in fact, the Obama administration claimed $22 billion in savings from its own regulatory lookback.

So all we're simply saying here is this ought to be something that we do to try and ensure that the regulations that are there, that are designed to promote and protect public health and safety are just that, but that regulation for regulation's sake can be excessive, and it has a consequence, it always has a cost, and I think that that cost is borne by a lot of individuals, in my state, farmers and ranchers and small business people.

I can tell you, I probably, in traveling my state last year, because I was running for reelection, have never had a time where I've had more just people volunteer to me when you talk about issues, and it didn't matter whether it was agriculture or energy or manufacturing, it always came back to regulations and the cost of regulation.

And so I think this is a serious issue, and I certainly, and I think Members on both sides take it seriously, but we can do a much better job, and hopefully in a way that preserves the important elements of our regulatory environment in this country, but that does away, pares back, a lot of this stuff that just ends up adding tremendous cost to our economy and sacrificing economic growth, which ultimately is, again, paid by consumers in this country in the form of lower wages and fewer better paying jobs and a lower standard of living.

So I appreciate everybody's testimony today. There will be an opportunity if you would like to submit additional questions. Senators are encouraged to do that for the record. And then I would ask our panelists, upon receiving those, to submit their written answers to the Committee as soon as possible.

And with that, this hearing is adjourned. Thank you.

[Whereupon, at 12:31 p.m., the hearing was adjourned.]

# APPENDIX

AMERICAN CABLE ASSOCIATION
*Pittsburgh, PA, January 31, 2017*

Hon. JOHN THUNE,
Chairman,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

Dear Chairman Thune and Ranking Member Nelson:

The American Cable Association (ACA) wishes to express its support for this Committee's hearing on the negative impacts of unnecessarily burdensome regulations on diverse sectors of our Nation's economy, including the communications sector in which ACA's members operate. ACA represents roughly 750 small and mid-sized companies that offer video, broadband Internet, and telephony services to nearly 19 million homes nationwide, including in rural areas that are unserved by larger providers.

To supplement the hearing's record, ACA identifies in this letter several outdated and burdensome regulations that especially affect smaller telecommunications service providers that should be modified or eliminated. ACA has previously identified these regulations to the Federal Communications Commission (FCC) as part of its 2016 Biennial Review of Telecommunications Regulations. These regulations are by no means a complete list of the undue regulatory burdens faced by ACA members in their provision of video, broadband, or telephone services.[1] This is, however, a good starting point for what we hope will be an ongoing effort to eliminate or modify regulations to spur economic growth and innovation in the communications industry and beyond.

*Universal Service Fund Contribution Requirements.* ACA has proposed several changes to the Universal Service Fund (USF) contribution requirements that would reduce regulatory burdens on smaller telecommunications providers. First, ACA recommends increasing the USF *de minimis* exemption from its current contribution-based threshold of $10,000 to a revenue-based threshold of $200,000. The existing contribution-based *de minimis* exemption creates administrative burdens and uncertainty for many qualifying providers, who must still file the quarterly Telecommunications Reporting Worksheet and contribute on a quarterly basis if they are unsure whether they will meet the existing *de minimis* threshold. By raising the threshold and using a revenue-based, rather than a contribution-based, threshold would relieve operators of many of the associated administrative requirements, and would protect against the effective reduction of the threshold in the future if contribution rates continue to grow as they have over the past decades.

Second, ACA recommends a downward revision of the safe harbor for allocating VoIP traffic as interstate communications from 64.9 percent to 22.1 percent.[2] In determining how to calculate its required universal service contributions, a VoIP provider may either provide studies of their actual traffic patterns, or they may rely on the safe harbor established by the FCC. The existing safe harbor, which was created in 2006, is a highly inflated proxy for interstate revenues that does not accurately reflect today's mix of VoIP traffic. Although many larger providers opt not to use the safe harbor because it is so uneconomical, smaller operators do not have

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[1] The regulations identified in this letter only include those that apply to the operations or activities of telecommunications service providers, which were the regulations for which the Commission sought comment in the 2016 Biennial Review Public Notice.

[2] In 2012, the FCC indicated that "the average percentage of VoIP traffic studies is 22.1 percent interstate/international, with the media study reporting 14.7 percent interstate/international." *Universal Service Contribution Methodology, A National Broadband Plan for Our Future,* WC Docket No. 06–122, GN Docket No. 09–51, Further Notice of Proposed Rulemaking, FCC 12–46, ¶ 125 (rel. Apr. 30, 2012).

the resources necessary to prepare and file the multiple traffic studies that are required to demonstrate their actual traffic ratios. Thus, these small operators are placed at a competitive disadvantage, and their customers are forced to overpay the universal service contribution (and other fees keyed to the Form 499).

Relatedly, ACA recommends a repeal of the unnecessary traffic study requirements for providers that seek to allocate the jurisdictional percentages of their VoIP revenue. At present, VoIP providers who wish to use this method of calculating their interstate contributions must submit a traffic study with each quarterly Form 499–Q, which imposes a significant administrative burden and legal cost. Instead, small providers should be permitted to rely on the prior year's traffic study when preparing Form 499–Qs and require only one traffic study filing annually in connection with the Form 499–A. Additionally, a VoIP provider that determines its jurisdictional allocations by measuring 100 percent of its traffic for the reporting period should not be required to file a traffic study.

*Broadband Reporting Form 477.* In 2013, the FCC assumed responsibility for the collection of broadband deployment data, and revised its Form 477 collection, which is mandatory for all wireline and mobile wireless providers. In adopting its rules, the FCC sought to alleviate burdens on filers, but did not provide any exemptions or additional relief for small providers, claiming that the benefits of collecting information from small providers outweighed the costs. ACA believes that the FCC could relieve the burdens on smaller operators while still maintaining sufficiently accurate data by instituting an annual, rather than biannual, filing process for small providers. Over the past several years, the FCC has developed a sound database of deployment data, including deployment trends. Further, the Broadband Data Improvement Act only requires the FCC to make an annual assessment, so there is no need to require small providers to file twice a year.

*Rural Call Completion.* In establishing rules to address concerns about call completion in rural areas, the FCC sought to balance its need to collect complete data with the significant burdens the new data collection and reporting requirements would impose on smaller providers. Accordingly, it limited its definition of Covered Provider to providers that make the initial long distance call path choice for more than 100,000 domestic retail subscriber lines. ACA supported this outcome, providing evidence that the "proposed monitoring and reporting requirements would be onerous for ACA members" and noting that the quality of the data collection would suffer little since the vast number of voice subscriber lines are controlled by mobile wireless operators (about 75 percent) and the top ten multiple system operators controlled more than 95 percent of the lines supplied by cable operators. Nonetheless, ACA members with more than 100,000 subscriber lines still find that the burdens of compliance are significant. Thus, ACA proposes that the Covered Provider threshold be increased to at least 250,000 subscriber lines, if not more. Such an increase would be consistent with the definition of—and exemption for—small broadband Internet access providers in legislation passed in the House of Representatives this year and a bill approved by this Committee last year. ACA also suggests creating a safe harbor for compliance for Covered Providers with more than the threshold number of lines so long as they require in their access tariff or via contracts with long distance providers that the long distance provider complete calls they originate in compliance with the Commission's rules.

Thank you again for the opportunity to provide this Committee with information regarding some of the unnecessarily regulatory burdens faced by small telecommunications providers. ACA looks forward to working with this Committee in the future as it seeks to explore how a smarter regulatory approach can create jobs and spur economic growth.

Sincerely,

MATTHEW M. POLKA,
*President and CEO,*
American Cable Association.

NATIONAL VENTURE CAPITAL ASSOCIATION
*February 1, 2017*

Hon. JOHN THUNE,
Chairman,
Senate Committee on Commerce,
Science, and Transportation,
United States Senate,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Senate Committee on Commerce,
Science, and Transportation,
United States Senate,
Washington, DC.

Dear Chairman Thune and Ranking Member Nelson:

On behalf of our Nation's venture capital investors and the entrepreneurs they support, thank you for calling a hearing on "A Growth Agenda: Reducing Unnecessary Regulatory Burdens." We welcome the opportunity to share our perspective on regulatory challenges faced by startups and their investors that are within the Committee's jurisdiction.

**Government procurement of advanced technology**

Venture-backed startups are pushing boundaries with new technologies and work tirelessly to deliver new products and services into the hands of consumers. We are witnessing the rapid adoption of these products and services in the private sector, but unfortunately the Federal Government is often behind in acquiring the best technology due to government procurement challenges encountered by startups. The unfortunate reality is U.S. procurement law and policy favors large companies with teams of lawyers and compliance officers and disfavors small, but growing, startups that often have the most innovative products. By working to improve the procurement process for agencies within its jurisdiction, the Committee can promote dynamic, young companies and ensure our government is using the best technology as it works to safeguard the Nation.

We suggest two approaches the Committee can take to improve acquisition law and policy. First, the Committee can use its oversight function to encourage various departments to avail themselves of startup technology. Some departments are better than others are at building relationships into the entrepreneurial community to source new technology rather than continue to purchase from established players. For example, the Department of Defense established the Defense Innovation Unit Experimental (DIUx) to "continuously iterate on how best to identify, contract, and prototype novel innovations through sources not traditionally available to the Department of Defense."[1] With offices in Silicon Valley and Boston, DIUx has been successful at building strong contacts with venture capitalists and startup founders to determine what technology is coming next and how the Department of Defense can acquire it for the war fighter. We believe this is a model that can be replicated within other Federal agencies and encourage the Committee to advocate as such with the agencies within its jurisdiction.

Second, the Committee should work with agencies within its jurisdiction to modify procurement practices to encourage startup engagement. In 2015, the Department of Homeland Security (DHS) developed "an Innovation framework to be implemented utilizing the flexibility of an Other Transaction Solicitation (OTS) to engage non-traditional Government contractors, including start-up companies."[2] DHS believes that "[t]hrough *non-dilutive funding* and providing *opportunities for operational testing and market access* [it can] incentivize product developers to open the aperture of their development roadmaps to include homeland security solutions."[3] DHS has further explained that

> [t]his Innovation OTS will employ a streamlined evaluation approach where, in response to a call, vendors submit a short written application, and, at DHS' discretion, the vendor may be subsequently asked to provide an oral presentation or pitch . . . the anticipated time to award after notification that an application has been selected for funding is 30 days.[4]

We commend DHS's efforts to ease the procurement process for startups and believe Federal departments within the Committee's jurisdiction would also benefit from such an approach.

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[1] Defense Innovation Unit Experimental, "Mission," available at *https://www.diux.mil/*.

[2] Department of Homeland Security Science and Technology (S&T) Directorate; Silicon Valley Office 5-Year Innovation Other Transaction Solicitation (OTS), HSHQDC–16–R–B0005, available at *file:///C:/Users/jeff.farrah/Downloads/DHS_ST_Innovation_5-Yr_OTS_v3_12-09-2015.pdf*.

[3] *Id.* (Emphasis in original)

[4] *Id.*

**Fintech and regulatory uncertainty**

Financial technology (or, "FinTech") is an area of significant interest to venture capital investors that shows great promise for the American consumer. Venture investment into FinTech reached $6.6 billion in 2015, up dramatically from just over $1 billion in 2011.

The public is witnessing tremendous innovation and growth with fintech startups. However, as technology companies operating in the financial services space, a number of regulatory agencies are wading into these waters. With the attention of each different regulatory agency comes new uncertainty. The Federal Trade Commission (FTC) has organized a number of fintech forums focusing on regulatory issues. We welcome the FTC's approach to listening and collecting information on the industry, but we caution against any regulatory action directed at these companies without a comprehensive look at regulatory activities by other agencies, as well as evaluating the state-by-state regulatory requirements that many of these companies go to great lengths to ensure compliance.

The entrepreneurial ecosystem thanks you for your leadership in calling attention to regulatory challenges. We stand ready to assist the Committee as you further examine this important policy matter.

Sincerely,

BOBBY FRANKLIN,
*President and CEO.*

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CTIA
*Washington, DC, February 1, 2017*

Hon. JOHN THUNE,
Chairman,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Dear Chairman Thune and Ranking Member Nelson,

Thank you for convening today's hearing in the U.S. Senate Committee on Commerce, Science, and Transportation to examine the impact of unnecessarily burdensome regulations on our Nation's economy and explore how a smarter regulatory approach would create jobs and spur economic growth. The U.S. wireless industry serves as an integral driver of America's economy, investing over $300 billion in America's infrastructure and economy in the past ten years alone.

The U.S. mobile ecosystem leads the world and the next generation of wireless networks, 5G technology promises up to 3 million new American jobs according to a recent study by Accenture Strategy. Remarkably, 1 out of every 100 Americans will have a new 5G job. 5G will also contribute an additional $500 billion in U.S. GDP. In addition to unlocking substantial growth and economic gains in communities across the country, 5G powered Smart City solutions will produce $160 billion in benefits and savings by reducing energy usage, decreasing traffic consumption, and lowering fuel costs.

Encouragingly, your hearing is focused on how we ensure our regulations help facilitate this type of next-generation investment in American jobs and communities. To realize our full potential, we need greater access, cost-based fees, and streamlined processes that reflect new technologies and will help make 5G and the Internet of Things a reality. Specifically, we must improve access to government-owned infrastructure, like utility poles and rights of way. Second, we must ensure reasonable rates for accessing this infrastructure that reflect the economics and architecture of today and tomorrow's wireless networks. Finally, we must simplify zoning processes with reasonable timetables and more uniform procedures for approving wireless infrastructure deployments.

Thank you again for convening this hearing and for your leadership in ensuring that regulatory and infrastructure policies will facilitate job creation and economic growth. I respectfully request that this letter and the attached Accenture Strategy study. "Smart Cities, How 5G Can Help Municipalities Become Vibrant Smart Cities" be submitted for the record at today's hearing. We look forward to working with you on a comprehensive growth agenda moving forward to promote innovation and investment in our mobile-first lives.

Sincerely.

MEREDITH ATTWELL BAKER.

ATTACHMENT

accenturestrategy

# How 5G Can Help Municipalities Become Vibrant Smart Cities

## Executive Summary

**For decades, the evolution of communications technology has laid the foundation for broad economic growth across the United States benefitting towns and cities large and small. The next generation of wireless network infrastructure will be built using small-cell networks employing 5G wireless technology. The connectivity and computing capacity unleashed by these high-speed wireless networks will bring the power of Smart City solutions to municipalities across the country.**

This can transform local economies. Research has suggested that Smart City solutions applied to the management of vehicle traffic and electrical grids could produce $160 billion in benefits and savings through reductions in energy usage, traffic congestion and fuel costs. These 5G attributes will enable cities to reduce commute times, improve public safety and generate significant smart grid efficiencies.

Beyond the benefits of pervasive Smart City technology, the potential gains from the deployment process for such technology are also significant since telecom operators are expected to invest approximately $275 billion in infrastructure, which could create up to 3 million jobs and boost GDP by $500 billion.

Full realization of the economic growth and cost savings from leveraging Smart City solutions built on 5G infrastructure will, however, depend on how robustly 5G networks are deployed locally, and will require different approaches from those used in the past. The network deployment build of 5G will involve 10 to 100 times more antenna locations than 4G or 3G. These cells are small – the size of a shoe box – and are critical not only for delivering the speed and capacity promised by this next generation of wireless, but also for supporting the increased number of devices that will be connected to the network in the future.

### 5G Economic Impacts

| | |
|---|---|
| **Investment** | $275 Billion |
| **Jobs Created** | 3 Million |
| **GDP Growth** | $500 Billion |

## Smart City Technology & 5G Are Expected to Benefit All Community Sizes

| | Saratoga, CA<br>29,900 Pop. | Beaumont, TX<br>118,000 Pop. | Metro Chicago, IL<br>9,472,000 Pop. |
|---|---|---|---|
| Jobs Created | 300 | 1,000 | 90,000 |
| GDP Growth | $50M | $180M | $14B |
| Network Investment | $20M | $100M | $8B |
| Smart Grid + Transportation Benefits | $10M | $70M | $5B |

To support the increased density of small cells that will be required to obtain both the economic and Smart City benefits enabled by 5G wireless networks, there are a number of steps municipal leaders should take to encourage telecom operators to invest in deploying next-generation infrastructure in their municipalities.

Today, many municipalities require approvals and fees based on the historical deployment of large towers that can be more than 250 feet tall. The shift from traditional large wireless towers to small-cell sites – affixed on locations from lamp posts to utility poles – will require a streamlining of the permitting process governing wireless infrastructure deployment and an appropriate adjustment in permit areas.

If municipal and regulatory leaders wish to reap economic benefits, including jobs and GDP growth, and accelerate their journey to becoming a Smart City, they should strive to be among the first to streamline permitting, change their fee structures, and reduce regulatory hurdles to support the new small-cell deployment model required for this next generation of wireless technology.

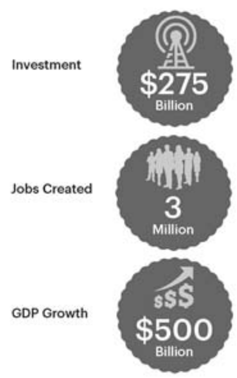
# The Next Generation of Wireless Technology Will Fuel Economic Growth

The full potential of Smart Cities will be unlocked by 5G networks and small cells, creating jobs as well as entire new industries. Communities that support 5G wireless technology will see significant economic and community benefits. This next generation of wireless technology is expected to create 3 million new jobs and boost annual GDP by $500 billion, driven by a projected $275 billion investment from telecom operators.

## Direct Economic Benefits

As telecom operators build out their networks, they are expected to invest across the country. Our analysis indicates that U.S. telecom operators could invest approximately $275 billion over seven years to deploy next-generation wireless technology, with trials beginning as early as 2017 in select cities.[1] Of that $275 billion, $93 billion is expected to be spent on construction, with the remainder being allocated for network equipment, engineering, and planning.

5G Economic Impacts



## 5G Is Expected to Benefit All Community Sizes

| | Saratoga, CA<br>29,900 Pop. | Beaumont, TX<br>118,000 Pop. | Metro Chicago, IL<br>9,472,000 Pop. |
|---|---|---|---|
| **Jobs Created** | **300** | **1,000** | **90,000** |
| **GDP Growth** | **$50M** | **$180M** | **$14B** |

Deploying the infrastructure required for 5G will also create jobs. We estimate that approximately 50,000 new construction jobs will be created each year over the 7-year buildout period. When we consider the effects on suppliers and other partners, and their spending in the economy, the full impact from construction spending alone could be approximately 120,000 jobs created each year during the first seven years of deployment.[2]

### Broader Economic Benefits

Though the direct jobs and investment to be expected from deploying 5G are significant, the broader economic benefits associated with an improved wireless communications network are even greater. Based on research into the benefits of adopting the next generation of wireless technology,[3] we expect 5G could help create 2.2 million jobs, and approximately $420 billion in annual GDP, spread across small, medium and large communities in the U.S.[4]

Another of 5G's contributions to generating jobs and economic growth will be providing the benefits of high-speed broadband to the 5% of Americans who currently do not have access. Because faster Internet connections allow users to utilize video applications for telecommuting, or participate in e-learning courses that give them additional skill sets or certifications, their employability and earning power increases, thus creating a more competitive workforce in different localities – which would, in turn, attract higher-paying jobs to these communities. If localities embrace 5G, and citizens who are not already online become adopters, we could see an additional $90 billion in GDP, and 870,000 in job growth.

Communities of all sizes are likely to see jobs created. Small to medium-sized cities with a population of 30,000 to 100,000 could see 300 to 1,000 jobs created. In larger cities like Chicago, we could see as many as 90,000 jobs created.

On a state level, there will also be significant economic benefits. Analyzing a sample of different-sized states across different regions, the number of jobs created in the short-term as a result of network deployment is expected to be significant for both large and small states, with California seeing more than 11,000 jobs created.

While the deployment of 5G wireless networks will bring near-term economic benefits, it will also help to ensure that U.S. communities remain competitive over the longer term by allowing them to fully leverage Smart City technology, and ensuring the latest wireless communications technology is available to citizens and businesses. The job impact for larger states could be considerable; California could see as many as 375,000 long-term jobs created.

## Expected Number of Jobs Created by State

| State | Network Deployment | Increased Competitiveness |
|---|---|---|
| California | 11,000 | 375,000 |
| Florida | 6,000 | 195,000 |
| New York | 5,000 | 190,000 |
| Oregon | 1,100 | 39,000 |
| South Dakota | 200 | 8,000 |

# Smart City Growth Will Be Accelerated by Next-Generation Wireless

The Smart City applications currently leveraging today's wireless networks are already showing significant benefits to communities. Building on the foundation of 4G LTE, 5G will accelerate these Smart City benefits.

The key attributes of 5G that will benefit Smart Cities include higher speeds; more connections – thus enabling wireless connectivity in unprecedented locations, ranging from street lights to sewer holes; quicker, more adaptive response times that support time-sensitive applications, such as vehicle-to-vehicle communications; and ultra-low-power connections, such as sensors for leak detection in water mains, since, in many cases, the replacement cycle is directly related to battery life.

We have picked three areas – energy/utilities, transportation, and public safety – to showcase what is possible when municipalities welcome next-generation wireless technology. These examples also illustrate how wireless connectivity is already creating jobs, generating municipal efficiencies, and increasing government revenue.

## 5G: Technology to Meet the Growing Demands of Smart Cities

## Energy & Utilities

Smart Grid. 5G technology will help unleash the next wave of Smart Grid features and efficiency. Across the U.S., Smart Grid benefits are estimated to be as high as $2 trillion dollars over 20 years.[5]

By allowing many unconnected, energy-consuming devices to be integrated into the grid through low-cost 5G connections, 5G enables these devices to be more accurately monitored to support better forecasting of energy needs. By connecting these energy-consuming devices using a smart grid, demand-side management will be further enhanced to support load balancing, helping reduce electricity peaks and ultimately reduce energy costs.

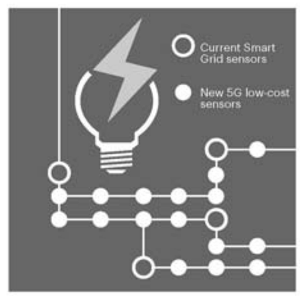
Capturing this data through 5G connections will further enable larger cities, or even state-level jurisdictions, to plan expensive energy infrastructure spending more efficiently and reduce downtime. In the event of power failure, smart grid technology enables precise, real-time diagnosis, down to the specific pole or transformer affected by an outage, which speeds up repairs and reduces downtime. For example, by installing smart grid technology, Chattanooga, TN, a medium-sized town, reduced the duration of outages by over 50% during a severe windstorm and saved the utility $1.4 million* in operational costs for just one storm.[6]

Last but not least, 5G is itself more cost effective and energy efficient than past generations of wireless technology, thus making its own contribution to energy savings.

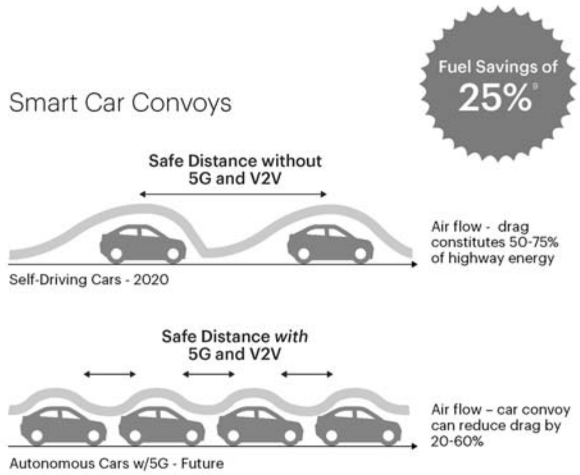
**Smart Lighting.** By automatically dimming public lighting when no pedestrians or vehicles are present, smart lighting can save power and reduce light pollution while still keeping neighborhoods safe. Smart lighting has begun to be rolled out in cities such as San Diego and Barcelona[7] as part of a larger Smart City initiative. Through its system, San Diego will save an estimated $1.9 million[8] annually through the installation of these street lights. Across the U.S., the potential savings from this approach are estimated to be more than $1 billion per year.

Smart lighting connected to a city's broadband network can also monitor local air quality. Adding this level of connectivity to smart LED lighting can also reduce the lighting system's maintenance costs.

Smart Energy Grid




5G enables additional low-cost connections to provide comprehensive coverage of the energy grid.




**5G vehicle-to-vehicle communications (V2V) could allow lead cars to communicate hazards to following cars, increasing reaction time and safely allowing car convoys.**

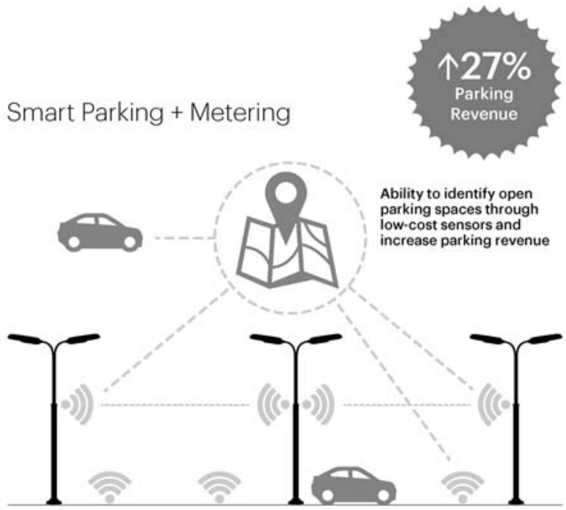
## Transportation

By leveraging next-generation wireless technology, communities can improve their transportation systems – enhancing public transportation, reducing traffic congestion, and generating revenue from public parking efficiencies.

**Public Transportation.** With increased wireless connectivity, communities with a public transit system can reduce rider wait times while also optimizing bus inventory. Giving transit operators minute-by-minute information on the number of users who are currently using the system, or who intend to use the system at a specific time, will help increase system utilization, and allow for dynamic bus routing.

**Traffic/Commuting.** Imagine being able to reduce traffic congestion in your community by 40%, saving drivers and operators in medium-sized cities approximately $100 million annually.[10] Traffic management systems can help deliver these benefits and, thanks to 5G's ultra-fast speeds, cars will be able to "convoy" or "platoon" in groups,[11] increasing road vehicle capacity, while providing substantial energy savings for vehicle owners. And if autonomous cars are supported by Smart Traffic Management systems, congestion could decrease and deliver additional productivity and quality-of-life improvements to residents.

## Smart Parking + Metering




Reduce time to find parking and congestion benefits all commuters and encourages traffic to commercial areas, boosting economic activity.

**Public Parking.** With real-time information available about empty on-street parking spaces, vehicles will no longer need to circle the block, but instead go directly to an open space, identified as such by a low-cost 5G sensor on a street lamp.

Combined with the smart metering systems that are already deployed in some areas, advanced wireless connectivity could increase parking revenue by 27%[12] while also helping reduce congestion and idling.

## Gun Shot Detection


Real-time monitoring of gunshots provides police and first reponders with exact location, speeding up response time.

### Public Safety

Smart City innovations in public safety are just beginning to take hold, and wireless connectivity is the driving force behind these innovations.

Chicago currently uses its 4G network to provide real-time video which allows first responders to assess a scene before arriving.[12] Deployment of 5G in a Smart City will enable the integration of all video surveillance, with access to specific locations, pole by pole, in ultra-high definition. This capability would allow responders to use facial recognition to identify known criminals or spot missing persons before arriving on the scene.

Thanks to wireless sensors, San Francisco is already able to generate detailed, real-time, location-based information when a firearm is discharged. This allows authorities to be immediately alerted, and has helped reduce gun crime by up to 50%* in neighborhoods where the technology has been deployed.[14] When a gun is fired, the sensors can triangulate the location, and sometimes even identify the type of gun. That information is sent to authorities to speed up deployment of personnel to the location.

In many communities, emergency warning systems are already providing alerts about tornados and other life-threatening weather events. Building on such warning systems, 5G flood sensors could also provide motorists with route guidance, helping reduce one of the primary causes of death during flooding: people choosing routes that pass through flooded areas.[15]

# Deploying Next-Generation Wireless Infrastructure

Smart City benefits, along with the significant economic growth and job creation described, depend on the deployment of 5G. But this next generation of wireless connectivity will require a wireless infrastructure that is significantly denser than that required by 4G.

The key to this new wireless infrastructure is the small cell. Telecom operators are already using 4G small-cell technology in limited deployments today to support increased capacity for new users and Smart City sensors. But the full promise of Smart Cities and 5G requires a robust deployment of small cells.

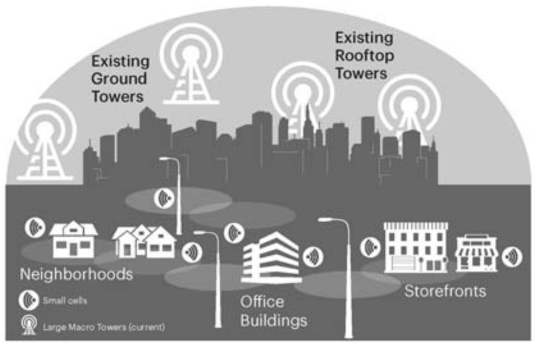
That is because tomorrow's wireless networks will require hundreds, or even thousands, of small cells, densely deployed across a city or town, instead of traditional macro cell towers, which are hundreds of feet tall and transmit wireless signals for miles. Complementing the existing macro cell sites, these small cells can be the size of a shoe box and discretely deployed nearly anywhere – from street lamps and utility poles to the sides of buildings.

The approach is similar to the supply-operations concept of distributing dispatch centers across a geographic area to serve customers more efficiently than one main, central warehouse. The approaches have similar benefits:

1 **Speed to deliver:** Just as numerous small dispatch centers can be located closer to the ultimate destination, and thus provide faster delivery, widely distributed small cells also deliver higher speed, and enable large amounts of data to be more readily delivered to users.

2 **Capacity to serve:** When a given dispatch center does not have the capacity to serve a certain client within the required timeframe due to the shortage of available resources/products, other nearby centers are able to provide service. Likewise, if a small cell experiences too much traffic demand due to a major event (e.g., an emergency situation in the area), other small cells can help meet demand, preventing the communication interruption that usually occurs with current technology.

## Macro and Small Cells




Existing towers will provide coverage for miles, while small cells will support the increased needs of a Smart City.

Small cells could be discretely installed on lamp posts, utility poles or sides of buildings.

3 **Specialization and diversification of fulfillment:** Just as small niche centers can provide specialized service to a local area, a "small cell" can also provide specialization of service to a large, diversified number of users. With the availability of sufficient numbers of small cells, wireless networks will support both specialized transportation solutions (e.g., vehicle-to-vehicle communication) and specialized public safety solutions (e.g., gunshot detection sensor communication), all while ensuring the best quality of service to other highly critical applications, such as a nearby hospital which requires highly reliable communications (e.g., for remote surgery).

Small cells are already beginning to supplement the operations of existing 4G macro towers, and will initially be the central strategy by which telecom operators deal with this ongoing growth in demand for mobile capacity and coverage ultimately leading to the full-scale 5G deployment that will be required by Smart Cities.

While the benefits of pervasive small-cell 5G technology are highly significant, the real-world logistics of deploying small cells on a large scale must also address the cost, complexity and time involved in deployment. Many municipalities continue to rely on regulations and processes that were created to handle the rollout of existing and previous wireless technologies, but which are likely to be inadequate for the rollout of 5G technology.

The challenges in this area are threefold: local permitting and regulations; access to public rights of way; and fee structures.

## Local Permitting and Regulations

**Currently, applications for small-cell implementations can take up to 18 to 24 months for approval, which is similar to the time required to approve one large macro cell tower. Recognizing that the density of small cells is up to 100 times greater than for macro towers, such an approval cycle will pose a tremendous challenge to both telecom operators and municipalities. In certain cases, slow turnaround/approval times have not only caused delay, but have resulted in approval of only part of the submitted plan. If approval for a full cluster of small cells is not supported, and fewer small cells are deployed as a result, the full benefits of this wireless technology will not be realized.**

In many cities, the approval cycle requires several separate tribunals for approval. Committees such as a neighborhood association, a planning commission, a zoning commission, the county council and others may each require a separate decision-making process.

Some cities also require a discretionary review of each installation, or else classify every small-cell installation as a new installation that requires its own separate environmental assessments and approvals, even if the location has an existing small-cell site operated by another telecom operator.

## Access to Public Rights of Way

**One potential option for telecom operators deploying small cells on Public Rights of Way is to work with a partner that offers a database of already-approved sites, and manages relationships with operators through efficient, mutually beneficial processes.**

Immediate access to these types of qualified sites and assets makes it quicker and easier to find locations to deliver 5G services to users and enable Smart Cities. It also shortens the time spent negotiating with site owners, and reduces the effort required to secure the necessary permissions and approvals.

One example of a partner would be the local public utility which manages utility poles. The FCC has supported wireless deployment by clarifying rules related to the use of utility poles, specifying that pole attachment laws should also cover wireless attachments, thus removing any ambiguity about how wireless attachments should be treated by utility pole owners. The FCC has also specifically required that any denial must be on a "case-by-case" basis.[16]

**While many owners of public utilities poles have embraced small-cell attachments from the beginning, others remain less enthusiastic. Without Public Rights of Way, the deployment of next-generation small-cell technology will continue to suffer – and communities will not be able to enjoy its benefits.**

## Fee Structures

**In many instances, fees imposed on small cells are comparable to those imposed on macro cells without regard to their differences. The application fees and other acquisition fees (including rental) of macro-cell sites are applied to each of the 50 to 100 small cells required resulting in costs being multiplied and deployment becoming financially unfeasible. Communities that apply previously used processes and regulations to small-cell rollouts, rather than updating their approach, can end up discouraging small-cell deployments.**

Such challenges, coupled with concerns about return on investment, will cause delays for the deployment of wireless infrastructure, potentially leading to the loss of projected benefits in the affected communities, and shifting those benefits, including economic development and increased competitiveness, towards communities that have developed plans to support faster deployment of next-generation technology. Such delays are also likely to have consequences for certain types of Smart City benefits that depend on having the 5G infrastructure in place.

Cost is one of the most significant challenges that telecom operators face when deploying small cells. Small-cell equipment itself typically accounts for 10% or less of a site's total cost of ownership, with a much larger part of the investment instead going to the services through which each site is selected, assessed, acquired and approved for implementation. Considering the large number of small cells required, the cost structure makes the total cost of installing small cells many times higher than the costs for existing infrastructure.

These regulatory and operational challenges are just a fraction of the issues telecom operators will face when implementing the small-cell technologies. There are other challenges they need to handle in parallel, such as acquiring new frequency spectrum; making sure there is high-capacity connectivity, such as fiber optics, to each of the small cells, and development of 5G know-how and expertise.

# Next Steps to Unlock Economic Growth

To build a 21st Century Smart City and reap the resulting economic benefits, municipal leaders must support an environment that cultivates smart innovations for all of their citizens. By facilitating 5G infrastructure deployment, they can make their communities more efficient and attractive to investments by telecom operators as well as other industries.

Keeping in mind the telecom operators' expected infrastructure investment of $275 billion for 5G deployment over seven years, and the opportunity to create up to 3 million new jobs, there are a number of steps that municipal leadership can take to improve the rollout process and save time, thus helping the prompt evolution of their community towards a Smart City and reaping the associated economic benefits. These steps address three main areas of challenge previously outlined: streamlined permitting and processes, right-of-way applications, and fee structures.

**Streamlined permitting and processes:**

- **Batch approvals –** By pre-approving cell antenna types and providing approval for specific areas, as opposed to pole by pole, approval processes can be streamlined, saving the city significant time and resources that would otherwise be spent processing repetitive permits.
- **Accelerated timelines –** To allow for efficient deployment of small cells, permits should have a reasonable approval time.

**Right-of-way applications:**

- Given the pervasive yet non-intrusive nature of small- cell technology's footprint, municipalities would benefit from providing access to sites or assets such as government-owned utility poles, streetlights and other street fixtures, wherever possible.

**Fee structure update:**

- The fees typically charged for macro towers, when applied to small cells, will deter telecom operator investment. Given the increased number of cells required for a 5G deployment, a new, rational fee structure – one that does not compromise revenues of the city – should be considered in light of the economic opportunity such a deployment represents. A city will benefit much more from the increased jobs and prosperity that 5G Smart City technology brings, than from the revenue the city generates from pole fees or permits.
- Additionally, municipalities should consider more efficient fee administration. Rather than establishing a different price for each type of lamp post or streetlight, cities could create simple asset classes based on location, power requirements, maintenance requirements and engineering charges, thus providing optimal terms and conditions for each small-cell deployment, while reducing unnecessary paperwork.

In addition to specific policy recommendations, municipalities should consider ways to ensure departmental coordination on decision-making. Given some of the time-consuming situations that telecom operators have faced as a result of piecemeal approval from the required city departments, it is clear that providing operators with a single point of contact for inter-departmental approvals would save time for both operators and city officials.

The evolution of 5G wireless technology, which will create the advanced infrastructure needed for Smart Cities, has reached a very promising juncture – yet also a critical one. The Smart City concept is real, and is starting to take shape in a number of municipalities in the U.S. and abroad. To reach its full potential, and unlock the full benefits of Smart Cities, communities now need to support small-cell deployments to enable a 5th generation of communications infrastructure. Cities and towns which are first to facilitate the wireless infrastructure evolution will see the greatest benefit, while slow adopters may be the equivalent of turn-of-the-century towns that were not supported by infrastructure, and slowly became less competitive and lost jobs while their populations shrank.

Given the large investment that telecom operators plan to make in the coming decade, and the 5G trials that are expected to start in early 2017,[17] municipal leaders should position their communities to take advantage of this investment and all of the other benefits that accompany it, including improving citizens' lives, creating jobs and increasing their economic competitiveness.

# Appendix – Methodology, Assumptions and Caveats Around Estimated Economic and Other Impacts

- Network investment costs are based on our knowledge of current estimates of expected costs, and assume adoption and coverage requirements will be similar to previous generations of technology. Technological advances, regulatory frameworks, and the availability and cost of wireless spectrum are examples of factors that may impact these estimates.
- Construction jobs directly created from the network investment were calculated using industry average costs.[18]
- Indirect and induced employment figures as a result of construction were calculated using industry-specific employment multipliers.[19]
- The impact of next-generation wireless technology on employment was estimated using research that studied the impact of previous generational shifts in wireless technology – specifically, the economic impact of 3G technology in the U.S.[20] The number of jobs created increased over time as the technology is adopted and the figures in this document represent the number at the end of the 7-year buildout.
- GDP growth related to jobs created from the next generation of wireless technology was determined using estimates of the elasticity of employment with respect to growth for the U.S.[21]
- The estimates of jobs created by providing broadband access to consumers through 5G wireless assumes the share of the population that currently doesn't have access to broadband internet will be the same at the time of 5G deployment, and that 5G will be a substitute for wireline broadband. It also assumes consumers who don't have access to the technology will adopt it at the same rate as those who do have access. Estimates of the economic impact are based on previous studies of the economic benefits of broadband covering employment[22] and GDP.[23]
- The estimates of long-term jobs created through adoption of 5G technology for different city sizes assumes the jobs are evenly distributed across city sizes based on population since the technology has benefits for people in all sizes of cities. This is assumed to be the case for broadband access as well: while households which do not have broadband internet access are predominantly in rural areas, the estimates of total jobs created by city size are distributed evenly across different city sizes based on population since there will be an indirect and induced impact affecting others beyond those who gain access to broadband connectivity.
- Though 5G is expected to deliver significant economic benefits, it is also important to reflect that delays in rollouts caused by technological, legal, or financial costs can significantly limit the deployment and adoption of 5G. The numbers may also vary considerably from city to city depending on the local environment, including the difficulty and cost of deployment. The benefits of the buildout, including the number of jobs created over time, will also vary, depending on adoption and usage of the technology.

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COMPETITIVE CARRIERS ASSOCIATION
*Washington, DC, February 1, 2017*

Hon. JOHN THUNE,
Chairman,
Committee on Commerce, Science, and Transportation,
U.S. Senate,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Committee on Commerce, Science, and Transportation,
U.S. Senate,
Washington, DC.

Dear Chairman Thune and Ranking Member Nelson:

Competitive Carriers Association (CCA) respectfully submits this letter for the record regarding today's hearing on "A Growth Agenda: Reducing Unnecessary Regulatory Burdens." CCA is the Nation's leading association for competitive wireless providers and stakeholders across the United States. CCA's membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents close to 200 associate members, including vendors and suppliers that provide products and services throughout the mobile communications ecosystem.

From our members' experience constructing networks and providing wireless service to consumers across the country, we have seen firsthand how regulatory burdens can impact wireless innovation, competition, and growth. In turn, unnecessary or poorly tailored regulations negatively affect the economy as a whole, especially in rural America. The cost of complying with unnecessary or poorly tailored regulations has skyrocketed and diverted resources away from wireless providers' investment in, for instance, rural infrastructure and job growth. On the other hand, the wireless industry has faced massive consolidation over the last several years, with two companies, AT&T and Verizon Wireless, emerging as the dominant players by any relevant measure. As a result of this consolidation and market concentration, market forces in lieu of regulation are insufficient in some instances to ensure that consumers continue to receive the benefits of innovation and competition. Accordingly, CCA urges Congress to carefully consider what regulatory burdens are appropriate in a consolidated industry where the primary input, spectrum, is finite and available only through government allocations. The United States demonstrates global leadership on mobile broadband issues, and is at the forefront of 5G development. To maintain this leadership, Congress should support a procompetitive regulatory regime.

Accordingly, it is of the upmost importance to remove regulations that harm competition among wireless operators and that slow the deployment of wireless networks, especially in rural or hard to reach locations, but it is also necessary to maintain and create rules that nurture competition and improve wireless services in rural or hard to reach locations. Baseline rules and safeguards are essential to enabling competition in the wireless industry, and fostering market conditions that enable many operators to provide innovative and meaningful competition is necessary to avoid the need for a more heavy-handed and burdensome regulatory structure in the future.

It is within this context that CCA offers these comments on reducing unnecessary regulations.

**Regulations That Unnecessarily Hinder Access To or Use of Spectrum**

Access to spectrum is critical to all wireless services and to ensuring competitive service availability, continued investment, and growth. CCA encourages close examination of any regulations that prevent equitable access to spectrum and make it more difficult and too costly for competitive wireless providers to provide new innovative services.

First, Congress should direct the Federal Communications Commission (FCC) to eliminate the regulations that require carriers to obtain approval for block-for-block spectrum swaps within the same markets. The FCC's current filing requirements for spectrum swaps within the same markets and for the same spectrum impose an unnecessary and burdensome review on transactions that are otherwise straightforward. In place of the approval requirement, the FCC should adopt a streamlined process and grant pro forma treatment of block-for-block spectrum swaps within the same markets. These swaps are important for efficient allocation and use of valuable resources and should be considered presumptively competitive. However, this process must account for the differences between high-band and low-band spectrum. For example, competitive concerns must be balanced when reviewing spectrum swaps that entail the exchange of less valuable spectrum for more valuable spectrum.

Second, the FCC's rules for spectrum lease approvals are overly complicated and unnecessary, and can disincentivize spectrum license holders from entering into agreements that could otherwise partition or disaggregate spectrum to make it available for use in rural areas. Particularly for straightforward spectrum leases that do not raise competitive concerns, these approvals should be eliminated. Instead, there should be a simple rule requiring prior notification of a spectrum lease for temporary leases ahead of a secondary market sale and for temporary leases that do not raise competitive concerns or undermine enhanced factor standards of review. The FCC should continue to review secondary market transactions that trigger a more rigorous competitive impact evaluation, to avoid aggressive concentration of the market. In the alternative, and under appropriate circumstances, the FCC should utilize its immediate approval procedures for temporary spectrum leases prior to a secondary market transaction. Technology and network efficiency requires spectrum harmonization between and among spectrum users. The FCC should prioritize efficient utilization of finite spectrum resources.

Third, the Commission should reform its spectrum licensing rules to permit electronic filing of spectrum subleasing applications. Requiring filings to be submitted through paper copies causes delay and is more burdensome for licensees.

**Regulations That Frustrate Wireless Infrastructure Buildout and Deployment**

Investment in wireless infrastructure is key to the Nation's economy and job growth. All corners of the country must have access to robust wireless services capable of supporting high-speed broadband service. Regulations that impede mobile broadband infrastructure investment, buildout, and deployment must be removed and, where necessary, replaced with light-touch regulations that restore and promote competition.

Close scrutiny of all infrastructure approval processes is urgently needed. For example, every wireless facility siting is considered a "federal undertaking" and subject to an extensive review process for historic preservation purposes. However, the current rules were developed for much larger wireless facilities, such as full-sized towers, and are ill-suited for the now-typical small wireless sites, which are far less obtrusive, if at all. In particular, it is highly unlikely that mounting a small facility would have any negative impact on historic preservation, and accordingly, requiring such a review unnecessarily imposes an expensive and time-consuming burden on providers.

Congress also should review the current barriers to deploying infrastructure on Federal lands and facilities. This is a huge impediment to rapid deployment of high speed mobile broadband in rural America. Carriers must have certainty regarding the process and timeline for application review when seeking to deploy on Federal lands and facilities, and unnecessary red tape, burdens, or open-ended timeframes frustrate efforts to expand mobile broadband, especially in rural areas. Congress must establish clear guidance that wireless coverage should be a top priority for all Federal land managers. Application challenges, from review times to inconsistent fees, increase the burdens on carriers exponentially as carriers work to densify their networks or can be prohibitively challenging where carriers seek to deploy services to unserved, high cost areas. These are just some examples of the many regulatory barriers to infrastructure deployment that competitive wireless providers face. Review of all barriers to infrastructure deployment is urgently needed, and policies should be uniformly applied and adhered to in order to streamline and simplify expanding mobile broadband to all parts of the country.

CCA commends the Committee and your leadership in reporting S. 19, the MOBILE NOW Act, to the full Senate and supports its swift passage. MOBILE NOW contains several key provisions that will reduce burdens and increase certainty for carriers seeking to deploy mobile broadband infrastructure, particularly in rural areas and on Federal lands and facilities.

**Universal Service Regulations That Are Outdated and Unnecessary**

Universal service policies are critical to providing broadband in rural and high cost areas. Competitive carriers must have long term certainty regarding Universal Service Fund support to maintain, upgrade, and expand their networks. This includes both a sufficient Mobility Fund Phase II and long term certainty regarding phasing out legacy support over the next several years.

Red tape and documentation for Eligible Telecommunications Carrier support should be reduced. In particular, the FCC should remove the annual state certification requirement, which no longer serves a function since the FCC can monitor compliance on Form 481. In addition, the Universal Service Fund (USF) high-cost and Lifeline voice service requirements in areas where carriers do not receive support are unnecessary and highly burdensome to wireless providers and hinder their ability to support consumers in these areas. In addition, the current USF contribution regulations are complex and at times require costly compliance obligations, and the current mechanisms for calculations are outdated and incomplete. A full review of the USF contribution system is needed to ease administrability of the fund and to identify ways to reduce the contribution factor that ultimately creates a high cost to consumers.

**Administrative Requirements That Are Burdensome**

There are numerous reporting requirements imposed by the FCC that generate duplicative or unnecessary reports. Specifically, the FCC should rescind unnecessary or duplicative reporting requirements related to location accuracy compliance, network outage requirements, Wireless Emergency Alert notifications, and filing paper copies of licenses. Many of these recordkeeping requirements have not yet been modernized consistent with the current wireless industry. Likewise, such reporting requirements result in substantial burdens and resource costs for wireless providers, often during times of disasters and emergencies. The FCC should modify or repeal these rules consistent with its goals to facilitate information sharing and strengthen and expand network buildout.

The FCC also should repeal rules requiring pre-closing authorization of pro forma transactions, such as transferring a license from one wholly-owned subsidiary to another. The rules are inconsistent depending on the type of license, most of which do not require pre-closing authorization. The FCC should simplify its filing requirements for such transactions, allowing post-closing notification in a single update. To the extent that express forbearance authority would be necessary, Congress should grant such authority, as it did for commercial mobile radio service and common carrier rules.

**Enhanced Open Internet Transparency and Other Requirements for Small Providers**

The FCC's *2015 Open Internet Order* imposed numerous regulatory obligations on providers of broadband, including enhancements to the existing transparency rules that governs the content and format of disclosures made by both wireline and wireless broadband providers. In recognition of the compliance burden concerns raised by smaller providers, the FCC granted a temporary exemption to certain small broadband providers. However, this exemption has expired, and as a result, small broadband providers are forced to take up the onerous reporting requirements. CCA commends Chairman Pai for his announcement on Monday that he has circulated an order that will extend and expand the exemption for five years. CCA is hopeful that this exemption will be swiftly adopted, and appreciates bipartisan Congressional support to exempt small business providers from these rules, including the Committee passage of the Small Business Broadband Deployment Act in the 114th Congress.

In addition, there needs to be a review of all regulatory burdens that impact small companies inordinately, using small business size standards as defined by SBA, and the FCC should ease regulatory burdens placed on smaller participants whose costs of compliance are exponentially greater. Regulations must be structured so that they support competition, rather than place far higher or unnecessary burdens on smaller carriers.

**FCC Privacy Rules that are Burdensome and Unnecessary**

Congress should address the FCC's recently-adopted privacy rules. By departing from the Federal Trade Commission (FTC)'s proven privacy regime, the FCC's rules create a harmful competitive disparity between ISPs and edge providers, and will sow confusion among consumers seeking to exercise control over their information online. The rules also create substantial costs and business disruptions, requiring new mechanisms and updates to hardware and software assets, and revisions to internal and external procedures, for compliance with these provisions, including to manage consents to use customer data. Perhaps worse, the Commission failed to comply with the Regulatory Flexibility Act ("RFA"), making no attempt to examine how its rules might impact small carriers. Specifically, the Initial Regulatory Flexibility Analysis ("IRFA") accompanying the FCC's Notice of Proposed Rulemaking did not describe and assess the economic impact of the Commission's proposals on small entities, nor did the IRFA propose or even discuss alternative rules that might address small-business-specific regulatory burdens. The IRFA included an estimation of the number of small BIAS providers that may be impacted by the rules, but did not, as required by law, provide "a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed, or more general descriptive statements if quantification is not practicable or reliable."

The Small Business Administration ("SBA") noted the same. In a letter to the FCC, SBA stated that "the FCC failed to comply with the RFA's requirement to quantify or describe the economic impact that its proposed regulations might have on small entities." The bipartisan leadership of the House Small Business Committee later raised similar concerns. While the FCC responded by enacting "numerous measures in [the Report and Order] to alleviate burdens for small providers," these measures did not go far enough to adequately accommodate small business providers' limited staff and capital resources, particularly for companies that may not collect or use data for the purposes the rules seek to address. The lack of a good faith effort to comply with the RFA, along with ignoring significant industry outcry, especially those representing small businesses, underscores the need for Congress to address the FCC's misguided privacy rules.

**Tower Lighting and Marking that is Unnecessary**

Wireless carriers, as well as other telecommunications providers, undergo significant notice, application, and review processes in construction and maintenance to site towers and specific rules regarding tower marking and lighting. The Federal Aviation Administration (FAA) Extension, Safety, and Security Act of 2016 contains a section directing the FAA to issue regulations directing the marking of certain towers between 50 and 200 feet. If promulgated, these regulations would impose significant costs on carriers and create new burdens while potentially putting the towers in conflict with other zoning requirements that do not allow for lighting or marking of towers or specifically require camouflaging techniques. Before the FAA issues regulations, Congress should ensure that any rules are appropriately tailored to capture safety concerns associated with portable or temporary towers, such as meteorological evaluation towers, without imposing unnecessary burdens on wireless carriers that would divert limited resources away from maintaining and expanding mobile broadband, especially in rural areas.

CCA appreciates the opportunity to assist your efforts to reduce unnecessary regulatory burden and welcomes any questions or comments you may have.

Sincerely,

STEVEN K. BERRY,
*President and CEO,*
Competitive Carriers Association.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO JACK N. GERARD

*Question 1.* In December 2014, President Obama observed that, at times, "the regulatory agencies treat every problem like a nail and only have a hammer, and aren't engaging with industry enough to think, all right, here is the problem we're trying to solve, is there a smarter way of solving it." How effective have regulators been in working with industry and incorporating their perspectives?

Answer. Unfortunately, we often find that regulators impose requirements that are either not achievable, not cost-effective, or that will not achieve the intended results. This often leads industry to litigate such flawed final rules to obtain the necessary relief from agency actions.

Technological innovations and industry leadership have propelled the oil and gas industry forward despite the unprecedented onslaught of 145 new and pending Federal regulatory and other administrative actions targeting our industry. The oil and natural gas industry remains committed to regulatory structures that promote safety, environmental protection, and responsible operations and it continues to look for ways to collaborate with regulators.

API has long supported and continues to support reducing the regulatory burdens on industry and urges Congress and the Administration to take measures to lower the cost to businesses while protecting workers, consumers, communities and the environment. We have also urged OMB to ensure that existing and future regulations are consistent with their authorizing statutes.

API has been active in previous regulatory relief efforts. In 2011 and 2015 we submitted suggestions for regulatory reform to the Administration, but were disappointed that this led to only small changes in regulation. We think that many opportunities still exist.

Wood Mackenzie evaluated the impact on the U.S. economy of various pro-development policies and regulatory constraints in the oil and natural gas sectors. See *http://www.api.org/news-policy-and-issues/american-jobs/comparison-of-us-oil-and-gas-policies*

- API requested Wood Mackenzie investigate the impact of potential changes to various oil and natural gas-related policies at both a Federal and state level
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The table below highlights key differences that pro-development approach could bring.

**Key findings: Potential impacts of US oil and natural gas regulatory policies**

| Impact on US* | Pro-development Policies | | Regulatory Constraints | |
|---|---|---|---|---|
| | 2025 | 2035 | 2025 | 2035 |
| Oil and Natural Gas Production | +2.8 MMboed** | +8.0 MMboed | -2.6 MMboed | -3.4 MMboed |
| Total Jobs Supported | +1.0 million | +2.3 million | -800 thousand | -830 thousand |
| GDP / Year*** | +$163 billion | +$443 billion | -$138 billion | -$133 billion |
| Total Government Revenue / Year | +$38 billion | +$122 billion | -$33 billion | -$18 billion |
| Cumulative Gov't Revenue (2016 - 2035) | +$111 billion | +$1078 billion | -$260 billion | -$500 billion |
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| Average Household Energy Expense | -$169/year | -$360/year | +$255/year | +$242/year |

*Incremental impacts assessed versus a Baseline scenario
**MMboed is million barrel oil equivalent per day
***All dollar numbers are in 2015 real US dollars



As is clear, pro-development policies could lead to more production, more jobs, more government revenue and reduced household energy expenses.

*Question 2.* It is critically important that our energy products get to market safely and efficiently. Last Congress, this Committee approved several safety improvements to crude-by-rail transportation in the bipartisan FAST Act, signed into law in December 2015. What is the status of industry compliance with those new requirements, and how you expect them to improve safety?

Answer. Safety is our industry's number one priority. API has been a proponent of a thoughtful, comprehensive and data-driven safety approach in order to improve on the 99.997 percent safety record of freight rail to reach our goal of zero accidents. Over the past several years, we've been working collaboratively with regulators, railroads, tank car builders, and other shippers to improve the safety of crude-by-rail transportation. Those efforts were furthered by the finalization of the tank car standards laid out in the FAST Act which included requirements for thermal insulation for DOT 117 and 117R cars and top fittings protection for retrofitted cars.

API has also supported the upgrading of the tank car fleet and would like to see these upgrades completed as quickly and as realistically possible. The industry is progressing with the retrofits and replacements of older tank cars. According to data from the Railway Supply Institute (RSI), the new DOT 117 standard now represents 14 percent of the crude oil fleet, up from 4 percent last year. At the same time, DOT 111's now represent only 3 percent of the fleet. (*http://www.tankcarresourcecenter.com/wp-content/uploads/2014/07/FASTAct_ImplementationUpdate.pdf*)

*Question 3.* Apart from those discussed in your testimony and at the hearing, are there any other examples of areas in which we can reform our transportation regulations to help get our goods to market more efficiently without compromising safety?

Answer. As an industry, we are committed to delivering 100 percent of our product to its destination without incident, and that is why we have been in agreement with the Pipeline and Hazardous Material Safety Administration and supported the development of effective and efficient natural gas and liquid pipeline rules to address pipeline safety. Unfortunately, the agency's proposed pipeline rules in some instances undermines the very safety efforts we are trying to bolster by applying a prescriptive one-size-fits-all approach that requires the shift of valuable industry resources away from potentially higher to low consequence, low risk areas. So, I would re-emphasize the point that it makes little sense to advance rules that will weaken and water down safety. In the case of the hazardous liquid and natural gas pipeline safety rules, we look forward to working with PHMSA in further analyzing and improving both rules to more effectively help guide the industry's attention and resources to those safety areas that can truly advance safety.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEB FISCHER TO JACK N. GERARD

*Question 1.* Mr. Gerard, you mentioned concerns with PHMSA's proposed natural gas transmission rulemaking, particularly as it relates to the agency's cost-benefit analysis and industry stakeholder estimates that found the rule would cost $33.4 billion to implement. How do you think that PHMSA and other agencies could strengthen their cost-benefit analysis to better analyze the impact of regulations?

Answer. Reflecting on recent cost-benefit analyses done by PHMSA, there are a number of items Federal agencies can do better to analyze the costs and benefits of regulations. One of the first steps should be to ensure that proposed rules are drafted as clearly as possible. Ambiguity is the enemy of accurate analysis. When a rule is written in a manner that allows vastly different interpretations, it is impossible to conduct a cost-benefit analysis that all parties will agree upon. In a similar vein, agencies should endeavor to fully understand how industry operates and how changes in regulations would change these operations. Failing to do this would result in incorrect baseline assumptions that doom the analysis from the start. The impact is compounded when the activity being regulated is already governed by an industry standard. The impact of forcing a change in how the industry operates can reverberate through the supply chain in unexpected ways.

There are a number of more specific suggestions inspired by the PHMSA analyses. First, agencies should be skeptical of cost estimates provided by vendors for new technologies. Regulations routinely call for the deployment of novel and commercially untested technologies. Few vendors have real world estimates of how much these technologies will actually cost. Agencies should also recognize that vendors likely have an incentive to underestimate these costs and should account for that in their analysis. Second, agencies should base benefit estimates on actual incident rates.

When a catastrophic event occurs, there appears to be a tendency to assume that accidents of that magnitude are now more likely without presenting compelling analysis to support that claim.

Third, agencies need to abide by OMB Circular A–4 in applying the same range of interest rates to costs and to benefits. Currently agencies, including PHMSA, are estimating benefits using the Social Cost of Carbon/Methane (which is calculated at 5 percent) and comparing those benefits against costs that have been discounted at 7 percent. Fourth, agencies should consider the impact of the proposed regulation on small entities. Even if the overall costs of a provision do not appear excessive, the costs at the company-level can be well beyond the operating capacity of many small businesses. As an example, according to ICF's analysis on the natural gas transmission and gathering line rule, small gathering line operators are disproportionately disadvantaged. The estimated annual compliance costs for small companies nearly equals estimated annual revenues from gathering fees. Lastly, agencies should be encouraged to perform cost-effectiveness analysis, per the direction provided in OMB Circular A–4, in conjunction with cost-benefit analysis to determine if there are less costly ways of achieving the same outcome.

*Question 2.* Mr. Gerard, in your written testimony you commented that the Pipelines and Hazardous Materials Safety Administration (PHMSA) has "strayed from a risk based approach" as it relates to the proposed natural gas transmission rule. As you are aware, in 2016, Congress passed the PIPES Act, bipartisan legislation I authored to strengthen risk management at PHMSA. The bill included a GAO assessment of the risk-based integrity management programs at PHMSA. Would you please provide more details about your concerns about PHMSA's risk based approach? How can Congress work to strengthen this approach at PHMSA?

Answer. API members are dedicated to a risk-based approach to pipeline safety—one that strives for continuous improvement through addressing known, quantifiable issues. Importantly, that is the same approach that Congress has used over the decades in its directives to the Department of Transportation (DOT) and PHMSA for regulating pipeline safety. However, API believes that the proposals in the natural gas transmission and gathering lines NPRM do not reflect a risk management approach, as directed by Congress, targeted toward eliminating the most significant risks posed to public safety and the environment.

With regards to integrity management, the natural gas transmission and gathering rule sets forth prescriptive repair criteria requirements following pipeline inspections. According to the NPRM, if an operator discovers an anomaly in their pipeline, the operator is not allowed to holistically assess the conditions of their pipeline and operate conservatively based on available data. The operator is instead forced to repair all discovered anomalies despite the level of risk posed to the pipeline. As such, the proposal is not based on risk but is instead based on a misguided principle that more is better without grounding that determination in potential pipeline safety improvements and benefits to the public and the environment.

PHMSA also proposes to regulate small-diameter rural gathering lines without regard to congressional mandates that required adequate data collection, appropriate risk-based analysis completion, and demonstrated increase to public safety or the environment. PHMSA did not conduct a thorough analysis of the existing rules as required by the 2011 PSA. Nor did they provide any qualitative or quantitative data demonstrating that such gathering lines pose a direct risk to the public. API requests that PHMSA allow operators to focus resources on the highest risks to their pipelines and maintain the flexibility to apply these requirements to operating pipeline systems.

Further, PHMSA should develop regulations based on comprehensive data and corresponding risk analyses.

*Question 3.* As it relates to regulatory reform, I've been a strong proponent of transparency, better cost-benefit analysis, and more stakeholder participation in the process. As chair of the Surface Transportation Subcommittee, I've convened hearings on performance-based regulations, whereby agencies set goals or benchmarks and allow flexibility in achieving those goals. From your perspectives, what are the benefits of moving away from prescriptive regulations towards more goal-oriented regulations?

Answer. PHMSA's integrity management regulations are built on the performance-based regulatory model which allows operators a variety of options to apply minimum safety standards to the specific characteristics of their pipeline systems. These regulations have been extremely successful in improving pipeline safety since their implementation in 2004. Pipeline systems are complex and vary greatly from operator to operator and system to system. Each pipeline operates uniquely; therefore, companies need flexibility to manage their assets appropriately and safely. For example, one operator may have a pipeline located in rocky soil that requires specific protective measures from dents. Alternatively, an operator may have a pipeline in sandy soil, where dents are not a concern; however, measures must be taken to address subsidence. Again, current Integrity Management regulations provide operators with that flexibility to determine which methods are appropriate to meet minimum pipeline safety standards, while encouraging technological advancements. It would be impossible for one agency to provide prescriptive criteria for any situation that may be encountered in pipeline operation. API and its members strongly support continued reliance on the current performance-based regulatory scheme because it is essential to improving pipeline safety and advancing pipeline technologies.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. DEAN HELLER TO JACK N. GERARD

*Question.* Over the past few weeks, I have been traveling through some of Nevada's eastern rural counties, like Elko, Eureka, and White Pine. Many of our local elected officials have been trying to provide their constituents access to natural gas.

Many of these rural communities rely on propane, which as you know is significantly more expensive for the consumer. It is beginning to be a hindrance to economic development. For example, Wells and West Wendover, Nevada have attracted the interest from some significant manufacturing companies that could bring jobs and economic development to the communities that need it the most. Unfortunately, the lack of natural gas infrastructure is proving to be a deal breaker.

The President has called for legislation that would make significant investments in infrastructure, both transportation and energy development.

Should this type of legislation occur, what type of regulatory reform would make the investment in rural communities more attractive? What are some of the government deterrents that prohibit some of your member companies from making these types of investments?

Answer. Investments in pipeline infrastructure are typically funded by long-term precedent agreements between pipelines and private companies. As such, certainty in the regulatory process is critical to incentivize these types of investments in all areas, be it rural, urban, or suburban. We often find that regulators impose requirements that are either not achievable, not cost-effective, or that will not achieve the intended results. This often leads industry to litigate such flawed final rules to obtain the necessary relief from agency actions.

Technological innovations and industry leadership have propelled the oil and gas industry forward despite the unprecedented onslaught of 145 new and pending Federal regulatory and other administrative actions targeting our industry. The oil and natural gas industry remains committed to regulatory structures that promote safety, environmental protection, and responsible operations and it continues to look for ways to collaborate with regulators.

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API has been active in previous regulatory relief efforts. In 2011 and 2015 we submitted suggestions for regulatory reform to the Administration, but were disappointed that this led to only small changes in regulation. We think that many opportunities still exist.

Wood Mackenzie evaluated the impact on the U.S. economy of various pro-development policies and regulatory constraints in the oil and natural gas sectors. See *http://www.api.org/news-policy-and-issues/american-jobs/comparison-of-us-oil-and-gas-policies*

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The table below highlights key differences that pro-development approach could bring.

**Key findings: Potential impacts of US oil and natural gas regulatory policies**

| Impact on US* | Pro-development Policies | | Regulatory Constraints | |
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As is clear, pro-development policies could lead to more production, more jobs, more government revenue and reduced household energy expenses.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BILL NELSON TO JACK N. GERARD

*Question 1.* In a 1968 report to the American Petroleum Institute (API), the Stanford Research Institute said, "In summary . . . man is now engaged in a vast geophysical experiment with his environment, the earth. Significant temperature changes are almost certain to occur by the year 2000 and these could bring about climatic change." Furthermore, "If the earth's temperature increases significantly, a number of events might be expected to occur, including the melting of the Antarctic ice cap, a rise in sea levels, warming of the oceans, and increase in photosynthesis." However, it was not until 2016 that API finally formed a climate change task force, issuing the following statement acknowledging the severe threat of climate change: "It is clear that climate change is a serious problem that requires research for solutions and effective policies that allow us to meet our energy needs while protecting the environment."

Why did it take so long for API to acknowledge what it knew almost five decades ago?

Answer. It appears that the referenced Stanford Research Institute report was a climate-related literature search. We do not have a copy on file here at API and are not familiar with its findings. That said, we have accessed the report online from *https://www.smokeandfumes.org/documents/16*. The quote in Senator Nelson's question that industry supposedly knew that climate change was caused by fossil fuels ("In summary . . . man is now engaged in a vast geophysical experiment with his environment, the earth. Significant temperature changes are almost certain to occur by the year 2000 and these could bring about climatic change.") is not a conclusion of the researchers themselves, but a quote from one of the studies they were evaluating (specifically Revelle, as noted on page 109).

Further, note that page 110 identifies the uncertainty inherent in the literature: "we are unsure as to what our long-lived pollutants are doing to our environment."

So, the premise of the question is flawed. The Stanford Research Institute report does not make the broad conclusions alleged in Senator Nelson's question. Of course, over recent decades the Federal Government has funded millions if not billions of dollars on research to understand better the role of greenhouse gases in the atmosphere and address some of the uncertainties in the science.

API has regularly reviewed its positions on the greenhouse gas issue and on other major public policy issues, and will undoubtedly do so in the future. API will continue to participate in the public discourse on this and other major issues.

*Question 2.* I take seriously my oversight responsibility for pipeline safety. That is why last year the Senate passed a bill that would give the Ranking Member the same access to unredacted oil spill response plans as the Chairman. As you know, these plans have been severely flawed in the past.

Your organization expressed concerns that expanding Congress' access to unredacted oil spill plans could result in the leak of that information. Can you explain to me why I should not be given access to those plans?

Answer. As we saw last October when environmental activists coordinated attacks on five major oil pipeline valve stations, oil pipelines continue to be targets for anti-oil activism. These events are a major concern for the industry and for pipeline operators in particular. In those attacks, the perpetrators clearly had specific knowledge of the valve location, facility operations and their role in the systems. It's with this in mind that we continue to believe protecting sensitive pipeline system data within operator specific pipeline spill response plans, as required under 49 CFR 194, is so important. Previous language introduced in the 114th Congress as part of the PIPES Act lacked clear or specific limitations on public disclosure of un-redacted pipeline spill response plans provided to Congressional members. API is supportive of sharing this type of information with those members of Congress or their staff who have legislative oversight for plans and plan requirements as long as there is strict adherence to non-disclosure procedures outlined under existing laws and regulations. Accidental disclosure of sensitive pipeline information to the general public could potentially pose significant safety, human health and environmental risks.

*Question 3.* In your written statement to this Committee, you note that "America is now the world's leading producer and refiner of oil and natural gas, a reality that was unimaginable just a decade ago" and that we have "transitioned from an era of energy scarcity and dependence to one of energy abundance and security." You continue, "Developments of the past decade have brought cost savings for American consumers, good paying jobs, renewed opportunities for U.S. manufacturing, a stronger economy and greater national security," and "record U.S. production and refining is happening alongside greater environmental progress."

Given these remarkable developments over the last ten years, what exactly do you think the Federal Government has been doing that has hindered the growth of your industry?

Answer. The remarkable developments of the past decade were achieved in spite of government policy that sought to restrict development. Technological innovations and industry leadership have propelled the oil and gas industry forward despite the unprecedented onslaught of 145 new and pending Federal regulatory and other administrative actions targeting our industry. The oil and natural gas industry remains committed to regulatory structures that promote safety, environmental protection, and responsible operations and it continues to look for ways to collaborate with regulators.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO ROSARIO PALMIERI

*Question 1.* As I understand it, the Executive Order issued by the White House on January 30, 2017, does not apply to independent agencies. Your testimony highlighted the limits on the Executive Branch's ability to direct independent agencies, such as Consumer Product Safety Commission, to help reduce the overall regulatory burden. Can you elaborate on additional steps Congress may need to take to ensure that independent agencies are regulating in a way that promotes U.S. manufacturing without compromising safety?

Answer. President Trump's Executive Order 13771, entitled "Reducing Regulation and Controlling Regulatory Costs," establishes the framework for the President's "one in-two out" regulatory reform initiative. As you note, the Order does not apply to independent regulatory agencies. Though the interim guidance implementing the Order's provisions effecting Fiscal Year 2017 regulatory costs encourages independent regulatory agencies to comply, it is unclear whether these agencies actually will.

The President does not exercise similar authority over independent regulatory agencies—such as the National Labor Relations Board, the Securities and Exchange Commission and the Consumer Product Safety Commission—as he does over other agencies within the executive branch. The rules issued by these agencies can impose significant costs on manufacturers. These agencies are not required to comply with the same regulatory principles as Executive Branch agencies and often fail to conduct any analysis to determine expected benefits and costs.

Congress should require independent regulatory agencies to conduct cost-benefit analyses of their significant rules and subject their analysis to third-party review conducted by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget or some other office. Consistency across the government in regulatory procedures and analysis would only improve certainty and transparency of the process. The case for the inclusion of independent regulatory agencies in a centralized review of regulations is clear, and Congress should act to make it certain.

There are several legislative proposals that would improve the quality of regulations issued by independent regulatory agencies. Last Congress, Senators Rob

Portman (R–OH), Mark Warner (D–VA) and Susan Collins (R–ME) introduced the Independent Agency Regulatory Analysis Act of 2015 (S. 1607, 114th Congress), which would provide the President authority to require independent regulatory agencies to conduct benefit-cost analysis for significant rules and submit them to OIRA for third-party review. Senator Portman is also lead sponsor of the Regulatory Accountability Act (S. 2006, 114th Congress), which would codify analytical requirements and sound regulatory processes for all agencies, including independent regulatory agencies. Senator Amy Klobuchar (D–MN) has introduced the SCORE Act (S. 2294, 114th Congress), which would establish a Regulatory Analysis Division within the Congressional Budget Office to conduct analysis of the prospective impact of economically significant rules, including rules issued by independent regulatory agencies.

*Question 2.* In December 2014, President Obama observed that, at times, "the regulatory agencies treat every problem like a nail and only have a hammer, and aren't engaging with industry enough to think, all right, here is the problem we're trying to solve, is there a smarter way of solving it." How effective have regulators been in working with industry and incorporating their perspectives?

Answer. The Administrative Procedure Act requires Federal agencies to publish in the *Federal Register* a general notice of proposed rulemaking for substantive rules and provide the public an opportunity to participate in the rulemaking (5 U.S.C. 553). Unfortunately, regulators often make their regulatory determinations (*e.g.,* how and who to regulate) before issuing a notice of proposed rulemaking and before they receive valuable feedback from those entities that are directly impacted by the agency's action. Last Congress, Senators James Lankford (R–OK) and Heidi Heitkamp (D–ND) introduced the Early Participation in Regulations Act (S. 1820, 114th Congress), which would require an agency to publish an advance notice of proposed rulemaking when it considers a major rule. Such a requirement would force agencies to seek public input before they make regulatory decisions.

Congress should also reform current statutory requirements that are designed to improve how agencies interact with stakeholders. The Regulatory Flexibility Act (RFA) requires Federal agencies to thoughtfully consider small businesses when developing regulations. If an agency determines that a regulation is likely to have "significant economic impact on a substantial number of small entities," then the agency must engage in additional analysis and seek less burdensome regulatory alternatives. In addition to requiring improved small business analysis, the RFA intended to improve public participation in a rulemaking. The law was amended in 1996 to require the Environmental Protection Agency and the Occupational Safety and Health Administration to empanel a group of small business representatives to help those agencies better consider a rule's impact before it is proposed. In recognizing the importance of this panel process, Congress expanded this requirement to include the Consumer Financial Protection Bureau when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The RFA's provisions have received universal support from lawmakers, but Congress needs to strengthen the law and close loopholes that agencies use to avoid its requirements.

Unfortunately, agencies are able to avoid many important RFA requirements—including holding small business panels—by simply asserting that a rule will not impact small businesses significantly. The law does not explicitly define a "significant economic impact on a substantial number of small entities," so agencies have great discretion in deciding when the RFA would apply to a proposed or final rule. Furthermore, only a small number of regulations require small business-oriented analysis because "indirect effects" cannot be considered. One of the original authors of the RFA, Sen. John Culver (D–IA), intended that the scope of the RFA include direct and indirect effects.[1] The law should be amended to ensure that indirect effects are considered by agencies as Congress intended.

The RFA's requirements are especially important to improving public participation and the quality of regulations, and have saved billions of dollars in regulatory costs for small businesses. In January 2017, Small Business Administration's Office of Advocacy, which monitors compliance with the RFA and assists agencies in meeting the law's requirements, issued its annual report indicating that it helped save small businesses $1.4 billion in regulatory costs.

Moreover, Advocacy has saved businesses cumulatively $130 billion in regulatory costs since it began tracking regulatory cost savings in 1998. Imagine the positive impact on regulations if agencies were not able to avoid the RFA's requirements so

[1] 126 Cong. Rec. 21,456 (1980).

easily. In addition, despite the success of the small business panel process, it only applies to three agencies.

*Question 3.* Apart from those discussed in your testimony and at the hearing, are there any other examples of areas in which we can reform our transportation regulations to help get our goods to market more efficiently without compromising safety?

Answer. The Department of Transportation (DOT) needs to keep its regulatory agenda in check so that critical transportation services on which manufacturers rely are not hampered by additional red tape. Some DOT regulations have made transporting finished goods to a consumer and component parts to a shop floor more difficult and more costly.

Regulatory requirements for prescriptive activities are not the best way to improve safety if measuring safety outcomes can provide better incentives and flexibility. Positive Train Control (PTC) is one of the best examples of how a technology mandate could have been more performance-based, which could have achieved better safety outcomes sooner. Had Congress and the Federal Railroad Administration (FRA) required performance standards for the types of incidents prevented by PTC, then railroads could have identified and implemented the best way to achieve those goals, which would have included PTC in tandem with other processes and technologies.

Additionally, on May 1, 2015, the Pipeline and Hazardous Materials Safety Administration (PHMSA) and the FRA issued a final rule mandating that trains hauling certain hazardous materials must install a braking system known as electronically controlled pneumatic (ECP) brakes, which the industry has tested for many years in actual revenue service and largely rejected as unreliable. The U.S. Government Accountability Office has criticized the lack of transparency in the agency's decision-making, and the National Academy of Sciences recently identified weaknesses and gaps in the FRA's analysis and modeling of the technology. This rule would impose a specific solution on the railroad industry that has been shown to provide minimal safety gains at great cost while negatively impacting rail operations.

On March 14, 2016, the FRA issued a notice of proposed rulemaking that would mandate a minimum of two persons must be in the locomotive cab for railroad operations, despite the absence of any sound science that suggests a safety gain would result. Freight railroads currently operate with two person crews in keeping with collectively bargained work arrangements. This command-and-control approach makes more difficult a glide path to technological innovation allowing railroads to gain necessary efficiencies to compete in the marketplace, at a time when policy makers are encouraging and incentivizing such advancements on the Nation's roadways. The railroad industry strongly opposes moving forward on a crew size rule that is not the product of collaborative industry stakeholder discussion.

Granting waivers is a measured approach to bridging past with present and help make regulatory evolution possible. The FRA's waiver authority is appropriately very broad. The regulations provide that, "the Secretary may waive compliance with any part of a regulation prescribed or order issued under this chapter if the waiver is in the public interest and consistent with railroad safety." The Secretary of Transportation and the FRA Administrator should review existing waivers, streamlining them as appropriate and making some permanent in order to provide certainty to the industry and stakeholders. Typically waivers are granted for no longer than five years. The department should expeditiously consider and act on pending waivers, especially those that promote innovation, demonstrate technology or proof of concept, or allow operating practices that are more efficient and consistent with railroad safety, and promptly grant them when appropriate. The FRA should reform the process for granting new waivers with a focus on efficiency, prioritizing technology and collaboration.

Today's manufacturers rely on interstate and global movements of goods and services. Patchwork state regulations and incompatible international standards disrupt supply chains and increase costs for manufacturers, yet have become all too common. Manufacturers support the primacy of the Federal Government in the regulation of interstate commerce. Manufacturers appreciate the Committee's approval of the Commercial Vessel Incident Discharge Act (S. 168), which would eliminate a regulatory burden hindering interstate and international commerce by replacing multiple Federal and state regulations with a single national standard for the regulation of ballast water and other discharges incidental to normal vessel operations. Additionally, as the Committee considers Federal Aviation Administration (FAA) reauthorization legislation, there is an opportunity to improve the FAA certification process for manufactured aviation products. Additionally, any new regulation of the air transport of lithium batteries should ensure that manufactures are in harmony with international standards. The NAM looks forward to working with this Committee to make the United States the best place in the world to build and make things that keep our economy moving.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. DEB FISCHER TO ROSARIO PALMIERI

*Question.* As it relates to regulatory reform, I've been a strong proponent of transparency, better cost-benefit analysis, and more stakeholder participation in the process. As chair of the Surface Transportation Subcommittee, I've convened hearings on performance-based regulations, whereby agencies set goals or benchmarks and allow flexibility in achieving those goals. From your perspectives, what are the benefits of moving away from prescriptive regulations towards more goal-oriented regulations?

Answer. Regulators often issue rules that are inefficient, impose unnecessary burdens and harm our ability to innovate and create jobs. If we are to succeed in creating more jobs and growing our economy, we must reform our regulatory system so that manufacturers can innovate and make better products instead of spending hours and resources complying with inefficient, duplicative and unnecessary regulations. For an agency to improve the effectiveness and efficiency of a regulation, it must define the problem that the rule would address. Then, as President Obama asserted in Executive Order 13563, the agency "must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends."

Poorly designed regulations can inhibit innovation and actually make it more challenging to efficiently meet regulatory objectives. Therefore, it is vital that agencies employ sound regulatory principles including the use of performance measures in place of technology or process mandates. Regulated entities will often find more efficient ways to achieve the regulatory objective than regulators could have planned for in advance of implementation. Regulators should, among other things, use the best available science, better calculate the benefits and costs of their rules, improve public participation and transparency, use the least burdensome tools for achieving regulatory ends and specify performance objectives rather than a particular method of compliance to improve the effectiveness of regulatory measures. Agency adherence to each of these regulatory principles is vital if we are to implement fundamental change to our regulatory system that improves the effectiveness of rules in protecting health, safety and the environment while minimizing the unnecessary burdens imposed on regulated entities.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BILL NELSON TO ROSARIO PALMIERI

*Question.* Just last April, President Obama signed into law the Child Nicotine Poisoning Prevention Act. I authored this law, which requires child-resistant packaging standards for liquid nicotine products, because the Consumer Product Safety Commission's (CPSC) statute—which you believe is overly broad—did not allow the agency to regulate liquid nicotine products. It took well over a year to get this bill passed, and while it was pending, many children were injured and a 1-year-old in New York died after ingesting a lethal dose of liquid nicotine.

You stated in your written testimony that Congress and the Office of Management and Budget should have more power to review and delay rules from CPSC and other safety regulators.

Under this framework, how can CPSC quickly respond to new, and often very serious, product safety issues?

Answer. Under existing law, the CPSC has the authority it needs to quickly respond to new and serious safety issues. The Consumer Product Safety Act (CPSA), as amended, provides the Commission with the authority to issue product bans to stop the distribution of harmful products. The agency's recall authority, for both voluntary and mandatory recalls, allows it to target products that are already in the possession of consumers. None of these actions would be subject to third-party review by the Office of Management and Budget or other body.

When the Commission has reason to believe a product presents a substantial product hazard, the agency can ask the court for a preliminary injunction to cease distribution of that product. Moreover, when a product poses an imminent hazard, the agency is given further authority to ask the court to grant "such temporary or permanent relief as may be necessary to protect the public from such risk." (5 U.S.C. 2061(b)(1)). These actions also would not be subject to third-party review.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. AMY KLOBUCHAR TO ROSARIO PALMIERI

*Question.* Mr. Palmieri, thank you for highlighting my SCORE Act in your testimony. I apologize that I had to leave for a vote in the Judiciary Committee before I had the chance to ask you a follow-up question. As you mentioned, the bill would establish a Regulatory Analysis Division within the Congressional Budget Office.

How do you think this office could lead to more efficient regulation of manufacturers and other segments of the economy?

Answer. Congress is at the heart of the regulatory process and produces the authority for the agencies to issue rules, so it is also responsible, along with the executive branch, for the current state of our regulatory system. While Congress does consider some of the impacts of these mandates it imposes on the private sector through regulatory authority it grants in law, it has less institutional capability for analysis of those mandates than the executive branch. Congress does not have a group of analysts who develop their own cost estimates of proposed or final regulations.

As you mention, the SCORE Act (S. 2294, 114th Congress) would establish a Regulatory Analysis Division within the Congressional Budget Office to conduct analysis of the prospective impact of economically significant rules. Not only would this office give lawmakers better information about the potential impacts of a proposed regulation, but it would also provide agencies with analysis conducted by an objective third party. This is an important rethinking of the institutional design of our regulatory system and could lead to regulations that more effectively meet policy objectives while reducing unnecessary burdens. We support this legislation

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO ROSARIO PALMIERI

*Question 1.* In January, the National Association of Manufacturers published a report entitled "Holding Us Back: Regulation of the U.S. Manufacturing Sector." This report says, "Manufacturers face 297,696 restrictions on their operations from Federal regulations."

During the hearing, you admitted that the report also included "Guides" and "Guidelines" that do not have the force of law, if they were published in the CFR. However, the report's "Methodology" on page 11 still says, "Guidance documents that pertain to specific regulatory programs, and sometimes have the effect of a regulation, were *excluded* [emphasis added]."

Will NAM issue a correction that "federal regulations" for the purpose of your report also includes guidance documents?

*Question 2.* Will NAM issue a correction that the report's methodology includes guidance documents?

Answer 1–2. The NAM study is a comprehensive review of restrictions from Federal regulations contained in the Code of Federal Regulations. During my testimony, I accurately described the scope of the Code of Federal Regulations as inclusive of agency promulgated regulations and, in rare instances, the codification of guidance documents. The Administrative Procedure Act (APA) defines a rule as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." Rules that have the force of law are required to be issued with notice and comment procedures as outlined in § 553 of the APA. Interpretive rules, guidance and statements of policy which do not have the force of law have no such requirement.

Unfortunately, agencies will frequently issue "legislative rules" which have the force of law disguised as guidance or an interpretive rule. As a result, courts have devised tests to identify what types of rules issued as guidance have the force of law. In *American Mining Congress v. MSHA* [1] the court set out a four-part test in which meeting any one of the parts indicated that a rule was a legislative rule. The four criteria included whether or not the rule was published in the Code of Federal Regulations, noting that 44 U.S.C. § 1510 limits publication in that code to rules "having general applicability and legal effect" as well as whether or not the agency guidance had "binding effect" that does not leave the agency discretion. The methodology of the study only includes rules which have the force of law because it only includes language that has "binding effect" and is published in the Code of Federal Regulations. No guidance, which is merely interpretive or a general statement of

[1] *American Mining Congress v. MSHA,* 995 F.2d 1106 (D.C. Cir 1993).

policy and thus lacks the force of law, was included in this study. Our description of the methodology is accurate.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BRIAN SCHATZ TO ROSARIO PALMIERI

*Question 1.* At the hearing, I asked if NAM had taken a position on President Trump's executive order banning travelers and immigrants from seven Muslim-majority countries and you offered to find out NAM's position. To follow up, I have the following requests:

Please provide a list of your member companies that have publicly opposed the travel and immigration ban and a list of the companies that have not.

Answer. Membership lists of the National Association of Manufacturers are confidential. A list of the NAM Board of Directors membership is public and available on our website.

*Question 2.* How many member companies must support a position for NAM to make it a priority?

Answer. The policy positions of the NAM are developed by our member companies and approved by the association's Executive committee and Board of Directors. A list of the NAM's Executive Committee and Board of Directors is available on our website, as is the approved policy positions of the association.

*Question 3.* Does the travel and immigration ban negatively impact your member companies?

*Question 4.* Has NAM taken an official position on the ban? If not, please let me know when NAM plans to take an official position.

Answer 3–4. The Executive Order issued on January 27 is currently enjoined by the U.S. Court of Appeals for the Ninth Circuit.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN THUNE TO GARY SHAPIRO

*Question.* In December 2014, President Obama observed that, at times, "the regulatory agencies treat every problem like a nail and only have a hammer, and aren't engaging with industry enough to think, all right, here is the problem we're trying to solve, is there a smarter way of solving it." How effective have regulators been in working with industry and incorporating their perspectives?

Answer. The Consumer Technology Association (CTA) has had the opportunity to work with Federal regulators under the jurisdiction of the Senate Commerce Committee to advance pro-innovation policies. Our experience to date has been varied.

CTA's work with the U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) is a prime example of this varied experience. CTA is working with NHTSA on its Federal Automated Vehicles Policy and is encouraged by its receptiveness to industry's perspective and recognition of the need for consistency for self-driving vehicles and the importance of flexibility for the industry to continue to innovate.

However, CTA is also working with NHTSA on its Phase II Driver Distraction Guidelines. CTA shares NHTSA's concerns about the hazards of distracted driving. But we believe the Phase II Guidelines take the wrong approach to technology, both in substance and by impermissibly reaching beyond NHTSA's statutory authority under the National Traffic and Motor Vehicle Safety Act ("Safety Act"). In this instance, CTA would have encouraged greater incorporation of industry's expertise and perspective. In the end, NHTSA does not have the authority to dictate the design of smartphone apps and other devices used in cars—its legal jurisdiction begins and ends with motor vehicle equipment. This regulatory overreach could thwart innovative safety solutions from ever coming to market.

Examples of positive industry engagement set by Federal agencies include the work of the Federal Aviation Administration (FAA) on drone policy. FAA's early and ongoing engagement with the drone industry and user community is to be commended and should be replicated by other departments and agencies approaching new industries. FAA reached out to the emerging industry early, appointing staff to engage directly and keep the path of communication open.

They regularly solicit feedback from industry and stakeholders, even appointing an advisory committee (the Drone Advisory Committee) to assist the agency with key issues. However, even with this orientation and approach, regulatory flexibility for FAA is needed, as they still must work through a regulatory regime established long before consumer and commercial drones took to the skies.

While my written and oral testimony expressed deep concern with the Federal Communications Commission's (FCC) broadband privacy rules and their effect on future innovation, CTA continues to work closely and cooperatively with the FCC on other matters. As one of many examples, when Congress passed the 21st Century Communications and Video Accessibility Act of 2010 (CVAA), industry was deeply involved in the legislative process. Similarly, industry has worked closely with the FCC to ensure the rules are implemented in way that balances the needs of industry and the needs of consumers with disabilities. Thus far, we have succeeded in striking a balance. Industry also worked closely and successfully with the FCC to craft rules that enabled the commission to conduct the world's first voluntary TV broadcast spectrum incentive auctions.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEB FISCHER TO GARY SHAPIRO

*Question 1.* Mr. Shapiro, in your written testimony, you observed how numerous agencies and committees may have potential jurisdiction over the Internet of Things. I am concerned that this disjointed approach could lead to conflicting or duplicative regulations being imposed on companies due to agencies operating in silos. Do you believe the Internet of Things will be enabled or inhibited by the imposition of new regulations? Given how many agencies could claim some basis for regulating the Internet of Things, how do we streamline the way that agencies and Congress are approaching the Internet of Things?

Answer. A myriad of overlapping and contradicting regulations will inhibit growth of the Internet of Things (IoT). For example, a startup developing a new wireless device may not know that there are FCC rules on equipment authorization and spectrum use. Meanwhile, IoT wearable devices offered by health care providers fall under the Health Insurance Portability and Accountability Act (HIPAA), while the same devices purchased from a retail store are regulated in an entirely different manner by the Federal Trade Commission (FTC). The FTC, the Federal agency most involved in exploring IoT, increasingly shares jurisdiction with other agencies that lack expertise in consumer privacy issues. To comply with the myriad of possible regulations requires the expertise of lawyers, and startups rarely have the resources needed to hire a team of legal experts.

The technology industry has considered how to navigate the fragmented approaches to IoT within the government, specifically within the legislative branch. Policymakers and regulators should avoid creating regulatory "silos" that confuse industry and consumers. Regulatory responsibilities should be clarified to avoid duplication among agencies.

CTA supports implementation of a consistent approach to privacy and security, building on the expertise of cross-cutting agencies such as the FTC, the National Institute of Standards and Technology (NIST), and others as appropriate.

CTA applauds the creation of the bipartisan Senate IoT Working Group, which aims to educate members and bring them "up to speed on this technology and its impact on the modern economy and consumers."

*Question 2.* Mr. Shapiro, your testimony highlighted the obstacles faced by members of your association that you characterize as "disruptive companies." I agree with your view that policymakers should exercise regulatory humility so new business models can grow and thrive. Is there a role for Congress to play in eliminating regulations that could stifle innovation by disruptive companies? Are there specific laws you would like to see passed or regulations you want to see eliminated?

Answer. Congress can enable disruptive innovators in several ways. First, change outmoded rules that inadvertently suppress current business models. For example, the Senate could pass the Modernizing Government Travel Act enabling Federal employees to use ridesharing services while on official government business.

Second, Congress can promote a business climate conducive to risk-taking and innovation. For example, startups are disproportionately the victims of patent trolls. Cracking down on patent abuse would save entrepreneurs time and resources fighting frivolous patent lawsuits.

Third, Congress and policymakers can use their "bully pulpit" to embrace innovation and explain how new technologies benefit our communities and our lives.

*Question 3.* As it relates to regulatory reform, I've been a strong proponent of transparency, better cost-benefit analysis, and more stakeholder participation in the process. As chair of the Surface Transportation Subcommittee, I've convened hearings on performance-based regulations, whereby agencies set goals or benchmarks and allow flexibility in achieving those goals. From your perspectives, what are the benefits of moving away from prescriptive regulations towards more goal-oriented regulations?

Answer. Over-regulation is always a danger, but the impact is more acute on a dynamic, rapidly-evolving industry such as technology. Ideally, regulation will be goal-oriented and focus narrowly on specific health and safety concerns or harms. This "light touch" approach will allow potentially life-saving innovations such as driverless cars to be deployed as quickly as possible.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEAN HELLER TO GARY SHAPIRO

*Question 1.* For tech companies like those at the Consumer Electronics Show, what regulations are doing the most harm to their business?

Answer. Several regulations present challenges to our members and the thousands of companies that exhibit at CES. One particularly onerous mandate was the Obama Administration's Department of Labor decision to increase the annual salary threshold, used to determine which employees are eligible for overtime pay, from $23,660 to $47,476. In startup culture, many employees knowingly join a new venture at a low salary, with the expectation of a substantial payoff should the venture succeed. Many times these initial employees are the friends—or even dorm-mates—of the founder. The massive expansion of overtime eligibility upends this business model and makes it unaffordable for many startups.

Another is the Securities and Exchange Commission (SEC) requirement for conflict mineral disclosure. As minerals are like water, disclosure is difficult to trace and the laws have been more harmful than helpful. Congress should eliminate that requirement.

*Question 2.* Are there any regulations coming out of the Federal Communications Commission (FCC) that you believe are harmful to innovation?

Answer. The FCC's most recent Order on broadband privacy failed to justify the FCC's decision to depart from longstanding precedent and FTC recommendations with respect to what information should be considered sensitive and thus subject to opt-in consent. To the contrary, the Order summarily dismissed record evidence that demonstrates how the Commission could institute a sensitivity-based framework that is consistent with the FTC's framework and with the goal of providing appropriate privacy protections to consumers across the Internet ecosystem. In sum, the FCC's latest broadband privacy rules will chill innovation across the entire Internet ecosystem.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BILL NELSON TO GARY SHAPIRO

*Question 1.* In your written testimony, you state that the cost of regulatory compliance has gone up more than $100 billion annually. However, I do not see any quantification of the potential benefits of regulations, which include injuries prevented and lives saved.

How do you believe we should analyze and balance benefits against costs?

Answer. We encourage regulators to use rigorous cost-benefit analysis to determine the impact of a regulation to society as a whole. The generally accepted method is to assign a monetary value to all predicted costs and benefits of a regulation including the potential impact on the economy, business, government, the environment and individual citizens.

*Question 2.* How do you propose that we calculate the value of lives saved or injuries prevented?

Answer. Protecting the health and safety of citizens is a basic and essential function of government. We encourage regulators to look at the full picture, including the health and safety benefits brought about by new technologies. For example, every year more than 30,000 people are killed in auto accidents on U.S. roads. Most of these deaths are caused by human error and could likely be prevented by self-driving cars and new mobility technologies. Therefore, government must ensure that life-saving innovations are made available to the public as expeditiously as possible.

*Question 3.* The development and application of drone technology holds great promise. I understand that at least some members of your association are involved in the rapidly evolving drone industry. New regulations governing the commercial use of small drones were crafted by the Federal Aviation Administration (FAA), and those new regulations took effect last August. Industry response to FAA's drone regulations seems to be generally positive. What is the view of your association?

Answer. CTA appreciates the FAA's inclusive approach to drone policy. The FAA has engaged industry early and often, forming the Drone Advisory Committee and consulting the industry on policy needs and priorities. We appreciate the Part 107 rules, which have been welcomed by our members, and look forward to working with the FAA to expand operations so we can make full use of this technology. We urge the FAA to move quickly to finalize rules regarding flights over people, flights beyond line of sight and at night, and other expanded operations.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BRIAN SCHATZ TO GARY SHAPIRO

*Question.* Unlicensed spectrum bands have empowered innovators—including many CTA Members—to deliver millions of new products which have enabled more than 70 million American homes that use Wi-Fi to connect to the Internet. What should Congress and the Administration do to make sure we can make more unlicensed bands available for innovation?

Answer. The need for additional spectrum to meet the ever-growing consumer and business demands for broadband services and applications is undisputable. CTA estimates unlicensed spectrum generates over $62 billion per year for the U.S. economy. The economic impact of unlicensed spectrum based on a device's incremental retail sale value, is a metric that takes into account only the fraction of the sales price attributable to unlicensed spectrum.

Unlicensed spectrum, as a complement to licensed spectrum, is critical to enabling the provision of robust mobile broadband services. It plays an important role in addressing spectrum constraints, especially in higher bands, and promotes innovation and investment. Making Federal spectrum available for commercial use is a critical element in addressing this need. To meet this objective, Congress and the Administration must develop incentive mechanisms that encourage Federal agencies to relinquish or share spectrum, and assure these agencies they can continue to meet their mission-critical communication needs.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN THUNE TO ADAM J. WHITE

*Question.* Even when agencies do perform full cost-benefit analyses of their proposed rules, they may still not capture the full regulatory burden on businesses when the full history of cumulative rules are taken into account. How effective have agencies been in assessing the cumulative burdens of, in some cases, decades of rules?

Answer. Agencies have not been successful in assessing the cumulative burdens of regulations—let alone *reducing* those burdens. The Administrative Conference of the United States diagnosed this problem well in 2014:

> Traditionally, Federal regulatory policymaking has been a forward-looking enterprise: Congress delegates power to administrative agencies to respond to new challenges, and agencies devise rules designed to address those challenges. Over time, however, regulations may become outdated, and the cumulative burden of decades of regulations issued by numerous Federal agencies can both complicate agencies' enforcement efforts and impose a substantial burden on regulated entities.[1]

To identify the agencies' failure on this point is not to "blame" them. As former OIRA Administrator Cass Sunstein observed, "[i]n principle, a competent analysis of costs might be able to capture those [cumulative] costs, but it is *exceedingly hard* to do so in the context of particular rules."[2] While it was good for the White House and Sunstein's OIRA to order agencies to look back at old regulations and attempt to quantify cumulative burdens,[3] one must concede the challenges inherent in that task.

The task of quantifying cumulative burdens is all the more difficult when one looks beyond the cumulative burdens imposed by a single agency, and considers the needless costs of redundant regulatory burdens across multiple agencies, or between

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[1] ACUS, *Retrospective Review of Agency Rules,* Recommendation 2014–5 (Dec. 4, 2014); *see also* Dudley, "Considering the Cumulative Effects of Regulation," GWU Regulatory Studies Center (Aug. 11, 2015).

[2] Sunstein, *The Regulatory Lookback,* 94 B.U. L. Rev. 579, 588–89 (2014)

[3] Exec. Order 13563 §§ 1(b) & 3; OIRA, *Memorandum to the Heads of Departments and Agencies, and of Independent Regulatory Agencies,* M–11–10 (Feb. 2, 2011).

Federal and state government, or even at the international level. Still, experts have offered hope that such analysis can be done, even if there is no single "silver bullet" for easily accomplishing the task.[4]

Given the challenges inherent in precisely calculating cumulative burdens, perhaps the solution lies in creating an *incentive* for *agencies themselves* to identify cumulative burdens as eagerly as possible. And that is a virtue of "regulatory budgets": by putting a cap on an agency's cumulative burdens, the agency itself has an incentive to identify excessively burdensome rules among its stock of existing regulations, and to reform or repeal them before imposing *new* regulatory burdens.[5] President Trump already has begun to impose regulatory budgets on agencies through an executive order,[6] but if Congress wants to reduce cumulative regulatory burdens then it should consider imposing regulatory budgets through legislation.

Congress should also look for opportunities to reduce cumulative regulatory burdens at the international level through trade agreements, as well as cumulative regulatory burdens between the Federal and state governments.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. DEB FISCHER TO ADAM J. WHITE

*Question.* As it relates to regulatory reform, I've been a strong proponent of transparency, better cost-benefit analysis, and more stakeholder participation in the process. As chair of the Surface Transportation Subcommittee, I've convened hearings on performance-based regulations, whereby agencies set goals or benchmarks and allow flexibility in achieving those goals. From your perspectives, what are the benefits of moving away from prescriptive regulations towards more goal-oriented regulations?

Answer. In my prior legal practice, I worked on energy infrastructure issues, and so I am familiar with the benefits and limits of performance-based regulation (PBR).[7]

In general, I think that PBR offers great promise, by creating an environment in which humankind's capacity for innovation and technological advancement is given space and incentive to find the best path toward achieving overarching goals. This strikes me as more promising than the agencies' traditional method of dictating specific standards for agencies to comply with. And we must always keep in mind that regulations are not an end in themselves—they are a means to the greater end of positive outcomes. If PBR is a better way of achieving those outcomes, then PBR should supplement the traditional regulatory approach of setting myriad minutely-detailed standards.

That said, specific regulatory standards have a virtue: namely, they are precise and transparent, and thus they can be administered more easily and predictably. If, as Justice Scalia once suggested, "the rule of law" is "a law of rules," then we should hesitate before discounting altogether the value of rules-based system.[8] The rules that bind the regulated community also bind the regulators.

Because there are both benefits and drawbacks to PBR, I would urge Congress to promote greater use of PBR but with an experimental mindset. Instead of prescribing greater use of PBR across all agencies and programs, consider targeting specific agencies and programs where PBR seems especially promising. If those programs are successful, then Congress could consider expanding the experiment to all agencies and programs.

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Thank you, again, for the opportunity to testify.

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[4] Bull, *Controlling the Cumulative Costs of Regulation: Exploring Potential Solutions* (2015), available at *http://www.thecre.com/forum2/?p=1052;* Weiss, *Regulatory "Look Back" in Practice: Deployment of the Single Window,* Yale. J. Reg.'s Notice and Comment (Dec. 10, 2015), at *http://yalejreg.com/nc/regulatory-look-back-in-practice-deployment-of-the-single-window-by-jeff-weiss/*.

[5] My co-authors, Oren Cass and Kevin Kosar, both highlighted the benefits of regulatory budgeting in our recent book, *Policy Reforms for an Accountable Administrative State* (2017); *see also* Jeff Rosen, "Putting Regulators on a Budget," *National Affairs* (Spring 2016).

[6] Exec. Order 13771 § 2 (Jan. 30, 2017).

[7] *See, e.g.,* Lowry & Kaufmann, *Performance-Based Regulation of Utilities,* 23 Energy L.J. 399 (2002); Coglianese *et al., Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection,* 55 Admin. L. Rev. 705 (2003); Aggarwal & Burgess, *New Regulatory Models* (white paper) (Mar. 2014).

[8] Scalia, *The Rule of Law as a Law of Rules,* 56 U. Chi. L. Rev. 1175 (1989).

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. DEB FISCHER TO LISA HEINZERLING

*Question.* As it relates to regulatory reform, I've been a strong proponent of transparency, better cost-benefit analysis, and more stakeholder participation in the process. As chair of the Surface Transportation Subcommittee, I've convened hearings on performance-based regulations, whereby agencies set goals or benchmarks and allow flexibility in achieving those goals. From your perspectives, what are the benefits of moving away from prescriptive regulations towards more goal-oriented regulations?

Answer. For many years, a recurring debate over regulation has involved the comparative costs and effectiveness of "performance" standards and "design" standards. Performance standards specify, for regulated entities, an outcome-based standard to meet, but they do not specify the means of meeting that standard. Design standards, in contrast, specify particular means regulated entities must use in order to achieve the underlying goals of regulation, such as pubic health and safety.

Proponents of performance standards have argued, often reasonably, that such standards allow regulated industry to meet regulatory goals more cost-effectively because they give industry flexibility to figure out how best to meet those goals. Performance standards do not lock in any one technological or other means of attaining regulatory goals, but make room for innovation in working toward these goals.

Sometimes, however, design standards may be preferable to performance standards. Sometimes it is difficult to describe desirable performance with the degree of specificity and accuracy necessary to develop an effective standard. In that case, design standards may be superior to performance standards. Design standards may also be easier to develop and enforce than performance standards. On occasion, too, a regulatory agency may not be trusted by the legislative body to develop a performance standard that adequately protects public health and safety (perhaps because the agency has been a reluctant or timid regulator in the past), and in that case as well a prescriptive design standard may be preferable insofar as it may impose greater constraints on a recalcitrant agency.

The bottom line is that it is difficult to conclude, across the board, that one type of regulatory standard is superior to another. The appropriate regulatory tool to use depends on the underlying circumstances, not on generalities about regulatory approaches.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BILL NELSON TO LISA HEINZERLING

*Question 1.* In Mr. Gerard's response to Senator Inhofe's question regarding a Securities and Exchange Commission (SEC) rule requiring publicly-traded oil companies to disclose payments to foreign governments, he stated that a joint resolution of disapproval of this rule under the Congressional Review Act (CRA) "sets aside this rule and allows us to work with the SEC to develop a rule to accomplish their purposes." However, the CRA states that a rule subject to a CRA joint resolution of disapproval "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."

If a rule is subject to a joint resolution of disapproval pursuant to the Congressional Review Act, can the agency reissue a similar rule?

Answer. The introductory paragraph of this question highlights the provision of the Congressional Review Act that is central to the question: a rule subject to a joint resolution of disapproval "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." (5 U.S.C. § 801(b)(2).) This provision does appear to prohibit an agency from reissuing a rule that is "substantially the same" as a rule disapproved under the Congressional Review Act.

However, two questions remain about the operation of this provision. First, it is not clear what "substantially the same" means. The term is not defined in the Act, and it is susceptible to a variety of interpretations. Second, it is not clear how the provision on "substantially the same" rules would be enforced. Certainly, Congress itself could undo a rule on the ground that it was "substantially the same" as a disapproved rule. The courts, however, may not be empowered to enforce this limit on subsequent rules, as the Congressional Review Act provides that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." (5 U.S.C. § 805.) An agency's determination that a subsequent rule is not “substantially the same” as a prior, disapproved rule would appear to be a “determination, finding, action, or omission” under the Congressional Review Act and therefore not subject to judicial review.

*Question 2.* In your testimony, you explained how industry often talks as though rules produce all costs and no benefits. In fact, some regulations, such as fuel efficiency standards, actually save consumers money. As was discussed at the hearing, some regulations even save lives.

It is my understanding that the “regulatory budget” portion of President Trump’s recent Executive Order would allow only for consideration of costs to industry of a new rule. Benefits to the public would not be considered.

Is that correct and, if so, what are the implications?

Answer. President Trump’s Executive Order on regulatory costs, titled “Reducing Regulation and Controlling Regulatory Costs,” addresses only the costs, and not the benefits, of regulation. It instructs agencies to eliminate at least two regulations for every new regulation they issue and to offset the private costs of any new regulation by eliminating the existing costs of prior regulations. The Executive Order does not mention, let alone require agencies to consider, the benefits of new rules to the public.

The Acting Administrator of the Office of Information and Regulatory Affairs has issued interim guidance on implementing this Executive Order. This guidance states that “[t]he regulatory cost cap has no effect on . . . the consideration of regulatory benefits in making regulatory decisions.” In addition, the guidance generally precludes agencies from considering cost savings (such as future energy costs savings) that arise from rules as offsets to the costs of those rules. Agencies may not, in other words, “pay for” the costs to private entities of a new rule by pointing to the benefits to the public of that rule.

The implication of the Executive Order’s failure to address the public benefits of rules is that agencies may eliminate highly beneficial rules in order to achieve the cost savings mandated by the Order. The Executive Order also embraces the common, flawed assumption I criticized in my testimony: that regulation produces all costs and no benefits.

*Question 3.* Is it true that our current regulatory process has no way of adequately measuring the benefits accrued from regulations and that the costs of regulatory compliance are often overstated?

Answer. It is true that our current regulatory process cannot adequately measure the benefits of many regulations. Many benefits remain unquantified and unmonetized in regulatory analysis. In conditions of uncertainty, agencies must often rest with qualitative descriptions of the benefits a regulation aims to achieve. Many benefits that can be quantified, moreover, are only problematically translated into monetary terms. There are continuing challenges, for example, with representing the value of human life with a precise monetary figure. Even outside the context of lifesaving rules, problems remain. When the Department of Justice issued rules implementing the Prison Rape Elimination Act, for example, it produced an economic analysis that offered monetary values for 17 different types of sexual abuse. Much of the analysis was predicated on the assumption that the victims of sexual abuse were in the position of having to pay their abusers to refrain from abusing them. This is just one example of the ways in which measuring the benefits of regulation by monetizing them can deeply misunderstand both the problems giving rise to regulation and the values underlying the impulse to regulate.

Apart from inadequately measuring the benefits of regulation, regulatory analysis also frequently overstates the costs of regulation. Regulated industries have an incentive to overstate costs to stave off proposed regulation, and both government and industry often underestimate the cost-saving innovation that will take place once regulation is in place.

*Question 4.* How do you propose that the benefits to American families that result from safety regulations—from hospital visits avoided to deaths that are prevented—be measured to adequately capture their value to us all?

Answer. I believe the best way to capture the value of the benefits of safety regulation for American families is to describe them as simply and clearly as possible. This means describing them in “natural units,” or terms in which laypeople would describe them. For example, if human lives are expected to be saved by a regulation, I would propose describing them as human lives. If illnesses are prevented, I would propose estimating the number of illnesses and describing the human effects of those illnesses as clearly and as fully as possible. I think confusion can result when, instead of describing regulatory benefits in terms we all can understand, we describe them as dollars or as other proxies for the actual benefits.

*Question 5.* Can you provide any examples of significant economic savings that accrue to families as a result of Environmental Protection Agency regulations?

Answer. The fuel efficiency standards issued during the Obama administration offered significant economic savings to families as a consequence of lowering fuel costs for automobiles. For example, the standard increasing fuel economy to over 54 miles per gallon by model year 2025 would, by 2025, on average, save families more than $8,000 over the lifetime of a vehicle. And this is on top of the health and environmental benefits of the rule, which themselves also have embedded in them economic savings to families, in the form of lowered health care costs, fewer lost work days, and more.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AMY KLOBUCHAR TO LISA HEINZERLING

*Question 1.* Americans expect a common sense approach to regulation, one protecting consumers and the public interest, without stifling innovation and economic growth. We need to protect consumers with clarity and consistency, not endless red tape. This is especially important to me because, before coming to the U.S. Senate, I spent 13 years as an attorney representing companies in regulatory areas.

How can we ensure that regulations protect the public interest, health, and safety without stifling innovation and growth?

Answer. First, we can recognize that the effects of regulation on innovation and growth are often overstated, especially insofar as regulatory critics ignore the innovation-forcing tendencies and the economic benefits of a good deal of regulation. Second, we can be mindful of a range of possible regulatory responses, from information provision to technology-based regulation to outright bans, and tailor regulatory responses, if possible given the underlying law, to take advantage of the creative impulses unleashed by regulatory strategies that allow firms some flexibility in choosing the means of compliance. This approach will not be desirable in all circumstances, but it is often a sensible approach. Third, it is always worth remembering that Congress is the body responsible for charging agencies with particular regulatory tasks, and thus it is Congress that decides, in the first instance, how to balance the values you describe.

*Question 2.* How do we strike the right balance between over-regulation on the one hand and under-regulation on the other?

Answer. We can begin to answer this question only by recognizing, first, that one person's "over-regulation" may be another person's "under-regulation." For example, the coal industry generally regards the Obama administration's Clean Power Plan as over-regulation, while many in the environmental community regarded it as under-regulation due to its modesty in comparison to the global climate threat we face. We must also recognize that the forces charging "over-regulation" are almost invariably better-funded, better-resourced, and more politically connected than the forces pressing for more regulatory action. It is easy, as a result, to hear the message of over-regulation more clearly than the message of under-protection.

Having said that, we should of course be on the lookout for both genuine over-regulation and genuine under-regulation. I believe that Congress, in the first instance, is the institution best suited to determining the methods by which we will evaluate potential regulatory frameworks. Some of these methods, such as technology-based regulation of environmental problems, may seem unduly rigid and yet they have yielded remarkable overall benefits to the public. They are not predicated on a case-by-case cost-benefit balancing of individual policies, but on an overall, legislative judgment that we have too much pollution of the air, water, and land, and that we should use the technologies we have to reduce it. The judgment about the appropriate balance between over-regulation and under-regulation is necessarily a judgment about underlying values, and as such I do not believe it is possible to set out an overarching framework for determining when we have gone too far in regulating and when we have not gone far enough.

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