

The Honorable Ron Johnson  
Chairman  
U.S. Senate  
Homeland Security & Governmental Affairs Committee  
Washington, DC 20510

The Honorable Thomas Carper  
Ranking Member  
U.S. Senate  
Homeland Security & Governmental Affairs Committee  
Washington, DC 20510

The Honorable James Lankford  
Chairman  
U.S. Senate  
HSGAC Subcommittee  
Regulatory Affairs & Federal Management  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member  
U.S. Senate  
HSGAC Subcommittee  
Regulatory Affairs & Federal Management  
Washington, DC 20510

Dear Senator Johnson, Senator Carper, Senator Lankford and Senator Heitkamp:

Thank you for the opportunity to weigh in on the important conversation on the impact of regulations, the problems with the current rulemaking process and recommendations for improvements to the system. The Coalition for Sensible Safeguards (CSS) is an alliance of more than 150 labor, environmental, public health, scientific, consumer, financial reform, small business, and public interest organizations joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.

## **BENEFITS OF PUBLIC PROTECTIONS**

### *Importance of Regulation*

In a democracy, citizens expect their government to protect their health and well-being since both lawmakers and agency staff are ultimately accountable to the people. Starting with the Progressive Era in the early 1900s, this meant ensuring that unsafe drugs and food could not be marketed to unsuspecting consumers and that workers in industrial settings were not forced to labor in unhealthy or high-risk workplaces. The New Deal brought more oversight of financial institutions and the associational and workplace rights of workers. With the growth of the consumer and environmental movements in the 1960s and 1970s, government responded to citizen concerns about industrial pollution and toxic chemicals by establishing rules limiting the emissions and substances that businesses are allowed to use or produce. Over time, as our expanding knowledge of medicine and science has improved our ability to evaluate the health risks of hazardous substances, public pressure to regulate their use has also grown.

Rules implement the laws Congress passes and are created utilizing the expertise of agency scientists and technical staff and after extensive research and consultation with scientists, engineers, industry-specific experts, workers, business owners and managers, and the public. These regulations are needed to provide essential protections that we as individuals cannot secure ourselves. Without regulations, we would not have the cleaner air and water or safer workplaces and products that we now take for granted.

In a society with little to no regulation, only the wealthy and privileged could afford protections. This is not how a democratic society should function. Our duty is to ensure equitable protections for everyone, and rules that provide those protections are a vital component to achieving that objective.

## *Costs vs. Benefits*

In practice, demands for better protections for human health and the environment have always been contested. There are costs to complying with new health and safety standards, and some corporations have bitterly fought rules that they allege increase their costs or constrain their activities. Even after the catastrophic oil spill in the Gulf of Mexico; the fertilizer facility explosion in West, Texas; the toxic coal ash contamination of the Dan River in North Carolina; the Bakken crude oil train derailment in Fayette County in West Virginia; and the housing and economic collapse that resulted from deregulating financial institutions, some observers argue that private firms can “self-regulate” and will respond to “the discipline of the market,” and so need no collective rules or external enforcement of standards for responsible corporate behavior.

In our government, the balance between the public’s interest in health and safety and commercial interests’ desire for profits is hashed out in the political square – first, through laws passed by elected officials (Congress and the president) that prioritize the value of human health and workplace safety, and next through specific, detailed rules that allow executive branch agencies to implement and enforce the priorities already written into our laws. For example, rules establish limits on the emissions or contaminants that commercial enterprises are allowed to produce, the workplace conditions that employers are required to maintain for their workers, and the information a bank has to provide a borrower.

Rulemaking is our democracy’s way of balancing the interests of the public’s safety and well-being with the profit-maximizing goals of the private sector. In fact, regulatory standards benefit private businesses, as well. They create a stable commercial environment, set the rules of competition, prevent a “race to the bottom,” and increase consumer confidence in products. If a rule is contested, it is almost always because a particular private business or industrial sector has a vested interest in maintaining the status quo.

Cost-benefit analysis has become a staple of the regulatory process; however, the current methodology has significant intrinsic flaws and limitations. In addition to the ethical concerns about putting a price on human life or suffering, these analyses are highly dependent on the assumptions upon which projections are based.

Historically, industries impacted by regulations have often overinflated predicted compliance costs. According to a study from the academics at the Center for Progressive Reform, agencies, especially the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA), primarily rely on industry to supply the estimated costs of proposed rules. Because companies know the purpose of the surveys, they have a strong incentive to overstate costs in order to skew the final cost-benefit analysis toward weaker regulatory standards. In some cases, OSHA and EPA regulation cost estimates have been inflated by at least 30% and generally by more than 100% of the actual cost of compliance.<sup>1</sup>

Agency projections of regulatory compliance costs which are typically based on industry supplied data have often been found upon review to be substantially overestimated<sup>2</sup>. However, benefits are often underestimated for a variety of reasons. Improvements in public health and the environment are diffuse and often difficult to quantify. Additionally, there is often sufficient scientific evidence to indicate a significant causal link between a problem and its impact (e.g., exposure to methylmercury and adverse cardiovascular effects), but not enough information to quantify or monetize that relationship.<sup>3</sup> When benefits are too difficult to quantify, they are often dropped from the analysis entirely, meaning a significant benefit

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<sup>1</sup> Center for Progressive Reform “Setting the Record Straight: The Crain and Crain Report on Regulatory Costs” (February 2011). Available at [http://www.progressivereform.org/articles/SBA\\_Regulatory\\_Costs\\_Analysis\\_1103.pdf](http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf)

<sup>2</sup> Center for Progressive Reform “Saving Lives, Preserving the Environment, Growing the Economy: The Truth about Regulation.” (July 2011). Table 6, page 13 shows several studies that found overestimated costs for numerous regulations. Available at [http://progressivereform.org/articles/RegBenefits\\_1109.pdf](http://progressivereform.org/articles/RegBenefits_1109.pdf). See also Eban Goodstein & Hart Hodges, “Polluted Data: Overestimating Environmental Costs,” 8 Am. Prospect 64 (Nov./Dec. 1997) and Winston Harrington, Richard D. Morgenstern, & Peter Nelson, “On the Accuracy of Regulatory Cost Estimates” (Resources for the Future, Discussion Paper 99-18, 1999) available at <http://www.rff.org/documents/RFF-DP-99-18.pdf>.

<sup>3</sup> Office of Management and Budget “2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities” Available at [https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014\\_cb/draft\\_2014\\_cost\\_benefit\\_report-updated.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/draft_2014_cost_benefit_report-updated.pdf)

is simply omitted.<sup>4</sup> Agency analyses of the benefits of a new rule or standard often list the benefits that are not able to be quantified and monetized, but it is essential that these unquantifiable benefits be considered in estimating the level of protections provided by a regulatory action.

### *Latest Industry Scapegoat*

Contrary to the past few years of misleading claims from industry – especially the U.S. Chamber of Commerce – numerous studies have failed to find evidence that regulations lead to significant overall losses<sup>5</sup> in employment.<sup>6</sup> No evidence shows that regulations lead to significant overall losses in employment or that regulations cause companies to move overseas. In fact, rules may increase employment and competitiveness by encouraging industry to become more productive and innovative in response to the regulations.<sup>7</sup>

Pollution control regulations result in jobs in areas such as construction and technology. For instance, the Manufacturers of Emission Controls Association (MECA) estimated that in 2010, the economic activity that resulted from emission control technology for new cars and trucks in the U.S. totaled \$12 billion. Additionally, MECA member companies provided 65,000 green jobs in the U.S.<sup>8</sup> The Institute of Clean Air Companies (ICAC) forecasts that the overall U.S. market for air pollution control and monitoring technology is around \$5 billion a year (in constant 2012 dollars) and is expected to increase to almost \$6 billion by 2016.<sup>9</sup> The Environmental Protection Agency's (EPA) Mercury and Air Toxics rule, which requires installation of pollution control systems on power plants and large industrial facilities, is projected to result in 46,000 short-term job-years,<sup>10</sup> as well as 8,000 long-term jobs.

## **CONCERNS WITH THE CURRENT FEDERAL RULEMAKING PROCESS**

### *Excessive Regulatory Delay – Undue Industry Influence, Judicial Review & Lack of Transparency*

After Congress passes a law, federal agencies begin to develop rules and standards to implement the legislation. The statutes typically give the responsible federal agencies guidance about the content and timing of the regulations, and agencies gather detailed information on the issue, develop ideas about appropriate standards, examine scientific studies, consult with groups that would be affected by the law, draft proposed rules, conduct cost and benefit analyses of those rules, and solicit public comment on them. It takes months or even years for these regulations to become final and for the impact of the law to actually be felt in the world. As an extreme example, the Government Accountability Office (GAO)

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<sup>4</sup> Center for Progressive Reform "Saving Lives, Preserving the Environment, Growing the Economy: The Truth about Regulation." White Paper #1109 (July 2011).

<sup>5</sup> See National Journal, "John Boehner's Remarks at Economic Club of Washington." (Sept. 15, 2011). Available at <http://www.nationaljournal.com/congress/text-john-boehner-s-remarks-at-economic-club-of-washington-20110915>

<sup>6</sup> Since 2007, the Bureau of Labor Statistics has asked firms that have had a mass layoff the reasons behind these layoffs. Only 0.2% to 0.4% of all mass layoffs were due to government regulation, as reported by the firms. Bureau of Labor Statistics (2012) "Extended Mass Layoffs in 2011." United States Department of Labor, Report 1039. Also, randomized surveys of small business owners show that at most, 25% of small business owners are concerned about excessive government regulation. See also American Sustainable Business Council et al. (2012) "Small Business Owners' Opinions on Regulations and Job Creation" (1 Feb). Hall, Kevin (2011) "Regulation, Taxes Aren't Killing Small Business, Owners Say," McClatchy Newspapers (Sept. 1). Dunkelberg, William C., and Holly Wade (2011) NFIB Small Business Economic Trends (August).

<sup>7</sup> Center for Progressive Reform "Saving Lives, Preserving the Environment, Growing the Economy: The Truth about Regulation." (July 2011)

<sup>8</sup> Manufacturers of Emission Controls Association, "MECA Highlights Economic Benefits of Mobile Source Emission Control Industry." (March 2011). [http://www.meca.org/galleries/files/MECA\\_economic\\_benefits\\_press\\_release\\_031111.pdf](http://www.meca.org/galleries/files/MECA_economic_benefits_press_release_031111.pdf). See also Institute of Clean Air Companies "Re: New Source Review Impact on Air Pollution Control (APC) Industry." (February 2004). <http://www.icac.com/?page=jobs&terms=%22re+and+new+and+source+and+review+and+impact+and+air+and+pollution+and+cont%22>.

<sup>9</sup> Institute of Clean Air Companies. September 2013. Available at [http://c.ymcdn.com/sites/www.icac.com/resource/resmgr/market\\_forecast/press\\_release\\_2013\\_market\\_fo.pdf](http://c.ymcdn.com/sites/www.icac.com/resource/resmgr/market_forecast/press_release_2013_market_fo.pdf)

<sup>10</sup> A "job-year" is one job for one year. See [http://www.whitehouse.gov/assets/documents/Job-Years\\_Revised5-8.pdf](http://www.whitehouse.gov/assets/documents/Job-Years_Revised5-8.pdf)

has reported that, on average, it now takes the Occupational Safety and Health Administration (OSHA) more than seven years to publish a final worker safety standard.<sup>11</sup>

The current federal regulatory system is plagued by a number of problems that make it difficult for federal agencies to react to identifiable hazards in a timely, proactive fashion. The system is frequently subject to undue industry influence during the development and review of standards and safeguards. One example is a rule that would offer construction and manufacturing workers protection from silica dust. Since the rule was sent to the White House Office of Information and Regulatory Affairs (OIRA) for review in February 2011, the office has hosted meetings with outside groups to discuss the rule. Most of those meetings were with industry groups that oppose the rule. In some industries, the relationship between agency staff and industry lobbyists has created a sort of “revolving door” – lobbyists from a regulated industry are involved in developing and reviewing rules that will impact that industry, and public officials leave the government to work in the regulated industry.

The overuse and abuse of the judicial review process can mire rules in litigation for years. In one striking instance, the U.S. District Court for the District of Columbia in 2012 struck down a Wall Street speculation rule designed to prevent energy price spikes, asserting at the behest of industry opponents that Congress never required the Commodity Futures Trading Commission to develop the rule, even though the Dodd-Frank financial protection law clearly requires just such a standard.

The lack of transparency is a troubling component of regulatory delay. OIRA, located in OMB, reviews any agency rule that it considers ‘significant.’ This extra review typically adds months to the rulemaking process and is a mechanism by which political influence can be exerted over agency decisions. Despite executive orders requiring that OIRA disclose its reasons for delaying or revising rules, rules can be held at the office for long periods with no explanation. An example is the rear visibility rule for vehicles, designed to save lives and prevent injuries and required by a law that Congress passed in 2008. This standard became stuck at OIRA in November 2011 with no explanation for the delay or disclosures about any revisions to the rule that OIRA may have requested of the Department of Transportation (DOT). The standard was finalized in May 2014, *six years* after the bill was signed into law and three years after the deadline Congress set for the agency to complete the rule. Energy efficiency rules have also been held up by the White House with no reasons given to the public, despite the president’s stated commitment to increasing the nation’s efficient use of energy.

Undue industry influence, abuse of the judicial review process and a lack of transparency in the rule review process leads to excessive delay of many rules, which violates the 90-day review deadline set out by the White House itself. In many cases, delays result in agencies missing statutory deadlines and violating federal law. Currently, more than 90 rules are under OIRA review, and 41 of those have been at the White House beyond the standard 90-day review deadline established by executive order.<sup>12</sup> Some of those rules have been under review for more than 120 days, and others have been at OIRA for years.

#### *What Happens When Rules Are Delayed? Rear Visibility Safety Rule Case Study*

In 2008, President George W. Bush signed the Cameron Gulbransen Kids Transportation Safety Act. The law was named after two-year-old Cameron Gulbransen, who was killed because he was too small for his father to see him behind the family SUV; his father accidentally backed over Cameron in their driveway. The vehicle did not have additional mirrors, back-up cameras, sensors or other safety technologies.<sup>13</sup>

The law included several mandates aimed at reducing fatalities and injuries to children in non-traffic auto accidents. Among its requirements, the law directed the DOT’s National Highway Traffic Safety Administration (NHTSA) to improve its standard on motor vehicles’ rear visibility to enable drivers to detect people immediately behind a vehicle.<sup>14</sup> The intent of the requirement for a new rear visibility rule was to avoid such tragedies by minimizing blind spots – areas

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<sup>11</sup> GAO Report, “Workplace Safety and Health: Multiple Challenges Lengthen OSHA’s Standard Setting” (April 2, 2012) Available at <http://www.gao.gov/assets/590/589825.pdf>

<sup>12</sup> Office of Information and Regulatory Affairs (April 28, 2015) Available at <http://www.reginfo.gov/public/>

<sup>13</sup> Kids and Cars: Backovers Fact Sheet Available at <http://www.kidsandcars.org/backovers.html#Fact%20Sheet>

<sup>14</sup> Public Law 110–189—FEB. 28, 2008, U.S. Government Printing Office: Cameron Gulbransen Kids Transportation Safety Act of 2007 Available at <http://www.gpo.gov/fdsys/pkg/PLAW-110publ189/pdf/PLAW-110publ189.pdf>

drivers cannot see by turning around or using their vehicles' mirrors. After a unanimous vote in the Senate and public support for the rule, the standard languished in the rulemaking process. Six years later, and three years past the deadline Congress set for NHTSA to issue the rule, the agency finalized the rule.

Unnecessary deaths and injuries are the costs of delay. In the case of the rear visibility safety rule, 209 children lost their young lives in the three years the standard was delayed.<sup>15</sup> Children like 13-month old Olivia Anne Hellwig who was killed in 2011 after a car backed over her stroller while she and her mother crossed the pedestrian crossing area at their local park.<sup>16</sup> According to DOT's own calculations, 210 fatalities and 15,000 injuries are annually caused from backover crashes.<sup>17</sup> By implementing the rule, NHTSA concluded that annual fatalities would be reduced by 95 to 112, and that 7,072 to 8,374 injuries would be avoided. In its proposed rule, NHTSA elaborated on the disproportionate risk backover crashes pose to children and older individuals. "When restricted to backover fatalities involving passenger vehicles," the proposed rule states, "children under 5 years old account for 44 percent of the fatalities, and adults 70 years of age and older account for 33 percent."

The agency estimated the cost of rearview camera systems at \$159-\$203 per vehicle, or \$58-\$88 for vehicles that already have electronic visual displays but not cameras.<sup>18</sup> Those estimates are based on older data and do not reflect lower prices in newer models that have resulted from some automakers including the cameras as standard equipment.

#### Rear Visibility Safety Rule Timeline<sup>19</sup>

- February 2008: President George W. Bush signs the Cameron Gulbransen Kids Transportation Safety Act into law
- March 2009: NHTSA releases an advanced notice of proposed rulemaking
- December 2010: NHTSA issues proposed version of the rear visibility rule and opens rule to public comment
- February 2011: Deadline the law set to finalize a new rearview safety rule
- February 2011: DOT grants itself its first extension on the rule
- November 2011: NHTSA submits draft of the final rulemaking to OIRA for the allotted 120 days of review
- January 2012: DOT grants itself its second extension on the rule
- December 2012: DOT grants itself its third extension on the rule
- June 2013: DOT withdraws rule from OMB and pushes the deadline back to January 2015
- September 2013: Safety advocates and parents sue DOT for failing to issue the finalized rule
- March 2014: DOT issues final rule – three years late
- May 2018: Date all vehicles over 10,000 pounds, including buses and trucks, must come equipped with rear visibility technology

When commonsense safety standards that will immediately save lives and prevent injuries – especially among children – are continually and unnecessarily delayed, the results are devastating for affected families and communities.

## IMPROVEMENTS AND RECOMMENDATIONS

### *Reduce Lobbyists' Ability to Block Public Protections*

Industry influence in the regulatory process flourishes outside of public scrutiny. Today, White House regulatory review – overseen by OIRA – is the most hidden part of the rulemaking process – and where big business lobbyists often exert their

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<sup>15</sup> Kids and Cars "National Statistics, Child Nontraffic Fatalities by Type & Year" Available at <http://www.kidsandcars.org/statistics.html>

<sup>16</sup> Kids and Cars "Backover News" Available at <http://www.kidsandcars.org/upload/pdfs/articles/2012/2012-05-09-patch-grayson.pdf>

<sup>17</sup> National Highway Traffic Safety Administration, Federal Motor Vehicle Safety Standards; Rear Visibility Rule (April 7, 2014) Available at <https://www.federalregister.gov/articles/2014/04/07/2014-07469/federal-motor-vehicle-safety-standards-rear-visibility#p-63>

<sup>18</sup> U.S. Dept. of Transportation, Federal Motor Carrier Safety Administration: "Federal Motor Vehicle Safety Standard No. 111, Rearview Mirrors" Available at <http://www.fmcsa.dot.gov/rulesregulations/administration/fmcsr/fmcsrruletext.aspx?reg=571.111>

<sup>19</sup> Kids and Cars: Rear Visibility Safety Standard – lawsuit exhibits <http://www.kidsandcars.org/release-the-rear-visibility-standard-april-11-2013.html>

biggest influence. An executive order signed by President Bill Clinton and reaffirmed by President Obama stipulates a series of transparency requirements for OIRA, but the office regularly ignores these requirements. Increasing transparency would reduce the ability of corporate and industry interests to block rules at the White House.

- Congress should require the OIRA administrator to release all documents exchanged between OIRA and rulemaking agencies, and records of all communication, shortly after a proposed or final rule is issued.
- Congress should require OIRA to identify all substantive changes made to a rule and indicate which White House offices or executive branch agencies, or outside parties, requested the changes. The public deserves to know how and why a draft rule was modified, making OIRA as transparent as the agencies they oversee.
- Congress should require OIRA to ensure that all documents it receives, including comments from any government agencies that may have a self-interest in weakening a protection, are made public.

#### *Close the Revolving Door*

The regulatory process relies on the expert knowledge of federal agencies – both officials appointed by the president and career staff. They must be informed about the concerns of all affected parties but must not be compromised by industry interests.

- Congress should prohibit presidential appointees from working on standards and rules that could uniquely affect and potentially benefit former employers or clients, beyond the effect that the rule will have on the public.
- Congress should prohibit presidential appointees from working on standards and rules that specifically affect companies where those officials are planning to work after leaving the government

#### *Strengthen Agency Enforcement Powers*

The work of protecting the public does not end when a rule is published; rules must be enforced in order to have their intended effect. Yet federal agencies can only do so much. OSHA, for example, has very limited resources to monitor a huge range of facilities across the country – and the legal authority to issue only very small fines when it catches violations. Congress can strengthen the agencies' enforcement powers and in turn make public protections more effective.

- Congress should fully fund federal agencies, especially when it comes to rulemaking and enforcement.
- Congress should establish stiff new criminal penalties for severe cases in which a corporate officer has knowingly and recklessly endangered the health or safety of an individual in violation of federal regulations.
- Congress should close a tax loophole that allows companies to write off penalties for health, safety and environmental violations as business expenses. This would more effectively deter such violations and would also provide much-needed revenue that could help support agency enforcement efforts.
- Congress should require companies to include specific information about regulatory violations and penalties in their periodic reports to the Securities and Exchange Commission. Making this information readily available to the public would help discourage regulatory violations and help encourage investment in responsible businesses.

#### *Tackle Delays and Interference at OIRA*

The Clinton executive order stipulates a 120-day limit (90 days plus an optional 30-day extension) on OIRA review of rules. This requirement is regularly ignored, delaying public protections.

- Congress should clarify that if OIRA review extends beyond 90 days, agencies may issue the proposed or final rule.

OIRA involvement in agencies' minor rules and internal "guidance documents" leads to unnecessary delays and potential political interference in matters that are rightly the domain of experts at those agencies.

- Congress should stipulate that OIRA may not review agency guidance documents, pre-rulemaking actions or rules that are not economically significant.
- Congress should stipulate that OIRA may not review or change a scientific determination by an agency.

A regulatory system that works for the American people is one in which agencies effectively fulfill their statutory missions of protecting people and the environment. However, a regulatory system plagued by delay and stymied by regulated industries cannot effectively protect the public.

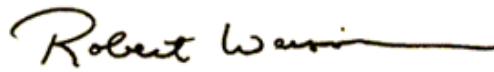
Many trade associations, lobbyists, and industry interests benefit greatly from the regulatory system's present hobbled state. As long as new rules can be tied up in procedural delays, large companies – some of whom are currently raking in historically large profits – can avoid investing in improved health and safety standards required by law. For the public, these delays represent real harm to real people and communities.

We can and must redesign the regulatory system so that it rewards enterprise while ensuring that the American quality of life is guaranteed for future generations. CSS looks forward to working with the committee to further examine the significant impact of regulations, the problems with the current rulemaking process and our recommendations to improve the system.

Sincerely,



Katherine McFate, President and CEO  
Center for Effective Government  
Co-chair, Coalition for Sensible Safeguards



Robert Weissman, President  
Public Citizen  
Co-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.*