FREE *to* PROSPER

A Pro-Growth Agenda for the 114th Congress

COMPETITIVE ENTERPRISE INSTITUTE

CEI

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A Pro-Growth Agenda for the 114th Congress

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Foreword

by Lawson Bader

Welcome to the New Year, and to a New Congress. Elections are over and the people's business is now at hand. I know; I've been there before.

Nearly 30 years ago, I entered the Senate Russell Office Building to start my first job in the nation's capital. I was awed by Washington, D.C.'s history, slightly overwhelmed, and eager to learn. As part of this learning process, I grew to appreciate the expertise and support of outside groups. My role was to listen and filter information through the lens of the Committee Chairman's priorities and principles. In the months ahead, your offices will be filled with powerful interest groups asking you to act in a certain way, and not in others. Some will be coy about their motives. Others will speak truthfully, but omit the "but on the other hand" when making their pitches.

So allow me to be transparent. The Competitive Enterprise Institute (CEI) has published this agenda as a practical guide, not a series of commandments. If you seek specific recommendations on how to revive the domestic U.S. economy and ensure America continues to be the land of opportunity, then please digest what we have authored. Keep it on your shelf as a ready-reference because I promise it will remain relevant throughout the life of the 114th Congress.

CEI uniquely works in the shadows. By that I don't mean we work in secret. Rather, it means that we focus on that dark, dry, challenging place where public policy and private markets interact. We have more than 30 years of institutional knowledge about the effects of economic regulation on innovation, entrepreneurship, and economic opportunity. The outcome of this interplay either constrains our nation's industriousness and our citizens' mobility and choices or sets them free. Drawing on that expertise, we offer this guide to help fill important gaps in the intellectual understanding of key regulatory concerns and to translate that into specific legislative action.

CEI does not represent any institution or private industry. We are not paid to generate papers nor contracted to work directly on specific regulatory concerns. We believe in unleashing the power of markets, but our idealism is tempered by a scholarly sense of what works and what does not. And we have libraries of knowledge about the impact of well-intentioned but poorly planned policies.

The Agenda focuses on eight topics—general regulatory reform, banking and finance, energy, environmental protection, employment and labor, consumer products, technology and telecommunications, and transportation. Each chapter outlines specific regulatory actions you can take, provides links to supporting documentation, and provides names of individual CEI policy experts who can advise further.

- **General regulation**. The most important step in reforming the regulatory state is understanding the proper role of the legislative and executive branches. No president has independent authority to issue regulations where there is no prior congressional approval. And no Congress should carelessly devolve regulatory oversight to the executive branch. Yet, both have occurred repeatedly during the past 30 years, and both parties are to blame. Thankfully, there are specific legislative actions that can help reestablish the checks and balances as intended by the Founders.
- **Banking and Finance**. Our modern economy relies on access to capital. A well-functioning financial system matches investors with enterprises for mutual benefit, rewards those who risk their own capital, and punishes those who abuse transparency requirements and violate property rights. Constricting that access means capital flees away from the areas where it can be most productive, thereby depriving entrepreneurs of the opportunities that a free economy offers and consumers of life-improving innovations. Unleashing new routes to capital is essential for America to maintain its innovative edge in our globalized world.
- **Energy**. As food is energy for human life, so energy is food for the life of the economy. Energy lights our homes and offices, heats and cools our dwelling spaces, fuels our industry, transports our goods, and powers our information networks. Affordable commercial energy is the key to modern civilization. However, there is perhaps no greater example of the law of unintended consequences than our modern energy policy—from the Environmental Protection Agency's carbon pollution standards to carbon taxes to the Clean Air Act's 1990 amendments—which threatens our economic future by making energy more expensive. Continued access to affordable energy must be a priority for Congress, to ensure economic growth.
- **Environmental Protection**. Few policy topics generate as much emotion as does concern over the environment. But no other policy area is in as much need of reform. Consider: The federal government already owns 30 percent of land in the United States, and has at its disposal legislative tools such as the Clean Air Act, Clean Water Act, and Endangered Species Act (ESA) to control and influence what remains outside its direct control. Current rules create perverse incentives for landowners to *not* preserve species on their property, lest the land lose most of its value due to restrictions on its use. It is long past time for Congress to address this regulatory excess and encourage genuine habitat protection.
- **Labor and Employment**. One of the American economy's greatest strengths is the ability of individuals and businesses to adapt to market forces around them. This freedom to adapt drives innovation, which in turn drives increases in labor productivity and job creation. It is important that Congress understand the difference between increases in productivity and artificial increases through labor prices due to regulatory changes, and promote pro-growth policies that benefit all workers and the economy at large.
- **Consumer Protection**. American consumers have always supported greater choice in the marketplace—whether at the grocery store, pharmaceutical counter, or toy store. They also value information and transparency about the risks and rewards of those consumer choices. From genetically engineered foods to generic drugs to playgrounds, Congress may see a role for helping consumers manage risk. Yet, government does not provide the answer to every risk in society. Instead, policy makers should focus on empowering consumers to put the marketplace's disciplinary role in consumer protection to good use.
- **Technology and Telecommunications**. It might be becoming cliché to point out, but technological progress outpaces nearly every regulatory hurdle thrown its way. We live in a global marketplace offering up an ever wider, ever changing array of choices in how we communicate, transact, and live with one another. With half the world now online, and the world's population rivaling the number of mobile subscriptions, investment in technology and telecommunications presents the single greatest opportunity for global growth and increases in productivity. Yet, many regulations remain on the books dating from the time when most people did not have a phone in their home. By removing these barriers in a comprehensive manner, Congress can help unleash the

creative forces that will develop tens of millions of new high-skilled jobs worldwide, in sectors that did not exist only a few decades ago.

- **Transportation**. Mobility is an important feature in our lives and our economy that we often take for granted—because it is all around us. The movement of people and goods that drive our prosperity depend on adequate transportation infrastructure investment and management. Transportation now accounts for nearly 10 percent of U.S. gross domestic product, but its regulatory infrastructure is long outdated, stuck in a time period that no longer exists. Congress should promote transportation policies that encourage both competition in the provision of transportation services and the adoption of new, efficiency-enhancing technologies.

As you move forward during this Congress, please remember that in formulating public policy, the choice is not between regulating and not regulating, but on finding the institutional framework most appropriate to advancing health, safety, efficiency, and long-term economic growth. For every supposed market failure cited to justify government intervention, there is a potential offsetting political and bureaucratic failure that can make things far worse.

Today, America's economic potential is being squeezed by overly burdensome regulatory policies covering the different areas outlined above. It is a welcome sign that Congress is coming to terms with the unsustainability of our nation's fiscal situation, but the hidden and growing burdens of regulations deserve more attention than they have received to date. Regulatory reform is critical. It is time for Congress to come out of the shadows and stop the regulatory Leviathan from smothering America's economic growth engine.

Reforming Regulations and Agency Oversight

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America has debated "Energy in the Executive" since the *Federalist Papers.* But President Barack Obama's second-term agenda takes the concept to a new level with respect to regulation, promising to act without Congress when he can.

In the past, presidents have used executive orders both to rein in regulation and expand it. Ronald Reagan's Executive Order (E.O.) 12291 set up central review of agency rules by the Office of Management and Budget (OMB), giving voice to hitherto voiceless consumers. Bill Clinton's E.O. 12866 returned "primacy" to agencies, undermining the process. Although Obama has issued several orders to streamline regulation, his "pen and phone" approach to policy making eclipses efforts to curtail regulation in any meaningful manner.

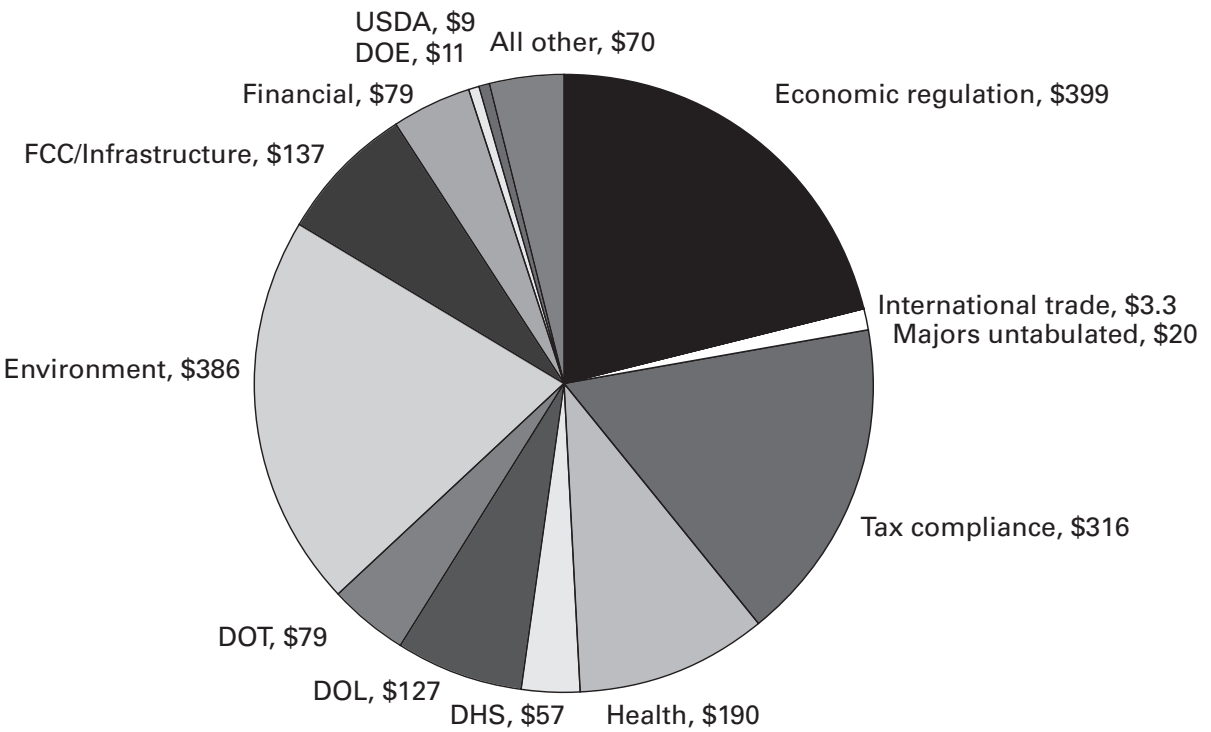
The Office of Management and Budget (OMB) estimates annual regulatory costs of up to $102 billion, as of 2013. Other reported costs include the *Information Collection Budget*'s 9 billion hours of compliance paperwork. But those hours do not come close to measuring the overall costs of the nearly $2 trillion regulatory state, with its interventions, bans, and permitting, resulting in uncertainty, wealth destruction, job loss, stifling of entrepreneurship, and loss of liberty.

The growth of federal spending is a problem. But decades of regulation may have even greater effects. Regulation is occasionally redistributive, often burdensome, and usually costly. Government solutions to perceived market failures often have consequences worse than the supposed problem they were designed to address. Regulatory bureaus cannot respond rapidly to changes in fields like health care provision, finance, infrastructure, and cybersecurity.

Since the 1980s, regulatory controls, such as semiformal central review of economic, environmental, and health and safety regulations, and analysis by the OMB's Office of Information and Regulatory Affairs have proven insufficient. OMB review captures a fraction of the regulatory enterprise.

Regulations and interventions require more transparency and scrutiny, but so do executive orders, guidance documents, memorandums, bulletins, and other "nonrules" that skirt notice and comment and the central review process. Even the notice and comment in the Administrative Procedure Act is insufficient, because final rules increasingly are not submitted to the Government Accountability Office and to Congress as required under the Congressional Review

Figure 1.1 Annual Cost of Federal Regulation and Intervention 2015 Estimate, $1.882 Trillion



Source: Wayne Crews, *Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway, 2015 Edition*, Social Science Research Network (SSRN), 2014, http://ssrn.com/abstract=2502883 and Competitive Enterprise Institute (CEI), 2014, http://www.tenthousandcommandments.com.

Act (CRA). That submission is necessary should Congress introduce a formal resolution of disapproval of an agency rule under the Act, so its neglect counts as a major lapse in accountability.

The choice is not between regulation or no regulation, but over what institutional framework is more appropriate to advancing health, safety, and efficiency. For every supposed market failure cited to justify government intervention, there is a potential offsetting political and bureaucratic failure. For example, price regulation has not been shown to work for consumers but has been shown instead to affect supply or access. Much environmental regulation now seen as necessary actually came about because of the lack of property or use rights in resources and amenities in the first place. Such regulation perpetuates government failure.

It is not even the case that, as OMB once put it that businesses generally do not favor regulation. Many businesses not only favor regulation but actively pursue it. Consumers did not lead the charge for the Interstate Commerce Commission, or for the state regulation of utilities, or for antitrust laws—those were secured by politically connected industries to protect profits and to restrict competition.

Policy makers should challenge agency benefit claims and demand better cost analysis, since agencies may overstate benefits and may tout benefits selectively. Agency pursuit of "benefits" has its own costs, particularly agencies that interfere with the improvement in health and safety innovation driven by competitive processes and consumer and social demands.

CONGRESSIONAL OVERSIGHT AND REFORM

> All legislative Powers herein granted shall be vested in a Congress of the United States.
>
> —Article 1, Section 1, U.S. Constitution

We need more aggressive oversight of agency regulatory actions, including hearings, better information disclosure, and withholding of the purse and slashing budgets of agencies when they exceed their bounds.

Congress should:

- Make greater use of the Congressional Review Act (CRA) to rein in agency overreach.
- Pass the Achieving Less Excess in Regulation and Requiring Transparency (ALERRT) Act, which would promote greater transparency, more accurate reporting, and analysis of regulations.
- Pass the Regulations from the Executive In Need of Scrutiny (REINS) Act, which would require Congress to vote on major rules—those with estimated annual costs of $100 million or more.
- Require creation of a Regulatory Transparency Report Card to tally up regulatory cost estimates and other regulatory data in a single publicly accessible document.

In the 113th Congress, the House of Representatives passed both the ALERRT and REINS Acts, but neither was taken up by the Senate. The 114th Congress should send both to the president to either sign or veto. Whichever course he chooses will send a strong signal regarding his administration's commitment to curbing overregulation and promoting transparency.

Congressional Review Act. To improve regulatory cost accountability, the 104th Congress passed the Congressional Review Act in 1996. That law sets up a 60-day period following agency publication of a regulation during which the rule will not take effect. That 60-day pause affords Congress an opportunity to pass a resolution of disapproval to halt the regulation. Congress has rarely used it. Although nodding toward congressional accountability, the CRA requires a two-thirds supermajority to strike "laws" that Congress never passed in the first place. Apart from the repeal of an intrusive Department of Labor ergonomics rule that would have put undue burdens on home offices, the law has not worked as intended.

REINS Act. As administrative law has replaced the type our Founders envisioned, congressional overdelegation to bureaucrats has created a disconnect between the *power* to establish regulatory programs and *responsibility* for the results of those programs. In 2013, 72 laws were passed by Congress, but 3,659 agency rules were established—a ratio of 51 rules for every law. Legal scholar Philip Hamburger has noted the rise of preconstitutional, monarchy-style prerogative in defiance of our Constitution, which "expressly bars the delegation of legislative power."

Public accountability for Congress and agencies should require that no major or economically significant agency rule becomes law *until* it receives an *affirmative* vote by Congress. The REINS Act, which passed the House in the 112th and 113th Congresses, would establish one such procedure for major rules with annual costs of $100 million or more.

However, agencies do not quantify most rules' costs, and many costly rules can escape the "significant" classification by their cost estimates coming in at just below the $100 million threshold. Therefore, Congress should consider expanding the REINS Act to cover *any* controversial rule, regardless of whether it is tied to a cost estimate. Congressional approval should also extend to guidance documents and other agency decrees. Cost-benefit analyses matter less when every elected representative goes on record as either supportive of or opposed to a particular regulation.

ALERRT Act. The ALERRT Act would improve public disclosure of annual regulatory output. Specifically, it would (a) codify various executive orders' requirements on cost analysis and make them enforceable, (b) extend flexibility for small business, (c) require least-costly regulatory alternatives, and (d) allow hearing-based proceedings for costly rules. As noted, it passed the House in 2014, but it was not taken up by the Senate.

Regulatory Transparency Report Card. Regulatory information is available, but it is often difficult to compile or interpret. It would be valuable to more effectively summarize regulatory data provided by the agencies as a chapter in the federal budget, the *Economic Report of the President*, the OMB's *Benefits and Costs* report, and other data sources. Previously, information such as numbers of proposed and final rules was collected and published in the annual *Regulatory Program of the United States Government*, in an appendix titled "Annual Report on Executive Order 12291." The *Regulatory Program* ended in 1993 when the Clinton administration replaced E.O. 12291 with E.O. 12866 as part of the aforementioned reaffirmation of agency primacy.

Worse, in recent years, federal agency oversight reports—such as the Unified Agenda of Federal Regulations, the OMB *Report to Congress* on regulations, and the *Information Collection Budget*—have been published late, and in the case of the Unified Agenda, not at all.

The fall 2011 edition of the Agenda did not appear until January 20, 2012, whereas the spring 2012 edition was never published. A single edition for 2012 with no seasonal designation finally appeared the Friday before Christmas, with no clarity on how its methodology might have been affected by the delay. In spring 2013, something called the "Spring 2013 Update to the Unified Agenda of Federal Regulatory and Deregulatory Actions" appeared instead of the normal Unified Agenda. And in late 2013, the fall edition was published the day before Thanksgiving.

By requiring periodic publication of a summary of already available but scattered data, Congress could go a long way toward making regulatory data more user friendly.

Data to be officially summarized and published annually should include the following:

- Tallies of economically significant, major, and nonmajor rules by department, agency, and commission;
- Numbers and percentages of rules affecting small business;
- Depictions of how regulations accumulate as a business grows;
- Numbers and percentages of regulations that contain numerical cost estimates;
- Tallies of existing cost estimates, including subtotals by agency and grand total;
- Numbers and percentages of regulations *lacking* cost estimates, with reasons for absence of cost estimates;
- *Federal Register* analysis, including number of pages and proposed and final rule breakdowns by agency;
- Number of major rules reported on by the Government Accountability Office in its database of reports on regulations;
- Rankings of most active executive and independent rulemaking agencies;
- Identification of rules that are deregulatory rather than regulatory;
- Rules said to affect internal agency procedures alone;
- Number of rules new to the Unified Agenda;
- Number of carryovers from previous years;
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch options to address them;
- Rules for which weighing costs and benefits is statutorily prohibited; and
- Percentages of rules reviewed by the OMB and action taken.

Regulations fall into two broad classes: (a) those that are economically significant, that is, costing more than $100 million annually; and (b) those that are not. However, many rules that technically come in below that threshold can still be very significant in the real-world sense of the term. Congress could require agencies to break up their cost categories into tiers that would be more descriptive of their real-world costs. One possible breakdown is shown in Table 1.1.

Knowing only that a rule is or is not economically significant reveals little. For example, some cost estimates of the Environmental Protection Agency's (EPA's) New Source Performance Standards rule figure its cost at around $738 million annually. Appreciating that the EPA is imposing a Category 2 rule would make for a more useful shorthand regarding its costs than referring to mere "significance."

Expert: Wayne Crews

Table 1.1 Proposed Breakdown of Economically Significant Rules

Category 1	> $100 million, < $500 million
Category 2	> $500 million, < $1 billion
Category 3	> $1 billion, < $5 billion
Category 4	> $5 billion, < $10 billion
Category 5	> $10 billion

For Further Reading

Wayne Crews, "The Other National Debt Crisis: How and Why Congress Must Quantify Regulation," *Issue Analysis* 2011 No. 4, Competitive Enterprise Institute, October 2011, https://cei.org/issue-analysis/other-national-debt-crisis.

———, *Ten Thousand Commandments 2014: An Annual Snapshot of the Federal Regulatory State*, Washington, DC: Competitive Enterprise Institute, 2014, https://cei.org/10kc.

REGULATORY BUDGET

Federal spending, taxes, and the deficit get plenty of attention. But it is equally important to monitor and reduce the nontax expenditures the government imposes. A regulatory budget could help incentivize other reforms like cost analysis and sunsets. It would also allow Congress to allocate regulatory cost authority among agencies and to distinguish among categories like economic, health and safety, and environmental regulations.

A comprehensive regulatory budget should include individual tallies from agencies, paralleling the fiscal budget as much as possible. Congress should specify the total cost budget for which it is willing to be held accountable and should divide it among agencies.

Congress should:

- Pass the National Regulatory Budget Act.

Sen. Marco Rubio (R-Fla.), who recently introduced the National Regulatory Budget Act of 2014, noted that overregulation impedes entry into the middle class by "stifling innovation and competition, depriving workers of opportunities and denying consumers more choices."

The Rubio version of the National Regulatory Budget Act would also create an Office of Regulatory Analysis.

Budgeting would force agencies to "compete" to ensure that their least effective, more poorly performing mandates save more lives per dollar or correct some alleged market imperfection better than another agency's rules. That approach should improve decision making and adherence to congressional intent. Agencies would concentrate on assessing costs, just as the fiscal budget focuses on costs and not on benefits. Although the budget's compliance cost calculations would be difficult, they would be easier to manage than separate cost and benefit calculations for every rule, which is not being done anyway.

Agencies regulating recklessly could lose the squandered budgetary allocation to a rival agency, or even face agency sunsetting regulations.

Budgeting can work best within that context: Regulatory Reduction Commission, sunsetting regulations, and one-in-one-out proposals.

Expert: Wayne Crews

For Further Reading

Wayne Crews, "The Other National Debt Crisis: How and Why Congress Must Quantify Regulation," *Issue Analysis* 2011 No. 4, Competitive Enterprise Institute, October 2011, https://cei.org/issue-analysis/other-national-debt-crisis.

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REGULATORY REDUCTION COMMISSION

Modeled on the successful military Base Closure and Realignment Commission (BRAC), the Commission on Regulatory Relief and Rollback was first proposed in 1995 by then-Sen. Phil Gramm (R-Tex.). A similar 2004 House proposal, the Commission on the Accountability and Review of Federal Agencies, would have addressed agencies and programs in need of rollback. The Progressive Policy Institute has developed a similar idea in detail, calling it a Regulatory Improvement Commission.

Congress should:

- Create a Regulatory Reduction Commission and task it to convene periodically.
- Augment the regulatory review process with sunsetting and one-in-one-out rules.

The BRAC model's bipartisan, independent structure helped resolve the politically intractable task of closing obsolete military bases, which provide jobs in members' districts, by bundling them into a single legislative package. BRAC formulated a list of recommended base closures that were set to go into effect after a given time unless Congress enacted a joint resolution of disapproval. If no such resolution was passed, the closures went into effect automatically.

To apply that technique in the regulatory arena, one option is for Congress to appoint a bipartisan commission to hold hearings to assess agency rules and regulations, and from that survey to assemble a yearly package of proposed regulatory reductions. The package would be subject to an up-or-down vote by Congress, with no amendments allowed.

The approved package would then be sent to the president for signature. The president could implement any commission recommendation requiring no legislation. The filtering process of holding hearings combined with the bundling of regulations would make the commission's recommendations more difficult to oppose politically—everybody stands a good chance of getting "hit," providing political cover.

Besides BRAC, there exists international precedent for streamlining. The Netherlands and the United Kingdom both set up autonomous, nongovernmental bodies to review regulation—the Regulatory Reduction Committee in the Netherlands and the Better Regulation Commission in the UK. Both set goals to reduce regulatory burdens by 25 percent over a four-year period, which appear to have been achieved with some success. (See the Organisation for Economic Co-operation and Development *Better Regulation in Europe* reports for the UK and the Netherlands.)

A Regulatory Review Commission could be augmented by embedding sunsetting regulations and in-and-out mechanisms into the process.

Review and sunsetting requirements built into laws and regulations could incentivize agencies to repeal outdated rules. Sunsetting clauses put an expiration date on new regulations (or laws) unless explicitly extended by Congress. Although continuation of rules will likely be common, such a procedure could encourage efficiency, boost accountability, and improve reporting of costs.

Widespread sunsetting across government could lessen the effectiveness of the interest-group mobilization that could be prompted by an approaching sunsetting deadline affecting a single agency. The United Kingdom, as noted, is experimenting with a bulk regulatory reduction approach, and has created sunsetting and review options to apply to new regulations.

Related to sunsetting—and also being tried in the UK—is a one-in-one-out procedure and, more recently, a one-in-two-out procedure. Like the reduction commission, that idea holds bipartisan appeal. In the United States, Sen. Mark Warner (D-Va.) has suggested a one-in-one-out reform, recommending the offsetting of every new rule through the elimination of another rule, either within an agency itself or elsewhere. One-in-one-out amounts to a status quo regulatory "budget," or a freeze at current levels. The OMB's annual *Report to Congress* could help inform the process of creating a culture of repeal.

Experts: Wayne Crews, Ryan Young

For Further Reading

Curtis W. Copeland, Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress, White Paper, Administrative Conference of the United States, July 15, 2014, http://www.acus.gov/sites/default/files/documents/CRA%20Report%200725%20%282%29.pdf.

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2

Banking and Finance

Access to capital is fundamental to the operation of a free society. It allows for the foundation, expansion, and smooth running of the enterprises that make up the private economy. It also provides room for the experimentation that allows innovation in product and service delivery. A well-functioning financial system helps match investors with enterprises for mutual benefit, and to the benefit of their employees and customers. When too many restrictions are placed on such a system, the economy slows both in its general flows and in innovation.

In the modern global economy, provision of access to capital generally occurs through the banking system as credit, through loans or credit cards. Once enterprises have reached a certain size, they can access capital markets such as stock markets and debt offerings. Thanks to technological innovation, recent years have seen an explosion of alternative means of gaining capital—peer-to-peer lending and crowdfunding prominent among them. At the individual household level, a variety of finance companies offer small-dollar loans that are often essential for keeping the lights on.

The smooth running of this system was disrupted by the financial crisis. A variety of government interventions, such as the Community Reinvestment Act and the actions of Fannie Mae and Freddie Mac, led lenders to overextend themselves by extending credit to a variety of sources that were unlikely to pay it back. Political convenience replaced sound economic judgment as a determinant of capital provision. When the banks that had extended the most problematic credit began to fail, government's reaction was to prop them up with taxpayer bailouts, thereby socializing their losses and breaking the incentive structure for avoiding such problems.

The Dodd-Frank Act of 2010 was meant to help solve the financial crisis, but in fact it did nothing to change the situation and made the problem worse. The establishment of the Financial Stability Oversight Council created a whole new class of designated "too big to fail" firms that are essentially controlled by financial regulators. Mortgage lending was further concentrated in Fannie and Freddie. A whole host of new regulations stifled credit provision by smaller banks. The Durbin Amendment's cap on credit card interchange fees may have forced a million people out of the banking system entirely by increasing other bank fees. The creation of the Consumer Financial Protection Board threatens the very existence of the small-dollar loan industry, as does a

Department of Justice initiative called Operation Choke Point. Finally, Securities and Exchange Commission (SEC) regulations threaten the development of crowdfunding as an alternative.

The result is a system where accessing capital is overly difficult for those otherwise qualified to receive it, while government is attempting to take over the provision of household credit—and in the case of mortgages has already done so.

The Competitive Enterprise Institute has proposed necessary reforms on those issues since before the financial crisis. The reform package we suggest would go some way toward correcting the problems introduced by Dodd-Frank as well as those that caused the financial crisis.

NEW APPROACH TO TOO BIG TO FAIL

When President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, he claimed the law would end bailouts for good. But nearly five years after its enactment, the problem of "too big to fail" has only gotten worse, as the five largest banks now hold 45 percent of Americans' financial assets, up from 30 percent 10 years ago, according to the Mercatus Center at George Mason University. Since the enactment of Dodd-Frank, 10 percent of small banks have either been acquired or closed. Innovations in consumer and business finance and payments systems are bubbling to the surface, but in many cases they remain stuck in regulatory limbo. That leaves consumers and small entrepreneurs with limited choices in saving, investing, and credit.

Congress should:

- End the Financial Stability Oversight Council's (FSOC) exemption from the Freedom of Information Act and mandate that it open its meetings to the public.
- Short of repealing the FSOC's designation of large banks as "systemically important financial institutions" (SIFI), give entities so designated more avenues to challenge the designation in court.
- Bar federal banking regulatory agencies from applying Basel III and other bank-centric rules to nonbanks, such as insurers.
- Repeal Dodd-Frank's Durbin Amendment, which sets price controls for what retailers pay banks and credit unions to process debit cards.
- Put the burden of proof on regulators at the Federal Deposit Insurance Corporation (FDIC), Federal Reserve, and Office of the Comptroller of the Currency when processing applications for new bank charters. Require bureaucrats to give specific reasons why such a charter would harm the safety and soundness of the financial system before denying a charter application for a new bank. Make a denial of a charter application challengeable in court.

Far from ending bailouts of big financial institutions, Dodd-Frank has enshrined them into law through the creation of the Financial Stability Oversight Council. Set up under Dodd-Frank, the FSOC has the power to designate a "systemically important financial institution." Dodd-Frank exempts this agency from open-meeting laws and the Freedom of Information Act, and the FSOC's secrecy rivals that of defense and intelligence agencies.

A SIFI designation means that a firm cannot be allowed to fail through normal bankruptcy or receivership, and gives the government the authority to make creditors of the financial institution whole. Large banks and financial firms with a SIFI designation have a competitive advantage over their smaller counterparts, as market participants are more likely to extend credit to SIFIs, given that government guarantee.

The SIFI designation has other market-distorting effects. Because the bailout of one SIFI is paid for by the others, the FSOC has an incentive to find healthy, stable companies to designate as a SIFI to pay the cost of bailing out a SIFI that engages in riskier activities. And when nonbank financial companies are designated as SIFIs, they may face bank-like capital rules, such as the much-criticized international Basel III standards (rules created by the Bank of International Settlements in Basel, Switzerland, that favor government securities over corporate bonds, and that are of questionable value for banks as well), which nearly all experts agree are inappropriate for insurance companies or asset managers, if they are even appropriate for banks.

That is why MetLife strenuously objected to being designated a SIFI in September 2014. It is also why in 2014 the House and Senate unanimously passed and President Obama signed into law the Insurance Capital Standards Clarification Act, which modifies Dodd-Frank to make it clear that the government need not force SIFIs or insurance companies with banking affiliates to adhere to bank-centric capital rules.

At the same time, innovations in consumer and business finance and payments systems are bubbling to the surface, but in many cases they remain stuck in regulatory limbo. Well-managed companies like Walmart and Apple can dip their toes into financial waters but cannot get bank charters because of a de facto FDIC ban on new charters for "industrial lending companies" affiliated with nonbank firms. In fact, the federal government

has slowed to a halt approval of new bank charters in general. Fewer than 30 charters for new banks were approved from 2009 to 2012.

Big banks are effectively sheltered from competition from both smaller rivals and larger firms that cannot form banking units. That factor exacerbates the problem of too-big-to-fail by limiting alternatives when a giant bank falters. To permanently end bailouts, Congress needs to end subsidies and simultaneously open up avenues for competitors to the big banks.

Experts: John Berlau, Iain Murray, Todd Zywicki

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BANKING REGULATORY REFORM

As of the second quarter of 2014, the regulated banking sector—comprising over 5,700 banks—held assets of over $15 trillion, including deposits totaling more than $10 trillion, and had $8 trillion worth of loans outstanding, according to Federal Deposit Insurance Corporation (FDIC) data. Although that picture might appear healthy at first glance, it conceals several problems. The number of people without a bank account in the United States rose by about 1 million between 2009 and 2013, owing to increased bank fees. An as-yet-unquantifiable number of businesses have had their bank accounts canceled as a result of Operation Choke Point, an aggressive Justice Department–led campaign to choke off financing for politically disfavored businesses. Individual immigrants are finding it more difficult to make money transfers, known as remittances, to their families abroad. Those problems need to be addressed to ensure renewed growth in the banking sector and the smooth running of a reliable financial system.

Congress should:

- Repeal the Durbin Amendment, Subtitle G, Section 1075, of the Wall Street Reform and Consumer Protection Act, better known as the Dodd-Frank Act.
- Amend Section 335 of Dodd-Frank to reduce the current standard maximum deposit insurance amount to $100,000.
- Repeal Section 1073 of Dodd-Frank to alleviate burdensome restrictions on remittance transfers to foreign countries.

Durbin Amendment. Interchange fees are the fees merchants pay to banks when a consumer uses a credit or debit card to pay for an item. The Durbin Amendment to the Dodd-Frank Act imposed price controls on transaction fees for debit cards for which the user's bank has assets of over $10 billion, affecting 64 percent of all debit card transactions issued in the United States. Those price controls reduced the average fee per transaction from about $0.50 to $0.24, which has resulted in a decrease in bank revenue of about $8 billion, with a similar increase to merchant revenue. The amendment was justified on the grounds that retailers would pass on the savings to consumers, but that has not in fact transpired. Instead, all the costs of the fee increase have been passed on to *bank* customers. In a June 2014 study, George Mason University law professor Todd Zywicki, International Center for Law and Economics Executive Director Geoffrey J. Manne, and Reason Foundation Vice President Julian Morris found the bank actions had the following effects:

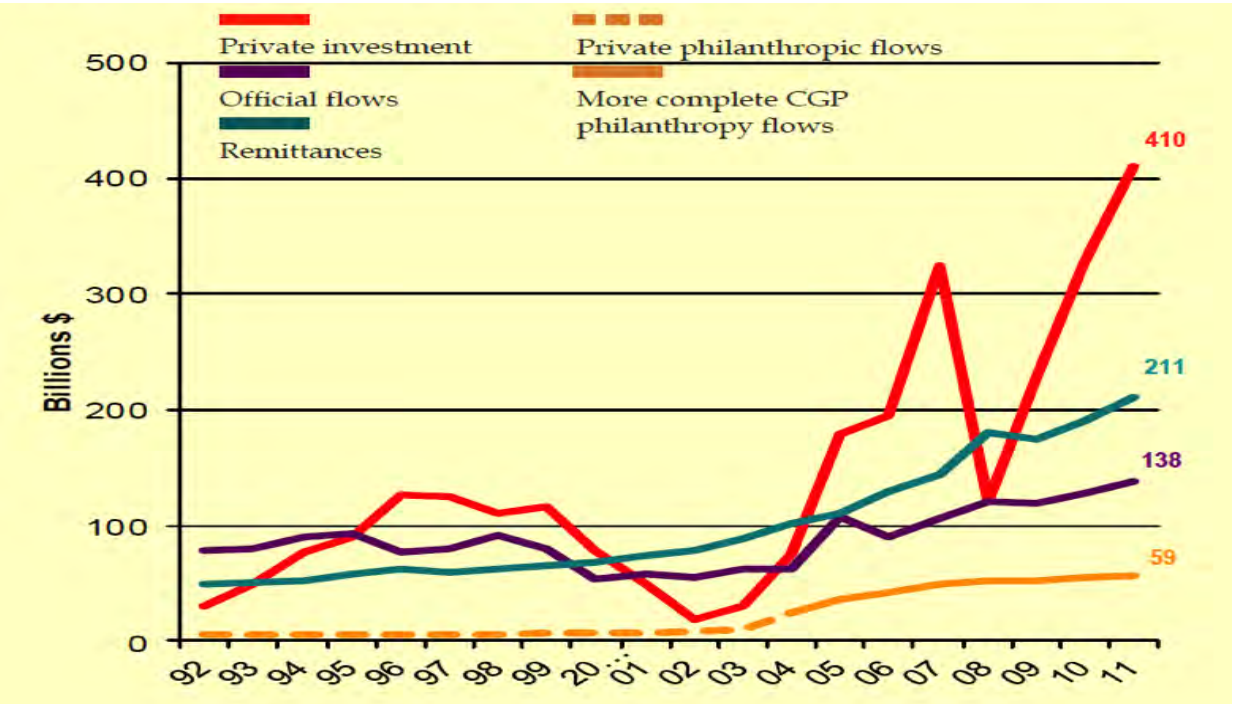
- Banks began to offer fewer free checking accounts. "The total number of banks offering free current accounts fell by 50% between 2009 and 2013," they note. "In comparison, fee-free banking actually increased at banks not subject to the Durbin Amendment."
- The minimum monthly balance requirement for free current accounts tripled between 2009 and 2012, increasing from about $250 to over $750.
- Average monthly fees on nonfree current accounts also doubled between 2009 and 2013, from about $6 to more than $12.
- Fee increases and loss of access to free checking led to an addition 1 million Americans, mainly among low-income households, joining the nation's unbanked population.
- Because of the increased fees, consumers have changed their behavior in relation to the banking products they use, increasing use of credit and prepaid cards, while decreasing use of debit cards. Credit and prepaid cards are not subject to the Durbin fee caps.

In addition, David Evans, Howard Chang, and Steven Joyce of the University of Chicago's Coase-Sandor Institute for Law and Economics found that the net decrease in consumer welfare as a result of the Durbin Amendment was between $22 billion and $25 billion annually, which equates to a loss of $200 per household.

The potential harm caused by interchange fee regulation has been known for some time. In a paper from 2002, Jean Tirole, who won the 2014 Nobel Prize for Economics, warned that regulators could not know the appropriate level of any cap. To increase consumer welfare, to reduce the number of the unbanked population, and to promote lower banking fees, Congress should repeal the Durbin Amendment in its entirety.

Deposit Insurance Reform. Deposit insurance was introduced in the United States in response to a series of Great Depression-era

Figure 2.1 Official, Private Investment, Philanthropic, and Remittance Flows from Donor Countries to Developing Countries, 1991–2011 (Billions of $)



Source: Carol Adelman, Jeremiah Norris, and Kacie Marano, "The Index of Global Philanthropy and Remittances 2013," Hudson Institute, 2013.

banking crises. The Banking Act of 1933 created the Federal Deposit Insurance Corporation to restore confidence in the banking system by providing that a certain amount of every bank customer's deposits would be guaranteed by the insurance system. In 1950, the amount insured was $10,000, which translates to about $80,000 today. The amount was raised through a series of steps to $100,000 in 1980, despite reservations by the FDIC itself.

During the financial crisis, the collapse of Washington Mutual and other banks raised concern among policy makers that ordinary consumers with banking assets, such as certificates of deposit, valued over $100,000 could lose out in the event of a string of bank collapses. The amount insured by the FDIC was therefore temporarily raised to $250,000 before the Dodd-Frank Act permanently increased it to that level.

Deposit insurance at such levels introduces a significant degree of moral hazard into the banking system. That means that bankers, knowing their customers' deposits are not at risk because they are backstopped by the FDIC, are more likely to engage in risky behavior with those deposits. They are also less likely to object to government rules that increase risk, such as the Community Reinvestment Act.

Moreover, the increased limits appear to have changed the FDIC's behavior. It has issued to banks guidance aimed at reducing its exposure to risky behavior by banks. One example was a 2011 FDIC guidance document aimed at increasing monitoring of relationships with third-party payment processors dealing with "high-risk" industries. That guidance was used by the Department of Justice to help initiate Operation Choke Point, whereby the department used its subpoena power to investigate such relationships. In many cases, banks responded to the increased level of scrutiny by terminating the banking relationship with the processor or industry in question—regardless of the bank's history with its customers. As a result, legal businesses have been left without access to banking services.

To reduce moral hazard in the banking industry, to reduce the incentives on the FDIC to impose unduly heavy-handed regulation, and to return deposit insurance to levels at which it was originally intended to protect working people's accounts, Congress should amend the Dodd-Frank Act to reduce deposit insurance to the previous level of $100,000 per account.

Remittances. Some of the world's poorest people depend on money they receive from relatives working in developed countries. In fact, that money dwarfs the world's official foreign aid budget, and the gap is increasing. In 2011, total private flows of aid totaled $680 billion—almost five times the official figure of $138 billion, according to the Hudson Institute. However, an argument that the industry facilitating those transfers is exploitative has gained currency and was enshrined in the Dodd-Frank Act, even though remittances had nothing to do with the financial crisis.

As a result, the Consumer Financial Protection Bureau, an agency set up by Dodd-Frank, has issued a rule (Remittance Transfer Rule—Subpart B of Regulation E) that imposes certain constraints on international money transfers. Its most important provision is the right to cancel a money transfer within 30 minutes of its being initiated. Proposals to reduce fees charged by remittance firms have also been advanced internationally by the World Bank in partnership with the G-8 and G-20.

Critics claim that high transfer fees are the result of an alleged market failure that calls for greater regulation. Yet markets in remittances are frequently overregulated. Many African governments have exclusive deals with money transfer companies, which operate as national monopolies, free from competitive discipline. And there are other regulatory pitfalls that drive up prices. A Western Union spokesperson told the *Guardian*:

> Our pricing varies between countries depending on a number of factors, such as consumer protection costs, local remittance taxes, market distribution, regulatory structure, volume, currency volatility and other market efficiencies. These factors can impact the fees and foreign exchange rates offered by corridor and service type.

All that suggests the remittance market needs less regulation. Proper competition, lower taxes, less restrictive "consumer protection" measures (which quickly become outdated), and less red tape in general would all likely increase the flow of funds between individuals.

Moreover, the 30-minute cancellation window would technically ban remittances using Bitcoin, whose transactions are irreversible. Yet Bitcoin is increasingly the vehicle of choice for remittances as its transaction costs are essentially zero.

Therefore, Congress should repeal or amend the section of Dodd-Frank dealing with remittance transfers to allow for Bitcoin transactions and a more flexible and competitive remittance market.

Experts: Durbin Amendment: John Berlau, Iain Murray, Todd Zywicki

FDIC Reform: Iain Murray

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ACCESS TO CAPITAL FOR SMALL AND MID-SIZED FIRMS (JOBS ACT II)

When Congress passed and President Obama signed the Jumpstart Our Business Startups (JOBS) Act of 2012, it marked a bipartisan recognition that securities laws—some dating from before most Americans had a telephone in their home—were holding back capital raising in the age of the mobile app. "A lot has changed in 80 years, and it's time our laws did as well," the president said upon signing the bill. "Because of this bill, startups and small business will now have access to a big, new pool of potential investors—namely, the American people." But although some regulatory barriers have been eased, the SEC has yet to finalize the crucial "crowdfunding" provisions of the JOBS Act to help the smallest startups partner with ordinary investors. As a result, opportunities for economic mobility are being lost.

Congress should:

- Permanently exempt publicly traded companies with a market value of less than $700 million from the most onerous provisions of Sarbanes-Oxley, Dodd-Frank, and other securities laws. Rep. Michael Fitzpatrick's (R-Ill.) Fostering Innovation Act (H.R. 2629), which passed the House Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises in 2014, would exempt companies meeting that threshold from the "internal control" auditing mandates of Sarbanes-Oxley.
- Lower the threshold for "accredited investors"—investors from whom entrepreneurs can raise capital while facing much less red tape than a public company—from its current floor of $1 million in net worth to $500,000. Further, as proposed by prominent crowdfunding attorney and blogger Mark Roderick, ordinary investors should be allowed to invest in a nonpublic firm if 25 percent of the initial capital is raised from accredited investors. That provision should satisfy many of the investor protection concerns by allowing wealthy accredited investors to give a "seal of approval" by putting their own money at stake.
- Revise the JOBS Act's "crowdfunding" provisions to allow entrepreneurs to increase the amount they can raise from investors from $1 million to $10 million. Repeal the onerous liability provision in the JOBS Act's crowdfunding section, which could potentially unleash a flood of lawsuits, not just for fraud but for vaguely defined "omissions of material fact." Repeal the mandate that crowdfunding portals must be registered broker-dealers. Those measures are contained in both Rep. Patrick McHenry's (R-N.C.) Startup Capital Modernization Act (H.R. 4565), which passed the House Financial Services Committee in 2014, and his Equity Crowdfunding Improvement Act of 2014 (H.R. 4564).

Although the JOBS Act modestly loosened the reins on entrepreneurs and investors, markets and innovation have taken a gallop in progress. According to Renaissance Capital, 2013 had 222 initial public offerings (IPOs), the most in the United States since 2000. Ever since the burdensome Sarbanes-Oxley Act was signed by President George W. Bush in 2002, there has been a dearth of IPOs on U.S. exchanges. Title I of the JOBS Act allows "emerging growth companies"—those with less than $750 million in market value and $1 billion in annual revenues—a five-year exemption from the costly "internal control" audits of Sarbanes-Oxley, as well as some provisions of Dodd-Frank. There is more than a casual connection between that regulatory relief and the sudden IPO boom, as evidenced by the fact that 80 percent of IPOs are "emerging growth companies" using the JOBS Act exemptions.

New opportunities to raise funds from millionaire "accredited investors" have also sprouted after Title II of the JOBS Act repealed the 80-year-old ban on advertising for investors by nonpublic companies. New Internet portals, such as AngelList and OurCrowd, have sprung up to allow entrepreneurs to communicate with the general public about investment opportunities, so long as they verify that only "accredited investors" are the ones who sign up.

However, the crowdfunding provisions of Title III were greatly watered down at the last minute before the JOBS Act passed the Senate. And because even those weakened provisions have yet to be implemented by the SEC, ordinary investors and small entrepreneurs are still losing out on many of the opportunities crowdfunding can provide. Congress should eliminate barriers to ease crowdfunding's move from a model based on donations to one based on wealth building and profit sharing.

Experts: John Berlau, Iain Murray

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GSE REFORM

Following the financial crisis of 2008, a consensus formed among lawmakers that government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac played a significant, if not the major, role in the mortgage meltdown. There also emerged a consensus that the GSEs needed to be curbed, if not phased out. Yet six years after the crisis, Fannie and Freddie are bigger than ever, and unsubsidized private capital still constitutes a minuscule share of the mortgage market. Nine out of 10 home mortgages are securitized or insured by federal government housing entities, putting taxpayers at risk and limiting choice and competition for homeowners.

Congress should:

- Pass legislation implementing a wind-down of Fannie and Freddie along the lines of the Protecting American Taxpayers and Homeowners Act, which passed the House Financial Services Committee in 2013. The GSEs would sell off part of their portfolios every year until they are completely liquidated.
- In the legislation, include a provision to ensure that GSE shareholders are fairly compensated in such a wind-down. Create a commission to determine fair market value of shares and to resolve claims. The legislation should not interfere with pending or future shareholder lawsuits, but set up the commission as an alternative mechanism that shareholders can use to settle claims.
- Repeal the "qualified mortgage" and "qualified residential mortgage" provisions of Dodd-Frank.

In the first few years after the housing crisis, the Obama administration called for, in the words of Treasury official Michael Stegman, "shrinking the government's footprint in housing finance." Yet because of government backing and crippling regulations facing competitors, Fannie and Freddie are once again making money hand over fist, and the government's role in the mortgage market continues to expand. Should anything go wrong, taxpayers will be left on the hook for an even bigger bailout.

Private capital has been scared off by Dodd-Frank's stringent underwriting rules, such as the regulations for "qualified mortgages" and "qualified residential mortgages" (two separate interlinking provisions of the law), from which loans bought by Fannie and Freddie are largely exempt. It has also been frightened by arbitrary actions against Fannie and Freddie shareholders. In 2012, the Obama administration implemented the "Third Amendment" in governing Fannie and Freddie, which allows the Treasury Department to take 100 percent of all the GSEs' profits in perpetuity, even after the GSEs paid back taxpayers for the cost of the 2008 government bailout.

Experts: John Berlau, Iain Murray, Fred Smith

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OPERATION CHOKE POINT

Operation Choke Point is a Department of Justice-led initiative based on guidance from the Federal Deposit Insurance Corporation aimed at "choking off" the financial oxygen to certain industries designated as "high risk" for fraud. It is an example of executive overreach, as it abuses existing powers for purposes never intended by Congress. As a result, it has turned into both an extensive fishing expedition that has caused many legal businesses to lose banking services and a vehicle for bypassing the legislative process to shut down politically disfavored industries.

Congress should:

- Amend the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) to prevent its abuse by politically motivated prosecutors.
- Reform the Bank Secrecy Act to provide less room for regulatory overreach.
- Remove all funding for Operation Choke Point.
- Amend Dodd-Frank to provide specific guidance on what constitutes, and does not constitute, fraud in payday lending to prevent regulatory abuse.

Operation Choke Point is ostensibly a joint effort by various regulatory entities—the Department of Justice, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation most prominent among them—to reduce the chances of Americans falling victim to fraud in a variety of "high-risk" industries, predominantly payday lending. It uses existing regulatory powers to provide heightened supervision of banks that do business with the third-party payment processors that provide payment services to those industries. CEI's *Issue Analysis* "Operation Choke Point: What It Is and Why It Matters" provides detailed background on how Operation Choke Point began and what it has turned into.

However, that seemingly laudable aim conceals a worrying reality. There is nothing illegal about most of those industries (at least not yet). However, because they have been designated high risk, banks are cutting off dealings with many processors and companies preemptively, before Choke Point's heightened supervision comes into play. As a result, many companies and individuals that have done nothing wrong have been frozen out of banking services. Without the links to banks, their financial lifeblood is choked off indeed.

Policy makers should weigh Operation Choke Point's few successes in stopping genuine fraudsters against that significant chilling effect, of which the primary victims are the customers of legal businesses that become unable to access financial services. In some cases, that chilling effect will push customers of the now-unobtainable service toward illegal providers, with subsequent risks to their health, liberty, or both.

The Department of Justice's main tool for its overzealous investigation has been subpoenas issued under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989—a statute that was not designed to prosecute consumer fraud, but rather fraud against banks. As a result, it allows for much greater damage awards than other more appropriate statutes for investigation and penalties, such as the Federal Deposit Insurance Act and the Federal Trade Commission Act. That higher level of potential damages for which banks might be found liable is a likely reason for banks to sever ties with potential "high-risk" customers. Congress should amend FIRREA to clarify that it is not intended for use in cases of consumer fraud.

The Department of Justice and its allies have used the Bank Secrecy Act's reporting provisions to compel banks to provide information on their customer activities that go well beyond anything authorized by normal legislative or regulatory authority. The Bank Secrecy Act should ideally be repealed, or at the very least amended, to place strict bounds on what regulators may require of banks—preferably requiring evidence of wrongdoing in order to be allowed to begin a criminal investigation.

Operation Choke Point began with executive branch agencies acting on their own, without authorization from Congress. Therefore, Congress should use the power of the purse to curtail this rogue operation. The House of Representatives has already passed a motion defunding the operation, and that should be a priority in the new Congress.

One of Operation Choke Point's primary targets has been the payday loan industry, even though the Dodd-Frank Act specifically exempted the industry from such regulatory constraints as interest rate caps. Nevertheless, financial regulators have taken such high annual percentage rate (APR) equivalents as de facto indicators of fraud, an approach that is completely inappropriate for payday loans, which are extremely short-term by definition. Therefore, Congress should amend Dodd-Frank to state in its instructions to regulators that high APR equivalents are not themselves indicators of fraud and should not be construed as such. Similar provisions should also apply to such indicators as high "recharge" rates (payments refused by the customer's bank), to which the payday loan industry is particularly susceptible.

Experts: Iain Murray, John Berlau

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3

Affordable Energy

As food is energy for human life, so energy is food for the life of the economy. Energy lights our homes and offices, heats and cools our dwelling spaces, produces and transports our goods and services, and powers our information networks. Without commercial energy, modern civilization would not exist, as Alex Epstein, president of the Center for Industrial Progress, explains in his recent book *The Moral Case for Fossil Fuels*.

Like food, energy is of greatest benefit to the greatest number when it is plentiful, reliable, and affordable. Affordable energy literally puts superhuman power at the beck and call of ordinary people. Affordable energy is the most basic reason the average person today lives longer and healthier, travels farther and faster in greater comfort and safety, and has greater access to information than the privileged elites of former times.

Carbon fuels—coal, oil, and natural gas—provide 82 percent of both U.S. and global energy, according to the U.S. Energy Information Administration (EIA). They are the world's dominant energy sources because, in most markets, they beat the alternatives in both cost and performance.

Critics, however, claim carbon fuels have hidden costs that make them unsustainable. Yet, technological advances have continually falsified predictions that we will soon run out of fossil fuels by improving our ability to find resources and to extract them at reasonable cost.

In the 1970s and 1980s, expert commentary often depicted air pollution as an ever-worsening problem that could be solved only by replacing carbon fuels with nonemitting alternatives. Technology falsified that narrative as well. Since 1980, U.S. consumption of coal has increased 31.6 percent; oil, 10.6 percent; and natural gas, 32.3 percent—even as emissions of the six most common air pollutants have decreased by 62 percent, according to EIA and U.S. Environmental Protection Agency data. Even without additional regulation, U.S. air quality would keep improving as newer vehicles and capital stock replace older models and equipment.

CLIMATE CHANGE

Today, critics claim unchecked carbon energy use will cause catastrophic climate change. However, the climate models producing scary impact assessments increasingly diverge from reality.

More importantly, carbon fuels make the climate more livable. Affordable energy supports wealth creation and technological progress, which make societies more resilient and protect people from extreme weather. Since the 1920s, global deaths and death rates from extreme weather have decreased by 93 percent and 98 percent, respectively, according to environmental economist Indur Goklany.

Since the Industrial Revolution, fossil fuels have been the chief energy source of a cycle of progress in which economic growth, technological innovation, human capital formation, and freer trade coevolve and mutually reinforce each other. The result has been a phenomenal increase in both the sheer quantity of human life (population) and human welfare as measured by life expectancy and per capita income. Electrification, the automobile, mechanized agriculture, air-conditioning and refrigeration, the Internet, health technologies, and many other innovations made important contributions to the quality of human life. None of those technologies would have been as highly developed or deployed at scale in a world without abundant, affordable energy.

Climate change mitigation policies pose serious risks to U.S. prosperity, competitiveness, and living standards. Carbon dioxide (CO_2) is the inescapable byproduct of carbon energy use. Commercial technologies do not exist for removing CO_2 emissions from vehicles, power plants, and factories. Consequently, mitigation policies would make carbon energy scarcer and more costly—and the more aggressive the policies, the larger the economic impacts.

The humanitarian concerns raised by anti-carbon policies are significant. Even without national controls on CO_2 emissions, household energy burdens increased over the past decade, especially for the poorest households. On average, U.S. households earning less than $50,000 a year spend more on energy than on food, medicine, clothing, insurance, or health care. Energy costs already impose real burdens on low-income households, including reduced expenditures for food, medicine, and education, reduced savings, and late credit card payments.

Keeping U.S. energy affordable is an important economic, moral, and humanitarian objective. Policy makers are physicians of the body politic. Those heeding the time-honored healer's maxim, "First, do no harm," will reject policies to tax and regulate away America's access to affordable energy.

CO_2 and the Clean Air Act

Since the late 1980s, scores of bills have been introduced in Congress to require the U.S. Environmental Protection Agency (EPA) to regulate greenhouse gases (GHGs), principally carbon dioxide from fossil-fuel combustion. None has been enacted to date. Yet in *Massachusetts v. EPA* (2007), the Supreme Court ruled that the 1970 Clean Air Act (CAA), enacted years before Congress's first climate change hearing, gives the U.S. Environmental Protection Agency (EPA) "unambiguous" authority to regulate GHGs. The EPA has interpreted that decision as a license to steamroll over congressional opposition to its climate policies.

Congress should:

- Amend the Clean Air Act to clarify that it never delegated to the EPA the authority to enact climate policies through the Act.

In *Massachusetts v. EPA*, the U.S. Supreme Court ruled that the EPA must regulate greenhouse gas emissions from new motor vehicles under Section 202 of the Clean Air Act, if the agency were to determine that such emissions endanger the public health or welfare. The Court reasoned that GHGs fit the Act's "capacious definition" of an air pollutant, and that including them in the agency's jurisdiction would not lead to "extreme measures."

However, neither the EPA nor the petitioners informed the Court what would happen once the agency established GHG emission standards for new motor vehicles. Under the agen-

cy's longstanding interpretation, regulating any air pollutant under any part of the CAA automatically triggers regulation of "major" stationary sources under the Act's preconstruction and operating permit programs. The Court had unwittingly set the stage for an era of extreme measures.

As a result, tens of thousands of previously unregulated "stationary sources"—such as hospitals, schools, office buildings, big-box stores, restaurants, and large single-family homes—would have to undertake complex analyses to determine their "best available control technology" options for curbing CO_2 emissions. An estimated 6.1 million "sources" would have to fill out CAA compliance forms and pay emission tonnage fees just to operate lawfully. Agency workloads would expand far beyond administrative capabilities, sabotaging environmental enforcement and economic development alike.

Major changes in public policy must be based on clear legislative mandates, or else self-government becomes a sham manipulated by nonelected judges and bureaucrats. Congress should curb the Environmental Protection Agency's overreach.

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EPA Carbon Pollution Standards Rule

The U.S. Environmental Protection Agency's (EPA) carbon pollution standards (CPS) rule would make energy more expensive by effectively banning investment in new coal generation—a policy Congress never approved.

Congress should:

- Overturn the carbon pollution standards rule.

Under the CPS rule, if utilities want to build coal power plants they can, but doing so will bankrupt them.

The rule sets a new source performance standard of 1,100 pounds of carbon dioxide per megawatt hour for new coal power plants. Since even state-of-the-art coal power plants emit 1,800 pounds of CO_2 per megawatt hour, the rule is a de facto ban on investment in new coal generation—a policy Congress has never come close to approving.

The EPA claims new coal plants can meet the standard by installing carbon capture and storage (CCS) technology. However, under Section 111(a) of the Clean Air Act, a performance standard must reflect the "best system of emission reduction" that is "adequately demonstrated," taking "cost" into account. CCS has not been adequately demonstrated to be cost-effective. No commercial, utility-scale CCS power plant is currently operating, and the handful under construction would be unaffordable absent generous subsidies. CCS nearly doubles the cost of new coal power plants, which already cost more than new natural gas combined-cycle (NGCC) units.

A Competitive Enterprise Institute analysis comparing current CCS technology to past technologies for reducing sulfur dioxide emissions from power plants reveals that CCS is even less adequately demonstrated today than dry scrubbers were in 1979, when the EPA and courts deemed the technology not commercially viable.

The EPA claims CCS is commercially viable because coal plants can sell the captured CO_2 to oil companies for use in enhanced oil recovery (EOR). But the agency can identify only 12 states with significant EOR operations (79 FR 1474). Coal power plants not located in relative proximity to oil fields would not have a market for their captured CO_2.

The EPA cites three CCS projects, at varying stages of development, to make the case that the technology is "adequately

demonstrated." However, the 2005 Energy Policy Act prohibits the agency from basing an "adequately demonstrated" determination on CCS projects that received subsidies under the Act. All three of the projects that the EPA cites have received such subsidies.

The utility-scale CCS plant nearest to completion is the Kemper Project in Mississippi. The facility's cost has increased from an initial estimate of $2.2 billion to $6.1 billion—88 percent to 107 percent more costly than advanced pulverized coal plants and 496 percent more costly than advanced NGCC plants, according to the U.S. Energy Information Administration's power plant capital and operating cost estimates.

The CPS rule is unlawful, if proposed in legislation it would be dead on arrival, and it is the gateway rule to the much-greater mischief of the Clean Power Plan. Congress should overturn it.

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Clean Power Plan

The U.S. Environmental Protection Agency's Clean Power Plan (CPP) would substantially increase electricity prices, raise alarming reliability concerns, and undermine federalism. Although potentially the most expensive Clean Air Act regulation ever, it will have no discernible impact on global temperatures or sea-level rise.

Congress should:

- Overturn or defund the EPA's Clean Power Plan.

The Clean Power Plan represents an EPA power grab over state electricity policies through an implausible interpretation of a minor provision in the Clean Air Act for a purpose Congress never intended.

The CPP establishes existing source performance standards (ESPS) for power-sector carbon dioxide emissions for each state. Calibrated in pounds of CO_2 per megawatt hour, the standards translate into mandatory statewide CO_2 reduction targets.

Some states without renewable energy quotas, emission caps, or demand-reduction mandates will have to adopt them; others with such requirements will have to tighten them. Grid operators will have to replace "economic dispatch" with "low-carbon dispatch," giving priority to generating units with low emissions rather than those with low cost. Once approved by the EPA, state compliance plans will be binding through 2030, regardless of how states' policy preferences may change in the interim.

The EPA claims the CPP will cost $7.3 billion to $8.8 billion in 2030. But the Virginia State Corporation Council estimates that Dominion Power (which serves customers in North Carolina, West Virginia, and Ohio, in addition to Virginia) will have to spend $5.5 billion to $6 billion to meet the state's 2020 CO_2

reduction target. If correct, Dominion alone will have to spend two-thirds of the EPA's estimated nationwide compliance cost. NERA Economic Consulting estimates that the CPP will:

1. Cost state power sectors between $41 billion and $73 billion in 2030—560 percent to 820 percent more than the EPA's estimate;
2. Cause double-digit electricity rate hikes in 43 states;
3. Force the premature retirement of 45,000 megawatts of coal generation capacity (equivalent to the New England states' combined electric output); and
4. Have disproportionate impacts on low- and middle-income households, which already struggle with high energy costs.

The expense is all the more exorbitant considering the rule's minuscule climate benefits. Based on EPA climate modeling, the CPP will reduce global warming by less than 0.02 degree Celsius in 2100, and reduce sea-level rise by 1/100 of an inch.

Moreover, through the CPP, the EPA is exceeding its authority to pursue goals Congress never authorized.

The EPA's authority to promulgate ESPS comes from Section 111(d) of the Clean Air Act. However, power plants, which have been regulated under CAA Section 112 since December 2011, are exempt from ESPS regulation, because regulation of a source category under CAA Section 112 preempts regulation under Section 111(d). The CPP establishes ESPS for state *power sectors*. To meet their CPP targets, states must regulate not only the designated facilities in question—fossil-fuel power plants—but also factors affecting demand for such sources, including retail electricity consumption, generation fuel mix, and generation dispatch policy. That regulatory overreach has no basis in the statute, the federal code, or regulatory practice.

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Social Cost of Carbon

The social cost of carbon (SCC), the damage supposedly caused by an incremental ton of carbon dioxide emitted in a given year, is an unknown quantity. By fiddling with speculative model inputs, SCC analysts can make renewable energy look like a bargain at any price and carbon fuels look unaffordable no matter how cheap. Even if modelers made all the right guesses, SCC analysis would still be one-sided and misleading, because it ignores the social costs of carbon mitigation.

Congress should:

- Overturn or defund any rule using social cost of carbon estimates for regulatory justification.
- Defund SCC modeling programs.

The social cost of carbon is an unknown quantity that is not discernible in either economic or meteorological data. SCC estimates are generated by computer programs called integrated assessment models (IAMs), which combine speculative climatology, made-up damage functions, and below-market discount rates to allow SCC analysts to get almost any result they seek. The higher the SCC estimate, the more plausible the claim that the benefits of CO_2-re-

duction policies justify the costs. In 2013, the administration increased its 2010 SCC estimates by almost 60 percent.

However, recent developments in climate science—including validation of the warming pause, the growing divergence between models and observations, and numerous studies indicating that the climate models of the United Nations Intergovernmental Panel on Climate Change are skewed toward greater warming—indicate climate change is better than feared, not worse than predicted. For example, there has been no trend since 1990 in U.S. hurricane-related damages once losses are adjusted for changes in population and wealth, and no trend globally since 1970 in the frequency and strength of land-falling hurricanes.

Agencies use SCC estimates not to develop rules but to promote them. For example, the EPA claims its Clean Power Plan will deliver $31 billion in climate benefits by 2030, even though by the agency's own scientific assumptions, the CPP will avert only 0.02 degree Celsius of warming by 2100, and even less by 2030.

The Office of Management and Budget's Circular A-4 instructs agencies to use discount rates of 7 percent—the average before-tax rate of return to private capital in the U.S. economy—and 3 percent—the average rate of return on long-term government bonds—in regulatory impact analysis. Lower discount rates may be used for intergenerational effects, such as climate change, but that is optional. The 7 percent discount rate, however, is mandatory for all cost-benefit assessments. The administration's SCC technical support documents use discount rates of between 2.5 percent and 5 percent. That lower-than-recommended range increases SCC estimates by increasing the present value of future hypothesized climate damages. It also hides the full opportunity cost associated with capital investment in climate mitigation.

Modelers can make renewable energy look like a bargain at any price, and carbon energy look unaffordable no matter how cheap, by cherry-picking discount rates and speculative assumptions such as how much warming results from a given increase in CO_2 concentration, how warming will affect ice-sheet dynamics, and how adaptive technology will develop.

Two assessment models used by the administration—known as Dynamic Integrated Climate-Economy (DICE) and Policy Analysis of the Greenhouse Effect (PAGE)—omit or severely underestimate the benefits of CO_2 fertilization on food production. A recent analysis using the Food and Agriculture Organization's commodity data and empirical CO_2 fertilization data estimates that rising CO_2 concentrations boosted global crop production by $3.2 trillion during 1961–2011 and will increase output by another $9.8 trillion between now and 2050. Omitting realistic CO_2 fertilization benefits injects a substantial pro-regulatory bias into SCC analysis.

Heritage Foundation analysts David Kreutzer and Kevin Dayaratna ran two of the administration's three IAMs using a 7 percent discount rate. SCC estimates decreased by 80 percent in the DICE model and declined to zero or became negative (social benefits exceeded costs) in another IAM used by the administration, known as the Climate Framework for Uncertainty, Negotiation and Distribution (FUND) model.

Even if all IAM inputs were correct, SCC estimation would still be one-sided and misleading, because it disregards the social costs of carbon mitigation policies.

The social benefits of carbon energy are substantial. For example, as climate economist Indur Goklany explains, capabilities supported by carbon energy—including mechanized agriculture, fertilizers, refrigeration, plastic packaging, and motorized transport of food from surplus to deficit regions—are among the chief reasons deaths and death rates from drought have declined by 99.97 percent and 99.99 percent, respectively, since the 1920s. A meal that sustains a human life has a social value far exceeding the market price of the food.

Since CO_2 cannot yet be decoupled at a reasonable cost from carbon energy, CO_2 reduction policies have social costs, including higher energy costs and reduced access to affordable energy for people in developing countries. Carbon energy supports every technology critical to human flourishing in the modern world. Without it, the Earth would sustain fewer people, and the average person would be poorer, sicker, and shorter lived.

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Carbon Taxes

A carbon tax is a market-rigging policy, not a free-market one. A carbon tax would not be revenue neutral and would not displace greenhouse gas regulations. Even if the tax were revenue neutral, it would make the tax system less efficient, as politics, not the social cost of carbon, which is unknowable, would determine carbon tax rates. Moreover, even the most aggressive feasible carbon tax would have negligible climate impacts, while imposing significant costs on the economy.

Congress should:

- Reject all carbon tax legislation.

A carbon tax seeks to tilt the market against carbon-based fuels. It has the same general functions as renewable energy quotas, fracking bans, or Solyndra loan guarantees: the power to pick energy market winners and losers. According to former Energy Secretary Steven Chu, carbon-pricing schemes "drive investment decisions towards clean energy." Or as President Obama put it, pricing carbon would "finally make renewable energy the profitable kind of energy in America."

Carbon taxes are costly symbolism. A carbon tax phasing out all coal generation by 2038 would reduce employment by 600,000 jobs in 2023, reduce a typical household's annual income by $1,200, and reduce the cumulative gross domestic product by $2.3 trillion, according to a 2013 Heritage Foundation analysis.

A carbon tax would not be revenue neutral. Washington's big spenders have no interest in "tax reform" that does not also "enhance" revenues. Any carbon tax made in Washington would increase current tax burdens, not offset them. The fact that British Columbia enacted a revenue-neutral carbon tax proves nothing. British Columbia's government is running strong annual surpluses. When a government is flush with cash, it is easy to be revenue neutral with new taxes. With Washington running annual deficits of nearly half a trillion

dollars, U.S. politicians are more likely to see a carbon tax as a new cash cow to milk.

Even a revenue-neutral carbon tax would make the tax system less efficient. As Institute for Energy Research economist Robert Murphy points out, the smaller the base on which a tax of a given size is levied, the more it adversely affects employment and distorts investment. The base of a carbon tax—a set of particular commodities or industries—is narrower than the base for retail sales, income, and labor taxes.

A carbon tax would not displace greenhouse gas regulations. Any grand bargain in which carbon taxes are meant to displace regulations is bound to give us carbon taxes *in addition to* greenhouse gas regulations. Cap-and-trade and carbon taxes are both carbon-pricing schemes, which supposedly make them more efficient than command-and-control regulation. However, if climate campaigners were serious about efficiency, the failed Waxman-Markey cap-and-trade bill of 2009 would have repealed existing regulations. Instead, the bill contained hundreds of pages of regulations on appliances, buildings, fuels, power plants, and electric generation fuel mix—in addition to its cap-and-trade scheme.

Politics, not the unknowable social cost of carbon, would determine carbon tax rates. As explained in the preceding section, the social cost of carbon is an unknown quantity that is not discernible in either economic or meteorological data. SCC estimates are generated by computer programs called integrated assessment models, which combine speculative climatology, made-up damage functions, and below-market discount rates, allowing SCC analysts to get almost any result they seek. The higher the SCC estimate, the more plausible the claim that the benefits of CO_2-reduction policies justify the costs. Such a pseudoscientific approach can be used only to rationalize political preferences, not to inform them. In debates over carbon tax rates, revenue-hungry agencies and politicians would patronize SCC modelers whose computers crank out the biggest, scariest numbers.

Even the most aggressive feasible carbon tax would have negligible climate impacts, as Cato Institute scientists Patrick Michaels and Chip Knappenberger show. Using the EPA's climate model emulator—appropriately called MAGICC, for Model for the Assessment of Greenhouse Gas Induced Climate Change—Michaels and Knappenberger calculate that the total U.S. contribution to global warming in the 21st century will be about 0.2 degree Celsius. That means that even an impossibly draconian carbon tax shutting down all U.S. carbon energy consumption tomorrow would have no discernible climate impact for several decades. The climate impact of any politically feasible carbon tax would be even more minuscule.

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CLEAN AIR NAAQS

The Clean Air Act's regulatory regime for ozone pollution abatement is fundamentally broken. Because ozone is a "non-threshold" pollutant, there is no "scientific" standard at which there is zero impact. Rather, it has a continuum of effect. And although differences in health impact along that continuum are slight, the differences in compliance costs are profound. Thus, setting the standard for ozone is a quintessential policy-making determination, for which the U.S. Environmental Protection Agency (EPA) should weigh both the costs and benefits in rendering a decision.

However, thanks to a series of federal court rulings, responsibility for setting ozone standards has been given to an insular group of advisers, the seven-member Clean Air Science Advisory Committee (CASAC). CASAC's recommended ozone standard, which is due to be finalized in 2015, could cost the economy trillions of dollars. Yet, CASAC is in no way accountable to U.S. voters. To fix the Clean Air Act's program for ozone pollution mitigation, Congress must restore policy-making discretion to the EPA and task CASAC with its proper statutory role of advising the EPA on the public health dangers of ozone—and of ozone policy.

Congress should:

- Require CASAC to fulfill its responsibility pursuant to 42 U.S.C. §7409(d)(2)(C)(iv) to "advise the administrator of adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards."
- Amend 42 U.S.C. §7607(d)(3) so that courts of judicial review afford deference to the EPA's reasonable explanation for adopting a national ambient air quality standard that differs from CASAC's advice.

Under the Clean Air Act, the Environmental Protection Agency must establish a national standard for ambient air concentrations of ground-level ozone at a level "requisite to protect public health." That national ozone standard must be reviewed and, if necessary, revised every five years. In 1977, Congress established the Clean Air Science Advisory Committee—a seven-member board nominated annually, primarily from the ranks of epidemiologists and public health officials—and tasked it with advising the EPA on the costs and social effects of its recommended ozone standard.

However, CASAC has never fulfilled its statutory duty to do so. That failure is troubling in light of the fact that ozone is a "non-threshold" pollutant—that is, there is no threshold at which ambient air concentrations of ozone cease to have an effect on human health. Therefore, there is no obvious line at which to draw zero impact. Rather, it is a continuum. And as explained by Susan Dudley, director of George Washington University's Regulatory Studies Center, "Once you recognize that science alone cannot determine definitively what the standard should be, then you are faced with policy decisions, and policy decisions involve tradeoffs."

That policy choice should be made by the EPA, which represents a branch of government that is accountable to voters through presidential elections. However, the D.C. Circuit Court of Appeals, which is the exclusive court of review for national ozone standards, has interpreted the Clean Air Act such that, in practice, the EPA cannot deviate from CASAC's advice on where to set the standard. As such, the EPA is effectively bound by CASAC in establishing an ozone standard.

The D.C. Circuit's empowerment of CASAC is hugely problematic. CASAC's recommended range of standards would place 80 percent to 96 percent of eligible counties in "nonattainment" status, which is a de facto deindustrialization mandate. According to a recent industry study, the ozone rule could impose costs of up to $1 trillion annually, making it the most expensive regulation ever. CASAC, an unelected body of technocrats, has no business rendering decisions of such gravity for the American people.

Experts: Marlo Lewis, William Yeatman, Myron Ebell, Chris Horner

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RENEWABLE FUEL STANDARD

The Renewable Fuel Standard (RFS), which requires refiners to blend and sell ever-increasing quantities of biofuel over a 15-year period (2007–2022), is a textbook study in the law of unintended consequences. It adds billions of dollars to the cost of food, prompts more greenhouse gas emissions than the petroleum consumption it is supposed to displace, contributes agricultural runoff, and imposes a hidden tax on motorists and billions in costs on poultry, hog, beef, and dairy farmers. Moreover, it has done little to reduce American dependence on foreign oil.

Congress should:

- Freeze the Renewable Fuel Standard at 15.1 billion gallons, as proposed by the U.S. Environmental Protection Agency (EPA) in November 2013.
- Develop and pass a plan to phase out the RFS.

By inflating corn and other commodity prices, the Renewable Fuel Standard adds billions of dollars to the cost of food.

The RFS is also bad for the environment. It shrinks species habitat by spurring farmers to shift 23 million acres of grassland, shrubland, and wetlands from food to fuel crops during 2008–2011, according to analysis by the Environmental Working Group. By artificially increasing demand for corn, the RFS contributes significantly to agricultural runoff and the 5,000-square-mile Gulf of Mexico "dead zone," where fertilizer-fueled algae blooms sink, decompose, and deplete oxygen in bottom waters, killing fish, crustaceans, and other marine animals.

The RFS may also be counterproductive as a greenhouse gas mitigation strategy. Shifting agricultural land from food crops to fuel crops releases carbon locked in soils, leading to more greenhouse gas emissions than the petroleum consumption it displaces.

The RFS also imposes a hidden tax on motorists, because ethanol has one-third less energy than an equal volume of gasoline. The RFS increased consumer spending on motor fuel by $14.5 billion (10 cents per gallon) in 2011, according to economist Thomas Elam.

The RFS has done little to reduce American dependence on foreign oil, which has come about largely because of increased fossil-fuel production here at home (and oil imports are a false security threat anyway). Instead, the RFS contributed to global instability, by adding to grain price spikes that triggered food riots in Africa and the Middle East in 2008 and 2011, according to the New England Complex Systems Institute.

Although the RFS does benefit corn farmers, it imposes billions in costs on poultry, hog, beef, and dairy farmers, who use corn as animal feed. The RFS contributed to widespread livestock-sector bankruptcies and job losses during the 2012 drought.

The RFS's 15-year production quota schedule is supposed to ensure regulatory predictability. Instead, the growing mismatch between statutory RFS blending targets and the amount of ethanol the market can actually absorb (a constraint known as the "blend wall") ensures that the EPA determines each year's target on the basis of political calculations and interest-group lobbying.

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4 Protecting the Environment

The federal government owns 30 percent of the land in the United States. It wants to regulate all the rest, primarily through the Endangered Species Act (ESA) and the Clean Water Act's Section 404 wetlands regulations. The Endangered Species Act has proven bad for wildlife because it is bad for people. The ESA has largely failed to protect endangered plants and animals because the threat of regulatory takings creates perverse incentives for landowners to manage their land so that it does not provide habitat for listed species. Regulation of wetlands under Section 404 of the Clean Water Act has gone far beyond what Congress intended when it wrote the law. Congress should rein in the Obama administration's worst regulatory excesses involving the ESA and wetlands, while pursuing enactment of regulatory takings compensation legislation.

Congress should:

- Prohibit funds to be used to finalize and implement the proposed rule (79 *Federal Register* 27066) changing the criteria for defining critical habitat for species listed under the Endangered Species Act.
- Prohibit funds to be used for the 22 Landscape Conservation Cooperatives and eight Climate Science Centers established by order of the Secretary of the Interior in 2009.
- Prohibit funds to be used to finalize and implement the proposed Waters of the United States rule. Congress should tighten the statutory definition of wetlands so that it is within the limits of its constitutional authority.
- Enact takings compensation legislation to compensate property owners for regulatory takings under the ESA or the Clean Water Act's Section 404 wetlands regulations.

The Obama administration is in the process of finalizing a rule that would make major changes in the criteria for defining critical habitat for endangered species. Although the U.S. Fish and Wildlife Service (FWS) has described those changes as minor, they will in fact make it much easier for the FWS to designate much larger areas as critical habitat than under current regulations. Congress should prohibit that rule from going into effect through an appropriations rider.

In 2009, then-Secretary of the Interior Ken Salazar created by secretarial order 22 Landscape Conservation Cooperatives (LCCs)

and eight Climate Science Centers. The Climate Science Centers are meant to advise the LCCs on managing all land—private and government owned—for climate change using the Endangered Species Act. Since changes in the climate could cause habitats to change, species may have to migrate to survive. Planning for those projected changes could require a huge expansion in critical habitat designations under the ESA. Those two programs have never been authorized by Congress. Congress should eliminate funding for both the LCCs and the Climate Science Centers.

The U.S. Environmental Protection Agency (EPA) is finalizing a Clean Water Act rule that redefines the Waters of the United States. The proposed redefinition of jurisdiction to regulate wetlands constitutes a huge expansion of the EPA's authority that directly contradicts limits set on federal jurisdiction by two Supreme Court decisions: *SWANCC v. Army Corps of Engineers* and *Rapanos v. United States*. In those cases, the Court ruled that the term "waters of the United States" does not include "isolated waters" such as isolated wetlands but rather "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"

Congress should prohibit finalization and implementation of that rule through an appropriations rider.

The underlying problem with both the ESA and Section 404 wetlands regulations is that regulators have no incentive to contain costs because the costs are borne by landowners. The solution is to enact regulatory takings compensation. Supreme Court decisions have acknowledged that regulatory takings can fall under the Constitution's Fifth Amendment provision: "nor shall private property be taken for public use without just compensation." However, the Court has also made it almost impossible to claim compensation, unless the regulation takes all or nearly all the value of the property.

The idea that the government and not private citizens should be required to pay for public benefits enjoys widespread popular support. During the 104th Congress, the House of Representatives easily passed legislation to allow landowners who have lost more than half the value of their property because of ESA, wetlands, and other land-use regulations to claim compensation. In 2004 and again in 2005, Oregon voters passed referendums by wide margins to provide compensation for property owners who have lost value in their property because of state land-use regulations.

It is critical for Congress to address takings compensation, as the Obama administration is preparing a new endangered species power grab over large parts of the country, as well as attempting to vastly expand wetlands jurisdiction. Currently, 1,563 animal and plant species are listed as endangered or threatened. In 2011, the Department of the Interior settled a lawsuit brought by two radical environmental pressure groups by agreeing to review 757 species for listing according to a work plan that would be completed within six years. The species under consideration for listing include 403 species of freshwater mollusks in the rivers of the southeastern United States. The economic damage that could be caused by those mass listings is frightening. The way to restrain the regulators is to require the federal government, not landowners, to bear the costs of their regulations.

Experts: Myron Ebell, Marlo Lewis, Robert J. Smith

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FEDERAL LANDS POLICIES

The vast federal estate, comprising nearly 30 percent of the land in the United States, is far too large. Many federal lands are in poor environmental condition. At the same time, natural resource production on multiple-use lands continues to decline. The 114th Congress can take significant steps to improve federal land management, even in the face of opposition by the Obama administration.

Congress should:

- Stop buying more private land to turn into federal land. Do not reauthorize the Land and Water Conservation Fund (LWCF), which expires on September 30, 2015. If reauthorized, require major reforms to the LWCF's federal land acquisition component.
- Place a moratorium on further designations of federal lands as Wilderness Areas and other preservation classifications.
- Reform the antiquated Antiquities Act of 1906.
- Require the U.S. Forest Service to increase timber production in National Forests with mandatory targets and timetables.
- Work to restore balance in the management of multiple-use lands to increase resource production by requiring the Department of the Interior to increase oil and gas leasing on federal lands and offshore areas, including in the Arctic National Wildlife Refuge, with mandatory targets and timetables.
- Review and hold hearings on the extent of lands withdrawn administratively from mineral production under the General Mining Act. Legislation should be drafted to reopen many multiple-use areas to mineral production.
- Conduct oversight hearings on the Bureau of Land Management's and the Forest Service's treatment of Taylor Grazing Act permittees. Develop legislation to protect and confirm the valid existing rights of permittees.
- Prohibit through an appropriations rider the consideration of climate impacts or the use of the social cost of carbon (SCC) guidance document in the preparation of environmental impact statements under the National Environmental Policy Act.
- Comply with Utah's Transfer of Federal Lands Act.

The four federal land agencies control nearly 30 percent of the land in the United States. Ownership is concentrated in the western states and Alaska and ranges from 28 percent in Washington to 47 percent in California to 81 percent in Nevada. Federal stewardship of those lands varies widely, but on average the environmental condition of federal lands is poorer than that of similar private lands.

The reason is not because there is too much natural resource production on federal lands. Production has declined at the same time environmental conditions have declined. For example, timber production in the National Forests has been reduced by over 80 percent since 1990, but the condition of the forests has declined dramatically over the same period. Federal land managers do not own the land they are managing and therefore do not have the same incentives as private landowners to take care of it.

In much of the rural West and Alaska, massive federal landownership means that the federal land agencies control local economies. Continuing declines in timber production, hard rock mining, oil and gas leasing, and livestock grazing resulting from federal management are having devastating economic effects on many rural communities.

The federal government already owns far more land than it can take care of properly. To improve the environmental condition of the federal estate, the first thing Congress should do is to stop acquiring more private land. Since the Land and Water Conservation Fund was enacted in 1965, the federal government has appropriated over $15.5 billion to acquire about 5 million acres of private land, according to the Congressional Research Service. Federal taxpayers must pay the annual costs for managing and protecting those lands, which have been removed from economic production and property tax rolls. The LWCF's current 10-year authorization expires at end of fiscal year 2015. Congress should let it expire. Short of that, it should reform the LWCF so that any further land acquisitions are conditioned on selling 10 acres of federal lands back into private hands for every acre acquired or $10 worth for every dollar spent.

After letting the LWCF expire, Congress should address the lockup of federal lands. More and more federal lands managed under the Multiple-Use and Sustained-Yield Act are being withdrawn from multiple uses and placed in specific preserva-

tion classifications that exclude other uses. Wilderness Areas and National Parks require congressional enactment, but most withdrawals are being done administratively by the Bureau of Land Management and the Forest Service. Placing land into a preservation classification almost always restricts recreational access and ends all natural resource production.

Through an appropriations rider, Congress should place a moratorium on all further reclassifications of multiple-use lands into preservation, while the Department of the Interior and the Forest Service produce an inventory itemizing the lands currently under preservation classification.

Congress should also reform the Antiquities Act so that the president cannot designate vast areas of federal lands as national monuments without congressional and state approval.

Most of the areas rich in minerals in the United States are federally owned. Congress should require that natural resource production be increased on multiple-use federal lands by setting mandatory targets and timetables for timber production and for oil and gas leasing. Congress should also develop legislation to reopen areas of mineral potential to entry under the General Mining Act.

Congress should investigate continuing attempts by the Bureau of Land Management and U.S. Forest Service to drive grazing permittees off the land and develop a response. Livestock grazing on federal lands is economically important in the intermountain West and is also essential to maintain ranges in good environmental condition.

Over the past four decades, environmental pressure groups have perfected the misuse of the National Environmental Policy Act (NEPA) to delay proposed major projects to death. Now they have an ally in the Obama administration, which is requiring that the direct, indirect, and cumulative carbon dioxide emissions produced by the project be taken into account using the Department of Energy's SCC guidance document and a December 2014 guidance document issued by the White House Council on Environmental Quality, which oversees NEPA. Congress should prohibit the use of any funds to apply these two guidance documents or any other consideration of climate impacts in the preparation of NEPA environmental impact statements. Congress should prohibit the use of any funds to apply the SCC in NEPA environmental impact statements or any other federal regulations.

The Transfer of Federal Lands Act, enacted by the state of Utah in 2012, requires the federal government to transfer federal lands in Utah, excluding National Parks and Wilderness Areas, to the state by December 31, 2014. Congress should comply with the terms of the Act and prepare to comply with similar legislation being considered in other western states.

Experts: Myron Ebell, Marlo Lewis, Robert J. Smith

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CHEMICAL RISK REGULATION

Originally passed in 1976, the Toxic Substances Control Act (TSCA) grants authority to the U.S. Environmental Protection Agency (EPA) to regulate all chemicals in commerce except those regulated under other federal laws, such as pesticide and cosmetics laws. Members of Congress have debated revising TSCA for more than a decade without success. At the heart of the debate is the law's robust, science-based risk standard, which limits the EPA from imposing needlessly onerous regulations that could unintentionally undermine public health, the environment, and economic well-being. Environmental advocacy groups would like reform to empower the EPA to regulate more, whereas industry groups want reform that will preempt the emergence of myriad overlapping and conflicting state chemical laws.

Congress should:

- Maintain the Toxic Substances Control Act's reasonable risk standard and apply similarly robust, science-based risk standards to other chemical regulation programs.
- Demand that TSCA reform preempt states from passing additional, overlapping, and conflicting chemical laws and regulations.

The Toxic Substances Control Act's current risk standard allows the Environmental Protection Agency to regulate chemicals that pose an "unreasonable risk of injury to health or the environment." The EPA must also consider (a) the effects and exposure to humans and the environment, (b) the benefits of various uses of regulated chemicals and the availability of substitutes, and (c) the proposed regulation's potential economic consequences and impacts on small business, technological innovation, the environment, and public health (15 USC §2605[c][1]). It also requires that the agency apply restrictions only "to the extent necessary to protect adequately against such risk using the least burdensome requirements" (15 USC §2605[a]). Citizens should demand at least as much before any government body issues regulations that undermine the freedoms necessary for society to progress and innovate.

Nonetheless, environmentalists and Democrats have pushed for TSCA reform that replaces the law's science-based standard with a political one based on the precautionary principle—a concept that calls on regulators to act *even in the absence of scientific justifications*. Once the precautionary principle is accepted as a matter of policy, it presses policy makers to make regulations as stringent as possible and encourages lawmakers to ban certain technologies because they *might* pose safety risks. But resulting policies, in fact, may prove more dangerous.

For example, environmental groups complain that TSCA did not allow the EPA to ban all asbestos uses, even though existing uses are safe, and a ban could have increased fatalities (see Safer Chemicals, Healthy Families website, http://saferchemicals.org/). That issue came to a head in 1989 when the EPA released a very ambitious TSCA rule banning most asbestos uses that affected dozens of businesses and applications, including uses for automotive brakes (54 *Federal Register*, vol. 29, no. 460, 1989; EPA Asbestos website, http://www.epa.gov/asbestos/pubs/frl-3476-2.pdf). But the Fifth Circuit Court of Appeals opinion in *Corrosion Proof Fittings v. EPA* stated not only that the EPA's rule failed to prove that the regulation was necessary to protect public health but also that the agency ignored the fact that "substitute products actually might increase fatalities," because of potential resulting brake failures. Moreover, the rule was unlikely to improve public health in other ways, because the type of asbestos and the limited human exposures related to current uses pose negligible risks.

Early draft legislation offered by Sen. Frank Lautenberg (D-N.J.) focused on changing TSCA's risk standard to make it more precautionary. Before passing away in 2013, Sen. Lautenberg cosponsored a compromise bill with Sen. David Vitter (R-La.), the Chemical Safety Improvement Act (S. 1009), that would have maintained some key features of the current law's reasonable risk standard but would eliminate the law's requirement that the EPA pursue the "least burdensome" regulations. It would have also expanded the EPA's power to collect data from industry and included a provision that would allow the agency to preempt state laws covering certain chemicals after it promulgated regulations covering them. In February 2014, Rep. John Shimkus (R-Ill.) began circulating a draft bill, the Chemicals in Commerce Act, which included some of the

same provisions of the Lautenberg-Vitter bill, including state preemption.

However, reform efforts fell apart at the end of the 113th Congress because of opposition from Senate Environment and Public Works Committee Chair Barbara Boxer (D-Calif.), who along with many environmental groups, strongly opposed state preemption provisions and the risk standard. Boxer offered her own draft legislation in September 2014, the Boxer Toxic Chemicals Control Act, which stripped out the preemption provisions and changed the risk standard to make it precautionary in nature. Refusing to negotiate, Sen. Vitter and his new Democratic cosponsor, Sen. Tom Udall (D-N.M.), indicated they would wait until the next Congress to advance their version of the legislation.

Expert: Angela Logomasini

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Labor and Employment

5

One of the American economy's greatest strengths is individuals' and businesses' ability to adapt to changing conditions. Increases in productivity, not artificial increases in labor prices, are the key to economic growth and rising wages. Open and flexible labor markets respond rapidly and effectively to changes in market conditions.

However, many workers and employers remain subject to an array of obsolete New Deal-era labor regulations. The old adversarial model of labor relations has little to offer the 21st-century workforce, which is characterized by horizontal corporate structures, significant job mobility, and instant, constant communications. However, rather than adapt to the changing economy, many unions are turning to government for help.

One major item on organized labor's agenda is an increase in the federal minimum wage, from $7.25 to $10.10 per hour. That increase is bad policy, a feel-good measure that politicians can sell as a mandate for higher wages for everyone, but in fact eliminates entry-level jobs—and thus makes entry into the job market more difficult for workers with few or no skills.

The National Labor Relations Board (NLRB) and the Department of Labor are the key federal labor law bodies. Favorable treatment from them would give unions a wholly arbitrary advantage in their organizing efforts. Members of Congress must resist the administration's efforts to politicize regulation, adjudication, and legislation in that arena. The threats are quite real for franchising, temporary staffing, independent contracting and subcontracting, interning, volunteering, supplying, and outsourcing.

NATIONAL LABOR RELATIONS BOARD AND NATIONAL LABOR RELATIONS ACT REFORM

Members appointed to the National Labor Relations Board (NLRB), nearly exclusively, come from the organized labor or management-side law firm ranks. As a result, board policy swings like a pendulum. The Board's case precedent flip-flops in favor of organized labor or management, depending on whether Democrats or Republicans hold the Executive Office. The NLRB's biased and ever-changing regulatory landscape makes compliance with the National Labor Relations Act (NLRA) arduous for employees, employers, and unions.

Congress should:

- Pass the Workforce Democracy and Fairness Act to preempt the National Labor Relations Board's ambush election rule.
- Amend the Employee Privacy Protection Act to make the disclosure of employees' private information to union organizers a voluntary and exclusively opt-in process.
- Reverse the franchise/joint-employer standard decision.
- Abolish or greatly reduce the National Labor Relations Board's adjudicatory role.
- Pass the Protect American Jobs Act.
- Pass the Employee Rights Act (ERA) to guarantee a federally supervised secret-ballot election for organizing and recertifying votes and for preventing union interference with employees who seek to decertify a union.
- Pass the Freedom from Union Violence Act.
- Pass the Rewarding Achievement and Incentivizing Successful Employees (RAISE) Act to allow firms to offer unionized workers greater compensation for superior performance.
- End monopoly bargaining by unions by deleting "exclusive" from the National Labor Relations Act.
- Rein in NLRB overreach on outsourcing and contract staffing agencies through appropriations limitation.

During the Obama administration, the National Labor Relations Board, composed of a majority with the predisposition to a pro-union viewpoint, has issued many decisions overturning long-standing case precedent and proposed rules that tilt the playing field in favor of organized labor at the expense of employees and the free flow of commerce. Currently, the NLRB operates to benefit labor unions, not the public interest, in labor disputes. Congress could go a long way toward reining in the NLRB by passing legislation to reverse some of its more partisan rulemakings and decisions. At best, Congress should abolish the NLRB or, at least, strip the agency of its adjudicatory and rulemaking authority.

Ambush Election Rule. The NLRB recently amended its rules governing representation case procedures. That rule change, generally known as the "ambush election" rule, is deliberately constructed to limit debate, by minimizing the time workers have to educate themselves on union representation. Specifically, the rule would shorten the time frame between the filing of a petition and the date on which an election is conducted to as little as 14 days. This is unnecessary. In FY 2013, the median time frame from the petition to when the election was conducted was 38 days, with unions winning 60 percent of all organizing elections, according to the NLRB.

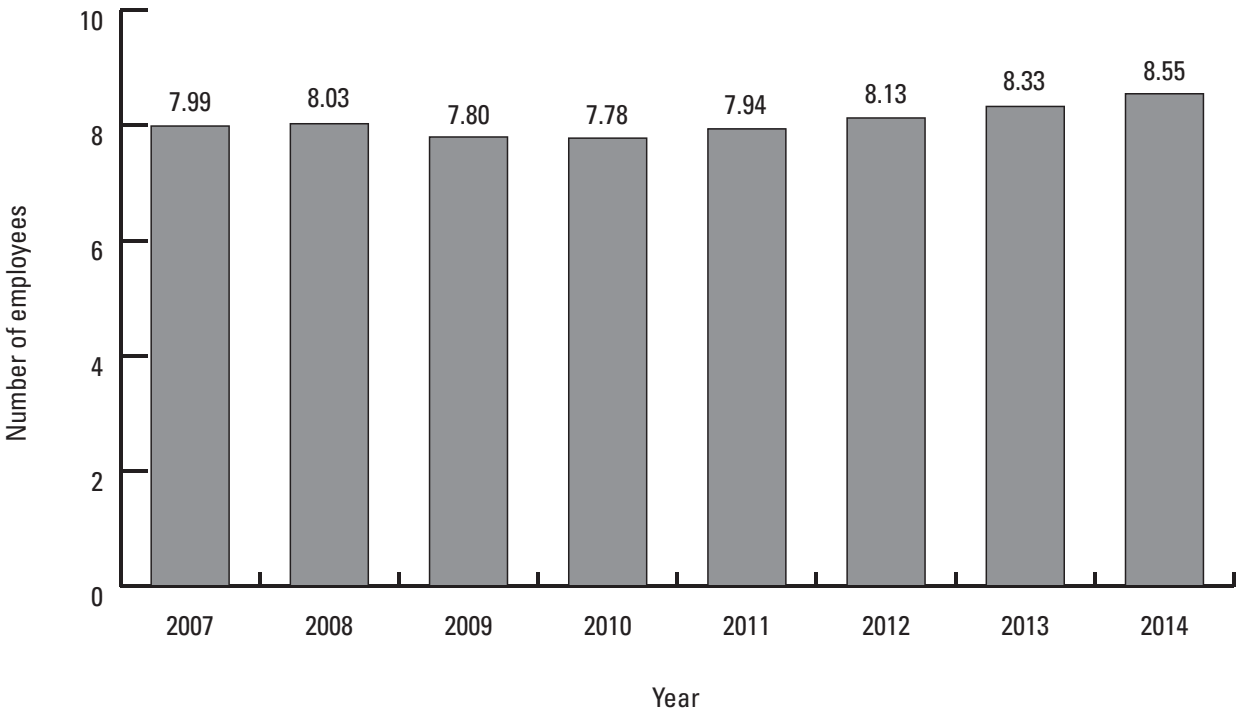
To address the shortened time frame of the NLRB's union election process, Congress should pass the Workforce Democracy and Fairness Act, which would amend Section 9 of the National Labor Relations Act and mandate a period of 35 days between the filing of the petition and the actual election.

The rule also would compel employers to provide union organizers with employees' contact information. Congress should preempt this. Government should not have the power to force employers to disclose workers' contact information to a special-interest group for any cause. That rule would almost certainly expose workers—who would not have the choice of opting out of union organizers' obtaining their information—to harassment, intimidation, and much higher risk of identity theft.

To prevent the disclosure of employees' contact information without their consent, Congress should amend the Employee Privacy Protection Act to make the disclosure of such information to union organizers a voluntary and exclusively opt-in process.

Joint Employer Decision. On July 29, 2014, the NLRB's Office of the General Counsel determined that the parent corporation of fast-food giant McDonald's is a joint employer with

Figure 5.1 Number of employees in franchise establishments in the United States from 2007 to 2014 (in millions)



Source: Statista 2014.

McDonald's franchisees and thus is liable for the franchisees' actions for purposes of employment law. The Board's criteria for what would qualify a company as a joint employer are inappropriately broad, extending to such hard-to-define concepts as indirect or potential control over workers.

The NLRB's decision threatens the successful American franchise system. If corporate McDonald's in Chicago were to be held responsible for every worker at every mom-and-pop McDonald's franchise, then corporate McDonald's would be forced to protect itself from liability. The ensuing restructuring would be quite different from the current franchise system.

In a statement, the National Restaurant Association said the decision "jeopardizes the success of 90 percent of America's restaurants who are independent operators or franchisees." And the decision's repercussions would be felt far beyond the fast-food industry, to include practically all franchised businesses, including car dealerships, hotels, dry cleaners, and a wide variety of service industries.

Organized labor favors the ruling because it would make it much easier to unionize entire franchise businesses. For example, if a local McDonald's franchise were to face unionization and corporate McDonald's were to be a joint employer, then the union would have leverage to bring corporate McDonald's to the collective-bargaining table. (Similar rulings could follow, with the NLRB general counsel filing amicus briefs in similar NLRB cases concerning Browning-Ferris Industries and Leadpoint Business Services.)

Experts: Aloysius Hogan, Trey Kovacs, Ivan Osorio, Iain Murray

The National Labor Relations Board's Adjudicatory Role. Instead of taking a piecemeal approach to enacting legislation to address problems caused by the NLRB's actions, Congress should abolish the agency or strip it of its adjudication and rulemaking authority. The Board no longer operates as it was intended by Congress—as a neutral arbiter in labor disputes. Worse, federal courts routinely give judicial deference to the NLRB on the basis of the board members' "expertise," which, as former NLRB member John Raudabaugh notes, has "proven nonexistent when case precedent is flip-flopped correlated only with political party majorities."

Congress should pass an amended version of the National Labor Relations Reorganization Act (NLRRA) of 2011, which would abolish the Board. The current version of the NLRRA transfers the NLRB's enforcement authority to the Department of Justice, and its rulemaking and election duties would be transferred to the Department of Labor. The bill should be amended to send NLRA disputes to an Article III court, where judges serve lifetime appointments, unlike NLRB members, who serve five-year terms and are therefore highly politicized.

Congress has introduced legislation to reduce the Board's authority. The Protect American Jobs Act (H.R. 795 in the 113th Congress) would take away the NLRB's authority to promulgate any regulation other than rules concerning internal Board functions.

Employee Rights Act. The Employee Rights Act (ERA) would amend Section 9(a) of the NLRA to guarantee workers a secret-ballot election when voting on union representation. Currently, a union may organize workers in two ways: by secret-ballot election or by the procedure known as card check.

To initiate a federally supervised secret-ballot election, a union must present a "showing of interest"—signed authorization cards that show at least 30 percent of employees support union representation—to the nearest NLRB regional office, which sets the election conditions, including location, time, ballot language, and eligible voters, and then holds the election.

If the union receives 50 percent plus one votes cast in favor of union representation, the union wins recognition and is certified as having exclusive representation over the collective-bargaining unit.

Under card-check, if the union obtains 50 percent plus one signed authorization cards from employees, then the union may persuade the employer to bypass the election and recognize it as the employees' exclusive representative. Without an election, workers are deprived of time to hear the pros and cons of unionization and to reflect on whether they want to unionize, which leaves workers open to union intimidation tactics.

Unions use a strategy known as a "corporate campaign" to browbeat employers into agreeing to card-check organizing. Corporate campaigns are aggressive, public relations campaigns designed to damage an employer's reputation until it accedes to union demands.

The Employee Rights Act would amend Section 9 of the National Labor Relations Act by adding a provision that requires all union recertification elections to be conducted by secret ballot.

That change is needed. Once a union is certified as the exclusive representative of a group of employees, it never needs to stand for recertification. That provision has led to what is known as inherited unions. Heritage Foundation labor researcher James Sherk found that only "7 percent of private-sector union members voted for their union. The remaining 93 percent are automatically represented by a union they had no say in electing."

To ensure that workers continue to desire union representation and new workers have a say in their own representation, the ERA amends the NLRA to require union recertification elections conducted by secret ballot once the workforce has turned over by more than 50 percent since the last election.

The ERA would also protect workers who petition to decertify their union. It would amend Section 10 of the NLRA by inserting a provision that penalizes labor unions that interfere with an employee's right to file a decertification petition, holding unions liable for lost wages or unlawful collection of union dues or fines and damages.

The NLRA already makes it an unfair labor practice for an employer to interfere with or restrain a worker's right to organize. Unions should be held to the same standard when employees

petition to decertify their union. Currently, many union constitutions contain provisions that punish workers who seek to decertify their union, including through steep fines and even termination of employment. (For an example, see Communications Workers of America Constitution, Article XlX—Charges Against Members, http://cwa-union.org/pages/constitution-continued#A19; and UNITE HERE Constitution, Article 16, Section 1, Subsection (i) "Secession or fostering secession or sponsoring or advocating decertification of, or deauthorization of union security for UNITE HERE or any affiliate," http://unitehere.org/wp-content/uploads/2014UNITE-HEREConstitutionFinal.pdf.)

Freedom from Union Violence Act. Workplace violence is a crime—unless committed by a union in the course of promoting unions goals. That is the unfortunate outcome of the U.S. Supreme Court's decision in *U.S. v. Enmons*, in which the Court wrote a huge loophole into the Hobbs Act (Title 18 USC §1951), a major federal anti-extortion law. That loophole, found nowhere in the text of the Act, allows unions to use violence to extort business into giving more money, benefits, and power to unions.

As a result of federal preemption, union violence often goes unprosecuted—such as, for example, threats hurled by members of the Teamsters at the cast and crew of the television show *Top Chef* last August. As Deadline Hollywood reported on August 20, 2014, "Angry that the show had not signed a Teamsters contract and that the production hired local [production assistants] to drive cast and crew vehicles, the dozen or so picketers from Boston's Teamsters Local 25 kept at it for hours, raining down racist, sexist and homophobic threats and slurs as staffers came to and left the set that summer day."

The Freedom from Union Violence Act of 2014, introduced by Sen. David Vitter (R-La.) in the last Congress, would amend the Hobbs Act by eliminating the judicially created loophole allowing union violence. That legislation should be reintroduced in the 114th Congress.

In addition, Congress should hold hearings into workplace violence in order to expose that alarming problem.

Experts: Aloysius Hogan, Trey Kovacs, Ivan Osorio, Iain Murray

RAISE Act. Under current federal law, the wages of 7.6 million workers are capped because of inflexible wage structures in union contracts that set not only a wage floor but also a wage *ceiling* for specific categories of workers. Instead, compensation in many union contracts is established on the basis of seniority.

The Rewarding Achievement and Incentivizing Successful Employees (RAISE) Act (S. 1542 and H.R. 3154 in the 113th Congress) would allow businesses to reward employees for outstanding performance by offering them higher wages than union contracts specify. The legislation would allow individuals trapped in ironclad union wage scales to be rewarded for merit, better performance, and higher productivity. Passing the RAISE Act could result in the average union member's salary increasing by $2,700–$4,500 per year, according to calculations by Heritage Foundation analysts.

Experts: Aloysius Hogan, Trey Kovacs, Ivan Osorio, Iain Murray

End Union Monopoly Bargaining. Under the National Labor Relations Act, a worker's freedom to choose how he or she is represented in the workplace is restricted by the principle known as exclusive representation. That restriction should be lifted.

Section 9(a) of the NLRA requires that if a majority of employees at a workplace vote in favor of union representation for the purposes of collective bargaining, that union then becomes the exclusive representative of all the employees at that workplace, including workers who voted against unionization. Congress should amend the provision by deleting the word "exclusive."

Workers should not be forced to accept representation they do not want. Yet the NLRA's exclusive representation provision prohibits an individual worker who is opposed to union representation to choose representation other than the union.

Eliminating exclusive representation would make unions more receptive to the needs of their membership and would provide workers the ability to negotiate the terms of their employment, instead of being forced into a one-size-fits-all contract covering all workers in a given bargaining unit.

Rein in NLRB Overreach on Outsourcing and Contract Staffing Agencies through Appropriations Limitation. The

battle over what constitutes an independent contractor, as opposed to an employee, has raged for quite a while in labor law circles. However, a series of recent NLRB decisions threatens to undo decades of precedent.

In one such case, *FedEx Home Delivery* (361 NLRB no. 55), the NLRB ruled on September 30, 2014, that drivers for the delivery firm FedEx were to be considered employees, not independent contractors. As a result, writes attorney Todd Leibowitz of the law firm BakerHostetler:

> Companies who wish to analyze whether their non-employee workers are properly classified as independent contractors must now contend with a new NLRB test, in addition to the IRS Right to Control Test (used for federal tax purposes), common law Right to Control Test (used for ERISA [Employment Retirement Income Security Act] and federal discrimination law purposes), modified Treasury version of the common law Right to Control Test (used for Affordable Care Act purposes), Economic Realities Test (used for Fair Labor Standards Act purposes), and the multitude of varying state law tests used for state wage and hour laws, workers compensation, and unemployment.

In another case, *CNN America, Inc.*, the cable news network CNN is appealing a recent NLRB ruling that forces the network to rehire workers from a temp agency *11 years* after the news giant terminated its contract.

In a third case, the NLRB ruled in favor of the Teamsters union, which argued that Browning-Ferris Industries, a client of Leadpoint, a staffing company it was trying to unionize, is a joint employer of Leadpoint employees and therefore should be bound by a collective-bargaining agreement between Leadpoint and the union. Matthew Austin, a partner at the law firm Roetzel and Andress, comments on Law360: "Let that sink in: BFI will be bound by the union contract between Leadpoint and Leadpoint's union. This [amicus brief of the NLRB general counsel and potential] ruling undermines the entire staffing and temporary employee industry" ("NLRB's 'Joint Employer' Test Will Rewrite Labor Law," Law360, September 18, 2014, http://www.ralaw.com/resources/documents/files/Law360%20Sept%202014%20Article.pdf).

An NLRB general counsel brief outright states, "The Board should not adhere to its existing joint-employer standard and should instead adopt a new standard," which would hold that joint-employer status exists in cases of direct control of workers, indirect control of workers, potential control of workers, or where industrial realities give significant control over the other business' workers (Amicus brief of the general counsel, June 26, 2014, http://www.laborrelationsupdate.com/files/2014/07/GCs-Amicus-Brief-Browning-Ferris.pdf).

Does telling a temp receptionist to dress professionally, where to sit, how to answer the phone, and when lunch and breaks occur constitute direct control, significant control, or potential control? Does adding extra tasks make a difference? Is donning a uniform a determining factor? Matthew Austin of Roetzel and Andress observes, "It's hard to imagine a scenario where the use of temporary workers, employees from a staffing agency, many subcontracting relationships, seasonal workforces and day laborers will not automatically bind the supplying and using companies."

The NLRB is waging an all-out assault on businesses that hire temps and contractors. Congress will have to step in to maintain the continued operation of those industries.

Experts: Aloysius Hogan, Trey Kovacs, Ivan Osorio, Iain Murray

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LABOR MOBILITY

Labor mobility is an important part of a free economy. Immigrant entrepreneurs have founded some of America's most iconic businesses—including Warner Brothers, Anheuser-Busch, Goya Foods, Goldman Sachs, Paramount Pictures, Sbarro, Forever 21, Google, Intel, Sun Microsystems, Yahoo!, Kraft, Pfizer, eBay, Nordstrom, and AT&T. In New York City alone, 70,000 immigrants own small businesses, including 90 percent of the city's laundry and taxi services. Studies find that immigrants are twice as likely as native-born Americans to found new businesses. Accordingly, America's employment system needs to be welcoming to immigrant entrepreneurs. At present, it is not. Moreover, efforts to clamp down on undocumented immigrants have led to unreasonable burdens being placed on employers, as the federal government outsources its policing function to them.

Congress should:

- Pass legislation introducing a more flexible and attractive immigrant visa program.
- Resist moves to make the E-Verify program, run by U.S. Citizenship and Immigration Services (USCIS), mandatory and preferably defund the program.

Immigrant Visas. America has no visa designated specifically for entrepreneurs. Most immigrants and immigrant entrepreneurs enter the country through family relations or employer-sponsored visas before they can start their own businesses. Google's Sergey Brin and eBay's Pierre Omidyar, for example, entered through the family-based immigration process. Talented foreigners without such connections must first find an employer willing to sponsor them. Then, they must usually wait years in the immigration queue before being allowed to enter. And when they finally arrive, they do so only as employees, not entrepreneurs.

America needs a genuine entrepreneurship visa, one that offers a clear path to permanent residency to any foreign-born, venture-backed founder of a new business in the United States, without further restrictions. That need should form the basis of a future bill.

Visas for entrepreneurs who invest in their own businesses are available, but with major restrictions. The E-2 treaty investor visa requires investors to justify their presence to the government every two years, and it excludes some major countries, including China, India, and Brazil. The E-2 and the EB-5 investor visa, which grants applicants a conditional visa, can be used to start businesses, but both base their requirements on specific investment levels that are too high for most new entrepreneurs to meet. The E-2 requires foreign immigrant investors to own 51 percent of the business and to have a personal minimum investment of $100,000 or more. The EB-5 requires an investment of at least $1 million, and the investor must prove that the investment has created at least 10 full-time jobs within two years.

A true entrepreneur visa would be established on the basis of what we know about how our domestic entrepreneurs start their businesses. According to the Internal Revenue Service, nonfarm sole proprietorships had average annual revenues of less than $60,000 in 2008. For small businesses, median annual revenue was $182,000 in 2012. Previous versions of entrepreneur visa proposals have required very high clearance levels by comparison with those realities. As of 2010, just 5.3 percent of immigrant-owned businesses began with startup capital of more than $250,000, the level needed for a renewal under the recent X visa proposal. Only 12.2 percent had $100,000 or more. Barely a quarter started with over $25,000.

E-Verify. In its current form, E-Verify is a voluntary Internet-based program run by U.S. Citizenship and Immigration Services, aimed at providing confirmation that a worker is eligible to work in the United States. The program compares the employee's I-9 form with U.S. government records. In the event of a mismatch, the program alerts the employer and gives the employer and the employee eight weeks to establish that the worker has the correct authorization to work.

E-Verify will result in at least 1.8 million erroneous initial nonconfirmations over the next decade, requiring legal employees to sort out those errors at federal offices. The process will, on average, cost legal employees who receive initial nonconfirma-

tions $280 per error to resolve—or nearly $50.5 million per year. Employees who receive a tentative nonconfirmation must resolve it at their own expense and on their own time, an especially costly burden for workers living in rural areas.

According to USCIS testimony, E-Verify would cause an estimated 40,000 authorized workers to lose their jobs annually because of erroneous final nonconfirmations, costing affected workers about $134 million in lost wages per year.

Furthermore, E-Verify would have a disproportionate negative effect on legal immigrants. USCIS's official E-Verify auditor, Westat, found in 2009 that naturalized citizens and authorized foreign-born workers are 26 times more likely than native-born citizens to receive a system error. Extrapolating from that finding, foreign-born individuals can expect to receive 82 percent of all errors. That implication may encourage employers to discriminate against otherwise qualified foreign-born applicants.

For employers, implementing E-Verify will be neither simple nor inexpensive. Extrapolating from the U.S. Department of Homeland Security's estimate of the costs incurred by federal contractors in using E-Verify, businesses required to use the system will face $4.1 billion in setup costs and $2.55 billion in annual compliance costs thereafter. Employers must learn an 88-page compliance manual and undergo training before they can participate in the E-Verify program. Under the White House proposal, which exempts businesses with fewer than five employees from the system, initial setup costs would be lower, at about $1.7 billion. Mandatory E-Verify will return nonconfirmations to about 650,000 unauthorized workers per year at the current rejection rate, costing businesses about $3.95 billion per year to replace them.

Implementation of E-Verify represents enormous compliance costs for both workers and employers and an inappropriate deputization of employers by immigration authorities to do their work for them.

Congress should resist moves to make E-Verify mandatory and preferably should defund the program.

Expert: Iain Murray

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INCOME INEQUALITY

A large part of the justification for policies like a federal minimum wage and collective bargaining rests on the supposed ills of income inequality. Income inequality, the argument goes, is harmful for society because it creates winners and losers. And because inequality is an inherent part of the free-market capitalist system, Congress should reduce relative poverty by adopting policies that raise wages. However, such policies do more harm than good.

Congress should:

- Focus on policies that tackle absolute poverty, rather than inequality.
- Reject taxes on capital, including on dividends or capital gains, and reduce those taxes if given the opportunity.
- Refuse to increase, and preferably abolish, the federal minimum wage.

Concerns over income inequality revolve around the idea that the rich are getting richer, while the poor, if not getting poorer, are not getting any richer over time, leading to greater inequality and *relative* poverty. That idea has recently received some intellectual heft following the publication of French economist Thomas Piketty's bestseller *Capital in the Twenty-First Century*. In *Capital*, the broad pattern Piketty traces is that before World War I, income inequality was very high in America but was especially so in Europe. The Gini coefficient, a widely used measure of inequality, ranges from zero at absolute equality to one at absolute inequality. Piketty finds that "Belle Époque Europe exhibited a Gini coefficient of 0.85, not far from absolute inequality."

Piketty argues that the two world wars destroyed accumulated capital in Europe, leading to an era of relative equality in which it appeared that what he perceives as the problem of capitalism had been overcome. Income inequality gradually increased in the postwar decades, with the rise sharpening in the 1970s and 1980s, to the point where today it is nearing prewar levels. America, in particular, has rapidly growing inequality compared with the United Kingdom or France.

The reason for that growing inequality, Piketty argues, is that the rate of return on capital is greater than the growth rate of the economy as a whole, leading to the rich getting richer. As a result, Piketty calls for a global tax on capital, an idea endorsed by leading leftist economists, such as Paul Krugman.

Yet such an argument ignores the problem of *absolute* poverty. Today's poor are in fact much richer in most respects than the richest of a century ago. They have access to faster, safer travel, undreamed-of communications technology, and much better health care, to name but three examples, than the lords of the Belle Époque. That change has come about as a result of global wealth creation.

Taxing capital would reduce the amount of capital formation and investment. Innovators would find it more difficult to find financing for their ideas. More importantly, consumers on all steps of the economic ladder would be denied life-improving inventions, efficiencies, and conveniences. The capital tax would actively harm the poor by slowing the ongoing increase in living standards that began about 200 years ago. That slowdown would make absolute poverty eradication even more difficult than it already is.

It is a moral imperative for public policies to maximize long-run economic growth. Even a few tenths of a percentage point difference in annual economic growth rates can add up to huge differences in living standards over time. Suppose two neighboring countries start with identical per capita annual incomes of $1,000. The first country grows by 2.5 percent per year. After a century, its per capita annual income will have grown nearly twelvefold, to $11,813. Its neighbor, with 2 percent annual growth, after a century will have an annual per capita income of $7,245, barely 60 percent as much. Those extra tenths of a percent in the first country's growth rate have a huge long-run effect on human well-being.

Therefore, Congress should reject any proposals to increase taxes on dividends or capital gains and preferably should reduce them.

Minimum Wage. Another policy favored by those concerned about relative poverty is to increase the federal minimum wage. Again, that policy harms those it is intended to help. A November

2013 Gallup poll found that 76 percent of Americans would vote in favor of a $9-per-hour minimum wage if it were put to a referendum. When Seattle passed a $15-per-hour minimum wage in 2014, to be phased in over seven years, the City Council's website proclaimed, "City Council Approves $15/hour Minimum Wage in Seattle: Historic vote addresses income inequality."

The problem with that thinking is that it ignores tradeoffs. A minimum wage helps some workers but at the cost of hurting other workers. That results in a regressive income transfer and increased inequality. Some of America's least well off workers get a raise precisely as other of America's least well off workers see their hours cut, or even lose their jobs entirely. Other workers will never be hired in the first place. A 2014 Congressional Budget Office study of a proposed $10.10-per-hour minimum wage estimates that "implementing the $10.10 option would reduce employment by roughly 500,000 workers in the second half of 2016, relative to what would happen under current law."

Moreover, even those who seem to benefit from the minimum wage are often harmed in other ways. The minimum wage increase in the SeaTac Airport district near Seattle led to workers losing benefits such as 401(k) accounts, health insurance, paid leave, paid parking, and complimentary meals if they worked at a restaurant. If wage costs increase, employers look for offsetting savings elsewhere, and fringe benefits are usually the first to go. As a result, the extra money in the pay envelope usually ends up going to pay for the lost benefits, often at less favorable tax rates for the employee.

Employers can also lay off some employees or cut employees' hours. Employers will also become more reluctant to hire additional workers, particularly those with low levels of skill, if required to pay them a higher wage. Consumers also lose out. Parking companies in the SeaTac district raised their prices rather than fire workers and replace them with automated kiosks.

The minimum wage's least visible tradeoff is that some workers are never hired in the first place. The individuals who were never hired because of a minimum wage hike are impossible to identify, but the data indicate that those willing would-be workers skew toward young and minority.

Young workers typically have higher unemployment rates than older workers to begin with, as younger people typically have fewer skills and less experience than their elders. And many young people are still in school or have young children, thus limiting their hours and availability. Minimum wages amplify that disparity by pricing some inexperienced and less skilled workers out of the market altogether. Federal minimum wage increases between 2007 and 2009 helped increase the youth unemployment rate by about 3 percent. Indeed, the high minimum wage in European countries such as France helps explain the very large youth unemployment rates there—24 percent as of this writing.

Congress should oppose any increase in the minimum wage and preferably should abolish it by repealing the Fair Minimum Wage Act.

Experts: Ryan Young, Iain Murray, Aloysius Hogan, Ivan Osorio

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PUBLIC PENSION REFORM

Limited government is essential to prosperity. Conversely, having to pay for a large and growing public sector curtails entrepreneurial activity by diverting capital away from the private sector. At the state and local level, that outcome has become a major problem, with states and municipalities facing large public pension shortfalls. Although pensions are a state and local matter, the size of many pension deficits could likely lead to calls for federal assistance. Congress should resist such calls.

Congress should:

- Hold hearings aimed at clarifying the Governmental Accounting Standard Board's (GASB) decision-making process in setting discount rates of public pension plans.
- Resist calls for bailing out underfunded state public pensions.

A central factor contributing to public pension underfunding is dubious accounting facilitated by the Governmental Accounting Standards Board, an independent, quasi-private organization. For years, GASB allowed public pension managers to calculate employer contributions using discount rates based on high investment returns, usually in the 7 percent to 8 percent range. Although some pension funds can achieve such return rates, they need to do so year on year in order to keep up with the growth in pension liabilities, which rise in an uninterrupted straight line.

Given the fixed nature of public pension liabilities, pension managers should use a risk-free rate, based on investment return projections consistent with 15- to 20-year Treasury bonds, in the 3 percent to 4 percent range.

GASB reformed its pension accounting standards in June 2012, when it approved GASB Statement 67, to replace GASB Statements 25 and 27—under which pension plans could base discount rates not on the certainty of liabilities coming due but on the projected returns on plan assets—effective in mid-2013. Although a small step in the right direction, the reform did not go nearly far enough. Although the new rules call for establishing discount rates for "unfunded" pension liabilities on a lower rate of return, that rate may still be too high. Worse, supposedly funded pension plans can continue to use the same high discount rate as under GASB Statement 25.

That adoption of a dual discount rate makes little sense. Congress should seek to find out why GASB adopted that standard.

Experts: Ivan Osorio, Aloysius Hogan

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PRIVATE PENSION REFORM

The Pension Benefit Guaranty Corporation (PBGC), the federal agency that insures private-sector pensions, reported a $27.4 billion deficit for FY 2013. Created by Congress in 1974, the agency is funded through premiums paid by insured companies, not federal tax dollars, but the PBGC's pension insurance scheme now functions as a huge corporate subsidy. In its current structure, the PBGC creates a major moral hazard.

Congress should:

- Give the PBGC the flexibility to adjust its own premiums to reflect risk in the future.
- Reject any PBGC bailout legistlation

While the Pension Benefit Guaranty Corporation's reported $27.4 billion deficit for FY 2013 was an improvement over the previous year's $34 billion figure, the agency still faces major challenges in fulfilling its mission. Moreover, that slightly improved outlook extends only to single-employer pension plans, not multiemployer plans, of which a significant percentage face a serious risk of insolvency. The PBGC now projects that its multiemployer program's deficit will grow from $8.3 billion in 2013 to $47 billion by FY 2023. Insolvencies now threaten about 1 million multiemployer plan beneficiaries. That level is clearly unsustainable.

Created by Congress in 1974 as part of the Employee Retirement Income Security Act, the PBGC is funded through premiums paid by insured companies, not federal tax dollars, but the PBGC's pension insurance scheme now functions as a huge corporate subsidy. In its current structure, the PBGC creates a major moral hazard.

Congress recently raised PBGC premiums, an idea the Government Accountability Office has endorsed. But Congress should go further and give the PBGC the flexibility to adjust its own premiums, like the Federal Deposit Insurance Corporation does. Lawmakers should not be in the business of setting prices, and there is no reason to make an exception for pensions, especially for an insurer supposedly funded by premiums.

For the beneficiaries of that de facto subsidy, defending it publicly requires some rhetorical sleight of hand. A May 2014 U.S. Chamber of Commerce report describes PBGC premium hikes as "essentially tax increases on the businesses that pay them." In reality, raising premiums amounts to the removal of a subsidy—a removal that can be made permanent only by Congress getting out of the business of setting the PBGC's premiums.

The U.S. government is not directly responsible for the PBGC's unfunded liabilities, but the agency's massive, mounting deficit makes a federal bailout a real possibility. In fact, some politicians have already proposed such a bailout. A bill introduced in the 112th Congress by Sen. Robert Casey (D-Penn.) sought to make the federal government explicitly liable for multiemployer plans under the PBGC's purview. The bill failed, but similar schemes could come up again, especially if the PBGC's deficit were to get much worse. Congress should resist any attempt at a bailout.

Experts: Ivan Osorio, Aloysius Hogan

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Food, Drugs, and Consumer Products

6

GENETICALLY ENGINEERED FOODS

The safety of genetically engineered (GE) organisms has been studied extensively by dozens of the world's leading scientific bodies. Every one of them has concluded that the techniques give rise to no new or unique risks compared with conventional breeding methods, and that the ability to move individual genes between organisms actually makes the characteristics of genetically engineered products more precise and predictable, and therefore safer, than comparable products developed with more conventional breeding methods. Furthermore, the consensus among scientists who have studied genetic engineering—also known as biotechnology and gene-splicing techniques—holds that the evaluation of those products "does not require a fundamental change in established principles of food safety; nor does it require a different standard of safety" than those that apply to conventional foods. (See Institute of Food Technologists, *IFT Expert Report on Biotechnology and Foods*, Chicago: Institute of Food Technologists, 2000, p. 23.)

Nevertheless, genetically engineered plants and animals, and foods derived from them, have been subject to extensive regulatory requirements imposed by three different agencies in the United States: the U.S. Department of Agriculture (USDA), Environmental Protection Agency (EPA), and Food and Drug Administration (FDA). Essentially all new genetically engineered crop plants must undergo rigorous testing and be vetted by the agencies before they are put on the market, even as conventionally bred plants with identical characteristics are subject to no regulation at all.

Congress should reform the USDA approval process for genetically engineered plants to require that only those with known high-risk traits and those whose risks are unknown be approved before commercial use. The expensive and lengthy review process is scientifically unjustified and adds millions of dollars to the development costs of each new GE variety. The cost and complexity of complying with those regulatory strictures have concentrated GE product development in the hands of six major seed companies, and has made it uneconomical to use genetic engineering to develop improved varieties of all but major commodity crops, such as corn and soybeans. Small startup firms and university researchers simply cannot afford the regulatory costs associated with bringing a new GE crop to market.

Despite the overwhelmingly positive record of environmental and human safety, and the substantial burden of mandatory testing and regulatory review, some critics have demanded special labeling for GE foods. They argue that, even if GE foods are safe and nutritious, consumers want the additional information. Current FDA policy reserves mandatory labeling for food products whose characteristics have been changed in a way that affects safety and nutrition. Where a food product has been changed in a material way—such as an increase or decrease in vitamins, the addition of an allergen, or some other change that affects safety or nutritional value—the product label must note the specific change.

Labeling advocates have been unable to persuade the FDA, but they have had some success at the state level. Connecticut, Vermont, and Maine have enacted legislation that would require certain GE foods to be labeled as containing genetically engineered ingredients. Those laws, if fully implemented, would needlessly raise the cost of *all* foods, whether they contain GE ingredients or not. They are also unnecessary because a thriving market for voluntarily labeled non-GE foods has developed, providing those who wish to avoid genetically engineered ingredients plentiful choice in the marketplace. State labeling mandates are also unconstitutional, and they may be preempted by the Federal Food, Drug, and Cosmetic Act. Congress should clarify that act to clearly preempt state GE labeling mandates.

Regulation of Genetically Engineered Plants and Foods

Dozens of scientific organizations, including the U.S. National Academies, American Association for the Advancement of Science, and Institute of Food Technologists, have carefully studied the safety of genetic engineering for consumers and the environment. All have concluded that the use of modern biotechnology, or gene-splicing techniques, gives rise to no new or unique risks compared with more conventional forms of breeding. In fact, say the experts, because the tools of genetic engineering are more precise and predictable, GE plants and foods derived from them will in many cases be safer than their conventionally bred counterparts.

Congress should:

- Reform the U.S. Department of Agriculture's approval processes for genetically engineered plants to require that only genetically engineered plants with high-risk traits be approved before commercial use.

In each of four studies conducted from 1989 to 2004, the National Research Council of the U.S. National Academies concluded that no scientific justification exists for regulating genetically engineered organisms any differently from conventionally bred varieties. The safety of a new plant variety has solely to do with the characteristics of the plant that is being modified, the specific traits that are added, and the local environment into which it is being introduced, regardless of whether genetic engineering or a more conventional breeding method is used to modify the plant. Nevertheless, to ameliorate public concerns about gene splicing, the U.S. Department of Agriculture and the Environmental Protection Agency each developed regulatory frameworks during the 1980s that require premarket approval for nearly all new genetically engineered plant varieties, regardless of the safety of the traits incorporated into individual plants.

Under the Plant Protection Act, the USDA treats essentially all GE plants as potential plant pests—organisms that may be injurious to agriculture—until they have been extensively tested under stringent rules, found not to be pests, and then "deregulated" by the department (7 CFR 340). Two decades of practical, commercial experience with GE crops have shown early concerns to be unwarranted, and approved varieties have an admirable record of consumer and environmental safety. Furthermore, the USDA has not once had to reject an application because the new variety was in any way unsafe. Yet instead of being comforted by that admirable safety record, the USDA's response has been to demand more testing and to lengthen the time it takes to review deregulation applications.

From 1992 to 1999, the USDA took an average of fewer than six months to deregulate 50 new GE varieties—after several years of required testing were completed for each. Regulatory review times grew steadily beginning in the 2000s, and the department now takes an average of over two full years to deregulate a new variety, despite a much smaller number of applications being submitted. (See USDA Animal and Plant Health Inspection Service, "Petitions for Determination of Nonregulated Status," http://www.aphis.usda.gov/biotechnology/petitions_table_pending.shtml.) Regulatory hurdles alone add between $6 mil-

lion and $15 million to development costs for each new variety, a burden that only large seed companies can afford—and then only for high-value commodity crops. Regulatory compliance costs for GE crops can often exceed the entire market value of most fruit and vegetable species. And small startup firms and university-based researchers simply cannot afford to bring any new GE varieties to market.

The current regulatory system for genetically engineered crop varieties cannot be justified scientifically. It singles out the more precise techniques of gene splicing for added scrutiny, even as crops bred using less precise, and arguably less safe, methods—such as induced DNA mutation and forced hybridization of different plant species—go entirely unregulated. Crops bred to withstand herbicides or with added resistance to certain pests are heavily regulated if they are produced with gene-splicing techniques, but the very same traits are not regulated at all if the crop was, for example, exposed to radiation in order to mutate the plant's DNA.

What is needed is a regulatory apparatus that focuses on new plant traits, not breeding method, and increases the amount of testing and scrutiny as the riskiness of individual traits rises. Congress should instruct the USDA to exempt low-risk traits, such as herbicide tolerance, from Plant Protection Act regulation and to focus solely on traits known to pose potential hazards to humans or the environment, as well as traits that are genuinely novel, whose risks are unknown.

Expert: Gregory Conko

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GE Food Labeling

The U.S. Food and Drug Administration's policy on labeling foods derived from new plant varieties, introduced in 1992, follows the advice of major scientific bodies and is premised on the view that what determines the safety, wholesomeness, and nutritional value of a food is its characteristics, not the breeding method used to develop it. (See Food and Drug Administration, "Statement of Policy: Foods Derived from New Plant Varieties," *Federal Register* 57, May 29, 1992, 22,984–23,005.)

Congress should:

- Codify the Food and Drug Administration's current labeling policy for food products, under which special labeling is necessary only when a food's characteristics have been altered in a material way, and preempt state GE food labeling requirements.

All breeding methods—from simple hybridization to the most modern biotechnology-based techniques—have the potential to introduce significant changes in the composition of foods. But well-known and easily performed testing methods are sufficient to determine a food's nutritional value and safety. Therefore, according to FDA policy, food producers have a legal obligation to ensure that new food plant varieties are safe for human and animal consumption, but special labeling specific to GE foods is not required.

Producers have a legal obligation to note on labels any time a food has been changed in a way that might be material to consumer safety and nutrition. Such changes might include a higher or lower level of vitamins or other nutrients, fats, carbohydrates, and other components beyond the normal variability present in conventional counterparts. Material changes could also include the introduction of an allergen or other potentially deleterious substance, or even a change in a food's taste, smell, texture, or its storage, handling, or preparation requirements.

If a new food product has been changed in any of those ways, its label must alert consumers to the modification, regardless of whether that change was made using genetic engineering or another breeding method. Importantly, it is not sufficient merely to state what *breeding method* was used to develop the product; the label must state what *change* has been made.

Ever since the first genetically engineered food products were put on the market—cheeses produced with an engineered clotting agent called chymosin in 1990 and milk from cows given an engineered version of the natural bovine growth hormone somatotropin in 1993—some critics have demanded that those products be labeled to indicate that gene splicing was used in their production. (See Center for Veterinary Medicine, U.S. Food and Drug Administration, "BST Update," *CVM Update*, March 21, 1996.) However, the FDA has resisted calls for special labeling of those genetically engineered foods that have been tested extensively for safety and have been found not to differ in any material way from their conventional counterparts. And where a food was changed in a material way, such as the introduction of a protein that could be allergenic or a modification that would produce healthier fats in cooking oils, the alteration would have to be included on the product's label.

The agency, which relies on mandatory labeling to alert consumers about important safety and nutritional changes, concluded that a mandatory GE label would falsely lead consumers to believe there is an important safety concern regarding genetic engineering when, in fact, there is none. According to the American Association for the Advancement of Science, "Legally mandating such a label can only serve to mislead and falsely alarm consumers." (See American Association for the Advancement of Science, "Statement by the AAAS Board of Directors on Labeling of Genetically Modified Foods," October 20, 2012, http://www.aaas.org/sites/default/files/AAAS_GM_statement.pdf.)

Labeling advocates respond that a large majority of consumers say they support mandatory GE labeling, and that, regardless of whether GE foods are safe, consumers have a right to choose. However, the demand for information has spawned a thriving market for voluntary labeling that indicates the absence of GE ingredients. Thousands of foods labeled "non-GE" can be found in grocery stores around the country, and both advocacy organizations and consumer groups have introduced pocket shopping guides and smartphone apps to help shoppers exercise the choice many say they want.

Finding no success with FDA, mandatory labeling advocates have turned to lobbying state governments instead. Bills and ballot initiatives to require labeling have been introduced in at least 25 states. Most have been rejected, but Connecticut, Vermont, and Maine have enacted such legislation. Those laws are unnecessary, given the availability of voluntary labeling information. If fully implemented, they will raise costs and prices for both GE and non-GE foods.

Furthermore, they are legally dubious on various grounds. They are unconstitutional because, as federal courts have concluded, satisfying consumer curiosity is not a governmental interest sufficient to overcome the producers' First Amendment rights not to include extraneous information on labels. (See *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2nd Cir. 1996).) And state GE labeling laws may also be preempted by the Federal Food, Drug, and Cosmetic Act, as one federal court has concluded (*Briseno v. ConAgra Foods Inc.*, No. 2:11-cv-05379 (C.D. Cal., November 23, 2011)).

Because the provisions of the Federal Food, Drug, and Cosmetic Act that preempt state labeling laws are ambiguous, supporters of FDA's current policy introduced a bill in 2014 explicitly to preempt state GE labeling rules: the Safe and Accurate Food Labeling Act (H.R. 4432). To build support for the legislation, the bill would also increase the stringency of the FDA's existing safety review for new genetically engineered food products. Yet the overwhelming majority of food safety scientists agree that no scientific justification exists for regulating genetically engineered organisms any differently from conventionally bred varieties, so even FDA's existing regulatory framework is unnecessary. Congress should clarify that the Federal Food, Drug, and Cosmetic Act does preempt state GE labeling laws, but it should resist needless calls to increase the already-burdensome regulation of genetically engineered foods.

Expert: Gregory Conko

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CONSUMER FOOD CHOICE

Federal Food, Drug, and Cosmetic Act

The U.S. Food and Drug Administration is trying to control Americans' diets by abusing its power to regulate food additives. In November 2013, the FDA published a tentative proposal to remove the "generally recognized as safe" (GRAS) status of partially hydrogenated vegetable oils, also known as PHOs or trans fats. Removal would mean that food producers would need to prove that PHOs are "safe" before being allowed to use the ingredients in their products—a hurdle that is likely impossible, given that FDA has indicated that it believes there is no safe level of trans fat consumption. Thus, the revocation of GRAS status is a way of creating a de facto ban on the ingredient. And public health activists and consumer advocacy organizations are pressuring the FDA to use its GRAS authority to ban or restrict additional ingredients, including sugars, salt, caffeine, and many others.

Congress should:

- Stop the Food and Drug Administration's march toward invasive control by amending the Federal Food, Drug, and Cosmetic Act to clarify that the agency has authority to limit or ban only those ingredients that are either acutely harmful to human health or have health risks that are cumulative over time, cannot be identified by the consumer, and cannot be mitigated through dietary or lifestyle choices.

Although there is some evidence that high levels of trans fat consumption may increase the risk of cardiovascular disease, a ban is regulatory overkill. In 2002, Americans consumed an average of 4.6 grams of PHOs a day. Yet in 2012, average daily consumption dropped to approximately 1 gram a day (or 0.5 percent of total daily calories) (FDA, "FDA Takes Step to Further Reduce *Trans* Fats in Processed Foods," news release, November 7, 2013, http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm373939.htm). Despite the dramatic voluntary decline in consumption and the fact that research has examined mainly the effects of high levels of consumption—and those that looked at consumption below 2 percent of daily calorie intake found no adverse effects—the FDA contends that any level of trans fat consumption increases the risk of cardiovascular disease and death and therefore warrants total elimination from Americans' diet. (See Dennis Strayer et al., *Food Fats and Oils*, 9th ed., Washington, DC: Institute of Shortening and Edible Oils, 2005, 20.)

Under the Federal Food, Drug, and Cosmetic Act, the FDA has the authority to approve additives for use in food if it determines they are safe. Revoking the GRAS status of PHOs because long-term overuse may lead to an increased risk of developing certain health conditions would be a significant shift in policy. By attempting to stop individuals from consuming ingredients that could be unhealthful if overused, the agency is trying to protect consumers not from dangerous foods, but from what it sees as bad choices.

The FDA appears to be basing its policies not on sound scientific evidence but on the wishes of extremist public health activists. For example, in 2012, Robert Lustig, a pediatric endocrinologist at the University of California, San Francisco, declared that sugar was a toxin and that the agency should consider removing its GRAS status, thus treating it like an additive that companies would need to prove is safe before they can add it to their products. In essence, the FDA sees trans fats as the low-hanging fruit in its broader effort to establish its authority to limit or ban ingredients that are not harmful, but that may be *unhealthful* if overconsumed. If successful, public health advocates will push the FDA to do the same with their true targets: sugar, salt, and caffeine in manufactured foods. What constitutes our diet ought to be the choice of every individual.

Experts: Michelle Minton, Gregory Conko

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"Nudging" Policies

In July 2014, Rep. Rosa DeLauro (D-Conn.) introduced the Sugar-Sweetened Beverages Tax Act, which would impose a na-

tional tax on sugary beverages and use the revenue to partially fund the Affordable Care Act. The goal of the tax is to make soda expensive enough that consumers will choose other beverages, leading to a reduction in obesity. Yet soda taxes do not result in more than trivial weight reductions because those who consume the largest amounts of sugar-sweetened beverages appear to respond least to higher prices, or they substitute other high-calorie foods and beverages for the taxed sugar-sweetened products. Sin taxes simply raise prices for low- and middle-income families at the grocery store.

Congress should:

- Reject proposals to impose soda taxes or any other attempt to use "sin taxes" to engineer individuals' choices.
- Monitor the proceedings of the Dietary Guidelines Advisory Committee (DGAC) to ensure that the next edition of its *Nutritional Guidelines for Americans* is based on nutritional science, that the committee participants are not politically motivated, and that no federal agency uses the *Guidelines* as a tool to socially engineer choices that ought to be left to individuals.

Although economic theory would suggest that higher prices generated by soda taxes should lead to lower consumption, real-world evidence suggests that sin taxes have only a minuscule effect on consumption of sugar-sweetened beverages. In part, the reason is that any decrease in soda consumption is offset by increased consumption of other sweet or calorie-dense drinks, such as fruit juices and whole milk. Most of the research predicting sizable benefits from soda taxes assumes that individuals will reduce soda consumption and not change any other consumption patterns.

Economic studies estimate that every 10 percent increase in soda prices may result in an 8 percent to 10 percent reduction in soda consumption, but that higher-calorie substitutes are consumed instead. Research on the effect of even very high taxes on sugary beverages found that 20 percent and 40 percent taxes on all sugar-sweetened beverages resulted in an average annual weight loss of only 0.7 to 1.3 pounds per person, respectively. Those studies also show that the weight reductions were driven almost entirely by middle-income households, and that sin taxes failed to alter the weight of lower-income houses at all.

In addition to taxes, another tool currently being used by public health nannies is the Dietary Guidelines Advisory Committee, which meets every five years and publishes the *Dietary Guidelines for Americans*. That publication is meant to outline what dietary and lifestyle choices promote good health. Based on the testimony at this year's meetings, the 2015 *Guidelines* will be more politically motivated and less science-based than ever before. DGAC members include many at the forefront of nanny-state activism, such as Sonia Angell, who led the effort to ban trans fats in New York City restaurants and has proposed using taxation and regulation to push Americans toward a plant-based diet.

Among other dubious suggestions, the DGAC's 2015 recommendations on sodium intake will likely echo the 2010 *Guidelines*, which advised adults to reduce their sodium intake to fewer than 2,300 milligrams a day (fewer than 1,500 milligrams for adults over 51), perpetuating the misguided "war on salt." However, a comprehensive report by the Institute of Medicine, commissioned by the U.S. Centers for Disease Control and Prevention (CDC), concluded that there was no evidence of a benefit to reducing sodium intake to below 2,300 milligrams, and that some groups might *increase* their risk of death by consuming fewer than 1,840 milligrams a day (Institute of Medicine, *Sodium Intake in Populations: Assessment of Evidence*, Washington, DC: National Academies Press, 2013). And a landmark 2011 study published in the *Journal of the American Medical Association* found that, although higher sodium consumption was associated with slightly higher blood pressure, lower sodium consumption was associated with higher cardiovascular disease mortality. The third of study subjects who consumed the least salt had three times the mortality as the third who consumed the most salt.

Although the *Guidelines* primarily affect school lunches, the military, and food stamp programs, it informs the policy of the FDA, USDA, National Institutes of Health, and CDC. For instance, when proposing to revoke the GRAS status of trans fats, the FDA relied heavily on the conclusions of the 2010 *Dietary Guidelines for Americans.*

Experts: Michelle Minton, Gregory Conko

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DRUGS AND DEVICE APPROVAL

Patients benefit from the thousands of available pharmaceuticals and medical devices on the market today. But the Food and Drug Administration's (FDA) overly cautious testing and approval process, and demands that such treatments meet a near-perfect level of safety, are often counterproductive. Patients can be injured if the FDA approves a treatment that is later found to be unsafe. But they are also harmed when needed treatments are delayed by regulatory hurdles, or when the cost and complexity of securing approval mean that promising new treatments are never presented for agency evaluation.

Safety concerns that arise after a drug or device is approved result in startling headlines and congressional hearings. That consequence incentivizes FDA regulators to be overly cautious in their decision making, demanding more trials with more patients, raising costs, and prolonging development times. Meanwhile, sick patients who are denied treatment options that may save their lives receive far too little attention. In 2012, Congress required the FDA to more formally measure the life-saving and health-enhancing benefits of new drugs and to explain how it weighed those benefits when making approval decisions. That process should be strengthened and implemented more quickly.

Congress should also require the FDA to update its decades-old rules for testing new drugs. Randomized, placebo-controlled clinical trials are good for detecting when medical interventions have large effects on populations of similar patients. But the homogeneous patient pools and tightly controlled clinical environments associated with randomized trials do not reflect real-world practice and outcomes very well. Existing clinical trial rules do not sufficiently account for variability among patients and differences in patient outcomes that are discovered only after clinical trials are begun. The rules prevent fast-paced adaptive learning in favor of more and longer trials with more patients, even though the latter are ill suited to discovering a drug's safety and benefit profile.

Individual patients disagree about how much risk they are willing to tolerate in order to obtain a new treatment's potential benefits. Therefore, the FDA's one-size-fits-all approval process means that decisions will be too cautious for some and not cautious enough for others. Those who view the agency's approval process as too quick may freely choose to use only products that have been on the market for several years with a well-established record of safety and efficacy. Those who seek access to medical products before the FDA has fully approved them have little or no choice. In theory, the agency's Expanded Access, or "compassionate use," program provides an option for terminally ill patients who cannot be enrolled in a clinical trial to access treatments that have not yet been approved. In practice, however, the process for seeking a compassionate use exemption is complicated, time-consuming, and burdensome, which means that many patients are denied a genuine opportunity to choose.

Benefit-Risk Assessment

The U.S. Food and Drug Administration's statutory mission is to ensure that "substantial evidence" is generated from "adequate and well-controlled investigations" for a new drug's safety and efficacy (21 U.S.C. 355[d], Federal Food Drug, and Cosmetic Act, § 505). But no drug is perfectly safe, in the sense that it has no negative side effects. And each drug affects individual patients differently. So the best we can expect from FDA decision making is a determination that an approved product's benefits outweigh its risks for the typical patient.

Congress should:

- Accelerate the FDA's implementation of the structured benefit-risk assessment process for new drugs mandated by the FDA Safety and Improvement Act of 2012, and require the agency to more fully consider the views of affected patients in approval decisions.

Even after extensive clinical testing, the net effects of a new medicine are not always well characterized. Drugs are generally tested in only a few thousand patients, leaving much unknown at the time an approval or disapproval decision must be made. In practice, the FDA has long been highly cautious when confronted with such uncertainty, even as patients with life-threatening or severely debilitating diseases have expressed a willingness to tolerate greater risk in exchange for the potential benefits of new therapies. Moreover, the agency's process

for assessing and balancing the benefits and risks of medicines is largely ad hoc, informal, and qualitative, relying primarily on the intuitive judgment of its medical review staff and expert advisory committees. As a consequence, agency officials tend to make incompletely informed judgment calls that substitute their own risk aversion for the judgments of affected patients. And because the FDA is not required to explain how it weighs risks and benefits, neither the public nor Congress has sufficient information on which to evaluate the agency's performance.

A 2007 Institute of Medicine report concluded that a more standardized and robust analysis of risks and benefits could improve FDA decision making with attendant improvements for public health. So, as a part of the FDA Safety and Improvement Act of 2012, Congress instructed the agency to "implement a structured risk-benefit assessment framework in the new-drug approval process to facilitate the balanced consideration of benefits and risks, a consistent and systematic approach to the discussion and regulatory decision making, and the communication of the benefits and risks of new drugs" (Food and Drug Administration Safety and Innovation Act, Public Law 112-144, Section 905). It also instructed the agency to consider in its new-drug approval decisions the views that affected patients themselves place on the value of various benefits and risks associated with new treatment options. However, the statutory text provided no other guidance to the agency, leaving substantial discretion regarding the assessment's structure and implementation.

In 2013, the FDA initiated a five-year plan to develop and implement the risk-benefit assessments, and it has begun to gather information and input from patient organizations to incorporate those views in approval decisions. (See FDA, "Structured Approach to Benefit-Risk Assessment in Drug Regulatory Decision-Making: Draft PDUFA V Implementation Plan," February 2013, http://www.fda.gov/downloads/ForIndustry/UserFees/PrescriptionDrugUserFee/UCM329758.pdf.) Implementation has proceeded very slowly, however, and it remains unclear how the agency will assess the demand by patients for more rapid introduction of innovative treatment options, and what value it will place on those demands. Both the development process and its application to individual approval decisions should be expedited and made more transparent.

Benefit-risk analysis can help decision makers better understand the likely consequences of their actions, and it can lead to greater transparency and accountability by forcing FDA officials to make their assumptions about the value of specific benefits and drawbacks of specific risks explicit. Ultimately, the purpose of formalized and published benefit-risk assessments is to put FDA's expert judgments on record, explain the agency's reasons for approving or denying approval for new products, and hold those decisions up to public scrutiny.

Expert: Gregory Conko

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Clinical Trials

A 2007 report by the U.S. Food and Drug Administration's Science Board concluded that "FDA's evaluation methods have remained largely unchanged over the last half-century," and that "[i]nadequately trained scientists are generally risk-averse, and tend to give no decision, a slow decision or even worse, the wrong decision on regulatory approval or disapproval" (FDA Science Board, "FDA Science and Mission at

Risk: Report of the Subcommittee on Science and Technology," 2007, 3, 5).

Congress should:

- Modernize and streamline the FDA's clinical testing protocols and approval process to take greater advantage of adaptive trial design and active learning.

First developed more than 50 years ago, the FDA's approach to clinical testing—which relies on multiple trials in three phases of testing—is premised on the belief that patients will have similar responses to medical interventions, and that a drug's benefits and side effects will be easy to identify given a large enough test population of patients with similar health and physical characteristics. We now know, however, that similar patients often respond quite differently to the same medications, and that the homogeneous patient pools and tightly controlled clinical environments associated with randomized trials do not reflect real-world practice and outcomes very well.

The FDA's main response to that phenomenon has been to demand more data from more patients to provide greater confidence in its decision making. That approach has caused the length of clinical trials to grow and the median number of tests conducted per patient (such as routine exams, blood tests, and X-rays) to rise. Those new hurdles have also made it more difficult to enroll patients in trials and to keep them in the trials until completion.

Randomized controlled trials are ill suited for detecting and testing subtle differences that occur in small patient subpopulations, which make them poor tools for fast-paced, adaptive learning. To minimize the occurrence of hindsight bias in data analysis, clinical trials begin with a hypothesis and a carefully constructed methodology for testing that hypothesis. When an unexpected or idiosyncratic effect is detected among a subpopulation of the test group, the FDA typically demands that the manufacturer form a new hypothesis and initiate an entirely new, often superfluous trial. In the process, adaptive learning is short-circuited, and the cost of drug development rises still further.

Today, new computational tools, better understanding of disease pathways, the development of biomarkers to predict drug effects, and other technological advances are enabling the use of innovative methods that could improve clinical trial quality. Those tools, combined with adaptive clinical trial designs—which allow researchers to learn as trials are in progress and, in turn, change dosing regimens or isolate patient subpopulations that respond especially well or poorly to the test drug—could help trial sponsors collect better, more robust data from fewer patients and in a shorter time. The FDA has announced its willingness to consider those new methods, but in a way that requires greater testing and more cautious analysis (FDA, "Adaptive Design Clinical Trials for Drugs and Biologics: Draft Guidance," February 2010, http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM201790.pdf). If the rules for adaptive trials remain too rigid, they could prevent patients from reaping the full benefits of the innovative methodologies.

The FDA must be more willing to allow flexibility in trial designs and to approve new drugs with fewer trials and fewer patients. Augmenting that accelerated testing process with more robust postapproval monitoring could lead to greater overall patient safety. After all, new drugs are generally tested on only a few thousand patients. The full benefit-risk profile of medicines is often unknown until they have been approved and prescribed to tens of thousands, or millions, of patients in real-world settings. So additional testing before approval simply cannot be expected to reveal a drug's true risks or benefits. Indeed, the rate of drug withdrawals remained essentially unchanged between 1971 and 2004, despite rising and falling trial requirements and approval times during that period. (See Center for Drug Evaluation and Research, "2003 Report to the Nation: Improving Public Health through Human Drugs," Food and Drug Administration, U.S. Department of Health and Human Services, April 23, 2004.)

Since 1992, the FDA has had an "accelerated approval" track for drugs that treat serious conditions for which no other treatments are available. In certain circumstances, such drugs may be granted limited approvals after a single Phase III trial (or on rare occasions, after Phase II trials are complete), under the condition that the manufacturer continue conducting additional trials to demonstrate safety and efficacy. The agency may also designate drugs intended

to treat serious conditions with an unmet medical need as "breakthrough therapies," which may be approved on the basis of a substantial reduction in symptoms or other serious consequences of the disease, rather than evidence that the product cures the disease per se. Those programs have greatly accelerated the introduction of promising new drugs on the market, but the FDA should be more aggressive in combining technologically sophisticated adaptive trial designs with the accelerated approval and breakthrough therapy pathways.

Using aggressive oversight—and, if necessary, additional legislation—Congress should encourage the FDA to permit greater flexibility in clinical trial methodology. It should also encourage the agency to approve drugs sooner and to demand fewer unnecessary trials—substituting more robust post-approval monitoring for the lengthier testing that is unlikely to reveal more about a drug's safety profile.

Expert: Gregory Conko

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Patient Choice

When making safety evaluations, the U.S. Food and Drug Administration is required, by statute, to determine the appropriate balance between patient safety and medical product effectiveness. The agency cannot know the optimal risk-benefit balance for every patient because each patient will have different views about how much risk and how many side effects he or she is willing to bear in order to use a new treatment that could alleviate symptoms or cure a disease. Therefore, it is important for individual patients to have more opportunities to choose a medical treatment that meets their unique health status and risk tolerance. Currently, few patients ever have the option of choosing a drug or medical device that has not satisfied FDA's risk-benefit preferences.

Congress should:

- Reduce burdens on patients wishing to use FDA's Expanded Access, or "compassionate use," programs and create other opportunities for patients to choose not-yet-approved drugs.

Some patients with unmet medical needs may be eligible to enroll in a clinical trial to test a new medicine or medical device. But because of the need for homogeneous patient populations in clinical trials, many simply do not qualify for enrollment because of their age, comorbidities, prior treatments, and the progression of their disease.

Under current law, the FDA may grant Expanded Access, or so-called compassionate use exemptions, for patients with serious or life-threatening diseases ("Expanded Access to Investigational Drugs for Treatment Use," 21 CFR § 312 Subpart I [2013]). But the process for seeking Expanded Access is complicated and time-consuming. It requires the patient's physician to submit a detailed application, which the FDA estimates will take 100 hours to complete. (See FDA, "IND Applications for Clinical Treatment [Expanded Access]: Overview," October 4, 2013, http://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/InvestigationalNewDrugINDApplication/ucm351748.htm; and FDA, "Investigational New Drug Application Form," http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Forms/UCM083533.pdf.)

The manufacturer must also consent to provide the drug, and the paperwork burden for manufacturers is also considerable. In addition, many manufacturers are concerned that granting such access could jeopardize their ability to enroll the clinical

trials needed for FDA approval. And many manufacturers are often reluctant to agree to Expanded Access use, because they may charge patients only the direct costs "incurred by a sponsor that can be specifically and exclusively attributed to providing the drug." (See Food and Drug Administration, "Charging for Investigational Drugs under an Investigational New Drug Application, Final Rule," 74 *Federal Register* 40872, August 13, 2009, http://www.gpo.gov/fdsys/pkg/FR-2009-08-13/pdf/E9-19004.pdf.) The paperwork and resource burden on manufacturers of making experimental drugs available are considerable, and those restrictions often make manufacturers unwilling to participate in compassionate use programs.

Although the FDA does eventually grant nearly all Expanded Access requests that are submitted by patients and manufacturers, that approval often comes many months after applications are submitted, jeopardizing the patient's best opportunity to treat the disease at a stage early enough to be effective. And in the end, the hurdles involved with seeking such an Expanded Access exemption mean that few patients ever even try to use that route. Despite substantial demand for early access to unapproved drugs, only about 1,000 patients each year navigate the process and complete an Expanded Access request.

Individual patients and their doctors are in a far better position than FDA bureaucrats to judge whether the uncertain risk and benefit of new treatments are warranted. The agency should focus on providing them with the information that is, and is not, known about experimental treatments and should permit patients to weigh the potential risks on their own, rather than on restricting patient choice.

Congress has previously examined proposals to reform the Expanded Access process by streamlining the paperwork burden and removing FDA's discretion to deny compassionate use to patients who meet basic qualifications. One such example is the Compassionate Access Act (H.R. 4732), introduced in 2010 by Rep. Diane Watson (D-Calif.). That bill, and others like it, have never reached a floor vote, but they provide Congress with a template to use as the starting point to develop legislation to make it easier for patients to seek and be granted Expanded Access exemptions. In addition, Congress should consider other options for giving patients access to not-yet-approved drugs and devices.

Expert: Gregory Conko

CONSUMER PRODUCTS

Many useful consumer products may soon disappear from the market, and innovation may dwindle, as policy makers—federal, state, and local—expand precautionary policies to ban and eliminate useful chemicals. For example, regulators and state lawmakers are placing some products on "chemicals of concern" lists, simply because they have the potential to cause adverse health effects at relatively high levels, even though risks are negligible or nonexistent at the very low levels at which those chemicals appear in consumer products.

Listing requires little consideration of the science, but it invites unnecessary regulation and, by scaring consumers about insignificant risks, even encourages voluntary elimination of many products. Such random elimination of technologies wastes the human ingenuity and investment that went into making those goods and denies society their benefits. Innovators must then divert resources to find substitute products, which may themselves pose new risks. The result is a poorer, potentially more dangerous world.

Congress should:

- Avoid legislation that creates or encourages arbitrary "chemicals of concern" lists or imposes scientifically unfounded precautionary bans on valuable chemicals.
- Promote legislation requiring federal agencies to employ risk- and-science-based standards for all chemical regulations.
- Increase oversight activity of the U.S. Environmental Protection Agency's (EPA) development of concern lists, as well as voluntary programs that characterize chemical risk without regulatory due process.

Congress and various regulatory bodies are advancing regulations purely on the basis of tenuous hazard profiles rather than on genuine risk. "Hazard" simply represents the potential for danger given specific circumstances or exposures. For example, water can be hazardous because excessive consumption can produce fatal water intoxification or hyponatremia, yet there is no need to regulate it or place it on a concern list. But that same approach is being used to demonize many synthetic chemicals that have been used safely in consumer products for decades.

EPA officials, for example, are developing a "chemicals of concern" list on the basis of hazard profiles for a number of chemicals to increase market pressure for their elimination without having to navigate the regulatory process to impose bans or other regulations. The agency also uses its Design for the Environment program to push companies to phase out certain chemicals because of their hazard profiles alone. The EPA can get away without proper reviews and standards because that program is considered voluntary.

Members of Congress have also introduced several bills to ban chemicals without regard to the potential adverse impacts of such bans. For example, during the 113th Congress, Sen. Chuck Schumer (D-N.Y.) introduced the Children and Firefighters Protection Act of 2014 (S. 2811), which would ban the use of 10 flame-retardant chemicals at levels of about 1,000 parts per million in children's products or upholstered furniture—and which would empower the Consumer Product Safety Commission to ban more. It does not require any evaluation of the benefits of those products, nor does it consider whether their absence will increase fire risks.

But we do know that fire risks are real and substantial. For example, the National Fire Protection Association reports that, in 2013, there were 1.24 million fires in the United States that caused 3,240 deaths, 15,925 injuries, and $11.5 billion in property damage. Meanwhile, there is little evidence that anyone has died or suffered significant injuries from trace chemicals found in furniture or clothing. It is dangerous to advance policies that ban such chemicals without demanding that regulators first consider the potential that, without those products, fires may burn more quickly, may be hotter, and may produce more deaths.

Also during the 113th Congress, Sen. Ed Markey (D-Mass.) introduced the Ban Poisonous Additives Act of 2014 (S. 2572), which would eliminate the chemical bisphenol A (BPA) from food containers. The resins that line food containers made with

BPA prevent the development of deadly pathogens in our food supply, protecting consumers from potentially deadly bacteria like E. coli. Because BPA resins have no good alternatives, BPA bans could increase food spoilage and serious food-borne illnesses. Meanwhile, the overwhelming body of evidence supports comprehensive scientific evaluations that have all found that the many benefits of that chemical outweigh its very low risks.

Self-styled consumer activist groups are also pushing the Food and Drug Administration to ban the antibacterial chemical triclosan, which has been used safely for more than four decades in soap, toothpaste, and antibacterial gels. Despite good scientific evidence that the chemical reduces bacteria-related risks, many manufacturers are voluntarily removing it from consumer products, and several states are even considering bans.

Valuable consumer products are lost to such rash bans, the cost of which is passed on to consumers. Congress needs to increase its oversight of the EPA, FDA, and other regulatory agencies that mischaracterize the risk profiles of various products by placing them on concern lists or use hazard-based classification systems.

Lawmakers should oppose legislation that bans products on political and unscientific grounds. In addition, lawmakers should pass regulatory reforms that set rulemaking standards for agencies that regulate chemicals in consumer products. Those standards should require that, before issuing a regulation, such agencies demonstrate that (a) significant risks exist at actual human exposure levels on the basis of the weight of the evidence and the best available, peer-reviewed science; (b) the risks of potential substitute products are unlikely to be higher than those of the existing product; (c) economic costs do not outweigh the benefits; and (d) the regulation chosen is the least burdensome one that meets their public health goal.

Experts: Angela Logomasini

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Technology and Telecommunications

7

In the history of human progress, few industries have grown as rapidly or as momentously as technology and telecommunications. Those global markets have upended the ways in which we communicate, transact, and live. Just a quarter century ago, mobile phones were expensive, bulky, and often unreliable; the World Wide Web was merely an untested scientific proposal. Today, nearly half the world is online, according to the International Telecommunication Union's estimates. That virtuous cycle of investment and innovation in technology and telecommunications has boosted global productivity immensely, helping create tens of millions of high-skilled jobs worldwide—many in sectors that did not even exist a few decades ago.

How lawmakers choose to govern technology and telecommunications will influence how those sectors evolve, including decisions about where to invest private capital. If lawmakers bow to pressure from entrenched interests and self-proclaimed public-interest advocates to impose prescriptive rules or onerous liability burdens on nascent technology markets, innovation and consumer choice will suffer. Although some disruptive newcomers will surely attract serious government scrutiny, most concerns expressed about novel technologies will prove unfounded or overblown—just as most of the fears once raised about now-familiar platforms, from the Internet to email to social networks, have proved manageable.

Congress should generally steer clear of enacting new mandates or prohibitions on technology and telecommunications businesses. Lawmakers should instead observe how voluntary institutions—chiefly, civil society and the marketplace—and courts and local governments react to market failures if and when they arise. Intervention will rarely be necessary; when it is, Congress should act with a scalpel, not a sledgehammer. Meanwhile, if Congress wants to ensure that technology markets realize their full potential, lawmakers should overhaul—and in some cases eliminate—outdated laws governing such areas as copyright, information privacy, wireless spectrum allocation, and wireline telecommunications.

INTERNET FREEDOM

In 1994, the Internet began to take off among U.S. consumers eager to use the platform's first "killer app"—the World Wide Web. By the late 1990s, the Internet had transformed global commerce and communications. In the United States, most companies that own the networks that compose the Internet and the applications that use it have avoided heavy-handed regulation. But a renewed push from self-styled consumer advocates urging federal regulators to impose network neutrality regulation on Internet service providers would upset that dynamic. Similarly, federal law has largely prevented states and localities from imposing onerous, discriminatory taxes on Internet access and online commerce—but existing protections against such taxes will expire if Congress fails to renew them.

Telecommunications

Congress should:

- Explicitly define the provision of broadband Internet access—both wireless and wireline—as an information service under the Communications Act.
- Deny the Federal Communications Commission (FCC) the authority to regulate any provider of any future data transmission medium, or any service operated over such a future medium, as a common carrier.
- Clarify that Section 706 of the Telecommunications Act (47 USC § 1302) confers on the FCC no independent source of regulatory authority, reversing the D.C. Circuit's contrary holding in *Verizon v. FCC*, 740 F.3d 623, 637–40 (D.C. Cir. 2014).

When Congress last overhauled the Communications Act of 1934, it passed the Telecommunications Act of 1996 (the 1996 Act), which made barely any mention of the Internet (Public Law 104-104, 110 Stat. 56; codified as amended in scattered sections of 47 USC). In the intervening 18 years, therefore, the Federal Communications Commission has operated with limited congressional guidance about how to regulate the Internet (see, for example, 47 USC § 151). Although the 1996 Act grants the FCC no express authority to regulate "information services" (47 USC § 153[24]), it does not specify whether providing Internet access is an "information service" or a "telecommunications service"—the latter of which is subject to stringent FCC regulation as a common carrier, including mandatory interconnection and rate regulation. (See Federal-State Joint Board on Universal Service, "Report to Congress," 13 FCC Rcd 11501, 11534–35, para. 69 and n.140, 1998.)

Soon after the 1996 Act's passage, the FCC encountered the question of how to treat the broadband Internet service that a growing number of cable companies were offering. In a rulemaking process commenced under Democratic FCC Chair William Kennard and completed under Republican FCC Chair Michael Powell, the FCC determined in 2002 that it would treat cable broadband as an information service—not a telecommunications service. (In 2005, the U.S. Supreme Court upheld the FCC's decision as a permissible construction of the 1996 Act.)

Meanwhile, the FCC was also considering how to treat broadband service offered by the incumbent telephone companies—also known as "Baby Bells," the firms that AT&T divested in 1984. Those legacy phone companies had long been regulated as common carriers under Title II of the Communications Act. Moreover, Section 251 of the 1996 Act required the Baby Bells to make their last-mile facilities available, at government-regulated rates, to their competitors—many of whom, like the Baby Bells, had started offering broadband Internet access over telephone wires using a technology known as the digital subscriber line (DSL) (47 USC § 251[c]). In 2005, observing the rapid growth of facilities-based wireline broadband competition, the FCC decided to deregulate the broadband component of *all* wireline facilities. That move not only freed phone companies from common-carrier regulation of their broadband offerings but also meant that they no longer had to share their lines with DSL competitors.

Since that time, wireline broadband providers have operated under a light-touch framework, enjoying similar freedom as companies that offer services and applications over the Internet, such as Amazon, Google, and Netflix. Under that regime, the Internet has flourished as a platform for free expression, innovation, and experimentation. That trend shows no signs of slowing down, as carriers continue to deploy more robust networks, while companies at the "edge" of the Internet—includ-

ing Amazon, Google, and Netflix—make similarly significant investments.

Yet the FCC has long sought to promulgate rules to codify a concept known as "net neutrality," which entails barring broadband providers from offering paid prioritization to time-sensitive Internet traffic—such as videoconferencing and telemedicine—either at the behest of broadband subscribers or companies at the "edge" of the network.

In 2008 and again in 2010, the FCC tried and failed to create enforceable net neutrality regulation—first through adjudication, then through rulemaking. On both occasions, the U.S. Court of Appeals for the D.C. Circuit rejected the agency's efforts, concluding that both FCC actions exceeded the authority Congress had delegated to the agency. In the more recent ruling, *Verizon v. FCC*, the D.C. Circuit accepted the agency's argument that Section 706 of the 1996 Act is an independent source of authority for FCC regulation (740 F.3d at 635). But the court nonetheless vacated the agency's no-blocking and nondiscrimination rules as impermissible, finding that the rules failed to "leave sufficient 'room for individualized bargaining and discrimination in terms.'"

Since the court handed down *Verizon* in January 2014, the FCC has embarked on yet another effort to impose net neutrality regulation. This time, many net neutrality advocates and some of their allies in Congress are pushing the FCC to adopt a radical approach floated by the agency in its May 2014 notice of proposed rulemaking ("Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking," 29 FCC Rcd 5561, 5564–65, para. 10, https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1_Rcd.pdf). They would have the agency reverse its longstanding decision to treat wireline broadband as a lightly regulated information service, rather than as a telecommunications service subject to strict common-carrier regulation under Title II of the Communications Act of 1934 (47 USC §§ 201–21). Reinterpreting broadband providers as common carriers, net neutrality supporters argue, represents the FCC's best hope of imposing enforceable net neutrality rules that withstand judicial scrutiny.

However, should the FCC decide that broadband providers are common carriers, the agency would gain not only the authority but also perhaps the *obligation* to impose myriad new regulations on broadband access. For instance, the FCC has a statutory duty to regulate the prices that common carriers charge for service, a practice known as "tariffing." The Act requires common carriers to file with the FCC detailed price schedules; the FCC, in turn, must ensure that those prices are "just and reasonable." Such price regulation, if imposed on broadband providers, would severely undercut their incentive to continue improving their networks, and it would spook investors, potentially depriving providers of access to the capital markets that finance most U.S. private-sector investment.

Net neutrality supporters dismiss those concerns, claiming that the FCC can and will exercise its statutory authority to "forbear" from tariffing and other especially onerous forms of common-carrier regulation. But it remains unclear whether the FCC is willing to broadly forbear from those rules—and, perhaps more importantly, *whether courts will permit the agency to do so*, given the agency's recent repudiation of its prior approach toward forbearance. The Internet's future is far too important to be gambled away by a risky bet on the FCC's willingness and ability to forbear from public utility-style regulations.

The FCC has suggested that it might pursue net neutrality without reinterpreting Title II of the Act to encompass broadband providers (29 FCC Rcd at 5610–12, paras. 142–47). That too would be a mistake. Even absent common-carriage mandates, net neutrality regulation is unnecessary and harmful on its own merits. Since the dawn of the net neutrality debate, American consumers have used myriad apps and services over myriad broadband providers—yet only two violations of net neutrality have been substantiated. In the more noteworthy instance, Comcast admitted to degrading some BitTorrent peer-to-peer traffic that it claimed was causing congestion for some of its other subscribers. That practice may have harmed Comcast's BitTorrent users, but what of the other subscribers whose experiences Comcast sought to improve? In the six years since it issued its Comcast order, the FCC has yet to conduct a real economic analysis of why an Internet service provider might manage its network such that certain traffic is prioritized—or degraded—relative to other data.

The virtues of paid prioritization by broadband providers are especially promising given the "two-sided" nature of the broad-

band market, wherein companies at the edge—for instance, Netflix—may have an incentive to help shoulder the costs that broadband providers bear in delivering Netflix traffic to consumers across the nation. Wireline broadband competition among two or more providers exists throughout the vast majority of U.S. markets, while wireless broadband is increasingly viable as a substitute to wireline service.

Experts: Ryan Radia, Wayne Crews

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Taxation of Internet Access and E-Commerce

Congress should:

- Make the Internet Tax Freedom Act permanent.
- Reject the Marketplace Fairness Act.
- Enact legislation that bars states from requiring out-of-state online sellers to remit sales or use taxes on the basis of the remote seller's relationship with passive in-state affiliate websites.

Internet Tax Freedom Act. In 1998, Congress enacted the Internet Tax Freedom Act (ITFA), which bars states and their political subdivisions from imposing "[t]axes on Internet access" and "[m]ultiple or discriminatory taxes on electronic commerce" (Internet Tax Freedom Act, Public Law 105-277, div. C, Title XI, 112 Stat. 2681–719 [1998]; codified as amended at 47 USC § 151 note). ITFA allows states to tax online purchases—an option most states have exercised—but it bars states from imposing a higher tax rate on goods purchased online than on comparable goods purchased through other means. And ITFA bars states from imposing taxes on Internet access, except for Internet-access taxes already in force at the time of ITFA's enactment. ITFA was originally scheduled to sunset in 2001, in part because the Internet was still quite new to the public in 1998. Fortunately, Congress extended ITFA in 2001, 2004, 2007, and most recently during the 2014 lame-duck session—albeit only through October 2015.

If ITFA is allowed to expire on that date, many states will likely enact Internet-access taxes—which could cost U.S. consumers $14.7 billion annually, if existing state and local telecommunications taxes are merely applied to Internet access, according to estimates by William Rinehart of the American Action Forum. States might also respond to ITFA's expiration by imposing additional sales taxes on goods and services that their residents purchase online. Congress can prevent both of those harmful outcomes by passing the Permanent Internet Tax Freedom Act (H.R. 3086 in the 113th Congress), which would permanently codify ITFA, thus eliminating the political battle that occurs every few years when ITFA is about to expire.

Marketplace Fairness Act. Large brick-and-mortar retailers are urging Congress to pass the Marketplace Fairness Act (S. 743 in the 113th Congress), which the Senate passed in 2013, but which has stalled in the House. The bill would allow any state to force out-of-state domestic Internet retailers such as Overstock and Amazon to collect sales taxes on goods shipped to customers in that state.

The Marketplace Fairness Act would impose substantial new burdens on small and medium-sized businesses across the country, many of which employ few staffers and rely primarily on the Internet to sell goods across state lines. Those burdens would hurt the thriving e-commerce sector, which has ben-

efited tremendously from low barriers to entry and minimal regulatory burdens. And it would enable many states to impose a de facto tax increase, as existing state laws that require residents to pay a "use tax" on goods they buy remotely for in-state consumption are rarely enforced.

Experts: Ryan Radia, Jessica Melugin, Wayne Crews

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PRIVACY

Increasingly, we use online services such as Gmail and Facebook for our private communications, while we store and back up sensitive personal documents in the "cloud" with Internet storage providers, such as Dropbox and Apple iCloud. Although criminals occasionally breach those services to access individuals' private information for nefarious purposes—from credit card fraud to offensive voyeurism—hackers pose only a modest threat to most Internet users, especially users who take reasonable security precautions online. And when such breaches do cause serious harm, stiff criminal penalties await those hackers who are caught and prosecuted.

Yet there is one adversary against whom existing laws offer limited relief: the government. Technological change has rendered obsolete the legal regime that Congress crafted to protect us against unwarranted government access to the private information we store electronically with third-party providers. From law enforcement to intelligence agencies, many government entities, however noble their intentions, possess powerful legal and technical tools for gaining access to our communications and "metadata" about them (metadata include information such as the date and time of a phone call, or the "to" and "from" addresses of an email, but do not include content-specific information).

As several recent leaks and newly declassified documents have revealed, the breadth of information secretly collected by the U.S. government from its citizens is staggering.

Therefore, Congress should require that all law enforcement and intelligence authorities do the following:

- Obtain a search warrant before compelling a provider to divulge the contents of a U.S. person's private communications or other personal information stored with a third-party provider.
- Obtain a search warrant before tracking the location of a U.S. person's mobile communications device.
- Obtain a court order on the basis of individualized, reasonable suspicion before it can compel a provider to divulge a U.S. person's call detail records under 18 USC § 2703 or Section 215 of the USA PATRIOT Act.

By modernizing existing privacy protections to reflect current technological realities, Congress can reaffirm its commitment to individual liberty in the information age and can ensure that the Internet remains a powerful engine of economic growth. Reforming those laws need not endanger crime victims or national security. Indeed, Congress can strengthen our privacy while preserving most of the tools that law enforcement and intelligence agencies need to do their important jobs.

The Stored Communications Act is the primary federal statute governing law enforcement access to private information stored by, or transmitted through, a third-party communications service (Electronic Communications Privacy Act of 1986, Public Law 99–508, Title II, 100 Stat. 1848 [1986]; codified as amended at 18 USC §§ 2701–10 [2012]). The law, enacted in 1986 as part of the broader Electronic Communications Privacy Act, provides for varying degrees of protection for information stored electronically with third parties. Some of those protections are fairly noncontroversial.

For instance, law enforcement may compel a provider to divulge so-called basic subscriber information, including a subscriber's name and address, with a standard subpoena (18 USC § 2703[c][2]). Yet the same standard applies when law enforcement wishes to access the *contents* of private data stored with a cloud backup provider or folder synchronization service. (The government must generally give a subscriber notice before accessing the contents of his or her records, although the government routinely delays such notice under 18 USC § 2705[a].) Those subpoenas are typically issued by a prosecutor and receive no judicial review whatsoever. On the other hand, the Stored Communications Act requires law enforcement to obtain a warrant issued upon a showing of probable cause before it may compel a provider to divulge the contents of a person's unopened emails stored remotely, provided that such emails are no more than 180 days old (18 USC § 2703[a]).

In 1986, when Congress crafted that law, the distinction between opened and unopened email—and between communications and other information stored electronically online—made sense, given the state of technology at the time. In 2014, however, Americans reasonably assume that their digital "papers and effects" are safe from warrantless government access—an assumption that is often

inaccurate. To remedy that mismatch between perception and reality, and to assure consumers that their data in the cloud are safe from law enforcement fishing expeditions, Congress should pass legislation based on the Email Privacy Act (H.R. 1852 in the 113th Congress), which enjoyed 270 cosponsors in the House—including most Republicans and nearly 100 Democrats. Congress should also require law enforcement to obtain a warrant before tracking the location of an individual's mobile device, except in emergencies that involve imminent threats to life, such as the kidnapping of a child.

Congress should also address the blanket warrantless surveillance of Americans' telephony metadata and other electronic information by the National Security Agency (NSA). That issue is distinct from law enforcement access, as U.S. intelligence agencies operate under a legal regime that parallels—but is largely distinct from—the Electronic Communications Privacy Act framework described above. Instead, the NSA's intelligence collection inside the United States is governed by the Foreign Intelligence Surveillance Act of 1978 (Public Law 95–511, 92 Stat. 1783 [50 USC §§ 1801–11]); and the USA PATRIOT Act of 2001 [Public Law 107–56, 115 Stat. 272]).

Unlike civilian law enforcement agencies, which must seek warrants, orders, and convictions through state and federal courts of general jurisdiction, the NSA and other intelligence agencies are overseen by the Foreign Intelligence Surveillance Court (known as the FISA Court) (50 USC § 1803). That specialized federal court hears only those matters involving national security and intelligence operations. Unlike most hearings held by civilian courts, the FISA Court's hearings are closed to the public, and most documents filed with the court are sealed as a matter of law. Until former NSA contractor Edward Snowden disclosed numerous classified documents to the *Guardian* and *The Washington Post* in 2013, little was publicly known about the substance of the FISA Court's opinions, or the activities it had authorized.

Among those documents was a FISA Court opinion interpreting Section 215 of the USA PATRIOT Act, a controversial provision that authorizes the Federal Bureau of Investigation to secretly seek a court order requiring a person or company to produce any "tangible things" related to an authorized investigation (50 USC § 1861). On the basis of that authority, the FISA Court issued an order that required Verizon's business unit to divulge to the NSA *all domestic telephony metadata* in the company's possession—including mobile phone data. The FISA Court has since renewed the Verizon order on numerous occasions, along with similar orders for information from an unknown number of other telephone companies.

Even if some small percentage of the telephony metadata collected by the NSA pertains to bona fide national security and intelligence-gathering operations, the digital dragnet authorized by the FISA Court cannot be reconciled with the principles codified in the Fourth Amendment to the U.S. Constitution—to outlaw the "general warrants" that British officials had used to search colonists' persons and papers without individualized suspicion. And although the Supreme Court has held that the Fourth Amendment does not implicate the collection of telephone records, Congress retains the ability to protect the American people by imposing limits on government officials that go beyond the bare minimum required by the Constitution.

Since the Snowden disclosures, the Obama administration has placed some limits on how officials may search the NSA's telephony metadata database, providing for judicial review of such queries in most circumstances. Yet those protections sidestep the fundamental problem with domestic surveillance. What matters most is not *how* the data are queried, but that the government forces companies to *divulge* their bulk records in the first place. Although the law should enable intelligence agencies to obtain telephony and other metadata from U.S. companies about individuals reasonably suspected to have direct involvement with a national security threat, such collection should be targeted and precise, not indiscriminate and suspicionless.

Experts: Ryan Radia, Wayne Crews

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CYBERSECURITY

Companies and consumers are increasingly worried about securing their digital information. A single data breach that compromises a firm's trade secrets or customer information can cost $1 billion or more in identity theft, lost business, system repairs, legal fees, and civil damages. Although cybersecurity is primarily a technological and economic challenge, laws and regulations also shape the choices that firms and individuals make about how to secure their systems and respond to intrusions.

Congress should:

- Reject proposals to regulate private-sector cybersecurity practices.
- Amend federal privacy statutes to remove impediments to the sharing of cyberthreat information among private firms.
- Focus on defending government systems and networks from cyberattacks.

The federal government has two primary roles in cybersecurity. First, it should enforce laws against accessing computers and networks without authorization by investigating suspected intrusions and prosecuting such offenses. Second, it should better secure its own computers and networks—with a particular focus on those systems that could, if compromised, endanger human life.

Some bills introduced in Congress would have the federal government regulate private-sector cybersecurity practices. Those proposals, however, are unwise, for any improvement they bring about in cybersecurity—if one is even realized—would likely be offset by countervailing economic burdens. Although many businesses have experienced costly cybersecurity intrusions, those businesses also tend to bear much of the ensuing costs—customers leave, insurers increase premiums, lawsuits are filed, and so forth.

Firms that suffer cyberattacks because of their lax cybersecurity practices often impose costs—externalities—on third parties who may be unable to recover the resulting losses, such as the time a consumer spends resolving disputes with banks over fraudulent credit card purchases. But the mere existence of that externality does not necessarily merit government intervention to eliminate it. Instead, such regulation is desirable only if it induces firms to take additional cost-effective precautions.

Even if a systematic market failure existed in cybersecurity, assuming that regulators are properly equipped to remedy that failure is folly. Why should regulators be expected to know how a firm should allocate its cybersecurity budget or how much it should spend on cybersecurity? Adjusting liability rules so that companies bear a greater share of the costs resulting from their cybersecurity behavior is far more likely to enhance social welfare than prescriptive regulation.

In addition, Congress could amend several federal laws to improve cybersecurity, albeit perhaps only marginally. For instance, various federal statutes limit the authority of a provider to intercept communications that traverse its own network or to share data that rest on its servers. Although those provisions aim to protect subscriber privacy, they also impede providers' ability to understand cyberthreats and to share their knowledge with other providers. Those statutes do contain exceptions that permit interception and sharing in certain circumstances—for instance, with the subscriber's "lawful consent" or to protect the provider's property—but those exceptions do not go far enough to ensure that contractual arrangements between a provider and its subscriber will suffice to enable interception and sharing.

Therefore, Congress should amend federal law to clarify that companies are generally free to monitor their own networks and systems for cybersecurity threats. To that end, in 2012 and again in 2013, the House of Representatives passed the Cyber Intelligence Sharing and Protection Act to liberalize the sharing of cyberthreat information (CISPA, H.R. 3523 in the 112th Congress; H.R. 624 in the 113th Congress). However, both versions of CISPA afforded companies exceedingly broad liability protection for cyberthreat information sharing, sweeping away not only federal statutes but also state common-law remedies as well.

In reforming federal laws to improve cybersecurity, lawmakers should respect contracts between private entities, some of whom may bargain for information-sharing regimes that differ from the statutory baseline. For that matter, cybersecurity legis-

lation should disavow any preemption of common-law principles—including the sanctity of contract and the duty to abstain from unreasonably causing harm to strangers—so that judges can adapt those doctrines to cyberthreats through case-by-case adjudication.

Experts: Ryan Radia, Wayne Crews

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COPYRIGHT

In the United States, federal copyright law confers on creators of original expressive works an attenuated property right in their creations. Like other forms of property rights, copyright serves important societal interests. It benefits not only creators but also consumers, who benefit from access to many works that might not have been created but for copyright protection. Thanks to the Internet, selling copies and licenses of those works is easier than ever. Yet so too is distributing them without authorization. Congress should therefore consider strengthening copyright laws to better protect creative works from infringement. At the same time, however, some protections afforded by copyright law actually inhibit consumers' ability to enjoy original works—and artists' ability to build on earlier works.

Congress should amend the U.S. Copyright Act to do the following:

- Provide a mechanism to deny foreign websites that facilitate copyright infringement but do not abide by the Digital Millennium Copyright Act's Section 512 safe-harbor access to the U.S. payments system.
- Proscribe tools that circumvent technological protection measures only if they are likely to undermine the value of the underlying creative works protected.
- Afford users of copyrighted works an affirmative defense to infringement if they could not find the copyright holder, despite conducting a good-faith, reasonable search for the owner.

Article I of the U.S. Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Since the nation's founding, Congress has enacted a series of federal copyright statutes—including, most recently, the Copyright Act of 1976 (Public Law 94–553, 90 Stat. 2541 [1976]; codified as amended at 17 USC §§ 101–810). For the most part, that regime works well, enabling artists to earn a living insofar as they create works that the public enjoys. From television to music to movies, the United States is home to many of the world's most celebrated artists and creative industries.

But the Copyright Act is not perfect. For instance, it contains an overbroad prohibition of tools that are designed to circumvent digital rights management (DRM). Although effective DRM can be invaluable, enabling content owners to better protect their expressive works from unlawful infringement, many legitimate and lawful reasons exist to circumvent DRM, such as making fair use of a creative work by removing digital copy restrictions. Yet Section 1201 of the Copyright Act bars technologies that are primarily designed to "circumvent a technological measure that effectively controls access" to a work or "circumvent[] protection afforded by a technological measure that effectively protects a right of a copyright owner" in a copyrighted work (17 USC § 1201).

Companies and individuals who sell or create tools that materially contribute to copyright infringement should be liable for those infringing acts—unless, that is, the tools are "capable of commercially significant non-infringing uses," to borrow a line from the U.S. Supreme Court's famous "Betamax" opinion in 1984 (*Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417). With regard to firms that distribute tools designed to circumvent technological protection measures, courts should assess case by case whether those tools are designed and marketed primarily to *infringe on the underlying work*, as opposed to merely facilitating noninfringing uses of the work—including fair uses (17 USC § 107).

Congress should also address the "orphan works problem," which affects tens of millions of copyrighted works. The Copyright Act protects each work for the life of its author plus 70 years, or for works of corporate authorship, for 120 years after creation or 95 years after publication, whichever endpoint is earlier (17 USC § 302–4). People die, and corporations are acquired or cease to exist. Therefore, for many works that remain subject to copyright protection, determining who holds the copyright to those works is difficult or even impossible. Companies that wish to monetize and distribute those so-called orphan works often forgo the opportunity, for they fear that the true owner might emerge out of nowhere and sue the company for copyright infringement.

To encourage copyright holders to come forward, and to protect firms that genuinely cannot find the owner of a work despite reasonable efforts to do so, Congress should amend the Copyright Act to create a new defense to copyright infringement lawsuits. A person who uses a copyrighted work should enjoy an affirmative defense to copyright infringement if he or she could not find the copyright holder despite conducting a good-faith, reasonable search for the owner. Although that statutory change would not resolve the orphan works problem entirely, it would mark a major step toward ensuring that consumers can enjoy the wealth of protected works whose owners are unknown.

Finally, Congress should address the problem of offshore rogue websites, such as BitTorrent trackers and certain cyberlockers, that facilitate piracy of copyrighted works on a massive scale with impunity. Specifically, Congress should "follow the money" and provide for a mechanism whereby the United States may petition a federal court to order U.S.-based payment systems and advertising networks to stop doing business with the rogue site. By passing narrow legislation that provides procedural due process to websites accused of facilitating infringement, Congress can make it harder for those sites to exploit creative works without compensating their owners.

Experts: Ryan Radia, Wayne Crews

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8

Transportation

Mobility is one of the most important features of our lives, one we often take for granted until it is threatened or lost. Most movements, whether of persons or goods, depend on adequate transportation infrastructure investments and management. In the United States, 4 million miles of highway enable 3 trillion vehicle-miles traveled every year, according to the Bureau of Transportation Statistics. Nearly 20,000 airports enable approximately 10 million annual aircraft departures and over 685 million annual passenger enplanements. More than $11 trillion worth of goods are moved every year in the United States by road, rail, air, and water. Transportation now accounts for nearly 10 percent of U.S. gross domestic product, according to the Bureau's figures.

Transportation networks vary in quality, financing, and management. For instance, roads are generally paid for out of tax dollars, whereas freight rail is privately financed and operated. One important lesson learned is that the private sector is generally better than government at financing and operating transportation systems. New technologies and management practices present serious challenges going forward, particularly to those systems that exist largely as government monopolies.

Even if privatization of existing networks is politically unattainable, the starting point for sound transportation policy is adherence to the user-pays/user-benefits principle. In short, the users who directly benefit from the movements should pay for transportation infrastructure and operations. Compared with general revenue funding of government-owned infrastructure and services, the user-pays principle offers the following advantages:

- **Transparency.** Unlike tax dollars that wind through convoluted bureaucracies, charges "follow" users.
- **Fairness.** Users pay and benefit directly from improvements generated from their payments, and users who use the systems more pay more.
- **Signaling investment.** Operating revenues generally track use, and popular systems can be identified for targeted improvements.

Unfortunately, many federal transportation programs do not adhere to the user-pays principle. In those cases, the programs should be reformed to meet the user-pays principle. If such reform proves to be impossible, it suggests that the program has a high cost and low value, and that it should be eliminated.

The history of economic regulation of transportation systems in the United States shows that competitive markets benefit consumers more than top-down planning and control. In the late 1970s and early 1980s, airlines, motor carriers, and freight rail were partially deregulated, leading to lower prices and improved service. Today, rules aimed at promoting safety dominate many discussions of transportation regulation. However, although safety regulation was well intended, many of the resulting measures provide few, if any, benefits at very high costs.

To better promote high-value, low-cost mobility, Congress should critically examine current practices and should seek to remove government barriers to competition and innovation in the transportation sector. The federal role in surface transportation should be rationalized to allow state and local flexibility, while adhering to the user-pays principle. The Federal Aviation Administration (FAA) should be reformed to promote increased airline competition and to encourage new innovations in aircraft systems, airspace management, and airport financing.

SURFACE TRANSPORTATION REAUTHORIZATION

Surface transportation policy has become less rational and more ideological in recent years. Environmentalists, ideologically motivated urban planners, and their political allies have succeeded in diverting resources from improving highways to mass transit, even as road congestion has dramatically increased—now imposing annually at least $160 billion in economic costs nationwide. The increased use of discretionary grants has further politicized the process and has enabled increased funding to high-cost, low-value projects. The current prohibition on states' tolling of their own Interstate segments restricts experimentation in revenue collection and financing that could usher in better funding and management practices. A rationalized federal role in surface transportation would allow the Department of Transportation to focus on narrow policy objectives, rather than trying to be everything to everyone, which has been the source of mission creep and inefficiency.

Congress should:

- Allow states to toll their own Interstate Highway segments.
- Streamline surface transportation programs by eliminating discretionary grant programs, such as Transportation Investment Generating Economic Recovery (TIGER) and New Starts.
- Examine motor vehicle safety standards to ensure that current rules are not unnecessarily restricting autonomous vehicle innovation.

The federal government spends over $50 billion annually on highways and mass transit, according to the Congressional Budget Office (CBO, "The Highway Trust Fund and the Treatment of Surface Transportation Programs in the Federal Budget," June 2014, http://www.cbo.gov/sites/default/files/45416-TransportationScoring.pdf). That spending largely takes the form of Highway Trust Fund grants to state and local governments. Funding sources are almost exclusively taxes on drivers, primarily the federal excise taxes on gasoline and diesel fuel. In recent years, Congress has set statutory outlays above receipts, leading to a series of general revenue bailouts of the Highway Trust Fund.

The most recent surface transportation reauthorization, the Moving Ahead for Progress in the 21st Century Act (MAP-21) of 2012, a $109 billion legislative package, has not improved the situation. MAP-21 relied on an $18.5 billion bailout of the ailing federal Highway Trust Fund and failed to address the core problem facing surface transportation programs—outlays exceed receipts (CBO, "Projections of Highway Trust Fund Accounts under CBO's August 2014 Baseline," Highway Trust Fund Accounts: Baseline Projections, August 27, 2014, http://www.cbo.gov/sites/default/files/cbofiles/attachments/43884-2014-08-HighwayTrustFund.pdf). In reality, MAP-21 merely kicked the can down the road to a time when existing problems will have worsened. In late July 2014, Congress passed the first extension of MAP-21, delaying meaningful action on reauthorization until at least May 2015.

To right the ship of surface transportation policy, Congress should recognize its own limitations and grant the states additional flexibility in meeting their highway needs. We suggest three reforms to include in that process.

First, Congress should repeal its prohibition on states' tolling of their own Interstate segments (currently codified at 23 USC § 129). Repeal can be accomplished by striking "(other than a highway on the Interstate System)" from 23 USC § 129(a)(1)(B) and 23 USC § 129(a)(1)(F), as well as 23 USC § 129(a)(1)(G) in its entirety. Congress may wish to add language requiring approval of the Secretary of Transportation to ensure that tolled Interstates are not used to impose barriers to commerce between the states.

Second, Congress should refocus its surface transportation programs away from discretionary grants and back toward traditional formula funding. Congress first authorized the Transportation Investment Generating Economic Recovery discretionary grant program in 2009 as part of the "stimulus" package. The purpose was to enable local governments to apply for competitive grants for surface transportation projects. However, recent analysis suggests that the program incentivizes the funding of wasteful projects and lacks accountability. The initial TIGER round authorized $1.5 billion in funding. Subsequent rounds have brought the total to over $4 billion, according to the Department of Transportation. Although small with regard to total surface transportation expenditures, TIGER grants are functionally little more than earmarks. As

such, Congress should not reauthorize TIGER or any similar discretionary surface transportation grants program, such as New Starts, and should focus on rationalizing the core formula funding programs to best meet the nation's infrastructure needs.

Third, Congress should examine current motor vehicle safety standards, order the National Highway Traffic Safety Administration (NHTSA) to consider the relationships between existing rules and emerging technologies, such as road vehicle automation, and authorize funding for the agency to do so. For instance, NHTSA currently requires that side-view mirrors be installed on all highway vehicles (49 CFR § 571.111). Tesla Motors recently petitioned the agency to revise its mirror rule to allow it to install cameras as mirror replacements.

In addition, NHTSA recently issued an advance notice of proposed rulemaking on vehicle-to-vehicle (V2V) communications systems ("Advance Notice of Proposed Rulemaking in the Matter of Federal Motor Vehicle Safety Standards: Vehicle-to-Vehicle (V2V) Communications," Docket no. NHTSA-2014-0022, August 20, 2014). At present, those systems are aimed at providing audible and visual alerts, such as advanced collision warnings to drivers. However, if drivers are no longer responsible or able to manually control vehicles, as is the case with fully automated vehicles, mandating V2V warning systems would provide no benefits while increasing costs.

Congress should convene a series of hearings to discuss the future relevance of NHTSA's federal motor vehicle safety standards in an age of rapidly developing "smart car" technology. In addition, NHTSA should be required to examine current rules that may pose barriers to innovation and should produce a report of its findings to Congress.

Experts: Marc Scribner

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FEDERAL AVIATION ADMINISTRATION REAUTHORIZATION

The Airline Deregulation Act of 1978 eliminated much of the economic regulation of airlines. Since then, the airline industry has rationalized, airfares have fallen dramatically, and airline travel has been democratized. Unfortunately, airspace management was not reformed in a similar direction. Limits on airport user funding have reduced investment and competition at U.S. airports. The United States remains one of the few developed economies to have its air navigation service provider integrated into its aviation safety regulation—in this case, the Air Traffic Organization (ATO) within the Federal Aviation Administration (FAA). That failure is reducing the efficiency of the National Airspace System while inhibiting the integration of new technologies, such as unmanned aircraft systems (UAS).

Congress should:

- Raise the cap on passenger facility charges.
- Commercialize air traffic control.
- Provide more stringent oversight of the Federal Aviation Administration's ongoing attempt to integrate UAS into the National Airspace System.

Just as tolling offers benefits over general revenue funding in surface transportation, aviation user charges offer significant advantages to nonuser funding. Since 1991, Congress has allowed airports to collect per-head charges on passenger enplanements, known as passenger facility charges (PFCs), to be spent on eligible airport-related projects under 49 USC § 40117. Currently, the maximum PFC is capped at $4.50 (49 USC § 40117[b][4]). That cap was last raised in 2000, and inflation has eroded its buying power by nearly half. Given the advantages of user charges over general revenue, Congress should strengthen the PFC by raising the cap to $8.50 and indexing it to inflation.

Most developed economies have independent air navigation surface providers. Going further, Canada privatized its air navigation service provider in 1996, creating a private nonprofit called Nav Canada to take over airspace management responsibilities. Unfortunately, the United States' National Airspace System is managed by the Air Traffic Organization, an agency within the Federal Aviation Administration. The ongoing problems facing the air traffic modernization program known as NextGen are largely attributable to obsolete government institutions.

The main obstacle preventing us from realizing those benefits is the fundamental conflict between the FAA's role as safety regulator and its role as air traffic control provider, which has led to an overcautious culture within the ATO. That conflict is compounded by the fact that the ATO faces a number of political oversight constraints, leading to its treating politicians and bureaucrats as its customers, rather than the airports and aircraft that rely on its services.

A recent study from the Reason Foundation's Robert Poole recommends three actions to bring U.S. air traffic management into the 21st century.

- The ATO should be separated from the FAA, with the FAA becoming exclusively an aviation safety regulator.
- That new air traffic manager should be funded through customer charges, rather than through aviation user taxes subject to annual appropriations.
- A newly independent air traffic control organization should be governed by a board of stakeholders in a manner similar to Nav Canada's governance structure, where airlines, general aviation, and air traffic controllers are represented.

In the forthcoming FAA reauthorization debates, Congress should hold hearings on and seriously consider Poole's proposal. Not doing so risks forgoing the benefits that other developed nations have already experienced. Air traffic control modernization will allow airspace users and managers to harness new navigation technologies. Those reforms are critical to emerging aircraft technologies, such as unmanned aircraft systems.

In the 2012 FAA reauthorization, Congress ordered the agency to "provide for the safe integration of civil unmanned aircraft systems into the national airspace system as soon as practicable, but not later than September 30, 2015" (Public Law 112-95, 126 Stat. 73). Unfortunately, little progress has been made in meeting that deadline. In June 2014, the Department of Transportation's Office of Inspector General issued a scathing audit

report that found that the FAA's airspace integration progress is going so poorly that the agency will miss its September 2015 integration deadline, and that "it is uncertain when and if full integration of UAS into the [National Airspace System] will occur" (Office of Inspector General, U.S. Department of Transportation, "FAA Faces Significant Barriers to Safely Integrate Unmanned Aircraft Systems into the National Airspace System," AV-2014-061, June 26, 2014, 3, https://www.oig.dot.gov/sites/default/files/FAA%20Oversight%20of%20Unmanned%20Aircraft%20Systems%5E6-26-14.pdf).

UAS technology could provide large mobility benefits in the future. Although safety, tort liability, and privacy concerns remain, the United States risks falling behind other nations in integrating UAS into the civil airspace. Congress should increase its level of oversight over the FAA's UAS integration progress and examine current statutory and regulatory barriers. For instance, the current right-of-way rules have long been interpreted by the FAA as authority to prohibit virtually all UAS flights (FAA, "Unmanned Aircraft Systems Operation in the U.S. National Airspace System: Interim Operational Approval Guidance," memorandum, AFS-400 UAS Policy 05-01, September, 16, 2005, http://www.uavm.com/images/AFS-400_05-01_faa_uas_policy.pdf).

In addition, no process exists for certifying commercial UAS operations. Given the "see-and-avoid" requirements contained in the right-of-way rules (14 CFR § 91.113[b]), currently the only way for private UAS owners to obtain operating permission is through the FAA's Certificate of Waiver or Authorization (COA), which the FAA is currently issuing only to those UAS operators in its experimental category. Current regulations explicitly prohibit experimental COA holders from "[c]arrying persons or property for compensation or hire" (14 CFR § 91.319[a][2]). One additional benefit of air traffic control commercialization, assuming it reduced the overcaution caused by the FAA's incentives as a safety regulator, could be a more rapid integration of UAS into the National Airspace System.

Experts: Marc Scribner

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