Down the Regulatory Rabbit Hole

How Corporate Influence, Judicial Review and a Lack of Transparency Delay Crucial Rules and Harm the Public

COALITION FOR SENSIBLE SAFEGUARDS
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This report was produced by the Coalition for Sensible Safeguards (CSS), an alliance of more than 150 consumer, small business, labor, scientific, research, good government, faith, community, health and environmental organizations united in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.

About the Coalition for Sensible Safeguards

The Coalition for Sensible Safeguards (CSS) was convened to defend and strengthen the standards and safeguards that protect the health and safety of the American people. We believe that a sound system of regulatory protections is essential to consumer confidence, growth, and the competitiveness of the American economy. The Coalition is committed to promoting a regulatory system that delivers timely rules based on the latest scientific evidence and that ensures effective enforcement of the laws of the land.

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Executive Summary

Our country's system of standards and safeguards protects us from unseen threats that no individual or community can address on their own. Our system is supposed to ensure that consumers can trust the products on the market, that all companies in an industry follow the same health and safety standards, and that the risks of air pollution and water and soil contamination are minimized. But for the regulatory system to work in the public interest, agencies must be able to fulfill their statutory missions thoughtfully and effectively – i.e., they must be allowed to issue rules to implement the laws passed by Congress.

Unfortunately, our regulatory system is frequently subject to undue influence from regulated industries during the development and review of standards and rules. The overuse and abuse of the judicial review process can mire rules in litigation for years. White House review of agency rules can slow the process further, despite executive orders requiring that reviews be completed in 90 days. The result is the excessive delay of updated standards and new safeguards required by law. More than 120 rules are stalled at the White House's Office of Information and Regulatory Affairs (OIRA); others are stalled at federal agencies or obstructed by legal challenges.

This report presents eight examples of the human consequences of delayed rules. These commonsense rules would make Americans safer and the United States economy fairer and stronger.

The rules are:

1. The installation of rearview cameras to prevent children from being backed over by vehicles
2. Protection from silica dust to prevent respiratory damage among construction and manufacturing workers
3. More oversight of imported food to ensure its safety
4. The extension of minimum wage and overtime rules to home care workers
5. The improvement of coal ash waste site safety rules to better protect communities and the environment
6. Better energy efficiency standards to save consumers and businesses money and reduce energy usage
7. The establishment of professional standards that prevent financial advisors from taking advantage of investors
8. New controls to prevent Wall Street traders from artificially driving up energy costs through speculation

To address these problems, the coalition recommends regulatory reforms that would improve transparency, lessen undue industry influence over the rulemaking process, impose more control over the revolving door, reduce inappropriate judicial review of regulations, improve enforcement of rules and increase penalties for corporate wrongdoing.

The Obama administration has the authority to act on six of these rules immediately. It should do so.

In addition, Congress should enact reforms that:

1) Reduce industry lobbyists' ability to block public protections by requiring OIRA to provide understandable explanations of why draft rules were modified;
2) Reduce unnecessary delays at OIRA and avert OIRA interference in matters that are strictly within agencies' domain;
3) Close the revolving door between regulated industries and government; and
4) Ensure that finalized regulations are effectively enforced and accomplish their intended goals.

Specific reforms in each of these areas are detailed in the recommendations section. A regulatory system plagued by delay and stymied by the special interests of regulated industries cannot effectively protect the American people. We can and must design a regulatory system that rewards enterprise and ensures that the American quality of life is guaranteed for future generations.

Introduction

America's regulatory system protects us from health, safety and environmental risks. It ensures all businesses in a particular industry are playing by the same rules and following basic labor standards. It assures parents that the food, medicine and toys they buy for their children are safe. Auto and highway safety standards have reduced fatality rates dramatically, saving tens of thousands of lives annually. Standards implemented under the Clean Air Act have vastly reduced the toxic pollutants that factories and refineries spew into the air, saving lives and preventing respiratory disease. The Clean Water Act has increased the health of our waterways.

Although there is much to be celebrated, new threats and hazards continually emerge – due to development of new chemicals, processes and products; better scientific understanding of risks; and the increased interdependence and flow of goods from globalization. Unfortunately, our regulatory system is not as responsive in the face of new knowledge and new risks as the American public has a right to expect. Instead, it is plagued by a number of problems that make it difficult for federal regulatory agencies to react to identifiable hazards in a timely, proactive fashion.

Industry influence: The regulatory system is frequently subject to undue industry influence during the development and review of standards and safeguards. One example is a rule that would offer construction and manufacturing workers protection from silica dust. Since the rule was sent to the White House Office of Information and Regulatory Affairs (OIRA) for review in February 2011, the office has hosted 11 meetings with outside groups to discuss the rule. Nine of those meetings were with industry groups that oppose the rule. In some industries, the relationship between agency staff and industry lobbyists has created a sort of "revolving door" – lobbyists from a regulated industry are involved in developing and reviewing rules that will impact that industry, and public officials leave the government to work in the regulated industry.

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

Lack of transparency: OIRA, located in the Office of Management and Budget (OMB), reviews any agency rule that it considers significant. This extra review typically adds months to the rulemaking process and is a mechanism by which political influence can be exerted over agency decisions. Despite executive orders requiring that OIRA disclose its reasons for delaying or revising rules, rules can be held at the office for long periods with no explanation. An example is the rearview visibility rule for vehicles, designed to save lives and prevent injuries. This standard has been stuck at OIRA since November 2011 with no explanation for the delay or disclosures about any revisions to the rule that OIRA may have requested of the Department of Transportation. Energy efficiency rules have also been held up by the White House with no reasons given to the public, despite the president's stated commitment to increasing the nation's efficient use of energy.

Missing deadlines set by Congress and executive orders: Undue industry influence, abuse of the judicial review process and a lack of transparency in the rule review process leads to excessive delay of many rules in violation of a 90-day review deadline set out by the White House itself. In many cases, delays result in agencies missing statutory deadlines, putting the agency in violation of federal law. Currently, more than 120 rules are under OIRA review, and 70 of those have been at the White House beyond the standard 90-day review deadline established by executive order. Some of those rules, including three discussed here, have been under review for more than 120 days. Some have been at OIRA for years.

This report, by the Coalition for Sensible Safeguards (CSS), presents eight examples of the consequences of delay: increased risks of injury, disease, death, environmental contamination, price-gouging and other economic risks. Unreasonable delay has left five of the eight stuck in the "rabbit hole" of prolonged review at OIRA. This report illustrates why this happens and how protections are stalled or blocked as major industries and their allies use their considerable resources to influence the process at every stage, including during OIRA's rule reviews.

All of this regulatory delay has significant consequences. Stalling or blocking rules means that lives are needlessly lost, injuries suffered, environmental harm permitted and consumer rip-offs extended as the American people wait for agencies and OIRA to act. And perhaps ironically, lengthy delays in finalizing new rules create the very regulatory uncertainty that many industry spokespeople denounce in their campaigns against sensible standards and safeguards.

This report recommends regulatory reforms that would improve transparency, lessen undue industry influence over the rulemaking process, exert greater control over the revolving door, address inappropriate judicial review of regulations, and increase and improve enforcement of rules, including by stiffening penalties for corporate wrongdoing.

The Federal Rulemaking Process

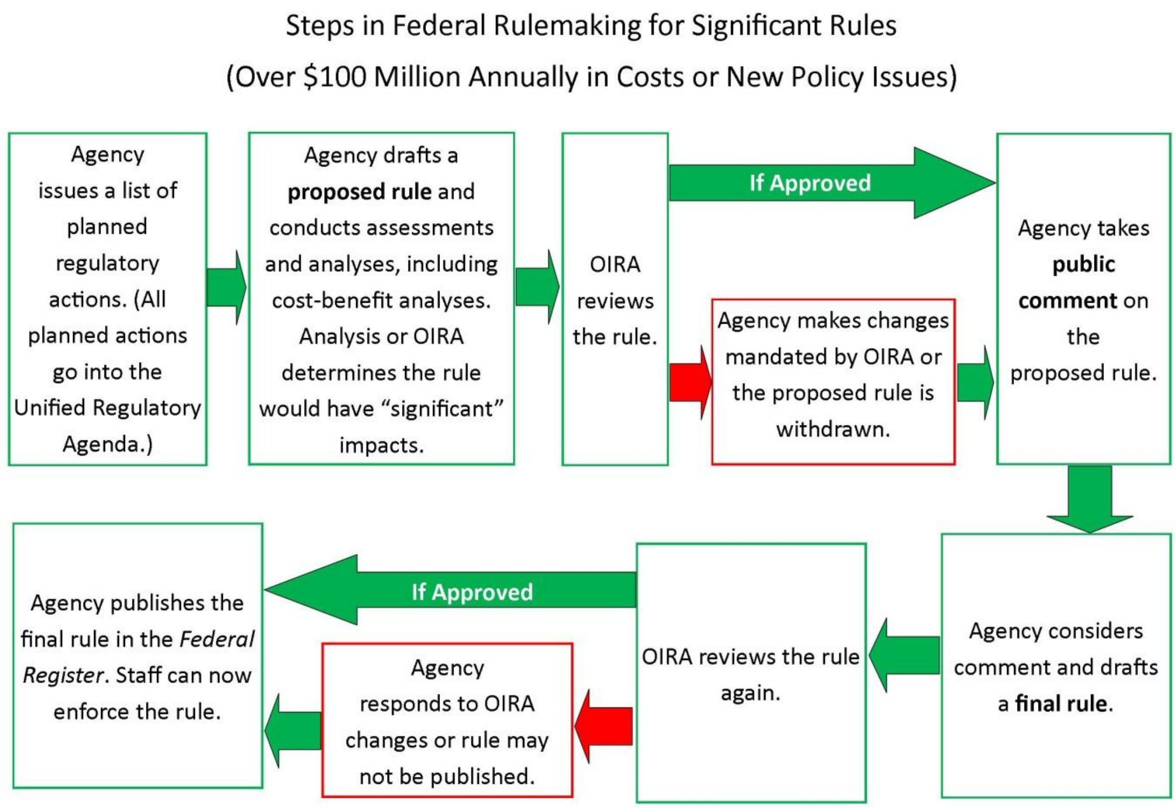
After Congress passes a law, federal agencies begin to develop rules and standards to implement the legislation. The statutes typically give the responsible federal agencies guidance about the content and timing of the regulations that will implement the law, and agencies gather detailed information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

The public first learns of a planned rule when an agency lists a rule in the semi-annual Unified Regulatory Agenda. Later, a notice of proposed rulemaking is published in the *Federal Register*. This notice invites the public, industry and fellow agencies to comment on a proposed rule and the potential effects it may have. Agencies then take these comments, revise the proposed rule, respond to the comments they have received, and publish a final rule in the *Federal Register*. A final rule has the same effect as a law and can be enforced with penalties.

When the Office of Information and Regulatory Affairs (OIRA) determines that a rule is a "significant regulatory action," it reviews the rule to determine if its estimated benefits outweigh its estimated costs. An executive order directs agencies generally to move forward with rules only upon OIRA approval. OIRA reviews both proposed and final rules before they are published. Under Executive Orders 12866 and 13563, OIRA review is not supposed to take more than 90 days (with the option of a 30-day extension), but in practice, reviews often take much longer. When OIRA is involved, the rulemaking process becomes complicated and multiple opportunities for delay are created, as demonstrated by **Figure 1** below.

Figure 1. Federal Rulemaking Process

Source: Center for Effective Government



Note: OIRA does not review rules submitted by independent regulatory agencies (e.g,. the Consumer Product Safety Commission or the Consumer Financial Protection Bureau).

Needless Deaths and Injuries of Children Result from Delay of the Rearview Visibility Rule

A commonsense new auto safety standard that will immediately save lives and prevent injuries—especially among children—continues to be unnecessarily delayed, lost down the rabbit hole of review at the Office of Information and Regulatory Affairs (OIRA).

> *"Nothing could have prepared us for such a loss. Our first born child was killed," said Rodney Bryant, whose two-year-old daughter Annabelle was killed when struck by a contractor's pickup truck backing down the driveway. "How could this happen? How could it have been prevented? We still search for answers every day… One thing that could have saved her is if the contractor had a rear detection device on his truck. We must continue to push our government and automobile manufacturers to make these devices mandatory!"*

Repeatedly Extended Deadlines

In 2008, President George W. Bush signed the Cameron Gulbransen Kids Transportation Safety Act. The act was named after two-year-old Cameron Gulbransen, who was killed when his father accidentally backed over him in the family's driveway. The law included several mandates aimed at reducing fatalities and injuries to children in non-traffic auto accidents. Among its requirements, the law directed the National Highway Traffic Safety Administration (NHTSA) to improve its standard on motor vehicles' rear visibility to enable drivers to detect the presence of people immediately behind a vehicle. The intent of the requirement for a new rearview mirror rule was to avoid such tragedies by expanding the field of view of a driver to minimize blind zones—areas drivers cannot see by turning around or using their vehicles' mirrors. Five years later, and two years past the deadline Congress set for NHTSA to issue the rule, it remains uncompleted.

Unnecessary Deaths and Injuries Are the Cost of Delay

The cost of delay: nearly 300 fatalities and 18,000 injuries annually from backover collisions. By implementing the rule, NHTSA concluded that annual fatalities would be reduced by 95 to 112, and that 7,072 to 8,374 injuries would be avoided. The agency estimated the cost of camera systems at $159-$203 per vehicle, or $58-$88 for vehicles that already have electronic visual displays but not cameras. Those estimates are based on older data and do not reflect lower prices in newer models. Many cars already have the cameras.

The overwhelming majority of backover crashes involve light vehicles—passenger cars, SUVs, pickup trucks and minivans. These types of crashes most often occur in areas off public roads, such as on driveways or in parking lots, because drivers cannot see a person standing directly behind the vehicle as they back up. NHTSA, in its proposed rule, elaborated on the disproportionate risk backover crashes pose to children and older individuals. "When restricted to backover fatalities involving passenger vehicles," the proposed rule states, "children under 5 years old account for 44 percent of the fatalities, and adults 70 years of age and older account for 33 percent."

Remembering Cameron Gulbransen

Cameron Gulbransen
kidsandcars.org photo

Two-year-old Cameron Gulbransen stayed inside as he always had done in the past when his father, pediatrician Dr. Greg Gulbransen, went to move the family SUV from the street into the driveway for the evening. Moments later and unbeknownst to Dr. Gulbransen, Cameron ventured out to the driveway. "While driving into the driveway, I choose to back into the driveway because each morning the street is filled with children and people walking dogs," Dr. Gulbransen said. "As always, I used both side view mirrors and the rear view mirror, as well as looked over my shoulder in an attempt to avoid hitting anything. Suddenly I noted a small bump with the front wheel and wasn't sure what it could have been. I knew I was too far from the curb to have hit that; and that there was no newspaper in the driveway. Quickly, I jumped from the vehicle and saw the most devastating scene of my life."

Cameron was killed because he was too small for his father to see him behind the SUV and the vehicle did not have additional mirrors, back-up cameras, sensors or other safety technologies specified by the rearview mirror rule.

Rear Visibility Safety Rule Efforts

- 2008: President George W. Bush signs the Cameron Gulbransen Kids Transportation Safety Act into law.
- 2009: NHTSA releases an advanced notice of proposed rulemaking.
- 2010: NHTSA issues proposed version of the rear visibility rule and opens rule to public comment.
- November 2011: NHTSA submits draft of the final rulemaking to OIRA for the allotted 120 days of review.

Stuck In OIRA's Blind Spot

The law set a Feb. 28, 2011, deadline to finalize a new rearview safety rule, but Congress afforded the secretary of the Department of Transportation the authority to extend the deadline. U.S. Transportation Secretary Ray LaHood extended the deadline twice during his tenure, most recently to Dec. 31, 2012. Today, NHTSA is waiting for OIRA to release the final rule.

Resources

- Public Law 110–189—FEB. 28, 2008, U.S. Government Printing Office: Cameron Gulbransen Kids Transportation Safety Act of 2007 *(http://www.gpo.gov/fdsys/pkg/PLAW-110publ189/pdf/PLAW-110publ189.pdf)*
- Public Citizen: Press Release, "Victory: Important Child Safety Bill Becomes Law" (Feb. 29, 2008) *(http://www.citizen.org/autosafety/article_redirect.cfm?ID=17564*)
- U.S. Dept. of Transportation, Federal Motor Carrier Safety Administration: "Federal Motor Vehicle Safety Standard No. 111, Rearview Mirrors" *(http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.aspx?reg=571.111)*
- Kids and Cars: Backovers Fact Sheet *(http://www.kidsandcars.org/back-overs.html#Fact%20Sheet)*

More Deaths and Disease from Silicosis While Waiting for a Stronger Silica Standard

High Time to Prevent Well-Known Killer

At least 1.7 million U.S. workers are exposed to silica dust, the cause of silicosis, a debilitating, preventable and sometimes fatal respiratory disease. In February 2011, a proposal to reduce worker exposure was supposed to be just a few months from being published. But the rule, which would save at least 60 lives each year, has not yet been proposed. As we wait, American workers die.

Meetings With Industry, Then Inaction

The Office of Information and Regulatory Affairs (OIRA) has hosted 11 meetings on the new silica rule since the Occupational Safety and Health Administration (OSHA) submitted the proposed [Occupational Exposure to Crystalline Silica] standard to it for review in February 2011. Nine of those meetings involved industry groups that oppose the rule. In one case, representatives of the National Association of Home Builders, a lobbying powerhouse which spent more than $2 million in campaign contributions across the 2012 election cycle, had an audience with the then-OIRA administrator himself. More than two years later, the rule remains stuck at OIRA.

OSHA image

"Evidence of respiratory health problems from silica exposure among stonecutters dates back to the 1700s," said Peg Seminario, AFL-CIO health and safety director. "Nearly a century ago, granite cutters in Vermont realized the connection between inhaling stone dust and fatal illnesses and demanded safety ventilation equipment. Yet somehow in 2013, industry is not required to train workers about the hazards of silica, take appropriate steps to control exposure, measure exposure levels or perform individual medical exams."

Silica Regulatory Efforts

- 1972: Current OSHA silica exposure standards adopted.
- 1990s: Silica standards and safeguards widely recognized to be far too weak to protect workers; e.g., sampling equipment for silica standard in construction is obsolete and no longer available.
- 1996: OSHA initiates Special Emphasis Program for Silicosis.
- 1998: OSHA initiates silica rulemaking.

- 2003: Small business panel completes review of the draft silica rule as required under the Small Business Regulatory Enforcement Fairness Act.
- 2007-2011: OSHA collects and analyzes scientific data on silica exposure and prepares regulatory documents associated with rulemaking.
- 2011: OSHA sends draft silica standard to OIRA for 90-day review before publishing the standard for public comment, as required under Executive Order 12866.
- 2012: Public health professionals and occupational safety experts write President Obama calling on OIRA to release the draft silica rule.
- Present day: Silica rule remains stuck in OIRA, not yet released back to OSHA for public comment process.

Why is a New OSHA Silica Standard Necessary?

A new silica rule will save lives. Silica is a mineral present in sand, rock, brick and concrete. Typically, workers are exposed to silica by inhaling small particles from blasting, cutting, drilling and grinding stone materials at work sites such as construction operations, glass manufacturing plants and foundries.

NIOSH photo

At least 146 people died of silicosis in 2008, according to the Centers for Disease Control and Prevention (CDC). Public health experts estimate there are 15 to 30 new cases of silicosis nationwide for every reported silicosis death, or 2,200 to 4,400 people newly diagnosed with silicosis every year. Additionally, out of every 1,000 workers exposed to silica, OSHA estimates 27 will contract silicosis-induced lung cancer.

A Painful Death

During an April 2012 U.S. Senate hearing on lifesaving job safety rules, Tom Ward, a Michigan bricklayer, shared his firsthand experience with the dangers of silica. His father died of silicosis when Ward was just age 13. “In his twenties he worked as a sandblaster for five or six years … then just a few years into his new job he started getting short of breath,” Ward said. “We got the official diagnosis—silicosis—when he was 34 years old. It took five years for silicosis to kill him. It was a slow and painful process.”

Resources

- OSHA: Information about Occupational Exposure to Crystalline Silica standard submitted to OIRA for review in 2011 *(http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=UNIFIED_AGENDA&p_id=6502)*
- OSHA: Crystalline Silica Fact Sheet *(http://www.osha.gov/OshDoc/data_General_Facts/crystalline-factsheet.pdf)*
- Center for Construction Research and Training: History of Silica Regulatory Efforts *(http://www.silica-safe.org/regulations-and-requirements/status-of-regulatory-efforts/history)*

Greater Risks of Foodborne Illnesses from Imported Foodstuffs Until the Foreign Supplier Verification Program Is Implemented

Release FDA Proposal to Assure the Safety of Imported Food

The Foreign Supplier Verification Program (FSVP) rule—a program detailed within the Food Safety Modernization Act (FSMA)—should be released by the White House immediately so that the U.S. Food and Drug Administration (FDA) can finally hold U.S. foreign food importers accountable for the safety of their products. While the FDA is empowered to prevent contaminated food from entering the United States, the FSVP places an explicit responsibility on the importer of the food to ensure that it meets our safety standards.

> *"Consumers expect that the food they eat is safe, whether it's produced here in the U.S. or comes from overseas," said Chris Waldrop, director of the Food Policy Institute at the Consumer Federation of America. "FDA needs to be able to hold importers accountable for the safety of the food they bring into the country."*

Marc Roberts/Flickr Creative Commons photo

Down the Rabbit Hole of OIRA Review

On Nov. 28, 2011, the FSVP was part of a package of proposed food safety rules sent by the FDA to the White House's Office of Information and Regulatory Affairs (OIRA) for review. Two of those rules—addressing produce safety and "preventive controls" for food—were released on Jan. 4, 2013, and the FDA is now soliciting public comments.

Both consumer and food industry groups have stressed the importance of the FSVP proposal and urged the administration to release and implement the rule. The FSMA directs the FDA to issue regulations regarding the FSVP no later than one year after the date of enactment. More than two years later, however, the FSVP proposal inexplicably remains under review by OIRA.

Millions of Americans Sickened While Rule Is Blocked

According to the Centers for Disease Control and Prevention (CDC), 48 million Americans (one in six) get sick, 128,000 are hospitalized and 3,000 die from foodborne diseases annually. Nearly 16 percent of the U.S. food supply is imported, although certain products have much higher import rates (for example, 85 percent of all our seafood and 60 percent of our fresh fruits are imported). Yet the FDA has not yet required foreign food importers to meet the same safety standards demanded of U.S. food producers.

- U.S. food imports grew from $41 billion in 1998 to $78 billion in 2007.
- FDA inspects only about two percent of all imported food into the United States.
- In 2008, 1,442 people in 43 states were sickened by salmonella-contaminated peppers grown in Mexico.

- The CDC examined 39 foodborne illness outbreaks (2005-2010) and found that nearly half of those outbreaks occurred in 2009 and 2010. The CDC also found that 45 percent of imported food that caused outbreaks originated in Asia.

10-Month-Old Beck Christoferson—One of Millions Sickened Annually

Portland, Ore., mother Chrissy Christoferson always looks for healthy foods for her children, and that included corn-and-rice snacks with some vegetable flavoring. “We never imagined something that seemed so wholesome would make our child so sick,” Christoferson said.

At age 10 months, Christoferson’s son, Beck, suddenly suffered a severe bout of diarrhea. Christoferson assumed it was the flu. When she took Beck to the doctor three days later, *Salmonella wandsworth*, an uncommon bacteria that infects mostly children, was found in his digestive system. Beck was sick for 10 more days and may face health problems in the future. A month after the episode, the public health department informed Christoferson her son’s illness had been caused by a vegetable seasoning mix produced in China—an ingredient of the corn-and-rice snack he had eaten. Across the country, 55 other people had been infected in the same outbreak. The average age of the victims was just 16 months.

> *“People assume that if it’s being sold on the shelves, it’s fine and there must be some inspector out there taking care of it, when in reality things are always slipping through the cracks without necessarily being recalled,” Christoferson said.*

Foreign Supplier Verification Program Efforts

- January 2011: President Barack Obama signs the Food Safety Modernization Act into law, specifically mandating the FDA to issue regulations including the FSVP rule.
- November 2011: The FDA sends its draft proposed rule to OIRA.
- January 2012: The FDA is required by law to issue the final rule, but the deadline passes with the proposed rule still at OIRA.
- August 2012: The Center for Food Safety and the Center for Environmental Health sue the FDA and the White House for failing to meet rulemaking deadlines under the FSMA.
- April 2013: A U.S. District Court rules that several FSMA rules, including the FSVP, have been “unlawfully withheld”—and orders the FDA to present to the court a new timeline for the rules’ completion.

Resources

- Food and Drug Administration: Food Safety Modernization Act *(http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm247548.htm)*
- Office of Information and Regulatory Affairs: Foreign Supplier Verification Program *(http://www.reginfo.gov/public/do/eoDetails?rrid=121268)*
- Centers for Disease Control and Prevention: Surveillance for Foodborne Disease Outbreaks – United States, 2009-2010 *(http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6203a1.htm?s_cid=mm6203a1_w)*
- Consumer Federation of America: Food Policy Institute *(http://consumerfed.org/issues/food-and-agriculture)*
- STOP Foodborne Illness *(http://www.stopfoodborneillness.org/)*
- Make Our Food Safe Coalition *(http://www.makeourfoodsafe.org/)*

Continued Poverty Among America's Care Workers Who Still Aren't Covered by Minimum Wage and Overtime Rules

Rule Past Due to End Unfair Exemption of Caregivers

Today, 2.5 million workers provide critical home care to older adults and people with disabilities, and the profession continues to grow to meet the needs of an aging population, but these hardworking men and women still do not have the legal right to earn a minimum wage or overtime pay. For a generation, these workers have been consigned to working poverty as they struggle to win a rule change that would extend these minimal protections.

Fact: One-fifth of American home care workers live below the poverty line.

Promises Made, Then Inaction

A dozen years ago, the U.S. Department of Labor (DOL) set out to redress a quarter-century of excluding home care givers from the most basic protections of the Fair Labor Standards Act (FLSA). After being instructed by the Bush administration to withdraw this effort, a decade later, the DOL again addressed the exclusion in a 2011 notice of proposed rulemaking. The DOL twice extended the opportunity for public comment on its proposed rule, considered the comments for nearly a year, and finally sent its draft final rule to the Office of Information and Regulatory Affairs (OIRA). Two years later, the DOL's draft rule, which would provide minimum wage and overtime protections for in-home care workers, remains stuck down the regulatory "rabbit hole" with no certainty of when it may emerge.

OIRA has hosted nine meetings on the rule, four of them with senior health care companies opposed to the rule. Despite enthusiastic public comments in support of the changes by President Barack Obama, the final rule has yet to be issued.

"When this exemption to the FLSA was established in 1974, it was meant to apply to casual work arrangements like babysitting," then U.S. Secretary of Labor Hilda Solis said in 2011, announcing the proposed rule. "It was not intended to cover professionals whose vocation was in-home care service … Professional caregivers are committed to their jobs. This is truly work from the heart, but it's also hard and demanding. So it's time for us to take better care of our nation's caregivers and provide them with the wage protections that they deserve."

President Barack Obama announces the proposed rule at a White House ceremony, December 15, 2011. White House photo

On the same day, President Obama said: "The nearly 2 million in-home care workers across the country should not have to wait a moment longer for a fair wage. They work hard and play by the rules and they should see that work and responsibility rewarded."

History of the Companionship Exemption

- 1974: Congress passes narrow exemptions for casual babysitters and companions, meant to exclude those workers providing company to older adults or persons with disabilities from FLSA coverage.
- 2001: U.S. Department of Labor proposes narrowing the companionship exemption to bring the home care workforce into line with overall FLSA policies.
- 2002: Under a new administration, the DOL withdraws its proposed rule.
- 2007: U.S. Supreme Court rules in the case of *Long Island Care at Home, Ltd. v. Coke* that the DOL has broad policymaking discretion to "work out the details" of the exemption through the regulatory process.
- August 2011: Numerous state legislators send a letter to the DOL urging an end to the companionship exemption.
- December 2011: President Barack Obama announces support for extending protections to caregivers, and the DOL issues a notice of proposed rulemaking that would end the exclusion of most home care workers from minimum wage and overtime protections.
- February 2012: Comment period on proposed rule ends and is then extended for another month; approximately 26,000 comments are submitted, roughly three quarters in favor of the rule change.
- March 2012: At a hearing in the House of Representatives, some lawmakers challenge the DOL's authority to make changes to the companionship exemption.
- December 2012: A coalition of home care workers writes to President Obama asking him to push OIRA to finalize the proposed rule change.
- January 2013: The DOL sends its final rule to OIRA for review.

A Question of Basic Fairness—For Home Care Workers and Clients

Because of the nation's aging population, home care is a rapidly growing industry, but the millions of individuals who provide home care still earn an average wage of less than $10 per hour. Although this occupation has one of the highest injury rates in the country, approximately one-third of home care workers have no health care insurance themselves and another third depend on publicly funded insurance like Medicaid or Medicare. Long shifts contribute to needless caregiving errors and high worker burnout. As a result of these conditions, the home care industry suffers an estimated turnover rate of 44 to 65 percent annually, meaning that clients lose access to familiar and skilled caregivers.

The Department of Labor has estimated that the additional costs associated with extending minimum wage and overtime legal protections to in-home care workers would be less than one-tenth of one percent of the industry's revenues.

An All-Too-Common Tale

Josephina Montero, a home care worker in New York City, earned the minimum wage of $7.25 per hour to care for elderly and disabled patients, but she was not paid overtime despite sometimes working 60 hours per week. Caregivers in Philadelphia like Anna Thomas, Tracey Dennis, Renee Johnson and Marilyn Jackson were also paid the minimum wage but were not paid for the time they spent traveling between their clients' homes during the workday, dropping their overall per hour pay well below the minimum wage. In 34 states, home care workers' wages are low enough to qualify them for public assistance.

Resources

- National Employment Law Project 2011 report, "Fair Pay for Home Care Workers" *(http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf?nocdn=1)*
- PHI National Resources and Timeline for ending the minimum wage exemption for care workers *(http://phinational.org/campaigns/home-care-workers-deserve-minimum-wage-protection)*
- Department of Labor: Notice of Proposed Rulemaking to Amend the Companionship and Live-In Worker Regulations *(http://www.dol.gov/whd/flsa/companionNPRM.htm)*
- Department of Labor: FACT SHEET: The Home Health Care Industry under the Fair Labor Standards Act *(http://www.dol.gov/whd/regs/compliance/whdfs25.htm)*
- Direct Care Alliance's resources on the campaign to end FLSA exemptions for care givers *(http://www.directcarealliance.org/index.cfm?fuseaction=Page.ViewPage&PageID=614)*

Continued Health and Environmental Risks From Unregulated Coal Ash Waste Sites

Rule to Address Widening Health Threat Continues to Be Blocked

American families living in the shadow of large toxic coal ash dump sites deserve the protection of a regulation controlling the design and management of those highly hazardous sites. The U.S. Environmental Protection Agency (EPA) recognizes the need for action, but for nearly three decades, strong safeguards have been weakened and stalled as they run into various obstacles during the rulemaking process. Meanwhile, the public remains inadequately protected from coal ash waste, the hazardous byproduct of burning coal to generate electricity that contains several toxic contaminants—including arsenic, cadmium, lead, selenium and mercury—linked to cancer, heart disease and neurological damage. Political interference and industry dominance of the regulatory process has delayed the completion of this rule for too long; the EPA should finalize a strong coal ash standard right away.


Earthjustice photo

In December 2008, a coal ash waste surface impoundment at a Tennessee Valley Authority (TVA) facility near Kingston, Tenn., burst, ultimately spilling 1.1 billion gallons of inky sludge across 300 acres of the town at depths of three feet—a spill larger in quantity than the Deepwater Horizon disaster in the Gulf of Mexico. A few weeks later, the future administrator of the EPA promised to take decisive action to ensure that coal ash waste is properly managed. Four years later, Kingston residents and other families living near coal ash dump sites still wait for the EPA to make good on this promise.

Industry Interests Red-Light Coal Ash Rule

Following the Kingston disaster, the EPA decided to resurrect its long-stalled efforts to regulate the disposal of coal ash waste under the Resource Conservation and Recovery Act (RCRA), the chief law governing waste disposal in the United States. (For the past 25 years, the agency has taken up this effort in fits and starts). In October 2009, the EPA sent to the White House Office of Information and Regulatory Affairs (OIRA) a draft proposed rule that would subject coal ash to RCRA's strict controls for hazardous wastes. The rule then sat at OIRA for nearly seven months, well beyond the permissible 120-day deadline for OIRA reviews, and was the subject of an unprecedented lobbying blitz that included 47 meetings with outside groups, a majority of them industries opposed to the rule. What emerged was hardly recognizable: OIRA forced the EPA to transform its proposal into a confusing morass of "co-proposals." The original strong proposal was watered down and relegated to one of three options that the EPA would consider, along with two weaker options that would essentially treat coal ash no differently from household garbage.

Industry interests—ranging from power plants to coal ash reuse companies—have been more than happy to take advantage of the resulting confusion. They have inundated the EPA with reams of irrelevant, redundant and ultimately useless comments, studies and spreadsheets with the aim of confusing the agency and delaying the rule. So far, the tactic has worked. Industry's original raft of comments have forced the EPA to initiate a series of supplemental comment periods that elicited still more comments. All told, the EPA estimates that it must work through more than 450,000 comments as it works toward a draft final rule. Though the agency has already been at it for over two years, no end appears to be in sight. EPA officials repeatedly refuse to offer a time frame for issuing the final rule, but their most recent regulatory agenda suggests that one will not be forthcoming in 2013.

Coal Ash Regulatory Efforts

- 1980: Congress directs the EPA to study coal ash waste and decide how best to regulate coal ash—as a hazardous waste subject to strict standards, or as a non-hazardous waste (*i.e.*, like household garbage) subject to weak standards with weak state oversight.
- 1980s-1990s: The EPA equivocates over how to treat coal ash.
- 2001-2009: George W. Bush administration declines to address issue.
- 2009: The EPA submits draft proposal to OIRA for regulatory review.
- 2010: OIRA completes review, and EPA issues "co-proposal"; initial public comment period begins and ends followed by several supplemental comment periods.
- 2011-2012: The EPA opens supplemental comment periods.
- June 2013: EPA is well into its second year of processing public comments on the proposal; a final rule isn't likely to be issued until 2014 or later.

Health and Safety of Entire Communities Depend on Coal Ash Rule

Each year, U.S. coal-fired electric utility plants produce about 140 million tons of highly hazardous coal ash waste. The majority of this waste gets piled into colossal dump sites, including wet "surface impoundments" (a term for man-made pits in the ground that hold coal ash mixed with water, often behind massive dams) and dry landfills. The poor design and maintenance of these dumpsites has already yielded catastrophic consequences. These dumpsites commonly leak their toxic stews into adjacent rivers, wetlands and groundwater, contaminating drinking water and harming human, animal and plant life. Earthjustice estimates that there have been 203 cases of contamination and spills linked to faulty coal ash disposal sites across 37 states. A recent study by researchers at Duke University confirmed concerns about the hazards posed by disposal sites, finding elevated levels of arsenic, selenium and other toxic pollutants in lakes and rivers located downstream from a large North Carolina coal ash disposal pond. In several cases, the contamination levels exceeded existing EPA environmental and health standards.

Families and Environment Suffer From Regulatory Inaction

Residents of communities located near the human-made waste disposal lake of Little Blue Run located near the convergence of Ohio, Pennsylvania and West Virginia have witnessed firsthand the risks posed by an improperly managed coal ash waste. The lake collects waste from a nearby coal-fired power plant. In satellite photos, the pond has an otherworldly turquoise blue color. It is unlined and therefore allows toxic constituents to escape into neighboring rivers, groundwater and drinking water supplies. The contents of the pond are partly held back by a dam that the EPA has classified as "high hazard," meaning that a breach could cause the loss of life or significant property damage. Many of the families living close to the dam, including that of Debbie Havens of Lawrenceville, W.Va., have reported an alarming history of health problems. Her doctors have discovered three benign tumors in her breast and have identified possible thyroid cancer; her husband has been diagnosed and treated for thyroid cancer. Other residents have shared stories of the devastation caused in their community, and many fear for their lives and homes.

Resources

- EPA's rulemaking page for the coal ash rule: Standards for the Management of Coal Combustion Residuals Generated by Commercial Electric Power Producers *(http://yosemite.epa.gov/opei/RuleGate.nsf/(LookupRIN)/2050-AE81)*
- Earthjustice: Coal Ash Contaminates Our Lives *(http://earthjustice.org/our_work/campaigns/coal-ash-contaminates-our-lives)*
- Center for Progressive Reform: Two Years After Tennessee Disaster, U.S. Effort to Prevent the Next Coal Ash Catastrophe Faces Uncertain Future; Eye on OIRA, Coal Ash Edition: Putting Lipstick on a Not-so-cute Little Pig *(http://www.progressivereform.org/CPRBlog.cfm?idBlog=12CDDDC3-D6EF-C19D-B8A744EF1F92460D)*
- Center for Effective Government: No Movement on Coal Ash Protections Despite Mounting Evidence of Danger *(http://www.foreffectivegov.org/no-movement-on-coal-ash-despite-danger)*

Higher Costs for Consumers, Businesses and the Environment While New Energy Efficiency Standards Are Delayed

The Mounting Costs of Inaction

Extensive delays in completing eight new appliance, lighting and equipment energy efficiency standards hurt consumers, businesses and the environment. According to a recent study by the Appliance Standards Awareness Project (ASAP) and American Council for an Energy-Efficient Economy (ACEEE), the financial cost of the administration's delay has already exceeded $4 billion in savings for consumers and businesses. The environmental damage has been no less significant. Had the administration's efficiency standards been issued on time, more than 40 million metric tons of carbon dioxide emissions (the primary cause of climate change) would have been avoided—an amount equal to the carbon dioxide produced by burning more than 100 million barrels of oil. Each additional month of regulatory inaction costs consumers another $300 million in lost savings and results in another 4.4 million metric tons of additional carbon dioxide emissions.

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After years of delays at the U.S. Department of Energy (DOE) and the Office of Information and Regulatory Affairs (OIRA), the Obama administration should act immediately in finalizing long overdue energy efficiency standards.

Slow-Moving DOE and OIRA Review

The Obama administration has fallen behind on the efficiency front following its early successes in issuing several standards that stalled under previous administrations. At present, standards for electric motors and six other types of equipment are overdue. They are stuck in OIRA review long past the stipulated 120-day deadline.

> *"According to OIRA's website, it has been reviewing some of (the Department of Energy's) appliance standards for a year or more," said Andrew DeLaski, executive director of the Appliance Standards Awareness Project (ASAP). "It gets worse; a Freedom of Information Act request filed by the Natural Resources Defense Council in 2012 revealed that several standards had been sent to the White House for review months before OIRA publicly acknowledged receiving them. Not surprisingly, OIRA logged the rules as received soon after NRDC requested the records."*

In January 2013, ASAP and ACEEE reported on the cost of overdue energy efficiency standards; the results of their research, updated, are presented below.

Table 1 shows the products for which new standards are overdue, including whether the next step is a proposed rule ("NOPR") or a final rule, whether the rule has been received by OIRA for review or remains under development at DOE; the final rule deadline; the number of months OIRA has held the rule; and the total number of months it is overdue.

Table 1. Status of Delayed Energy Efficiency Standards

The methodology used for calculating the cost of delays is available here.

Product	Rule Stage	Rule Status	Final Rule Deadline	Months at OIRA as of Jan. 2013	Total Months Overdue	Deadline Status
Microwave ovens	Final	DOE issued final rule 5/31/13	June 2011 (fall 2010 reg. agenda) (*3)	**n.a.**	20	**MISSED; RULE ISSUED MAY 2013**
External power supplies	Final	NOPR issued 3/27/12; DOE working on final rule (*2)	July 2011 (statutory)	**n.a.**	23	**MISSED**
ER, BR, and small diameter reflector lamps	NOPR	OMB acknowledged receiving NOPR 2/17/12	Aug. 2011 (fall 2010 reg. agenda) (*4)	**16**	22	**MISSED**
Walk-in coolers and freezers	NOPR	OMB acknowledged receiving NOPR	Jan. 2012 (statutory)	**21**	17	**MISSED**

		9/23/11				
Metal halide lamp fixtures	NOPR	OMB acknowledged receiving NOPR 2/17/12	Jan. 2012 (statutory)	**16**	17	**MISSED**
Distribution transformers	Final	DOE published rule 4/18/13	Oct. 2012 (judicial)	**n.a.**	6	**MISSED; rule issued April 2013**
Electric motors	NOPR	DOE working on proposed rule	Dec. 2012 (statutory)	**n.a.**	7	**MISSED**
Commercial refrigeration equipment	NOPR	OMB acknowledged receiving NOPR 2/17/12	Jan. 2013 (statutory)	**16**	5	**MISSED**

1. *The OMB does not always provide timely acknowledgment that it has received rules sent by an agency; thus, the external power supply rules may be at OMB.*

2. *The DOE covered ovens in a 2009 final rule but deferred standards for microwave ovens to allow for a test method update. That update was finished and DOE then missed multiple self-imposed deadlines for a final rule, which it has now completed.*

3. *The DOE erroneously left certain types of reflector lamps out of a 2009 final rule. The agency has missed multiple self-imposed deadlines for correcting this mistake. Most recently, progress has been halted because a budget rider prohibiting DOE enforcement of the Energy Independence and Security Act (EISA) light bulb standards also forbids DOE work to complete the reflector lamp standard.*

The DOE is the agency responsible for completing new efficiency standards. Once the DOE completes a draft notice of proposed rulemaking or a final rule containing a new standard, it sends it to OIRA. During the first two years of the Obama administration, the DOE and OIRA worked well to complete new standards on time. But over the past two years, OIRA's reviews have become lengthy—as long as 20 months in one case—and the DOE has fallen behind.

OIRA Delay Hurts Consumers and the Environment—Every Day

Table 2 (source: ASAP and ACEEE research) below shows the lost consumer and business savings and additional emissions caused by the delays for each overdue standard.

Table 2. The Cost of Delays through Feb. 1, 2013

Product	Lost Consumer and Business Savings (Millions 2011$)	Additional CO_2 Emissions (million metric tons)
Microwave ovens	$276	2.1
External power supplies	$370	4.2
Ellipsoidal reflector, bulged reflector and small diameter reflector lamps	$1,052	7.7
Walk-in coolers and freezers	$1,105	10.3
Metal halide lamp fixtures	$261	3.2
Distribution transformers	$347	6.1
Electric motors	$202	4.2
Commercial refrigeration equipment	$92	1.2
TOTAL	$3.7 billion	39 million metric tons

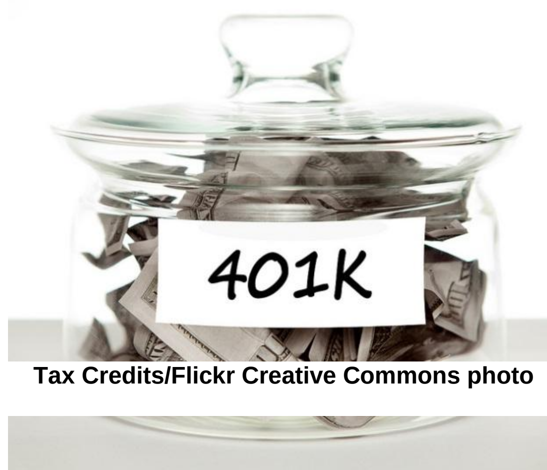
Energy Efficiency Regulatory Efforts

- 1975: President Gerald Ford signs the Energy Policy and Conservation Act, establishing an Energy Conservation Program and giving the DOE the authority to issue efficiency standards.
- 2007: President George W. Bush signs the Energy Independence and Security Act of 2007, extending the DOE's authority to set efficiency standards and setting legal deadlines for the agency to complete many standards.
- January 2013: President Barack Obama announces an energy efficiency goal in the State of the Union address: "Let's cut in half the energy wasted by our homes and businesses over the next twenty years."
- May 2013: Energy Secretary Dr. Ernest Moniz, in his first day in office, declares that "Efficiency is going to be a big focus going forward."

Individual Investments at Risk from the Absence of Fiduciary Standards for Financial Advisors

Loophole Lets Brokers Legally Dupe Investors

Many investors believe that the person they purchase investments from is legally forbidden from taking advantage of them. Unfortunately, that's not always the case. Even in the wake of the global financial crisis, which should have opened our eyes to the problems with allowing self-interested Wall Street operatives to run our financial system, only limited restrictions are in place against self-dealing by brokers advising individual investors. They may literally take actions that harm their clients to benefit themselves, without breaking the law. Given that Americans have $10.3 trillion dollars invested in IRAs and 401(k) type plans as of 2012, this is no small issue.



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The Dodd-Frank Wall Street Reform and Consumer Protection Act gave the Securities and Exchange Commission (SEC) the authority to require that all professionals who advise investors be held to a higher standard of conduct, a fiduciary duty, which would legally require them to put the interests of their clients ahead of their own. Nearly three years after the passage of Dodd-Frank, the SEC has not proposed, let alone finalized these rules.

SEC Made Initial Progress, but Rule Now Severely Delayed

The Dodd-Frank Act required the SEC to study whether there should be a uniform high standard for those who provide advice to investors, instead of the current system in which there are different standards for professionals who are technically "financial advisors" as opposed to "brokers." The SEC completed its study in January 2011 and concluded that there should be a uniform standard. The SEC originally said it would propose a rule in the second half of 2011. Now, more than two years after its study was completed, there is still no rule in sight. Instead, the agency put out a request for information on March 1 of this year to help inform a cost-benefit analysis for a new rule. This means that a new rule is probably at least a year away.

The rule is delayed both because industry opposition is forcing the agency to conduct time-consuming, unnecessary analysis before proposing it and because the SEC has a large Dodd-Frank-related workload and limited resources; the act requires the SEC to undertake more than 100 rulemakings.

Why We Need the Fiduciary Standard

At one time, only a small elite invested. However, the past few decades have seen the birth of discount brokers who market their services to a larger swath of Americans. Studies have shown, though, that average investors are quite naïve about the investments they make and how brokers are compensated. A 2010 survey by AARP found that 71 percent of 401 (k) account holders did not even know they were paying fees.

Furthermore, investors mistakenly believe that the professionals they buy investment products from are required to operate in their clients' best interest. A 2011 SEC report found that average investors generally are not aware of the distinction between investment advisors who are required to act in the best interest of clients and broker-dealers who are not.

Dealer-brokers, who sell investments to individuals, are required by law only to meet a much lower standard of conduct. The investments they sell must be "suitable" for the consumer. However, they are often paid through commissions on individual deals, setting up a conflict of interest with their clients. They are paid more when their clients invest in financial products that pay higher commissions, but high commissions mean that clients are receiving a lower return on their investment. Today, a broker can recommend a five percent front-loaded mutual fund with back-end fees, even if there are similar funds without fees, and regulators can't do anything about it, because no rule has been broken. All that matters for the brokers to comply with the existing rules is that the specific fund they recommended—a balanced mutual fund for example—is an appropriate investment for that particular client. Whether or not the client is getting gouged with commissions is not important, legally speaking.

Americans seeking to save for retirement or their children's college education deserve a system in which they can rely on trusted advisors who are prohibited from self-dealing. They need the SEC to create a rule that requires all financial professionals who sell products to individual investors to operate in the best interest of their clients and to disclose any conflicts of interest.

Fiduciary Standard Regulatory Efforts

- July 2010: President Barack Obama signs the Dodd-Frank Wall Street Reform and Consumer Protection Act, which authorizes the SEC to require professionals who advise investors to put their clients' interests ahead of their own.

- January 2011: The SEC completes study, concludes that there should be a uniform fiduciary standard.

- March 1, 2013: The SEC issues a request for information to inform a cost-benefit analysis for a new rule.

Resources

- Demos: "The Retirement Savings Drain: Excessive Hidden Costs of 401(k)s"
  (http://www.demos.org/publication/retirement-savings-drain-hidden-excessive-costs-401ks)
- AARP 2011: "401(k) Participants Awareness and Understanding of Fees"
  (http://www.aarp.org/work/retirement-planning/info-02-2011/401k-fees-awareness-11.html)

Costly Oil and Gas Price Spikes from Unregulated Speculation by Wall Street Traders

The Longstanding Speculation Problem

What if Wall Street banks could make big bets on the future prices of oil and other commodities, bets so big that they could drive up prices and hurt consumers? Unfortunately, they can—and do—just that. And it's not breaking the rules presently.

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In the futures markets, big banks, oil companies and other companies trade energy contracts that effectively set commodity prices.

Wall Street traders act as speculators, placing bets on the direction of prices. These firms seek to create price volatility, as every quick and significant price change brings new profit opportunities for the banks. This is a contrast to consumers, who benefit from stable, consistent pricing. More than a decade ago, prior to the markets being deregulated, energy producers and consumers made up 85 percent of the trading market. Today, thanks to deregulation, speculators like the banks make up 85 percent of the trading volume. This helps explain how the speculators—and not supply and demand fundamentals—drive the trading that sets the prices we all pay. Increasingly, a small group of banks command the lion's share of the "positions" in a market, giving them de facto control over what direction the prices will take.

For decades, the Commodity Futures Trading Commission (CFTC) has set "position limits" on many agricultural commodities, meaning a limit on the portion of the future market for a certain product one individual entity can control. One company, in other words, can't try to corner the market on a certain farm product in the future and drive up prices. Consumers still experience price variation but are protected from some of the spikes that could happen if there were no position limits.

That's not the case for oil and natural gas trading. In those areas, big banks can and do speculate with vast sums of money—and have raised prices for consumers. In the months prior to the run-up of oil prices in 2007-08, the share of market participants who were speculators as opposed to commercial end users jumped to more than half. Academic studies have generally favored the view that speculation has been one of the causes of price spikes.

A Congressional Breakthrough—Then Delays

Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, ordering in Section 737 that the CFTC "shall … establish limits on the amount of positions, as appropriate … [in order] to diminish, eliminate or prevent excessive speculation … [and] to deter and prevent market manipulation, squeezes and corners." Congress had finally taken action to set position limits on a range of commodities, including oil and gas, that had escaped limits for years.

Wall Street banks lobbied the CFTC relentlessly to not issue the rule. They claimed, remarkably, that the Dodd-Frank law had not actually instructed the CFTC to issue a rule, but rather had given the CFTC the option to issue a rule if certain conditions were met. In fact, while an early version of the bill in the House had said CFTC "may" issue the limits, the language was deliberately changed to "shall" – the language that was included in the final law.

In October 2011, the agency issued the final rule, affecting 28 commodities. It was billed as a compromise: Traders were limited somewhat in the bets they could hold, but not as limited as public interest experts said was necessary. Still, it was incremental progress.

The banks promptly challenged the rule, and in September 2012, the D.C. District Court overturned the rule. The judge said that Dodd-Frank had not required the rule but rather made it possible if certain conditions were met. The CFTC would have to prove that those conditions—excessive speculation—existed, the judge said. What was once a laughing-stock reading of congressional intent had now become a real obstacle.

Two months later, the CFTC announced that it would appeal to the D.C. Circuit Court of Appeals, where the case is pending today. In April, 19 senators filed an amicus brief with the appeals court urging it to overturn the lower court decision. "Dodd-Frank was designed and intended to make position limits mandatory," the senators wrote.

In May, CFTC Commissioner Scott O'Malia said that he expected the agency would issue a new proposed rule in June; that proposal is expected to demonstrate the excessive speculation the court had said needed to be shown. Should the CFTC's original rule fail on appeal, the new proposed rule would be the vehicle for eventually issuing the protection.

Rule Hangs in the Balance; Public Loses in the Meantime

Even traders and analysts working in the oil industry largely agree: 73 percent of those polled by Reuters said speculation had raised prices above levels dictated by supply and demand.

The public has waited long enough for progress. Three years after Congress passed the law that was to finally mitigate the problem, the rule is in limbo.

If the appeals court overturns the lower court, the rule could finally go into place, but only after a moderate delay. If the appeals court sides with the lower court, the delay could be months or years longer, as the CFTC issues a proposed and then final rule that includes the elaborate documentation to prove the existence of price speculation—something that Congress had already long identified as a problem.

Ultimately, when the rule is issued, it will still need to be strengthened to adequately protect consumers. But even this incremental progress is first facing the gauntlet of industry opposition, opposition that has achieved its goal of delaying and weakening the rule.

Position Limits Regulatory Efforts

- July 2010: President Barack Obama signs the Dodd-Frank Wall Street Reform and Consumer Protection Act, which mandates that the CFTC establish position limits to diminish, eliminate or prevent excessive speculation.
- October 2011: The CFTC issues a final position limits rule.
- September 2012: The U.S. District Court for the District of Columbia overturns the rule.
- November 2012: The CFTC announces it will appeal to the D.C. Circuit Court of Appeals.
- May 2013: CFTC Commissioner Scott O'Malia says that he expects the agency will issue a new proposed rule in June.

Resources

- Americans for Financial Reform and Public Citizen: Comment on Notice of Proposed Rulemaking *(http://www.citizen.org/documents/AFRCFTCPositionLimitsCommentLetter.pdf)*
- Senator Carl Levin et al.: Amicus Brief in Support of CFTC *(http://levin.senate.gov/download/eftc_amicus)*
- Public Citizen: Testimony on the need for position limits *(http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/hearing072909_slocum.pdf)*
- Public Citizen: Senate testimony on speculation in energy market *(http://www.citizen.org/documents/TysonHSGACspeculation.pdf)*

To Reduce Regulatory Delays

Recommendations for the Obama Administration:

Finalize the rules discussed in this report.

The Obama administration has the authority and ability to issue six of the eight rules discussed in this report and should do so promptly.

Three of the rules discussed here have been delayed even beyond legal deadlines set by Congress. The FDA's foreign supplier verification rule, NHTSA's rear visibility rule and most of the DOE's stalled energy efficiency rules are all held at OIRA, in direct violation of deadlines passed by Congress and signed by Presidents Obama or George W. Bush.

The administration should move to promptly finalize those three rules and the DOL's home care worker rule, the EPA's coal ash rule and the DOL's silica exposure rule.

Recommendations for the U.S. Congress:

Enact reforms to reduce lobbyists' ability to block public protections.

Industry influence in the regulatory process flourishes outside of public scrutiny. Today, White House regulatory review—overseen by the Office of Information and Regulatory Affairs (OIRA)—is the most hidden part of the rulemaking process—and where big business lobbyists often exert their biggest influence. An executive order signed by President Bill Clinton and reaffirmed by President Obama stipulates a series of transparency requirements for OIRA, but OIRA regularly ignores these requirements. Increasing transparency would reduce the ability of corporate and industry interests to block rules at the White House.

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

Enact reforms to reduce unnecessary delays at OIRA and avert OIRA interference in matters that are strictly agencies' domain.

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

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

- Congress should empower the public to dislodge rules that are stuck at OIRA beyond the 120-day limit.

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

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

Close the revolving door between regulated industries and government.

The regulatory process relies on the expert knowledge of federal agencies—both officials appointed by the president and career staff. They must be informed about the concerns of affected parties, while not compromised by industry interests, and should be free of conflicts of interest.

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

Enact reforms to ensure that finalized regulations accomplish their intended goals.

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

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

Conclusion

Restoring a Regulatory System That Works for the American People

A regulatory system that works for the American people is one in which agencies fulfill their statutory missions of protecting people and the environment as effectively as possible.

As the case studies within this report illustrate, many crucial safeguards have been subject to inexcusable delays ranging from several years to more than a decade. Extravagant claims by corporate interests and their allies in government notwithstanding, the flow from the regulatory pipeline has been slowed to a trickle.

Many trade associations, lobbyists, and special industry interests benefit greatly from the regulatory system's present hobbled state. They benefit from the status quo, and have ample resources to invest in thwarting new rules. As long as new rules can be tied up in procedural delays, large companies—some of whom are currently raking in historically large profits—can avoid investing in improved health and safety standards required by law. For the public, however, these delays represent real harm to real people and communities. Homecare workers continue to labor without overtime pay or the promise of a minimum wage; workers exposed to silica are sickened and die; untold numbers of Americans continue to fall ill from unsafe foreign foods; and tens of thousands of people are needlessly injured by preventable backover auto accidents, to name a few.

A regulatory system plagued by delay and stymied by the special interests of regulated industries cannot effectively protect the American people. We can and must design a regulatory system that rewards enterprise and ensures that the American quality of life is guaranteed for future generations.

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