

This is a preliminary transcript of a Committee hearing. It has not yet been subject to a review process to ensure that the statements within are appropriately attributed to the witness or member of Congress who made them, to determine whether there are any inconsistencies between the statement within and what was actually said at the proceeding, or to make any other corrections to ensure the accuracy of the record.

1 {York Stenographic Services, Inc.}

2 RPTS MEYERS

3 HIF188.020

4 HEARING ON ``THE VIEWS OF THE INDEPENDENT AGENCIES ON

5 REGULATORY REFORM''

6 THURSDAY, JULY 7, 2011

7 House of Representatives,

8 Subcommittee on Oversight and Investigation

9 Committee on Energy and Commerce

10 Washington, D.C.

11 The subcommittee met, pursuant to call, at 10:35 a.m.,
12 in Room 2322 of the Rayburn House Office Building, Hon. Cliff
13 Stearns [Chairman of the Subcommittee] presiding.

14 Members present: Representatives Stearns, Terry,
15 Burgess, Blackburn, Bilbray, Scalise, Gardner, Griffith,
16 Barton, DeGette, Schakowsky, Castor, Markey, Green,
17 Christensen and Waxman (ex officio).

18 Staff present: Alison Busbee, Legislative Clerk; Stacy

19 Cline, Counsel, Oversight; Todd Harrison, Chief Counsel,
20 Oversight/Investigations; Brian McCullough, Senior
21 Professional Staff Member, Commerce, Manufacturing, and
22 Trade; Andrew Powaleny, Press Assistant; Alan Slobodin,
23 Deputy Chief Counsel, Oversight; Sam Spector, Counsel,
24 Oversight; Kristin Amerling, Democratic Chief Counsel and
25 Oversight Staff Director; Michelle Ash, Democratic Chief
26 Counsel, Commerce, Manufacturing, and Trade; Phil Barnett,
27 Democratic Staff Director; Tiffany Benjamin, Democratic
28 Investigative Counsel; Jocelyn Gutierrez, DOE Detailee; Karen
29 Lightfoot, Democratic Communications Director, and Senior
30 Policy Advisor; Felipe Mendoza, Democratic Counsel; Ali
31 Neubauer, Democratic Investigator; and Roger Sherman;
32 Democratic Chief Counsel, Communications and Technology.

|
33 Mr. {Stearns.} Good morning, everybody. The
34 Subcommittee on Oversight and Investigation will come to
35 order, and there will be an opportunity for each of us to
36 give an opening statement, and I shall open with mine.

37 President Obama's Executive Order 13563 states that
38 agencies must take into account the costs and benefits of
39 proposed regulations; use the least burdensome methods to
40 achieve regulatory goals; maximize net benefits; and evaluate
41 alternatives to direct regulation.

42 The Order also requires agencies to conduct periodic
43 reviews of significant regulations to determine whether they
44 are outmoded, ineffective, insufficient, or excessively
45 burdensome. These retrospective reviews have been required
46 for more than 30 years, and if conducted as intended, could
47 be a crucial tool in reducing the burden of regulation on our
48 economy today.

49 As chairman of this subcommittee, I have set out to
50 ensure that these goals are simply achieved. Regulations
51 cost money, and in today's weak economy, we cannot afford
52 such burdens when they are totally unnecessary. During our
53 June 3rd hearing, Mr. Cass Sunstein of OMB indicated that
54 although independent agencies were not bound to comply with
55 the Executive Order, he believed that they should.

56 Unfortunately, none of the independent agencies under
57 the committee's jurisdiction have to date complied with the
58 Executive Order.

59 We are holding this hearing today to ask the CPSC, the
60 FCC, the FTC and FERC to explain why they did not submit a
61 regulatory review plan to Cass Sunstein by May 18th, as they
62 were asked to do. While each of these agencies engages in
63 some degree of regulatory review, none of them conduct the
64 kind of top-to-bottom, regular retrospective review that will
65 help to unburden our economy.

66 The CPSC, perhaps more than any other agency today,
67 seems determined, in our opinion, to pass regulations without
68 even a hint of regulatory humility. Commissioner Northup will
69 testify that CPSC regulations are estimated to cost industry
70 billions of dollars with no cost-benefit analysis done to
71 justify those regulations and no analysis done to show
72 improved safety for our children. Commissioner Northup has
73 also submitted for the record today a list of businesses that
74 have closed their doors in part because of CPSC regulations.

75 Now, we realize many of the CPSC's most damaging
76 regulations are required by the CPSIA, which has had a number
77 of unintended consequences. Until Congress can act to reform
78 that law, we would hope the CPSC would use its discretion
79 where possible to comply with the President of the United

80 States Executive Order. Where CPSC doesn't have discretion,
81 we would hope the CPSC Democrat commissioners would be
82 cooperative in helping this committee identify where they
83 need more discretion rather than sending last-minute partisan
84 letters meant to derail the reform process.

85 Meanwhile, Congress asserted deregulatory goals in
86 regard to the FTC decades ago, removing its authority to
87 operate under the Administrative Procedure Act and instead
88 instituting Mag-Moss procedures, created under a Democratic
89 Congress to halt the agency from further significant
90 rulemaking. Today, the agency resorts to rulemaking through
91 orders and guidelines that do not undergo a notice and
92 comment process.

93 Although FERC does not issue a large number of
94 regulations, there is room to improve in its rulemaking and
95 regulatory review also. FERC regulations call for broad
96 ranges of data sets without a clear indication on how the
97 agency utilizes this information. It has not conducted a
98 top-to-bottom review of its regulations since the Clinton
99 Administration. And it is unclear what, if any, cost-benefit
100 analysis is done of the impact its policies have on the
101 energy industry and consumers.

102 Now, as for the FCC, in drafting both the Communications
103 and Telecommunications Acts, Congress emphasized the

104 importance of deregulation. The FCC is required to review its
105 telecommunications regulations every 2 years and its media
106 ownership rules every 4 years. But these reviews fall short
107 of what the President and this committee have asked agencies
108 to do. They only cover a narrow set of rules at the FCC and
109 the commission can't seem to get these reviews done on time,
110 and the commission hasn't repealed or modified any
111 significant regulations in recent review periods. Perhaps
112 that is because the commission is too busy taking conclusion-
113 driven actions, such as the Net Neutrality Order and the
114 Chairman's Section 706 report.

115 So my colleagues, I look forward to learning more about
116 what each agency will do to adopt the principles of the
117 President's Executive Order. I hope the format of this
118 hearing gives you all the opportunity to learn about what
119 other agencies are doing to improve these processes.

120 [The prepared statement of Mr. Stearns follows:]

121 ***** COMMITTEE INSERT *****

|
122 Mr. {Stearns.} With that, I yield to the ranking
123 member, Ms. DeGette.

124 Ms. {DeGette.} Thank you so much, Mr. Chairman.

125 This is the fourth in a series of hearings examining the
126 government's regulatory review process, and I frankly am
127 pleased to hear you today embrace the President's Executive
128 Order that sets forth principles of regulation protecting
129 public health, welfare, safety and the environment while at
130 the same time promoting economic growth and competitiveness.
131 I thought that Cass Sunstein was an excellent witness talking
132 to us about how we can all agree on a bipartisan basis that
133 we should eliminate unnecessary regulations at the agencies.

134 Now, today we have witnesses, and I am happy to welcome
135 all of them, particularly our former colleague, Congresswoman
136 Northup, and these witnesses represent four important
137 independent federal agencies: the Consumer Product Safety
138 Commission, the Federal Energy Regulatory Commission, the
139 Federal Communications Commission and the Federal Trade
140 Commission. Now, Congress created these agencies as
141 independent entities, and so therefore, as you noted, Mr.
142 Chairman, they are not covered explicitly by the President's
143 Executive Order on regulatory review. But it is important,
144 though, for the subcommittee and the public to understand

145 whether the independent regulatory review processes at these
146 agencies are effective and efficient.

147 I would like to correct the record. Mr. Sunstein when
148 he testified, he said he had urged these independent agencies
149 to conduct regulatory review processes but he did not say
150 that they should submit reports to him like the agencies
151 under the purview of the Executive Order, so I was a little
152 confused, Mr. Chairman, when you had said that somehow they
153 should submit reports because not only are they not required
154 to but Mr. Sunstein himself does not believe that these
155 agencies are directly subject to the Executive Order and that
156 is an order to pervert any President, Democrat or Republican,
157 from overreaching their authority.

158 Now, as we hear from these agencies on their regulatory
159 review efforts, I think we need to keep a few thoughts in
160 mind. First of all, these agencies were created originally
161 as independent entities to insulate them from political
162 influence and we have given them decision-making
163 flexibilities that other agencies do not have. Secondly,
164 irrespective of the Executive Order, as I mentioned, there
165 are a number of statutory requirements concerning
166 transparency and efficiency in the regulatory process that
167 already apply to the independent agencies. For example, the
168 Regulatory Flexibility Act requires federal agencies,

169 including independent agencies, to analyze the impact of
170 their rules on small organizations. The Administrative
171 Procedure Act broadly lays out the scheme under which
172 agencies propose and finalize regulations, and provides for
173 public participation in the rulemaking process.

174 Finally, it is important to remember that the underlying
175 mission of all of the agencies before us today is to ensure
176 the safety and the health of all of our citizens. While we
177 should make sure that the regulations they propose are well
178 crafted and not overly burdensome, we should also acknowledge
179 the importance of the work they do and the regulations they
180 promulgate. For example, this year, the FCC issued a report
181 and order to adopt a rule requiring mobile providers to enter
182 data roaming arrangements with other providers, allowing
183 consumers to remain connected when they travel outside of
184 their provider's coverage area. FTC recently established the
185 Do Not Call registry, which lets consumers choose whether
186 they want to receive calls from telemarketers. This is
187 wildly popular with my constituents, by the way. And every
188 day, FERC acts as a neutral adjudicatory body handling
189 extremely complicated technical issues on the electricity
190 market.

191 But I want to talk just in the last minute that I have
192 about the recent proposals on the other side of the aisle

193 that would undermine the Consumer Product Safety Commission
194 and some of the other good work that they have done. Three
195 years ago, this committee and this Congress worked hard in a
196 significantly bipartisan manner to put meaningful reforms for
197 consumers into the Consumer Product Safety Improvement Act.
198 This has yielded unbelievable benefits. The CPSC has
199 initiated a wide range of recent efforts to protect children
200 from mandatory standards to cribs to the problem of dangerous
201 toys to banning certain phthalates, and on and on. And this
202 evidence shows that it is beginning to happen.

203 So I think it is important to notice that these reforms
204 were worked out by this committee in one of the last great
205 efforts that was completely bipartisan. We should embrace
206 that. If there are problems with the way the regulations are
207 being promulgated, we need to talk about that, but
208 eliminating these important consumer product safety
209 provisions is simply not an option.

210 Thank you, Mr. Chairman.

211 [The prepared statement of Ms. DeGette follows:]

212 ***** COMMITTEE INSERT *****

|
213 Mr. {Stearns.} I thank the gentlelady.

214 The gentleman from Nebraska, Mr. Terry, is recognized
215 for 3 minutes.

216 Mr. {Terry.} Well, thank you, Mr. Chairman. I
217 appreciate you holding this important regulatory reform
218 hearing.

219 I applauded the President when he issued his Executive
220 Order creating this cost-benefit analysis and look towards
221 creation of jobs versus elimination of jobs by regulation,
222 and I feel that it is time that the independent agencies
223 adopt this and that is why I have introduced H.R. 2204, the
224 Employment Act, which will require that all major regulations
225 include a statement of the number of jobs created, lost or
226 sent overseas because of the new rules and regulations.
227 Under this Act, all major federal action significantly
228 affecting jobs and job opportunities require rigorous
229 analysis compared to that given to the environmental impacts,
230 and this legislation would establish a policy that jobs are
231 important as is public health and the environment. And this
232 would be an issue of, you could take into effect the jobs
233 lost by certain American toy companies when we figure out
234 that children don't eat ATVs but yet banning children ATVs
235 could have an impact on jobs.

236 Now, we have already seen the problems caused by
237 regulators not paying enough attention to the effect their
238 actions have on jobs. In my own district, regulations
239 enacted by the Consumer Product Safety Commission acting far
240 beyond its authority or intent of this law, what I feel isn't
241 one of the most important ones, it is important but I think
242 it may be an example of one of the most poorly written bills
243 too. For example, Wes and Willie's. I shouldn't have used
244 their name but it is a local small business making children's
245 clothes, some of which they have contracted to have done in
246 China as well as Omaha. Does it really make sense that the
247 same design has to be tested on every size of tee shirt,
248 different color of tee shirts? Does it make sense that they
249 have to add 10 tee shirts together assuming a child is going
250 to completely eat 10 tee shirts in one sitting? None of this
251 really makes sense.

252 So this type of system where it is one size fits all,
253 Mattel versus Wes and Willie's, it really doesn't make a lot
254 of sense. I have found out the irony is that many of these
255 rules don't really protect the consumers but just make it
256 more difficult to do their job, really putting small
257 businesses in particular on the brink of extinction because
258 of these unnecessary rules and regulations.

259 So I appreciate this hearing so we can protect, and I

260 will give my time back to the chairman.

261 [The prepared statement of Mr. Terry follows:]

262 ***** COMMITTEE INSERT *****

|
263 Mr. {Stearns.} I thank the gentleman, and I yield 2
264 minutes to the gentlelady from Tennessee, Mrs. Blackburn.

265 Mrs. {Blackburn.} Thank you, Mr. Chairman, and welcome
266 to our witnesses. We appreciate that you are here to talk
267 with us about the President's Executive Order 13563 and its
268 non-application to the independent agencies.

269 These agencies have refused to voluntarily comply with
270 the order to require justification for the cost and the
271 burdens of their regulations. Some agencies believe that
272 their political ends justify their regulatory means and that
273 their insulation from the traditional checks and balances is
274 a blank check for them to pursue hyperactivist causes.
275 Bureaucrats bolted a restrictor plate to our economic engine
276 and they really have flagged private sector job growth to the
277 pits and now they are resisting voluntary compliance with the
278 Obama order because failing to justify their costly
279 regulations means Congress and the American people are going
280 to raise more questions instead of delegating more power and
281 authority.

282 Now, these agencies don't know how to make the best
283 individual decisions for us, what foods we eat, what toys we
284 buy, what privacy settings we want on our mobile devices or
285 what light bulbs we prefer to use in our homes. These

286 agencies that use explicit regulatory intimidation and
287 threats of government taking to impose voluntary regulations
288 on job creators aren't even willing to hold themselves to the
289 same standard. They refuse. We need to hold these agencies
290 accountable. Let us ensure greater efforts are taken to
291 balance the economic harms with the agencies that these
292 agencies are causing on our economic growth and jobs, and I
293 yield back.

294 [The prepared statement of Ms. Blackburn follows:]

295 ***** COMMITTEE INSERT *****

|
296 Mr. {Stearns.} The gentlelady yields back, and I
297 recognize the distinguished ranking member, Mr. Waxman, for 5
298 minutes for his opening statement.

299 Mr. {Waxman.} Thank you very much, Mr. Chairman.

300 This is the fourth hearing this subcommittee has had on
301 the issue of regulations. The others have been on the
302 President's Executive Order, and the third focused on health
303 regulations that were recently adopted. Now we are looking
304 at the independent regulatory agencies. The President's
305 Executive Order applies to those agencies that are under the
306 Office of Management and Budget. They are not independent.
307 The agencies before us are determined by law to be
308 independent. That doesn't mean they don't take into
309 consideration costs and benefits when they issue regulations.
310 They have to have notice and comment and get full input. I
311 think that what we need to do is to make sure we don't have
312 regulations that are unnecessary but these hearings that we
313 have had devolved into forums for questioning health,
314 environment and consumer protection laws that my colleagues
315 on the Republican side of the aisle find objectionable. I
316 was struck by the comments of the last speaker that we don't
317 want these independent agencies, they don't make good
318 decisions, they don't know how to make the best decisions,

319 they are using regulatory intimidation on jobs creators. I
320 can think of no other expression of hyper view of all this.
321 We shouldn't have a lopsided focus on the costs with no
322 seeming consideration of the benefits, and we haven't had
323 hearings that have resulted in any substantial legislation or
324 important oversight findings.

325 Now, the four independent agencies have done a lot to
326 make the lives of American citizens better. The Consumer
327 Product Safety Commission recently launched a new consumer
328 complaint database, which allows parents and concerned
329 consumers to obtain important product safety information and
330 which will improve CPSC's ability to identify trends in
331 product hazards more efficiently. Just this morning, I
332 released the first analysis of the product safety database.
333 We found that in its first 3 months of operation, the
334 database has already logged over 1,600 incident reports,
335 including reports of almost 500 injuries or fatalities. And
336 consumers visiting the online database have conducted almost
337 1.8 million product searches. Now, maybe some of these
338 manufacturers don't want anybody looking over their shoulder
339 but that is not the job of these agencies to do what the
340 manufacturers want. Their job at the CPSC is to protect the
341 consumers.

342 Mr. Chairman, I would ask unanimous consent that this

343 report be included as part of the committee record.

344 Mr. {Stearns.} Will the gentleman hold? I think we
345 just have a copy of it.

346 Mr. {Waxman.} I will withdraw my--

347 Mr. {Stearns.} Just withdraw until we have a chance to
348 look at it.

349 Mr. {Waxman.} The FCC just proposed rulemaking to
350 require cell phone companies to provide usage alerts that
351 warn consumers of unexpected charges on their bills. Less
352 than 7 months ago, the agency adopted a crucial rule to
353 protect the openness of the Internet. I think these are two
354 very important accomplishments, and Ms. DeGette pointed out
355 others. The FTC has recently adopted rules to protect
356 homeowners from scams falsely promising relief from mortgage
357 payments. In the last year alone, the FTC's Bureau of
358 Consumer Protection filed over 60 cases to protect the rights
359 of consumers. Is this intimidation? It seems to me these
360 agencies are doing their job, and we want to keep them
361 independent from the political pressure that you can see
362 clearly in the comments of members of this committee. FERC
363 protects consumers from price gouging in the electricity and
364 energy markets.

365 These accomplishments are important. They save money for
366 the American public, prevent fraud and improve public safety

367 and public health. They may offend powerful companies that
368 would like to take advantage of consumers, and which may have
369 support by some members of Congress in carrying their water,
370 but that is no reason for us to browbeat the agencies. The
371 focus of our oversight should be to help these agencies
372 advance the goal of enhancing the lives of the American
373 family.

374 Our committee is responsible in the area of legislation
375 in some key areas: health care for seniors, setting our
376 Nation's energy policy, promoting telecommunications
377 innovation and competitiveness, and ensuring appropriate
378 consumer protections for American families and children. The
379 oversight work of this subcommittee should shed light on how
380 to best legislate in these and other important subjects.

381 That is why there are real costs when this committee
382 focuses its time on partisan wheel spinning and messaging.
383 We lose the opportunity to move legislation that will promote
384 jobs, promote economic security and protect the health,
385 safety and welfare of the American public.

386 I hope that we make good use of our time today with the
387 commissioners, and I urge the chairman and all members to
388 support their efforts on behalf of the American public, and I
389 yield back the balance of my time.

390 [The prepared statement of Mr. Waxman follows:]

391 ***** COMMITTEE INSERT *****

|
392 Mr. {Stearns.} I thank the gentleman, and all opening
393 statements are concluded.

394 I ask unanimous consent that the written opening
395 statement of Mr. Upton and others who wish to provide opening
396 statements for this hearing be made part of the record.
397 Without objection, the documents will be entered into the
398 record.

399 [The information follows:]

400 ***** COMMITTEE INSERT *****

|
401 Mr. {Stearns.} Now it is my opportunity to welcome our
402 distinguished panel. I don't remember in my experience in
403 Congress where I have ever seen these many agencies collected
404 together, and I don't think there ever has been, at least in
405 my experience. So it is a very auspicious occasion to have
406 this distinguished group here to meet, and we appreciate you
407 coming.

408 I thought for the members I would just give you a brief
409 bio of each of the witnesses. Commissioner Robert Adler,
410 Consumer Product Safety Commissioner, is a commissioner at
411 the United States Consumer Product Safety Commission. He was
412 appointed in August 2009. Prior to assuming office, he
413 served as a professor of legal studies at the University of
414 North Carolina at the Luther Hodges Junior Scholars in Ethics
415 in Law at Chapel Hill's Kenan-Flagler Business School. At
416 the University of North Carolina, he served as the Associate
417 Dean of the MBA program as Associate Dean of the school's
418 bachelor of science in business. Welcome.

419 Commissioner Anne Northup is the honorable. In fact,
420 she serves the 3rd Congressional District of Kentucky
421 representing Louisville district in the United States House
422 of Representatives as a Republican from 1997 to 2006. Before
423 her tenure in Congress, she served in the Kentucky House of

424 Representatives for 9 years from 1987 to 1996. On July 30,
425 2009, President Obama nominated her to a seat on the Consumer
426 Product Safety Commission and was confirmed by the Senate on
427 August 7, 2009. Welcome, Anne.

428 Commissioner Robert McDowell was first appointed to a
429 seat on the Federal Communications Commission by President
430 Bush in 2006. He was reappointed to the commission by
431 President Barack Obama in 2009. He brings over 16 years of
432 private sector experience in the telecommunications industry
433 to the commission. Welcome.

434 Chairman Jon Wellinghoff was named chairman of the
435 Federal Energy Regulatory Commission, FERC, the agency that
436 oversees wholesale electric transaction and interstate
437 electric transmission and gas transportation in the United
438 States by President Obama on March 19, 2009, a member of the
439 commission since 2006. The U.S. Senate confirmed him to a
440 full 5-year FERC term in December 2009. He is an energy
441 specialist with more than 34 years experience in the field.
442 Welcome.

443 Commissioner Philip Moeller is currently serving his
444 second term on the commission of FERC, having been nominated
445 by President Obama and sworn in for a term expiring on June
446 30, 2015. He was first nominated to FERC by President Bush
447 in 2006 and sworn into office on July 24, 2006. From 1997

448 through 2000, he worked in Congress, serving as an energy
449 policy advisor to Senator Slade Gordon, where he worked on
450 electricity policy.

451 And then we have Chairman Job Leibowitz from the Federal
452 Trade Commission. He served as chairman of this commission
453 since February 2009. He was appointed to the FTC as
454 commissioner in the fall of 2004. Before coming to the
455 commission, he had a long career in the public sector,
456 working for the U.S. Senate Judiciary Committee for almost 10
457 years, and prior to that, in the office of Senator Paul
458 Simon. Welcome.

459 Commissioner William Kovacic served on the Federal Trade
460 commission since January 2006 and served as chairman from
461 March 2008 to March 2009. He was the FTC's General Counsel
462 from 2001 through 2004 and worked for the commission from
463 1979 until 1983. He has been a professor of law at George
464 Washington University Law School and has also taught law at
465 George Mason University School of Law. Welcome.

466 As you know, the testimony that you are about to give is
467 subject to Title 18, section 1001 of the United States Code.
468 When holding an investigative hearing, this committee has the
469 practice of taking testimony under oath. Do any of you have
470 any objection to testifying under oath? No? Okay.

471 The Chair then advises you that under the rules of the

472 House and the rules of the committee, you are entitled to be
473 advised by counsel. Do you desire to be advised by counsel
474 during your testimony today? If not, then if if you would
475 please rise an--

476 Mr. {Bilbray.} Mr. Chairman.

477 Mr. {Stearns.} Yes?

478 Mr. {Bilbray.} I hate to interrupt right now, but one
479 thing I would ask, at least of one member here, is that
480 pictures are not taken while they are being sworn in. I know
481 this is done, but I just think that is unfair to the
482 witnesses. I think it sends a message that it is not
483 appropriate and I would ask the camera people not to take a
484 picture of individuals with their right hand raised. I just
485 think it is used to often to send the wrong message to the
486 public. Everyone here is voluntarily participating and we
487 should not be giving a false impression to the public. That
488 is just one member's statement but I think in the environment
489 of fairness on both sides, I am going to raise this issue
490 again and again, and I am doing that today, and I apologize.

491 Mr. {Stearns.} I thank the chairman, and as you know,
492 he and I are good friends. Unfortunately, I will have to
493 overrule you. I think the press has a right to take pictures
494 when they want, and I think that is probably what I have seen
495 in my experience being involved with so many Oversight and

496 Investigation hearings as well as others that it is customary
497 to let the press have access, so I am sorry to have to
498 overrule you. And if all of you would please stand up and
499 raise your right hand?

500 [Witnesses sworn.]

501 Mr. {Stearns.} Well, it is my pleasure now to start
502 with the opening statements, and Mr. Adler, we welcome you
503 and look forward to your statement.

|
504 ^TESTIMONY OF ROBERT S. ADLER, COMMISSIONER, CONSUMER PRODUCT
505 SAFETY COMMISSION; ANNE NORTHUP, COMMISSIONER, CONSUMER
506 PRODUCT SAFETY COMMISSION; ROBERT MCDOWELL, COMMISSIONER,
507 FEDERAL COMMUNICATIONS COMMISSION; JON WELLINGHOFF, CHAIRMAN,
508 FEDERAL ENERGY REGULATORY COMMISSION; PHILIP D. MOELLER,
509 COMMISSIONER, FEDERAL ENERGY REGULATORY COMMISSION; JON
510 LEIBOWITZ, CHAIRMAN, FEDERAL TRADE COMMISSION; AND WILLIAM E.
511 KOVACIC, COMMISSIONER, FEDERAL TRADE COMMISSION

|
512 ^TESTIMONY OF ROBERT S. ADLER

513 } Mr. {Adler.} Thank you very much, and good morning,
514 Chairman Stearns, Ranking Member DeGette and the members of
515 the Subcommittee on Oversight and Investigations. Thank you
516 for the opportunity to testify along with my colleague, Anne
517 Northup, on behalf of the Consumer Product Safety Commission.
518 My name is Bob Adler and I have been a commissioner at the
519 agency since August of 2009.

520 I am honored to sit in the company of so many of my
521 fellow independent agency commissioners, and I bring you
522 regrets from Chairman Tenenbaum, who is not able to be here
523 today.

524 In order for me to respond to the subcommittee's request

525 for the agency's response to Executive Order 13563 and
526 similar Executive Orders, I briefly need to review a few
527 critical points about rulemaking at the CPSC. I do so to
528 make the point that we have undertaken the promulgation of
529 regulations and their retrospective review in the full spirit
530 of the policies incorporated in the Executive Orders despite
531 our being exempt from the orders, so I would like to make a
532 few observations and I promise I will be brief.

533 First, since 1981, the CPSC has been required under
534 amendments to the Consumer Product Safety Act and to the
535 other acts that it enforces to conduct an exhaustive cost-
536 benefit analysis when we write safety rules. Under these
537 amendments, our cost-benefit approach is as comprehensive, if
538 not more so, as that set forth in any Executive Order issued
539 by the Office of the President, and I think in the case of
540 any other agency. In fact, over the years, in part because
541 of the detailed and lengthy cost-benefit procedures contained
542 in our laws, the commission has actually promulgated very few
543 mandatory safety rules under these procedures.

544 Now, I did a count, so I could be off by one or two, but
545 by my count, in 30 years we have issued a grand total of nine
546 mandatory safety standards, or about one every 3-1/3 years,
547 which is meant we have had to turn to alternative approaches,
548 one of which is working with the voluntary standards sector

549 to promulgate voluntary standards and to upgrade voluntary
550 standards. The other thing that we have done is to work
551 through a very successful corrective action recall program,
552 and I think that has been successful.

553 With respect to regulatory review, you did note the
554 passage of the Regulatory Flexibility Act in 1980. At that
555 time, the CPSC choose to undertake a retrospective review of
556 every safety rule under its jurisdiction from the very
557 beginning, not just those identified as having a significant
558 impact on a substantial number of small economic entities.
559 Since this review, we have continued for the past 30 years to
560 comply with the requirements for retrospective review of our
561 regulations under the Regulatory Flexibility Act.

562 In addition to conducting a retrospective review of
563 regulations under the RFA, the CPSC has voluntarily
564 undertaken a comprehensive review of its regulations
565 beginning in 2004 and temporarily suspended in 2007 in a
566 spirit consistent with Executive Order 1356. In fact, in
567 conducting our review, we have committed the agency to using
568 OMB's assessment tool. The only departure from our approach
569 arises because of the enactment of the Consumer Product
570 Safety Improvement Act in 2008. In response to its grave
571 concerns about the need to protect the lives of young
572 children, Congress voted overwhelmingly, and in the House it

573 was a vote of 424 to 1, to set a number of very tight
574 guidelines for the commission to meet. Our general counsel
575 did a count of the number of deadlines imposed on us. There
576 were 42 separate deadlines imposed by the Consumer Product
577 Safety Improvement Act.

578 But recognizing the difficulty of meeting these
579 guidelines, Congress streamlined our rulemaking authority
580 when writing these children's safety rules and limited the
581 requirements in the CPSIA for economic analysis of the impact
582 of the rules. The streamlined procedure directed to regulate
583 hazardous children's products such as infant bath seats, baby
584 walkers and cribs, all of which were associated with an
585 unacceptable number of fatalities and serious injuries has I
586 believe resulted in significantly more expeditious and
587 protective safety standards that should save numerous lives
588 in the coming years and could not have been accomplished
589 otherwise.

590 I particularly want to note the commission's new crib
591 standards, which was unanimously approved by all of our
592 commissioners and became effective last Tuesday, June 28.
593 This standard sets the most stringent safety requirements for
594 cribs in the world and ensures that the place that infants
595 spend the most time and the most time alone will be the
596 safest place in their homes. Having noted that, I hasten to

597 add that even with this new authority under CPSIA, the
598 commission remains obligated to conduct economic analyses
599 under the Regulatory Flexibility Act assuring that our most
600 vulnerable small business sector is safeguarded along with
601 safeguarding our most vulnerable young consumers.

602 The commission is well on its way to meeting the
603 deadlines imposed under the CPSIA. We haven't met all of
604 them, and we are going to miss a few more, but as we wind
605 down the bulk of our CPSIA rulemaking, it is my understanding
606 that Chairman Tenenbaum has directed staff to develop options
607 to restart the retrospective review process.

608 In closing, notwithstanding that independent agencies do
609 not fall under the direct purview of Executive Orders like
610 13563, we at CPSC have always tried to implement the wisdom
611 contained in those Executive Orders and to coordinate our
612 efforts in the spirit of such orders to the best of our
613 ability.

614 Finally, I note that CPSC's jurisdiction is very broad.
615 Roughly speaking, if you walk into a department store, a
616 sporting goods store, a hardware store, a toy store or you go
617 to a school, that is us. Those products that are in those
618 institutions are the things we regulate. But we are an
619 agency that has barely above 500 people and a budget just
620 about \$118 million. In other words, I am sitting at a table

621 with agencies that are between two and a half and three times
622 our size. But given these limits on our resources, I think
623 we have done a good job in advancing consumer safety, and
624 thank you very much.

625 [The prepared statement of Mr. Adler follows:]

626 ***** INSERT 1 *****

|

627 Mr. {Stearns.} I thank the gentleman.

628 Ms. Northup, welcome. It is particularly nice to have a

629 former member.

|
630 ^TESTIMONY OF ANNE NORTHUP

631 } Ms. {Northup.} Thank you. Chairman Stearns and Ranking
632 Member DeGette, thank you so much for the opportunity to
633 testify in front of you, and I am delighted to be back on
634 Capitol Hill with you. I have great respect and appreciation
635 for the challenges you face every day and the decisions you
636 make. I do appreciate the opportunity to come and give you
637 some idea of what it looks like from the other side, from a
638 regulatory agency.

639 You just heard an excellent history of review of the
640 Consumer Product Safety Commission and the past, the way they
641 operated, primarily through the development of voluntary
642 guidelines, through risk assessment and intervention when
643 there were real risks based on science and the ability to
644 intervene when they were dangerous products. However, all of
645 what was said about the reviews of our regulations and the
646 reasonableness of that changed in 2008 when the Consumer
647 Product Safety Improvement Act went into effect, and in fact,
648 very little of that would be present today. As a matter of
649 fact, we no longer have the option to consider risk in most
650 of the things we do. We are required to write rules based on
651 numbers that were given to us in the CPSIA but that hasn't

652 stopped us in the regulatory process of casting a wider net
653 including maybe more toys and more children's products or
654 more products than the law requires us to do to make steps
655 where the testing is more rigid than required by the law.
656 And so while the law is very difficult, it has been very hard
657 for small businesses in particular to comply with it, we have
658 at the agency, in my opinion, gone beyond what the law has
659 required us to do.

660 Let me just give you some idea. In the time since the
661 CPSIA passed, we have been involved in about 50 rulemakings
662 if you include the statements of policies, the notice of
663 requirements and lab accreditations, and by the way, lab
664 accreditations are huge because any time we do a notice of
665 requirements for labs to be accredited, within 6 months every
666 product under that category has to begin sending every
667 component and every part of their product to a lab for a
668 third-party test and certify based on those tests and label
669 their product to reflect what those certifications are.

670 So in truth, while I appreciated what Representative
671 Waxman said about big companies complaining, it is actually
672 the opposite. Very few of our largest companies complain.
673 Most of them make products in such large numbers that they
674 can spread their costs around, and what we have really done
675 is put out of competition the smaller businesses that made

676 things primarily in this country. Those are the people that
677 we hear from because they cannot spread their costs over so
678 many products.

679 You know, I hear so often people say oh, yes, that is
680 the law we passed to decrease the number of things coming in
681 from China or that is the law we passed to make the big
682 companies comply, but in fact, the effect of the cost of
683 these regulations has been the burden that has put many, many
684 small businesses out of business. It has caused those
685 smaller businesses to leave the children's product market.
686 We have the public that has fewer choices than they have ever
687 had in the past and we are told that if we--our four, by the
688 way, biggest rules are still to come. They are expected to
689 come before December 31st or to take effect by December 31st.

690 I thought I would share with the committee one that I
691 anticipate that we will agree on, the majority. I expect it
692 to be a 3-2 vote, and that is allowing the parts per million
693 of lead in any component of a child's product to reduce to
694 100 parts per million as of August 15th. This is what our
695 economic team said about this: ``Economic impacts are likely
696 to occur. They are going to have to use more expensive low-
697 lead materials rather than the non-conforming materials used
698 today. The cost associated with the reengineering products
699 to make the new materials, the cost to make leaded components

700 that are inaccessible, the increased testing costs, the
701 increased consumer products, the reductions in the types and
702 quantities of the children's products available to consumers,
703 businesses that are exiting the children's product market,
704 manufacturers going out of business, reduction in the utility
705 of products and the reduction in the durability of
706 products.' ' This is all for this one rule that we are about
707 to--or this one step-down that we are about to take effect,
708 and it says there is no anticipated benefit in health to
709 children because of this. And so I would just point out to
710 you that 10 out of 40 of the small manufacturers of bicycles
711 left the market with the original step-down. We anticipate
712 more will exit the market. And my question, I guess, is,
713 what sort of regulation sort of rationalization can be
714 brought to this process. I have proposed many times ways to
715 within the limits of the law to lessen the impact of this,
716 and I am disappointed that we haven't done more of that at
717 the commission. Thank you.

718 [The prepared statement of Ms. Northup follows:]

719 ***** INSERT 2 *****

720 | Mr. {Stearns.} Commissioner McDowell.

|
721 ^TESTIMONY OF ROBERT MCDOWELL

722 } Mr. {McDowell.} Thank you, Mr. Chairman and Ranking
723 Member DeGette and all members of the committee for having me
724 here today.

725 During my 5 years at the FCC, I have supported policies
726 that promote consumer choice through abundance and
727 competition in lieu of regulation whenever possible. I
728 therefore welcome today's dialog on regulatory reform.

729 Fifty years ago, there were only 463 pages in the FCC's
730 portion of the Code of Federal Regulations, the C.F.R.
731 During this period, Americans only had a choice of three TV
732 networks and one phone company. Today, over-the-air TV,
733 cable TV, satellite TV and radio, and the millions of content
734 suppliers of the Internet offer consumers with an abundance
735 of choices. In other words, the American communications
736 economy was far less competitive in 1961 than it is today yet
737 it operated under fewer rules.

738 In contrast, by late 1995, the FCC's portion of the
739 C.F.R. had grown to 2,933 pages, up from 463 34 years
740 earlier. As of the most recent printing of the C.F.R. last
741 October, it contained a mind-numbing 3,695 pages of rules.
742 Even after Congress codified deregulatory mandates with the

743 landmark Telecommunications Act of 1996, the FCC still
744 managed to add hundreds more pages of rules.

745 To put it another way, the FCC's rules measured in pages
746 have grown by almost 800 percent over the course of 50 years,
747 all while the communications marketplace has enjoyed more
748 competition. During this same period of regulatory growth,
749 America's GDP grew by a substantially smaller number, 357
750 percent. In short, this is one metric illustrating
751 government growth outpacing economic growth.

752 To be fair, some of those rules were written due to
753 various Congressional mandates and sometimes the FCC does
754 remove regulations on its own accord or forbear from applying
755 various mandates in response to forbearance petitions. But
756 all in all, the FCC's regulatory reach has grown despite
757 Congressional attempts to reverse that trend. At the same
758 time, Congress has given the FCC ample authority to
759 deregulate. The legislative intent of key parts of the 1996
760 act such as sections 10, 11, 202H and 706, just to name a
761 few, was to reduce the amount of regulation in
762 telecommunications, broadcasting and information services.
763 For instance, Congress ordered the FCC through section 10 of
764 the 1996 act to forbear from applying a regulation or
765 statutory provision that is not needed to ensure that telecom
766 carriers' market behavior is reasonable and not necessary for

767 the protection of consumers. Similarly, section 11 requires
768 the FCC to conduct reviews of telecom rules every 2 years to
769 determine whether any such regulation is no longer in the
770 public interest as a result of meaningful economic
771 competition and to repeal or modify any regulation it
772 determines to be no longer necessary in the public interest.

773 Removing unneeded rules can liberate capital currently
774 spent on lawyers and filing fees, capital that would be
775 better spent on powerful innovations. Accordingly, it is my
776 hope that the FCC stays faithful to Congress's intent as
777 embodied in section 11 by promptly initiating a full and
778 thorough review of every FCC rule, not just those that apply
779 to telecom companies but all rules that apply to any entity
780 regulated by the commission. The presumption of the FCC's
781 review should be that a rule is not necessary unless we find
782 compelling evidence to the contrary.

783 The first set of rules I would discard of course would
784 be the recently issued Internet network management regulatory
785 regime, also known as net neutrality. As I have stated many
786 times before, those rules are unnecessary at best and will
787 deter investment in badly needed next-generation
788 infrastructure at worst. No evidence of systemic market
789 failure exists to justify these overly burdensome
790 regulations.

791 Furthermore, the FCC has too many forms. To give you
792 some examples, there is form 603, form 611T, form 175, form
793 601, form 492, form 477, form 323 and forms 396, 396C--I am
794 not sure what happened to 396A and B--form 397 and 398, among
795 many, many others. While a few forms may be necessary, many
796 could be eliminated or simplified. Similar repeal
797 initiatives should be on our plate soon. For example, as I
798 noted in a speech in May, the so-called fairness doctrine is
799 literally still codified in the C.F.R. The doctrine
800 regulated political speech. Political speech is core
801 protected speech under the First Amendment and the doctrine
802 is patently unconstitutional, as the FCC found in 1987.

803 Chairman Genachowski recently informed your committee
804 that he supports removing references to the doctrine and its
805 corollaries from the C.F.R. and intends to move forward on
806 this effort in August. I look forward to helping him fulfill
807 that promise.

808 In the same spirit, it is time to eliminate the outdated
809 newspaper-broadcast cross-ownership rule in the upcoming
810 review of our media ownership regulations. Evidence suggests
811 that the old cross-ownership ban may have caused the
812 unintended effect of reducing the number of media voices,
813 especially newspapers in scores of American communities.
814 Overall, however, what is needed is a comprehensive and

815 sustained effort to repeal or, where appropriate, streamline
816 unnecessary, outdated or harmful FCC rules. All future
817 regulatory proceedings should start with a thorough market
818 analysis that assesses the state of competition in a sober
819 and clear-eyed manner.

820 In the absence of market failure, unnecessary
821 regulations in the name of serving the public interest can
822 have the perverse effect of harming consumers by inhibiting
823 the constructive risk-taking that produces investment,
824 innovation, competition, lower prices and jobs. In sum,
825 decreasing the burdens of onerous or unnecessary regulations
826 increases investment, spurs innovation, accelerates
827 competition, lowers prices, creates jobs and serves
828 consumers.

829 I look forward to working with all of you in pursuit of
830 these goals. Thank you, Mr. Chairman.

831 [The prepared statement of Mr. McDowell follows:]

832 ***** INSERT 3 *****

|

833 Mr. {Stearns.} I thank the gentleman.

834 Welcome, Chairman Wellinghoff, for your opening

835 statement.

|
836 ^TESTIMONY OF JON WELLINGHOFF

837 } Mr. {Wellinghoff.} Thank you, Chairman Stearns, Ranking
838 Member DeGette and members of the subcommittee. I want to
839 thank you all for having us here today, and my colleague,
840 Commissioner Moeller, to discuss our views on regulatory
841 reform in independent agencies. We have submitted full
842 testimony here that I would like to have entered into the
843 record, and I will summarize my testimony.

844 The commission continually seeks to streamline its
845 regulations in order to foster competitive markets and
846 facilitate enhanced competition to minimize consumer costs.
847 Implementing the statutory authority provided by Congress, I
848 am committed to assisting consumers in obtaining reliable,
849 efficient and sustainable energy services at a reasonable
850 cost for appropriate regulatory and market means. Fulfilling
851 this mission involves pursuing two primary goals: ensuring
852 that rates, terms and conditions are just and reasonable and
853 not unduly discriminatory or preferential, and promoting the
854 development of safe, reliable and efficient infrastructure
855 that serves the public interest. The commission has taken
856 and continues to take a number of steps to make certain that
857 its regulations meet the fundamental objectives set forth by

858 Congress without imposing undue burdens on regulated entities
859 or unnecessary costs on those entities or their customers.

860 For example, the commission has taken several steps to
861 remove barriers to entry of new businesses and technologies
862 which facilitate competitive markets and can lower consumer
863 costs. The commission also seeks out ways to help entities,
864 particularly small ones, navigate the federal regulatory
865 process. The commission has also recently reduced burdens on
866 applicants, speeding up processes of filings and improved
867 public access to documents.

868 In sum, I support the goals of Executive Order 13563. I
869 have directed the commission staff to conduct review of the
870 commission's regulations with the goals of the Executive
871 Order in mind. This direction is consistent with the
872 commission's practice of engaging in constant self-review to
873 avoid red tape or unnecessary regulation that would impose
874 undue burdens on the energy industry and its consumers.

875 Thank you, and I look forward to answering any
876 questions.

877 [The prepared statement of Mr. Wellinghoff follows:]

878 ***** INSERT 4 *****

|

879 Mr. {Stearns.} I thank the gentleman.

880 Commissioner Moeller, welcome.

|
881 ^TESTIMONY OF PHILLIP D. MOELLER

882 } Mr. {Moeller.} Thank you, Mr. Chairman, Ranking Member
883 DeGette, members of the committee. I appreciate the chance
884 to be before you today to talk about these important issues.
885 I welcome your oversight, and I will summarize my written
886 comments with a brief history, I guess, of how our
887 regulations have evolved at the commission and then give you
888 three examples of where I think we kind of struggle with
889 balancing the need to ensure that our services are provided
890 safely at fair and just rates but also making sure that we
891 are protecting and not unduly burdening the entities that we
892 regulate.

893 The Federal Power Commission, our predecessor, really
894 came into its own after the passage of the 1935 Federal Power
895 Act and the 1938 Natural Gas Act, and as regulators then, the
896 commission was highly relating these entities because they
897 were monopoly providers of services that were deemed
898 essential but over the decades and particularly in the last
899 25 years, regulation has evolved so that more competitive
900 forces can provide consumers with frankly lower prices at
901 better service. These came through two landmark orders on
902 the natural gas side, 436 and 636, which restructured the

903 pipelines, and then on the electric side, orders 888 and 2000
904 that set up regional markets and allowed for open access of
905 the transmission systems. Again, these have had great
906 benefits for consumers but our responsibilities as regulators
907 in monitoring these markets have increased substantially
908 since then.

909 Three areas where we particularly spend time, the first
910 of which I will say is the reliability area of assuring the
911 reliability of the bulk power system. Now, the origins of
912 this issue came from the 1965 Northeast blackout a voluntary
913 set of regulations came about after that, but as time went
914 on, particularly in the late 1990s, it was clear that a
915 mandatory system was going to be necessary, some kind of a
916 cop on the interstate electric highway, and although there
917 was legislation in the late 1990s, eventually it took the
918 2003 blackout and the 2005 Energy Policy Act before you as
919 Congress directed us to create a national electric
920 reliability organization with eight regional entities, and in
921 the meantime, we have adopted 101 national standards, 11
922 regional standards, and we have had a very active enforcement
923 process on those standards. In fact, we have had 7,000
924 violations to date since they became mandatory in June of
925 2007. And frankly, we are struggling with our role, the role
926 of NERC, the role of the regional entities because we have a

927 bit of a backlog on these violations. They are about to
928 about 3,200.

929 I think the good news, though, is that through NERC, or
930 through our direction to NERC, they are working to make sure
931 that it is a better streamlined process so that we can
932 eliminate the backlog and essentially share the best
933 practices amongst the entities we regulate on the bulk power
934 system.

935 A second area is related to that and that is with our
936 new powers of enforcement that you gave us in the 2005 Energy
937 Policy Act, partly emanating from the Western crisis in 2000
938 and 2001. You gave us the kind of major league enforcement
939 authority that few agencies have. We can fine entities up to
940 \$1 million per day per violation. And initially when we put
941 out some of our rulings with some significant fines, there
942 was some criticism from the industry that we lacked
943 transparency in the process and lacked priorities, and I am
944 happy to say that our office of enforcement under the urging
945 of several of us on the commission has opened up that system
946 so that we are a much more transparent system now. We
947 adopted annual priorities in terms of enforcement, adopted
948 guidelines based on the U.S. Sentencing Commission, and
949 essentially have processes and policies in place that allow
950 anyone under investigation to know at certain times that they

951 are and give them the certain rights that other agencies give
952 them. So we are making progress there.

953 The third area I would note, because I come from the
954 Pacific Northwest, is the hydropower system. We regulate
955 2,500 hydropower dams throughout the Nation and some have
956 complained that that processing of licensing or, more often,
957 re-licensing, is both costly and time consuming, and that
958 much is true, but I don't think much of that can be put on
959 FERC. I think actually the laws itself that govern the
960 process of re-licensing are worth looking at if this is
961 something that inspires you because we actually I think do a
962 good job under the current system of setting timetables but
963 often the resource agencies don't have any consequence to
964 missing the timetables involved.

965 In the meantime, though, I think we have tried as an
966 agency to develop small hydropower systems through MOUs with
967 various states that are interested. We have tried to open up
968 the process to stakeholders and developers that are
969 interested in small hydropower development and we have come
970 up with a pilot licensing process for the new hydrokinetic
971 technologies of in-stream power, ocean power and tidal power,
972 again in a way through our regulations to try and encourage
973 an industry to move forward.

974 And finally, I will send a compliment to our colleagues

975 at the Federal Trade Commission. They have been active in
976 some of our rulemakings, and their perspectives are always
977 very valuable.

978 Thank you for the opportunity again to testify, and I
979 look forward to answering any questions.

980 [The prepared statement of Mr. Moeller follows:]

981 ***** INSERT 5 *****

|

982 Mr. {Stearns.} I thank the gentleman.

983 Chairman Leibowitz, welcome.

|
984 ^TESTIMONY OF JON LEIBOWITZ AND WILLIAM E. KOVACIC

985 } Mr. {Leibowitz.} Thank you, Chairman Stearns, Ranking
986 Member DeGette, Mr. Barton, Dr. Burgess, Mr. Terry, members
987 of the subcommittee. Let me thank you for the opportunity to
988 appear here today with my friend and my colleague, Bill
989 Kovacic, to discuss the FTC's longstanding regulatory review
990 program. It has been and it is a bipartisan priority for us
991 as well as our plans for ensuring that this program continues
992 to protect American consumers while minimizing burdens on
993 American businesses.

994 Today, the FTC is announcing additional measures to
995 strengthen our regulatory review process including an
996 expedited schedule for reviewing rules and guides to meet the
997 demands of the marketplace, a new streamlined form for pre-
998 merger filings, a new page on our website to provide greater
999 transparency and public participation in reviews and a sort
1000 of review of the reviews, that is, we are asking stakeholders
1001 how we can make our review process even better. In that same
1002 spirit, we are also seeking to identify acts of Congress that
1003 appear to be of little value but that impose burdens on
1004 businesses, particularly small businesses and the commission.

1005 So let me give you a brief overview of the FTC before

1006 Commissioner Kovacic describes the history and nature of FTC
1007 regulatory reviews. After he is finished, I will tell you a
1008 little more about what the commission is doing today to
1009 enhance and improve our approach to regulations.

1010 Simply put, we are building on our longstanding
1011 regulatory housecleaning efforts over the years under which
1012 we have eliminated outdated rules from the Mad Men era
1013 including those addressing extension ladders, fiberglass
1014 curtains and frosted cocktail glasses. That is true.

1015 As you know, the Federal Trade Commission is the only
1016 federal agency with both consumer protection and competition
1017 jurisdiction in broad sectors of the economy, and our work
1018 touches the lives of virtually every American. We are
1019 primarily a law enforcement agency but we perform our mission
1020 using other tools as well including rulemakings from time to
1021 time, either when Congress asks us or when additional clarity
1022 is needed in the marketplace. Most of our rules, by the way,
1023 are a result of directives from Congress because you have
1024 recognized that they would be valuable to consumers and
1025 businesses alike by protecting all of us from unfair and
1026 deceptive acts or practices and by leveling the playing field
1027 so that legitimate businesses aren't at a competitive
1028 disadvantage from the bottom feeders who don't always play
1029 fair, and with that, I would like to turn it over to

1030 Commissioner Kovacic.

1031 Mr. {Stearns.} Mr. Kovacic, go ahead. Just for
1032 members' information, the two gentlemen from the Federal
1033 Trade Commission are going to split their 10 minutes so they
1034 will be going back and forth, as I understand. Welcome.

1035 Mr. {Kovacic.} Thank you, Mr. Chairman, Madam Ranking
1036 Member and your colleagues for the opportunity to speak here
1037 today. Although the Executive Order that we have been
1038 focusing on doesn't bind independent agencies, the FTC does
1039 endorse its goals, and in particular, we endorse the
1040 intuition that changing market conditions dictate ongoing
1041 efforts to determine whether existing rules have become
1042 outdated, unduly burdensome or simply ineffective.

1043 To ensure that our work meets this objective, since 1992
1044 we have had a voluntary program to review our rules and
1045 guides. We examine each regulation and rule in a 10-year
1046 cycle. Each year we publish a schedule of review and we
1047 begin the examination of each rule or guide by publishing a
1048 Federal Register notice, and this notice seeks comment on the
1049 continuing need for the regulation or the guide and an
1050 examination of its costs and benefits to consumers and
1051 businesses. We also ask whether consequent economic
1052 developments call for changes in the rule or its outright
1053 abolition. We also consider whether the measure conflicts

1054 with other intervening State, local or national legal
1055 commends.

1056 We use these comments and we use the results of
1057 workshops that we conduct from time to time to decide whether
1058 there is a continuing need for the regulatory command or
1059 guideline and how needless burdens could be avoided, and if
1060 adjustments are warranted, we start proceedings to modify or
1061 appeal the rule or guide. As John mentioned, through this
1062 process, we have repealed 37 rules and guides. We haven't
1063 repealed one outright since 2004. I think we did look at the
1064 most serious cases first but we have undertaken modifications
1065 with respect to others since that time. We now have 12
1066 reviews in place. In one proceeding, we are considering
1067 amendments to the labeling requirements for the alternative
1068 fuels and alternative-fueled vehicles, and here we are
1069 assessing how to eliminate the need for firms to apply
1070 redundant labels that are mandated by different agencies. In
1071 another instance, we have accelerated the review of our Hart-
1072 Scott-Rodino mechanism for mandating the notification and
1073 reporting of mergers, and we intend to initiate reviews of 11
1074 more rules or guides by the year's end.

1075 Comments provided in this process I think overwhelmingly
1076 show business support for not only the mechanism we have used
1077 but for the rules and guides themselves, and our guidelines

1078 in particular stand out as means to reduce business burdens
1079 by clarifying what we regard to be the line that separates
1080 appropriate from inappropriate behavior, and in doing so, we
1081 think we have significantly reduced the cost of complying
1082 with what you know to be the exceedingly broad general
1083 mandates that appear in our statutes.

1084 My colleague will now explain recent measures that we
1085 have taken to enhance this review process, and I look forward
1086 to your questions and comments later. Thank you.

1087 Mr. {Leibowitz.} As Commissioner Kovacic has explained,
1088 we have long had a program for reviewing our guides and our
1089 regulations. You noted, Chairman Stearns, in your opening
1090 statement the importance of taking costs and benefits into
1091 account and we do do that. It is critically important to us.
1092 All of our work including the guides is done publicly with
1093 input from stakeholders.

1094 But earlier this year, we began examining what more we
1095 could do to improve these rules and really relieve undue
1096 burdens on industry, so as part of this effort and very much
1097 in the spirit of the President's Executive Order, here is
1098 what we are doing. First, as Commissioner Kovacic noted, we
1099 are undertaking a review of 23 rules and guides. That is
1100 more than a third of all the rules we administer, rules and
1101 guides we administer. As announced in our Federal Register

1102 notice today, six of the rules under review have been
1103 accelerated to take into account for rapid changes in the
1104 marketplace. Congresswoman DeGette, you mentioned the Do Not
1105 Call Rule, and we recently strengthened the Do Not Call Rule,
1106 the Telemarketing Sales Rule, which Do Not Call is part of.
1107 It has 200 million, actually now more than 200 million
1108 registered phone numbers, and Dave Barry has called it the
1109 most effective government program since the Elvis stamp.

1110 Second, our Federal Register notice asked for the public
1111 to comment on the FTC's 20-year program of reviewing its
1112 rules. Businesses have generally been, as Commissioner
1113 Kovacic noted, supportive of our regulatory reviews but we
1114 nevertheless asked a number of questions. For example, how
1115 often should the commission review rules and guides, how can
1116 we modify programs to make them even more responsive to the
1117 needs of consumers of businesses.

1118 Third, the FTC's new regulatory reform website just went
1119 live today because not everyone reads the Federal Register,
1120 although I know many of you do. It serves to provide--and
1121 many of us do. It serves to provide greater transparency for
1122 members of the public to understand our regulatory review
1123 efforts. It allows them to more easily comment on our
1124 ongoing rule reviews as well as on the FTC's process to
1125 review its rules. It also contains links to the 37 rules the

1126 commission has eliminated over the years as well as easy
1127 links to other resources like the new 10-year review schedule
1128 and the streamlined HSR, Hart-Scott-Rodino, pre-merger form.

1129 Fourth, commission staff are seeking to identify
1130 statutes that might impose undue burdens on businesses or on
1131 the commission. Although a law's goals may be laudable, some
1132 statutes passed by Congress, as we know, can detract from
1133 other beneficial work, and I think Commissioner Moeller sort
1134 of alluded to this with respect to licensing issues. So one
1135 example is the FACT Act, which was passed in 2003, Fair and
1136 Accurate Credit Transactions Act, and it came out of the
1137 Financial Services Committee, and it required the FTC to
1138 conduct 30 separate rulemakings, studies and reports, 30.
1139 Some of those obligations of course make sense, but at one
1140 point around 2005, and this was shortly after I came to the
1141 commission, about a third to half of our financial practices
1142 staff, and these are the folks who go after mortgage fraud,
1143 were actually spending time writing reports because they were
1144 obligated, and we do what Congress tells us to do. Now, we
1145 have been writing reports since 1914, we are very good at it,
1146 but in fact our staff should have been spending more time
1147 going after the bad guys who were preying on American
1148 homeowners. So consistent with the goal of reducing
1149 unnecessary burdens, commission staff is now working to

1150 identify reports required by statute, and I think statutes
1151 themselves that divert businesses or commission resources
1152 from more pressing work, and the staff has identified sort of
1153 two such reports at least preliminarily. So year after year,
1154 the mandated ethanol industry report has shown that there is
1155 almost no concentration in the ethanol fuel market. The
1156 report doesn't appear to provide significant value to the
1157 public but it does impose burdens on small businesses because
1158 they have to respond to inquiries from the FTC, and so our
1159 staff is proposing that the report be eliminated or at the
1160 very least that the frequency be reduced to every 3 years.

1161 Additionally, while the FTC, the DOJ, the Department of
1162 Education are very involved in fighting scholarship scams,
1163 and for the FTC's part, we compile complaints, the annual
1164 report about scholarship scams, the annual report that the
1165 three agencies must jointly produce each year on the topic
1166 which is required by statute, doesn't appear to FTC staff to
1167 advance any real or significant goals.

1168 So Mr. Chairman, through these four initiatives, we are
1169 working to improve the FTC's review program. We will do our
1170 best going forward and working with this committee to ensure
1171 that all of our regulations protect American consumers while
1172 minimizing burdens on businesses. Thank you. Of course, we
1173 are happy to answer questions.

1174 [The prepared statement of Mr. Leibowitz and Mr. Kovacic
1175 follows:]

1176 ***** INSERT 6 *****

|
1177 Mr. {Stearns.} Mr. Kovacic, do you have anything
1178 briefly you would want to add since Chairman Leibowitz had
1179 most of the time?

1180 Mr. {Kovacic.} No, I don't. Thank you.

1181 Mr. {Stearns.} All right. With that, I will start with
1182 opening questions. I think before I start, I would like to
1183 put on the record Mr. Cass Sunstein's memorandum of February
1184 2, 2011. Without objection, so ordered.

1185 [The information follows:]

1186 ***** COMMITTEE INSERT *****

|
1187 Mr. {Stearns.} And I understand the ranking gentlelady
1188 has a document, evaluation of consumer product safety
1189 database, that she would like to put in.

1190 Ms. {DeGette.} That is correct.

1191 Mr. {Stearns.} Without objection, so ordered.

1192 [The information follows:]

1193 ***** COMMITTEE INSERT *****

|

1194 Mr. {Stearns.} Chairman Leibowitz, before I start my
1195 questions, I think myself and staff are a little struck that
1196 you have voluntarily stepped up to the plate and sort of
1197 followed the spirit of this Cass Sunstein letter right there,
1198 and I think it is interesting when you look at the letter I
1199 just put in the record, he said in particular such agencies,
1200 talking about the independent agencies, are encouraged to
1201 consider undertaking retrospective analysis of the existing
1202 rules. You have stepped up to the plate to do it. Not all
1203 the independent agencies have done it. You have actually
1204 identified some areas that you think you have to do where you
1205 don't think you should be doing it, so I guess the question
1206 from Members of Congress is, what would you like us to do to
1207 help you?

1208 Mr. {Leibowitz.} Well, I think having oversight
1209 hearings like this is useful. It sort of shines a public
1210 light on regulations that do work because of course
1211 regulations are very important and ones that need to be
1212 modified. You know, look, we are a very bipartisan
1213 consensus-driven agency. We work together. We try to do
1214 regulatory reviews because we know they are really, really--

1215 Mr. {Stearns.} Well, you have identified some things
1216 that I think you would like some legislation to--

1217 Mr. {Leibowitz.} And yes, and we have identified--

1218 Mr. {Stearns.} We will follow up on that.

1219 Mr. {Leibowitz.} That would be terrific, Mr. Chairman.

1220 Mr. {Stearns.} Commissioner McDowell, I couldn't help
1221 but take your comments ``sober and clear manner'' when you
1222 talked about over 50 years regulations have gone up 800
1223 percent. Is that true? That is 16 percent a year in the law
1224 of 72. That means every 4-1/2 years these regulations are
1225 doubling. That is really staggering to think that that is
1226 occurring. Is that an accurate explanation of what you said,
1227 that regulations could possibly be doubling every 4-1/2 years
1228 based upon 800 percent increase for 50 years?

1229 Mr. {McDowell.} That would appear to be the case, yes.

1230 Mr. {Stearns.} Let me move, based upon what--I just put
1231 a letter in from Cass Sunstein where he said these
1232 independent agencies should step up and voluntarily--that is
1233 the spirit of what he is talking about. Obviously, President
1234 Obama has indicated he wants that done, and he didn't include
1235 the independent agencies but I would like, if you would, just
1236 to answer some questions yes or no just for the limited
1237 amount of time. So Commissioners Adler and Northup, yes or
1238 no, did the CPSC submit a regulatory review plan to OMB?
1239 Just yes or no.

1240 Mr. {Adler.} No.

1241 Mr. {Stearns.} Okay.

1242 Ms. {Northup.} No, it didn't.

1243 Mr. {Stearns.} Yes or no, has the CPSC publicly
1244 committed to conduct a review of all existing regulations in
1245 accordance with the Executive Order? Yes or no.

1246 Mr. {Adler.} As far as I am concerned, yes.

1247 Ms. {Northup.} No, I have not been informed that we are
1248 having any review.

1249 Mr. {Stearns.} Okay. Mr. Adler, if you answer yes, as
1250 you did, why hasn't there been a notice so that Commissioner
1251 Northup would know about it if you answered yes?

1252 Mr. {Adler.} Well, first of all, with respect to
1253 submitting a formal plan to Cass Sunstein, he is actually a
1254 hero of mine as a former academic, but in order to preserve
1255 independence--

1256 Mr. {Stearns.} You said you have issued a public
1257 notice?

1258 Mr. {Adler.} What I said was, we had begun a
1259 retrospective review beginning--

1260 Mr. {Stearns.} But you haven't issued a public notice?

1261 Mr. {Adler.} --in 2004 that was temporarily suspended
1262 in 2007, and as soon as Chairman Tenenbaum gets back, I
1263 anticipate we will resume that process.

1264 Mr. {Stearns.} So you personally believe the CPSC

1265 should conduct a review?

1266 Mr. {Adler.} Oh, yes, sir.

1267 Mr. {Stearns.} Okay. CPSC used to conduct regulatory
1268 reviews but has stopped in recent years. Is that a fair
1269 statement?

1270 Mr. {Adler.} They stopped in 2007 under then-Acting
1271 Chairman Nord, and I believe it was because of passage of the
1272 Consumer Product Safety Improvement Act, and just competition
1273 for resources within a very tiny agency.

1274 Mr. {Stearns.} Okay. Commissioner McDowell, do you
1275 believe the reviews the FCC conducts under the
1276 Telecommunications Act take the place of the kind of look-
1277 back the President and this committee has asked for?

1278 Mr. {McDowell.} No.

1279 Mr. {Stearns.} You also state in your testimony that
1280 net neutrality is the first rule you would discard upon the
1281 agency review of its regulation. Is that true?

1282 Mr. {McDowell.} Yes.

1283 Mr. {Stearns.} I agree with you. Chairman Genachowski
1284 hails the net neutrality rulemaking proceedings as a test
1285 case for openness. However, I believe there were some bad
1286 precedents set in this proceeding. Commissioner McDowell, do
1287 you believe you were able to review the record in the net
1288 neutrality docket or were there items placed late into the

1289 docket that made it very difficult to review before the vote?

1290 Mr. {McDowell.} There are about 3,000 pages of
1291 documentation placed into the record in the final 2 or 3 days
1292 or 4 days.

1293 Mr. {Stearns.} And you had no opportunity to review
1294 those?

1295 Mr. {McDowell.} Well, there was opportunity but there
1296 wasn't enough time.

1297 Mr. {Stearns.} As a commissioner, when was the first
1298 time you saw the net neutrality order that you voted against
1299 on December 21, 2010, and was it the same rules proposed in
1300 October 2009?

1301 Mr. {McDowell.} There were several drafts, of course,
1302 the first in October of 2009, but we got the final draft
1303 about quarter to midnight the night before the vote.

1304 Mr. {Stearns.} I understand although the agency passed
1305 its net neutrality rules in December, the docket to
1306 reclassify broadband services under Title II remains open. I
1307 think this is surprising, as Chairman Genachowski has made
1308 efforts to close other dockets opened at the FCC. Do you
1309 believe this docket should be closed?

1310 Mr. {McDowell.} Yes.

1311 Mr. {Stearns.} Are you aware of any reason why this
1312 docket remains open?

1313 Mr. {McDowell.} Only speculation. I have no firsthand
1314 knowledge.

1315 Mr. {Stearns.} Chairman Wellinghoff, in your testimony
1316 you say you support the goals of the Executive Order and have
1317 directed commission staff to conduct a review of existing
1318 regulations with the goals of the Executive Order in mind.
1319 Why didn't you submit a regulatory review plan to OMB?

1320 Mr. {Wellinghoff.} Because I believe that we weren't
1321 subject to the Executive Order under OMB.

1322 Mr. {Stearns.} Notwithstanding what Cass Sunstein had
1323 sort of directly, the spirit of the law was for you to
1324 comply?

1325 Mr. {Wellinghoff.} I believe in fact we are complying
1326 with the spirit of the law by directing the regulatory review
1327 that I have directed staff to do.

1328 Mr. {Stearns.} Have you submitted a notice for public
1329 comment on this review?

1330 Mr. {Wellinghoff.} My general counsel has indicated
1331 that is not necessary to staff review.

1332 Mr. {Stearns.} Well, let me ask you personally. Do you
1333 believe FERC should conduct a retrospective review in the
1334 spirit of the Executive Order?

1335 Mr. {Wellinghoff.} Yes, we are doing that. I have
1336 directed my staff to do that.

1337 Mr. {Stearns.} Okay. My time is expired.

1338 Ms. {DeGette.} Thank you, Mr. Chairman.

1339 Mr. Chairman, my recollection of what Cass Sunstein said
1340 is that the independent agencies should comply with the
1341 spirit of the law, not the specific legal requirements, and I
1342 guess I will ask you, Chairman Leibowitz, since your agency
1343 is supposed to be the paragon of virtue today, have you
1344 submitted a plan to OMB? Has your agency submitted a plan to
1345 OMB?

1346 Mr. {Leibowitz.} We have not submitted a plan to OMB.

1347 Ms. {DeGette.} And that is because you are not legally
1348 required to, right?

1349 Mr. {Leibowitz.} And that is because we are not legally
1350 required to, although as you know--

1351 Ms. {DeGette.} But that doesn't mean you are not doing
1352 regulatory reform, correct?

1353 Mr. {Leibowitz.} No, no, no. I think as everyone
1354 knows, we are doing a lot of regulatory reform.

1355 Ms. {DeGette.} And Commissioner Adler, also your
1356 agency, although it hasn't submitted a plan to OMB, you are
1357 doing regulatory reform too?

1358 Mr. {Adler.} That is correct.

1359 Ms. {DeGette.} Thank you.

1360 Now, Chairman Leibowitz, something you said was very

1361 interesting to me. You talked about how a lot of the
1362 regulations that you do is a result of statutes passed by
1363 Congress directing you to do regulations, correct?

1364 Mr. {Leibowitz.} That is correct.

1365 Ms. {DeGette.} And you gave several examples of that,
1366 right?

1367 Mr. {Leibowitz.} Yes.

1368 Ms. {DeGette.} Now, Commissioner Northup, you talked
1369 about a lot of the regulations that the CPSC is promulgating
1370 as a result of the statute that Congress passed, correct?

1371 Like the lead standards and other regulations.

1372 Ms. {Northup.} That is correct.

1373 Ms. {DeGette.} So Mr. Chairman, one thing I am
1374 concerned about, you can't really talk about regulatory
1375 reform in a vacuum without looking at the statutes that
1376 Congress has passed but ask these agencies, and so I think
1377 there are two levels here. There is the regulations
1378 themselves, which may be overly burdensome, but there is also
1379 statutes that I think we should look at, and I know, Chairman
1380 Leibowitz, you had actually come up with a list of some
1381 statutes that you think could be streamlined so that the
1382 agencies, whether they are the independent agencies or not,
1383 could also streamline their regulations, correct?

1384 Mr. {Leibowitz.} That is correct.

1385 Ms. {DeGette.} Would you be willing to submit a copy of
1386 those statutes to this committee so that we could then look
1387 at those statutes within the purview of this committee and
1388 think about ways to fix them so that we can reduce the burden
1389 of regulations?

1390 Mr. {Leibowitz.} It sounds like very much a bipartisan
1391 effort on this subcommittee, and we would be glad to do that.

1392 Ms. {DeGette.} Okay. For the rest of the commissioners
1393 who are here, I would just ask for a yes or no answer. Would
1394 you be willing to also submit a similar list of statutes that
1395 your agency deals with that you think could be streamlined so
1396 the regulatory process could be streamlined? Commissioner
1397 Adler?

1398 Mr. {Adler.} Yes.

1399 Ms. {DeGette.} Commissioner Northup?

1400 Ms. {Northup.} I have.

1401 Ms. {DeGette.} Oh, you have? Great. I would love to
1402 get a copy of that.

1403 Mr. McDowell?

1404 Mr. {McDowell.} Yes.

1405 Ms. {DeGette.} Chairman?

1406 Mr. {Wellinghoff.} Yes.

1407 Ms. {DeGette.} Commissioner?

1408 Mr. {Moeller.} Yes.

1409 Ms. {DeGette.} Chairman?

1410 Mr. {Leibowitz.} Yes.

1411 Ms. {DeGette.} And Commissioner Kovacic?

1412 Mr. {Kovacic.} My list is the same as Jon's.

1413 Ms. {DeGette.} Okay. Great. This is a good effort
1414 down here at the end of this table.

1415 And I wanted to ask you, Commissioner McDowell, because
1416 you had listed off numbers of regulations. I don't think
1417 that you think that--first of all, are all those regulations
1418 that you listed--I don't know them by heart--are they all
1419 duplicative or unnecessary regulations, the ones you listed?

1420 Mr. {McDowell.} Are you talking about the number of
1421 pages I cited?

1422 Ms. {DeGette.} Well, you listed some different
1423 sections. You just threw out a whole bunch of regulations.

1424 Mr. {McDowell.} The sections I cited were statutory
1425 sections that gave us the power to deregulate on our own, and
1426 I also listed--

1427 Ms. {DeGette.} No, no, but--

1428 Mr. {McDowell.} --the forms--

1429 Ms. {DeGette.} --you said there--oh, the forms. Just
1430 because there is a form, doesn't mean that it is per se
1431 unnecessary, correct?

1432 Mr. {McDowell.} No, and I didn't imply that.

1433 Ms. {DeGette.} So the numbers of the forms that you
1434 listed, are those particular forms unnecessary in your view?
1435 Mr. {McDowell.} Not all of them necessarily.
1436 Ms. {DeGette.} Okay. So you were--
1437 Mr. {McDowell.} That is what I said in my testimony.
1438 Ms. {DeGette.} That was kind of a figure of speech that
1439 you were talking about a lot of forms, right?
1440 Mr. {McDowell.} I think that my testimony speaks for
1441 itself. It is a lot of forms.
1442 Ms. {DeGette.} Well, here is my question to you. Have
1443 you compiled a list of regulations for your agency that you
1444 think are duplicative or overly burdensome?
1445 Mr. {McDowell.} Yes, ma'am, it is in my testimony.
1446 Ms. {DeGette.} Okay. That is the comprehensive list.
1447 And has everybody else--
1448 Mr. {McDowell.} It is not the complete list but there
1449 is--
1450 Ms. {DeGette.} Could you get us your complete list?
1451 That would be really helpful.
1452 Mr. {McDowell.} Sure.
1453 Ms. {DeGette.} You know, along with our brand-new
1454 member from Colorado, Mr. Gardner, my neighbor to the north
1455 and others, we are trying to develop bipartisan legislation,
1456 and to be honest, as you see from these folks down here,

1457 regulatory reform is not a partisan issue. I mean, nobody
1458 wants to have overly burdensome regulations, and so I guess
1459 what I would ask everybody here from all of these agencies,
1460 as well as a list of statutes that you think lead to overly
1461 burdensome regulations, if you can give us a list of
1462 regulations that you think are overly burdensome, that would
1463 be helpful too.

1464 Commissioner Adler, would you be willing to do that?

1465 Mr. {Adler.} I am speaking only for myself, but for
1466 myself, yes.

1467 Ms. {DeGette.} Okay. Commissioner Northup, I believe
1468 you have probably already done that.

1469 Ms. {Northup.} I have. It is part of my testimony but
1470 I have also previously sent to the Hill a list of--

1471 Ms. {DeGette.} If you could get that to our staff too,
1472 that would be great.

1473 And Commissioner McDowell?

1474 Mr. {McDowell.} Absolutely.

1475 Ms. {DeGette.} Mr. Chairman?

1476 Mr. {Wellinghoff.} Yes.

1477 Ms. {DeGette.} And Commissioner Moeller?

1478 Mr. {Moeller.} Yes.

1479 Ms. {DeGette.} And then--

1480 Mr. {Leibowitz.} We certainly will, although we have

1481 eliminated a lot of regulations. We do ongoing regulatory
1482 reviews pretty rigorously.

1483 Ms. {DeGette.} Okay. Thank you very much.

1484 Mr. {Stearns.} The gentleman from Texas, Mr. Barton, is
1485 recognized for 5 minutes.

1486 Mr. {Barton.} Well, thank you. I would stipulate that
1487 all the individuals before us are paragons of virtue today
1488 because they are subject to the Energy and Commerce Committee
1489 and that recognition makes you a paragon.

1490 I think we need to repeat, this is kind of a hearing
1491 that is unusual in that this Executive Order that we are
1492 asking you folks to comment on explicitly excludes you, and
1493 as we all know in Washington, not too many commissioners and
1494 chairmen voluntarily comply with things that they don't have
1495 to. Those of us that have been around a little bit
1496 understand that.

1497 So my first question is, what should this committee do
1498 in the absence of statutory language that would force
1499 compliance with something similar to the Executive Order?
1500 Should we pass some sort of a statutory requirement that you
1501 all do similar things that the President says in his
1502 Executive Order or should we let the sleeping dog lie? Let
1503 us try Chairman Wellinghoff. He doesn't come before us too
1504 often.

1505 Mr. {Wellinghoff.} Thank you, Mr. Barton. I don't have
1506 any specific recommendation for you, sir. I think in fact,
1507 as I have indicated in my testimony, we are going to comply
1508 with the spirit of it and in fact have a staff review, and I
1509 think our agency certainly as an economic regulatory agency,
1510 each and every regulation that we institute do in fact take
1511 into account whether rates are just and reasonable and
1512 services are, and we also provide the industry with an
1513 opportunity to fully comment on those regulations and
1514 determine ultimately whether the regulations are burdensome
1515 based upon those comments and information that we gather. So
1516 I don't have any specific recommendation for you.

1517 Mr. {Barton.} Mr. Leibowitz?

1518 Mr. {Leibowitz.} I would say this. You know, we comply
1519 with the spirit of the Executive Order. I think it is a
1520 terrific Executive Order. We go beyond it because I think
1521 only four of our rules would be sort of within reg flex, and
1522 we do reg reviews of all of rules and all of our guides, but
1523 I also think it is important to preserve the independence of
1524 agencies too, and as you can see, you know, agencies provide-
1525 -by having members not of the President's party, agencies as
1526 a sort of institutionalized matter provide checks and
1527 balances, and they are independent voices. And so I
1528 understand what you are saying because I think you believe

1529 that the Executive Order has a lot of good things in it, and
1530 we agree.

1531 Mr. {Barton.} The Republicans think what the President
1532 says he is doing, we are not sure he is doing it, but what he
1533 says he wants to do, we think is a good thing. And so you
1534 folks say the right words, you are comply with the spirit and
1535 you agree in general, but the truth is, you are not going to
1536 do anything unless you absolutely have to. The question is,
1537 should I get with Ms. DeGette and Mr. Stearns and put
1538 together a bipartisan bill that would make it a requirement?

1539 Mr. {Leibowitz.} Let me defer to Commissioner Kovacic
1540 because I know he wants to add something here.

1541 Mr. {Kovacic.} Congressman Barton, I would like to
1542 quarrel with your suggestion that we only do what the gun at
1543 the head compels us to do. I was a junior case handler at
1544 the FTC for the first time in 1979, and I think it has been
1545 in the DNA of the agency internally, partly because of our
1546 structure, partly because we have a large team of economists
1547 to do this kind of introspective work as long as I have known
1548 the agency, and I would emphasize, I think that would be very
1549 constructive would be two things. First is for us to have
1550 perhaps a more frequent conversation in settings like this
1551 with your staff about we do. In 2008, 2009, we did a
1552 comprehensive self-study of our agency. We benchmarked

1553 ourselves with 40 of our counterparts overseas. We talked
1554 extensively with our counterparts at federal, State
1555 government, and we did a substantial publicly available
1556 assessment of how we are doing. I think it would be helpful
1557 on one front to have a more extensive continuing conversation
1558 with the committee about the measures we do take that aren't
1559 obliged, and the second is, to go back to something that
1560 several of you have mentioned--

1561 Mr. {Barton.} You are going to have to be quick,
1562 because I have got 20 seconds and I have got one more
1563 question.

1564 Mr. {Kovacic.} The other thing is to think more in the
1565 design of legislation itself about what burdens it will
1566 impose.

1567 Mr. {Barton.} I want to ask Commissioner McDowell--I
1568 mean, I can't let him sit here and not ask him some question.
1569 The pending regulation regulating the Internet under Title II
1570 is still pending at the FCC. Do you have any information for
1571 us what Chairman Genachowski intends to do with that? Is he
1572 going to withdraw it or push forward with it? What is your
1573 view on that?

1574 Mr. {McDowell.} Sir, just to be clear, the open
1575 proceeding to regulate the Internet under Title II, I don't
1576 have any information as to whether or not he is going to

1577 withdraw it or what the reasoning might be for keeping it
1578 open.

1579 Mr. {Barton.} Don't you think he should withdraw it?

1580 Mr. {McDowell.} I do.

1581 Mr. {Barton.} That is the right answer. Thank you, Mr.
1582 Chairman.

1583 Mr. {Stearns.} I thank the gentleman.

1584 I think the next speaker on this side is Mr. Green. You
1585 are recognized for 5 minutes.

1586 Mr. {Green.} Thank you, Mr. Chairman.

1587 First, I want to take the opportunity to thank all our
1588 commissioners for being here. Those of us who have been on
1589 this committee a number of years welcome back our colleague
1590 from Kentucky. What you do every day is very important in
1591 ensuring the health and safety of our citizens, particularly
1592 consumer protection, but everything. FERC, obviously from
1593 Texas, FERC is very important to what we do, and the FCC and
1594 of course FTC.

1595 Mr. Leibowitz, in your testimony you discuss the
1596 children's online privacy protection rule or regulation your
1597 agency promulgated that helps protect privacy of children
1598 online. Can you please tell us more about this rule and does
1599 it ensure that children are protected while using the
1600 Internet?

1601 Mr. {Leibowitz.} Well, you know, it was a bipartisan
1602 piece of legislation passed out of this committee, but we
1603 also understand that the Internet has changed and technology
1604 has changed the way children use the Internet dramatically in
1605 the last few years, and that is why we actually moved up our
1606 regulatory review of COPPA by 5 years, and so we are working
1607 with stakeholders. We put out a sort of notice of inquiry
1608 and we will have proposed COPPA improvements, draft
1609 legislation. We always put out--I am sorry, draft rule. We
1610 put that out. We take comments again, hopefully within the
1611 next few weeks by the end of the summer.

1612 Mr. {Green.} And I know for all the agencies, and this
1613 is just an example, there is a lot of concern about agency
1614 regulation, but so much of what you do is in response to
1615 legislation, whether it is new legislation or previous
1616 legislation or may have been amended, and this is a good
1617 example of a rule that frankly as a father, or a grandfather
1618 now, I can't possibly monitor what my grandchildren may be
1619 doing on the Internet but we do need to have protection from
1620 an entity other than just the family.

1621 Mr. {Leibowitz.} Right, and the whole notion of COPPA,
1622 which is that if you are 12 years old or younger, you
1623 shouldn't be able to give consent to have your personal
1624 information go to companies on the Internet, you need to have

1625 parental consent, is a really good one, and that is the
1626 bedrock of COPPA, the law you passed.

1627 Mr. {Green.} Some of us might move that age a little
1628 higher, but I appreciate it.

1629 Mr. {Leibowitz.} Some of us might encourage you to do
1630 that.

1631 Mr. {Green.} And beyond issuing standards that require
1632 safety such as that, you have done children's cribs.
1633 Consumer protection safety works on manufacturers to organize
1634 recalls and remove dangerous products from the market.

1635 Mr. Adler, a recall authority has the potential to save
1636 lives, doesn't it?

1637 Mr. {Adler.} It certainly does, sir, and I believe we
1638 have saved many lives.

1639 Mr. {Green.} And other agencies have tools to help
1640 consumers too. For example, the FCC has taken steps against
1641 consumer fraud and deceptive practices through its
1642 enforcement powers.

1643 Mr. {Adler.} All the time.

1644 Mr. {Green.} Mr. Leibowitz, in your understanding, in
1645 fiscal year 2010 your agency initiated 66 court cases to
1646 protect the rights of consumers. How valuable is that
1647 enforcement action?

1648 Mr. {Leibowitz.} Well, we think they are critically--I

1649 mean, we are principally an enforcement agency. We do rules,
1650 mostly when you tell us to, but what we really do on both the
1651 antitrust and the consumer protection side is go to court to
1652 stop unfair or deceptive acts or practices and to stop people
1653 who engage in unfair methods of competition, and we have
1654 brought a variety of cases protecting privacy, stopping
1655 mortgage scams. That is what we do.

1656 Mr. {Green.} The lawsuits you file can have real impact
1657 on individual lives. Is that correct?

1658 Mr. {Leibowitz.} Yes, I mean, often getting redress if
1659 we win a case or if we settle one for injured victims, yes.

1660 Mr. {Green.} So there is a positive byproduct of
1661 agencies issuing regulations and enforcing regulations that
1662 are based on what Congress passes and the President signs?

1663 Mr. {Leibowitz.} Absolutely.

1664 Mr. {Green.} Mr. McDowell, I was pleased that the
1665 chairman of the FCC announced that the commission would
1666 comply with the President's Executive Order on regulatory
1667 review. It is important that that review is as comprehensive
1668 as possible, and I am looking forward to seeing the
1669 streamlining of the FCC, which I am sure as commissioners you
1670 would love to have. Given the constant change and the
1671 growing competition in the communications market, do you
1672 agree that the FCC should be diligent in reviewing and

1673 potentially eliminating regulations that no longer protect
1674 the public interest?

1675 Mr. {McDowell.} Absolutely, in a comprehensive way.

1676 Mr. {Green.} The biannual review requirement is the
1677 commissioner's major tool to accomplish this. Is this
1678 correct?

1679 Mr. {McDowell.} It is, but only for telecom companies,
1680 not for media companies or information service providers,
1681 etc.

1682 Mr. {Green.} Over the past 10 years, the commission has
1683 complied with its statutory duty to prepare and submit a
1684 biannual review?

1685 Mr. {McDowell.} Yes, sir.

1686 Mr. {Green.} Do you believe the biannual review
1687 requirement should be amended to include other entities?

1688 Mr. {McDowell.} I do.

1689 Mr. {Green.} And would you submit your recommendations
1690 for the record?

1691 Mr. {McDowell.} Yes, sir, and it is my testimony but I
1692 will reiterate it too.

1693 Mr. {Green.} Okay. I appreciate it.

1694 Mr. Chairman, I will yield back my time.

1695 Mr. {Stearns.} The gentleman yields back his time, and
1696 the gentleman from Nebraska is recognized for 5 minutes.

1697 Mr. {Terry.} Thank you, Mr. Chairman. Let me first
1698 start by thanking Jon Leibowitz. First of all, I like the
1699 little play between the two of you because it kind of signals
1700 that you work with both sides and work together, and Mr.
1701 Kovacic, the way that you have answered questions, you are
1702 telegraphing or telling us that you two actually work
1703 together, and I really appreciate that. I think that is the
1704 way America expects our agencies to work. So I want to thank
1705 you for that. And Jon, you are doing a good job. I like
1706 that you are actually--

1707 Mr. {Leibowitz.} Is this a setup? Because--

1708 Mr. {Terry.} No, there is no ``comma but'' coming here.
1709 I like that you are already attacking the issue of finding
1710 the regulations that are not very useful anymore and don't
1711 serve the purpose. So good job. That is exactly what my
1712 bill that is in a different committee wants every agency,
1713 independent agency to do, and it is to provide the
1714 flexibility.

1715 Commissioner Northup, we can sit here and say good job
1716 on cribs but it is amazing to me that we are sitting here
1717 talking about bicycles and ATVs and large cars and trucks
1718 that, you know, 6- and 7-year-olds play with but don't eat
1719 but yet we are regulating them.

1720 So you have to admit, Mr. Adler, there is some absurdity

1721 to the law. Do you agree with the rules and regulations--

1722 Mr. {Adler.} I think that Congress basically got the
1723 law right, and by the way, what you are talking about is a
1724 mandate that Congress imposed, not that the commission
1725 imposed, but there are always some portions of the law that
1726 need to be reexamined, and the issue you raised with bicycles
1727 and ATVs is one of those that we are actually taking a look
1728 at.

1729 Mr. {Terry.} And in regard to the absurdity of
1730 Congress's mandate--and by the way, I list this as one of
1731 those votes that I thought if I had to take back, we should
1732 have really fought harder on this one to make it a better
1733 law.

1734 So Anne, do you have specific requests for us of where
1735 we should change the Consumer Product Safety Improvement Act?

1736 Ms. {Northup.} Well, let me just said if I had been
1737 there, I wasn't, but I can imagine that I would have voted
1738 for the law. I certainly would expect I would have. When I
1739 was being confirmed by the Senate, I read the law. It seemed
1740 like such a good law. I was supportive. So many of the
1741 Senators at the confirmation hearing said we want you to use
1742 all the flexibility we gave you to rationalize this law; we
1743 believe that bicycles and ATVs and scooters--I mean, it goes
1744 way beyond those two--carving them out may be some people

1745 happy, but like you say, trucks kids play with, the axles in
1746 those trucks, if they bend, what good are they, but the
1747 problem is, when you try to--when we have tried to find
1748 flexibility, there just hasn't been three out of five votes
1749 for that. So it is going to take a change in the law. The
1750 discouraging part is that even the commissioners can't seem
1751 to agree how sweeping a change they would support but we
1752 desperately need--

1753 Mr. {Terry.} Well, do you have flexibility on, for
1754 example, third-party testing? I think there was an incident
1755 when this bill was being developed by a toy manufacturer that
1756 manufactured in China that perhaps there was accusations that
1757 their data in-house was not correct, so if you are a large
1758 international company, mandating third-party testing when you
1759 found out your in-house testing was inaccurate, but do it on
1760 a 10-person company in Omaha, Nebraska, on tee shirts where
1761 on every size and every color doesn't make sense to me. Do
1762 you have the flexibility to--

1763 Ms. {Northup.} No, we don't have that flexibility.

1764 Mr. {Terry.} Is that an area that we should look at?

1765 Ms. {Northup.} It is an area. In fact, today there are
1766 vast new ways to enforce the law. We track things coming in
1767 from overseas, tools that we didn't have in 2008. And I
1768 would give the commission the ability, the flexibility to

1769 require third-party testing where they think there is risk
1770 and they think it will be effective to enforce it. It is one
1771 of the proposals I have made. It would make a huge
1772 difference in the cost of this because as you say, every
1773 small business is telling us when they have to third-party
1774 test every single component individually for lead, when they
1775 have to then do random--

1776 Mr. {Terry.} Or phthalates.

1777 Ms. {Northup.} --when they have to do phthalates, when
1778 they have to do it to the toy standard, it is extremely
1779 expensive.

1780 Mr. {Terry.} Well, and one quick point on that. Do you
1781 guys try and obtain data, for example, when the third-party
1782 testers are telling a small company that prints motorcycles
1783 on tee shirts that asking that they test the cumulative
1784 effects of 10 tee shirts of the same color and size, do you
1785 ask, produce one piece of evidence that a child has eaten ten
1786 tee shirts?

1787 Ms. {Northup.} The problem here is that if there is,
1788 say, a dot of blue paint on that, they need enough blue paint
1789 to test to have a quantity of blue paint. I will tell you, I
1790 have pushed for a component part testing allowing somebody
1791 to--and I think we are going to pass this, and this is the
1792 flexibility that I think would be--is probably the most

1793 flexible regulation we have where you can take your blue
1794 paint and test it and then you can put it on every tee shirt
1795 and you don't have to tear up the tee shirt.

1796 But when you talk about bikes, for example, that have
1797 141 parts to them and every part, every time you change the
1798 shipment of spokes, the shipment of pedals, you have to have
1799 a new test for that, then you have to change the label so it
1800 reflects the component test that was used, it is very
1801 complicated.

1802 Mr. {Stearns.} The gentleman's time has expired, and
1803 Ms. Schakowsky, the gentlelady, is recognized for 5 minutes.

1804 Ms. {Schakowsky.} Thank you.

1805 You know, I think we all here agree that it is important
1806 for regulatory agencies to be efficient and mindful of the
1807 impact of regulations on businesses, and I think we all
1808 agree. I helped negotiate this bill. I am very proud of the
1809 legislation. But Henry Waxman introduced legislation that
1810 would deal with some of the unintended consequences. I think
1811 maybe we as a committee ought to take another look at that
1812 legislation, and I know that the commission would be willing,
1813 as I understand it. Is that not true, Mr. Adler, on behalf
1814 of Mr. Tenenbaum and Ms. Northup? I think we ought to look
1815 at that.

1816 But let me just say, to go back to risk-based

1817 assessment, that is what we had before, and I think that what
1818 we have found is that why we regulate and that is because
1819 time and time again industry has shown that they aren't going
1820 to police themselves, and that we need to do it, and one of
1821 the issues is the industry standard for cribs, and we had a
1822 press conference with the attorney general in Illinois on
1823 June 28th when the crib standard went into effect, and I
1824 congratulate all of you on that, although I have to say, I
1825 was disappointed to see the press release that went out that,
1826 you know, we didn't give people enough time when of course
1827 you had said earlier that you wished it had gone into effect
1828 the next day so that parents could be sure when we put our
1829 kids to bed alone or grandchildren that they are going to be
1830 safe.

1831 So let me ask you, Mr. Adler, do you consider the crib
1832 standard to be an example of a victory for the Consumer
1833 Product Safety Improvement Act?

1834 Mr. {Adler.} I think it is one of the finest things
1835 that has been done under the Consumer Product Safety
1836 Improvement Act. It is taking children who are our most
1837 vulnerable involuntary risk takers who are put in cribs that
1838 have to be the safest place in the home because they are
1839 there for long periods of time with no supervision, and it is
1840 saying that we have the most stringent safety standard in the

1841 world. I think it is really a magnificent achievement and I
1842 commend the Congress for directing us to--

1843 Ms. {Schakowsky.} And in fact, in the regulation, you
1844 did give some places that might have cribs some time to
1845 comply. Is that not true?

1846 Mr. {Adler.} We did, and I am delighted to respond to
1847 the issue that Commissioner Northup and I disagree on with
1848 respect to the independent retailers. I think that we had a
1849 group that said we need more time but we had another group
1850 that said please, please, please do not give more time, we
1851 have compliant cribs and we are prepared to sell them right
1852 now.

1853 Ms. {Schakowsky.} I ant to mention on the database, I
1854 have an op-ed from a gentleman in New Jersey whose daughter
1855 was injured by a crib in 2007. He called the manufacturer
1856 and asked if they had any other complaints about the crib and
1857 was told no, there weren't any, but actually found out that
1858 there were 84 reports to similar problems. Fortunately, his
1859 daughter was not hurt very bad.

1860 So Mr. Adler, the public information database was
1861 created by the CPSIA because previously, manufacturers would
1862 not, and the CPSC could not share lifesaving information with
1863 consumers. Is that correct?

1864 Mr. {Adler.} That is correct. I think the database is

1865 one of the finest pieces of the Consumer Product Safety
1866 Improvement Act.

1867 Ms. {Schakowsky.} So do you think that it actually is
1868 serving the function of making consumers more aware?

1869 Mr. {Adler.} It is, and I might just quickly point out
1870 that it is modeled after a similar database at the National
1871 Highway Traffic Safety Administration. Ours actually has
1872 more due-process rights for manufacturers than they do at
1873 NHTSA, and I think it is a very balanced piece that provides
1874 the proper attention to disclosure to protect consumers with
1875 the rights of manufacturers to make sure that the information
1876 is correct.

1877 Ms. {Schakowsky.} Do you think that Congress should
1878 force the Consumer Product Safety Commission to do a full
1879 cost-benefit analysis every time it takes steps to protect
1880 children from harmful products no matter how dangerous those
1881 products are?

1882 Mr. {Adler.} I actually think Congress got it right.
1883 Congress didn't say regulate with no attention to the
1884 economic impact. Congress said that when we regulate with
1885 respect to children, that we need to follow the dictates of
1886 the Regulatory Flexibility Act, and one of the things I like
1887 about that is, it is focused on vulnerable small business.
1888 That is the group that we are supposed to make specific

1889 economic findings with respect to when we are trying to
1890 protect our most vulnerable consumers.

1891 Ms. {Schakowsky.} I think I will yield back the 2
1892 seconds I have. Thank you, Mr. Chairman.

1893 Mr. {Stearns.} I thank the gentlelady. The gentleman
1894 from Texas, Dr. Burgess, is recognized for 5 minutes.

1895 Dr. {Burgess.} Thank you, Mr. Chairman, and
1896 Commissioner Northup, it is good to see you here.

1897 Ms. {Northup.} Thank you.

1898 Dr. {Burgess.} It is amazing you got confirmed by the
1899 Senate, so congratulations on that. What an accomplishment.

1900 And I apologize for being late. We had a Health
1901 Subcommittee hearing going on simultaneously. Can you give
1902 us an idea of the scope of the effect on the retail industry
1903 on this crib ban that has now gone into effect? I mean, I
1904 realize that the other commissioner said a cost-benefit
1905 analysis is not necessary but still, there has got to have
1906 been an impact.

1907 Ms. {Northup.} Let me just say, first of all, the
1908 regulatory flex analysis that we do is only--it is like
1909 checking a box. Sometimes it is a paragraph, sometimes it is
1910 a page. It says that small businesses are going to be
1911 affected, we are going to put some out of business, but we go
1912 right ahead and regulate. There is nothing, there is no

1913 requirement that it be cost-effective.

1914 What happened with the crib standard was, is that we
1915 issued it and we considered at the request of manufacturers
1916 how long it would take for them to get the new qualifying
1917 cribs tested, third-party tested, and into the market. Six
1918 months was decided. We didn't really think about retailers.
1919 There was one sentence in our rule that said we think 3 to 6
1920 months is enough for retailers too. Unfortunately, it took
1921 longer to get them developed, it took longer to get them
1922 tested, and by the time they got them to the retail stores,
1923 the retail stores, some of the orders they had placed last
1924 November arrived a week before the new standard took effect.
1925 They were not third-party tested, and so they were junk to
1926 them. How many? Well, we know that one group of retailers
1927 that did a survey had 17,000 of them. We know that we called
1928 five, not our biggest stores but five major retailers; they
1929 had 100,000 as of the 1st of June. That comes to about \$32
1930 million worth of materials that will have to be thrown away
1931 if they are not--and these are not drop-side cribs. These
1932 are not even cribs that are almost identical to the standard.
1933 They haven't been third-party tested or certified. But the
1934 new crib standard that went in in 2009 was the basis of our
1935 crib standard. And let me just say, if these are unsafe,
1936 then why we would have allowed daycare centers, the motel-

1937 hotel industry, leasers 2 years before they had to place
1938 them? It is because we did not believe they were unsafe.

1939 Dr. {Burgess.} That is a valid question.

1940 You know, in the winter of 2008, it was kind of a bleak
1941 time up here on the Hill, and with no thought to my personal
1942 safety, I took a trip to the CPSC and looked at the testing
1943 facility. It is remarkable in that it is very Spartan.

1944 There are certainly no--

1945 Ms. {Northup.} We have a new one now.

1946 Dr. {Burgess.} Oh, you do have a new one?

1947 Ms. {Northup.} Yes. We just moved 3 weeks ago.

1948 Dr. {Burgess.} This was an old missile base, as I
1949 recall, when I went out there, and I was struck that the
1950 folks there were working diligently and they were quite
1951 inventive and innovative, and I actually took a great deal of
1952 confidence away from that, but at the same time, I will never
1953 forget sitting in that press conference that the people on
1954 the youth motorcycle thing put together a couple of years
1955 ago, a beautiful little blond-haired boy about 10 years old
1956 in full motocross regalia standing at the microphone and said
1957 Mr. Congressman, if you will let me ride my bike, I promise I
1958 won't eat the battery when I am finished. And you know, that
1959 is the level of absurdity to which we have sunk.

1960 Ms. {Northup.} This testimony today has been

1961 fascinating, hearing the agency talking about the DNA, the
1962 DNA of the CPSC is really fabulous, but that has all changed
1963 because of the Consumer Product Safety Improvement Act and
1964 the rulemaking that we have done in compliance with levels
1965 and requirements that are unrelated to risk. For years this
1966 agency was risk-based, it worked with the Voluntary Standards
1967 Committee, which is very important because products emerge,
1968 they evolve, and these voluntary standards keep up with these
1969 evolutions. Any time we didn't think they were strong
1970 enough, we had the right to intervene, and we did, as my
1971 colleague pointed out.

1972 Dr. {Burgess.} Let me just briefly, I do need to ask
1973 our friend from the Federal Trade Commission a question on
1974 the--familiar with the ACO--if you read the Federal Register,
1975 you may be aware that there was a health care law signed last
1976 year that has caused some of us some grief, and when this new
1977 accountable care organization reg came through, did you guys
1978 participate in the writing of that regulation?

1979 Mr. {Leibowitz.} Well, we participated. It is
1980 principally from CMS, as you know, and we participated--

1981 Dr. {Burgess.} Well, what I know is, when we had the
1982 briefing, they had one guy from CMS and two guys from the
1983 Federal Trade Commission.

1984 Mr. {Leibowitz.} One from the Federal Trade Commission

1985 and one from the Department of Justice because we wrote it
1986 with the Department of Justice, or maybe two from the Federal
1987 Trade Commission and one from the Department of Justice. So
1988 we did the antitrust component, and their draft guys were
1989 taking comments, we did a workshop. And can I just say one
1990 other thing? And I will turn it back over to you.

1991 We believe that competition is critically important to
1992 health care, not regulation, and so what we are trying to do
1993 with the ACO implementation--you know, ACOs are a brave new
1994 world and very uncertain, but what we are trying to do is
1995 make sure that competition principles remain.

1996 Dr. {Burgess.} Look, you give the antitrust exemption
1997 to Major League Baseball, the National Football League, but
1998 here is the deal. The 21st century health care model, and
1999 this was started in the previous Administration with
2000 Secretary Leavitt, has been continued with Don Berwick at
2001 CMS, and now we have got an ACO rule that doesn't work in
2002 actuality. The rule is--you put something that was working
2003 in practice and rendered in invaluable in theory, and that is
2004 the problem that I see with what you have done.

2005 Mr. {Leibowitz.} Well, look, we have certainly--one of
2006 the reasons we put out draft guidance--and again, we have a
2007 small component of it. It is only the competition portion.
2008 One of the reasons why we put out draft guidance and why we

2009 are meeting feverishly with all stakeholders is, we want to
2010 make sure that, you know, to the extent that there is an
2011 uptake on ACOs, the notion, you pick up vertical efficiencies
2012 by putting together, as you know, different doctor practices,
2013 lab testing facilities and a hospital, is not a bad one. We
2014 want to make sure that you don't have one dominant provider
2015 so that, you know, it soaks up all the efficiencies, and we
2016 also--

2017 Dr. {Burgess.} What about the Karen Ferguson? I mean,
2018 you give a dominant provider status to insurance companies.

2019 Mr. {Stearns.} The gentleman's time has expired.

2020 Mr. {Leibowitz.} We will just point out, we cannot
2021 review the insurance industry. We are exempted from that.
2022 But yes, I hear what you are saying. I don't think we are in
2023 disagreement. We are going to try and make it work better.

2024 Mr. {Stearns.} The gentlelady, Ms. Christensen, is
2025 recognized for 5 minutes.

2026 Dr. {Christensen.} Thank you, Mr. Chairman, and I want
2027 to also add my thanks to all of the commissioners for being
2028 here, and as I listen to the testimony, it seems that all of
2029 the independent agencies that you represent have been
2030 undergoing some regulatory reform and even though you are not
2031 under the Executive Order, that you have really gone beyond
2032 what you had been doing to keep in spirit with the Executive

2033 Order, and I commend you for that.

2034 I sat on the Small Business Committee for about 10
2035 years, and each of you is governed by the Regulatory
2036 Flexibility Act, and so you are required to look at how the
2037 impact of your regulations on small business reviewed. I was
2038 going to ask Commissioner Northup, my classmate--

2039 Ms. {Northup.} Yes.

2040 Dr. {Christensen.} --about the effectiveness, but you
2041 have already kind of said that it is not effective. Is it
2042 the experience of the other commissioners that the Regulatory
2043 Flexibility Act does not do enough to protect small
2044 businesses?

2045 Mr. {Adler.} I don't agree with my colleague about
2046 that. I think that especially with respect to the impact of
2047 the Regulatory Flexibility Act on our agency, I think it has
2048 been a very good provision. I was just reviewing section 604
2049 of the Regulatory Flexibility Act, and to me, it is a smaller
2050 but focused cost-benefit analysis and it is something I think
2051 the commission has done very conscientiously.

2052 Dr. {Christensen.} Did I misinterpret what you said?

2053 Ms. {Northup.} No. It is often just a paragraph in a
2054 long rule, and even if we find that it will impact small
2055 businesses, it is not even--it doesn't require us to decide
2056 it is still worth going forward to make any changes to our

2057 rules. It has no impact on the rules that I--one or two
2058 maybe but very few that I can remember ever.

2059 Dr. {Christensen.} Does anyone else have that
2060 experience that RFA--

2061 Mr. {McDowell.} I find it to be toothless, and if you
2062 look at it from an appellate perspective, the appellate
2063 courts agree, there is really nothing the courts can do to
2064 make agencies change their rules based on the RFA.

2065 Dr. {Christensen.} That would be very disappointing,
2066 but it seems as though most agencies have had--most of the
2067 commissions have had good experience with the act.

2068 Mr. {Kovacic.} I think, Madam, that it has some limited
2069 effect in focusing our attention on things that are important
2070 but I think there are a number of other things we have done
2071 that have tended to be more significant and have come from
2072 within, and we would be glad to share those with you at your
2073 pleasure.

2074 Dr. {Christensen.} Thank you. And what I have been
2075 hearing is that most of the commissions have gone beyond what
2076 really has been required, and I appreciate that.

2077 Commissioner McDowell, on June 20th, you wrote a letter
2078 to Chairman Genachowski offering several recommendations on
2079 how the FCC should be reformed. You suggested reforming it
2080 to be more transparent, efficient, accountable and fiscally

2081 responsible, and from prior testimony to date, we have
2082 learned that Chairman Genachowski has proactively implemented
2083 some of those changes to facilitate your suggested reforms.
2084 Through these reforms, the FCC has improved external
2085 communications by creating a more user-friendly website which
2086 includes providing live streams of all public workshops and
2087 meetings. Do you think this new website has enhanced public
2088 participation and access to FCC activities?

2089 Mr. {McDowell.} Well, the FCC's website right now is a
2090 big controversial. It depends on which segment of the
2091 audience that uses it you ask.

2092 Dr. {Christensen.} You don't think that it has enhanced
2093 public participation?

2094 Mr. {McDowell.} Certainly in general, I think, Chairman
2095 Genachowski has taken some discreet steps on an ad hoc basis
2096 but I would like to see more comprehensive reform done.

2097 Dr. {Christensen.} But the FCC has also made effort to
2098 collect broader input from the public and industry, which
2099 included having more than 85 staff-led public forums and
2100 reinvigorating external advisory committees. Do you think
2101 these efforts have allowed for an increase in public
2102 participation?

2103 Mr. {McDowell.} Absolutely.

2104 Dr. {Christensen.} In fact, you have had several

2105 workshops on the national broadband plan to discuss potential
2106 reforms to the Universal Service Fund. Do you think that
2107 those workshops have been helpful?

2108 Mr. {McDowell.} They have, certainly.

2109 Dr. {Christensen.} Okay. And although the FCC is not
2110 subject to President Obama's Executive Order on regulatory
2111 reform, the FCC initiated their own look-back process which
2112 also is included in the statute. According to a letter
2113 Chairman Genachowski sent to Chairman Upton and Chairman
2114 Walden, this effort has resulted in the agency's eliminating
2115 and/or revising 49 regulations and identifying more than 20
2116 sets of unnecessary data collection requirements for possible
2117 elimination. Is that correct?

2118 Mr. {McDowell.} I don't know. I haven't seen the list
2119 of the 49 or the 20, so I am not quite sure.

2120 Dr. {Christensen.} Does it sound reasonable?

2121 Mr. {McDowell.} And I don't know if some are mainly
2122 data collection. I think the proceeding, as I understand,
2123 under section 11 that was initiated really was focused
2124 primarily on data collection, although it has general
2125 language in there, but the thrust of it was data collection
2126 and not just a comprehensive review of all of our rules that
2127 apply to all the entities regulated by the commissioner.

2128 Dr. {Christensen.} Well, our information is that 49

2129 regulations and identifying maybe 20 sets of unnecessary
2130 data. So it seems to me that the FCC's current leadership
2131 has been really successful in implementing new ideas on how
2132 to improve current regulations, and I look forward to hearing
2133 more from the commission and their continued focus on
2134 ensuring public participation and open exchange of ideas that
2135 improve the work of our government.

2136 My time is up. I yield back.

2137 Mr. {Stearns.} I thank the gentlelady, and the
2138 gentleman from California, Mr. Bilbray, is recognized for 5
2139 minutes.

2140 Mr. {Bilbray.} Thank you.

2141 Mr. Adler, you were bringing up this issue of trying to
2142 make sure that we have the safest cribs in the world, as we
2143 say. What percentage of the cribs that are on the market in
2144 the United States have elevated platforms or are made of a
2145 hard material--wood, plastic, steel?

2146 Mr. {Adler.} I don't know the answer to that. I would
2147 be delighted to--

2148 Mr. {Bilbray.} Would it be fair to say the overwhelming
2149 majority of them have elevated platforms or are made of hard
2150 material?

2151 Mr. {Adler.} I think that makes sense.

2152 Mr. {Bilbray.} And wouldn't you agree that any elevated

2153 platform or material when you have a child, you have a
2154 potential for injury because of dropping off of an elevated
2155 platform or injury because some activity that may end up
2156 meaning impact with the hard material, so there is a risk in
2157 both of those design features?

2158 Mr. {Adler.} That is an excellent point, and the
2159 commission standard is addressed to what we consider the
2160 unreasonable risks, but I don't think we could make that a
2161 fatality-free zone under all circumstances.

2162 Mr. {Bilbray.} Okay, and that is the point, is what is
2163 a reasonable level. You know, you could sit there and say
2164 that because we do not require all cribs to be on the ground,
2165 we do not require all cribs to be made of inflated material
2166 or soft material, it is not the safest it could be. It is
2167 reasonableness, and I think that is a determining factor.
2168 Wouldn't you agree?

2169 Mr. {Adler.} I would absolutely agree with that, but
2170 what we have done is make the cribs that are produced in the
2171 United States the safest within the types of fatalities that
2172 we think that--

2173 Mr. {Bilbray.} I just think that--and I appreciate
2174 that, making sure that, you know, we make these claims and
2175 these statements and elected officials or as public officials
2176 but it is reasonableness that really is the determining fact,

2177 and that is where the judgment issue has to come down.

2178 Let us talk reasonableness, Mr. McDowell. You recently
2179 discovered that the so-called Fairness Doctrine was still on
2180 your books, almost a quarter of a century after it was
2181 abandoned. Do you think it is reasonable that a federal
2182 agency has basically misinformation, if not, you know, some
2183 people may say the lingering lie of the Fairness Doctrine on
2184 your books? Do you think it is reasonable that almost a
2185 quarter of a century after a regulation isn't there, it still
2186 is being stated as being part of the process?

2187 Mr. {McDowell.} I don't think it is reasonable that the
2188 language remains on the books, if that is your question.

2189 Mr. {Bilbray.} And what are we doing to make sure that
2190 this mistake isn't throughout your regulatory guidelines so
2191 the public and the business community can read something and
2192 find out is it the gospel or isn't it?

2193 Mr. {McDowell.} Exactly. If the commission has opted
2194 not to enforce the rule, the rule should disappear from the
2195 books.

2196 Mr. {Bilbray.} Okay. Let us get down to the fact that
2197 the FCC has taken nearly 12 months--and I will say this. I
2198 spent decades in regulatory agencies so I understand how
2199 tough it is when you are in a regulatory agency of trying to
2200 take the theory of legislation and make it a practical

2201 application. But when you have got decision-making that is
2202 delayed for over 12 months, you know, and there is nothing on
2203 the books that requires you to make a decision in what is a
2204 reasonable time period, don't you think--is there anything to
2205 make you make a decision in less than 12 months?

2206 Mr. {McDowell.} Certainly, statutory language helps.
2207 There is nothing like the force and effect of law. But even
2208 that sometimes is not observed. For instance, the video
2209 competition report we are required to produce every year, the
2210 last time I think I voted on one was in 2007.

2211 Mr. {Bilbray.} Okay. So in other words, we need to
2212 basically tighten it up but also have some enforcement on
2213 that tightening. I will just tell you, somebody that built
2214 the light rail system in San Diego, we abandoned any federal
2215 funding just so we could avoid the regulatory oversight, and
2216 we built that system under budget and on time because we
2217 didn't take federal funding, and I think that is one of the
2218 things we don't talk enough about. People want transit, they
2219 want this, they want that. Sometimes the most important
2220 component to get the public the services that you claim you
2221 care about is getting the federal regulatory agencies out of
2222 the way so you can get the job done, and that is why I would
2223 just like to state down the line.

2224 Mr. Moeller, you were talking about hydroelectric. When

2225 you are reviewing the hydroelectric and the re-licensing, are
2226 you required to consider the no-project option and the
2227 environmental damage done if you don't approve it? Things
2228 like climate change, emissions, pollution and that kind of
2229 thing, are you required to basically take a look at this and
2230 understand that if you do not approve it, it will have an
2231 adverse impact because the alternative-energy capabilities or
2232 generation is going to cause pollution where the
2233 hydroelectric is not.

2234 Mr. {Moeller.} Well, typically, I think of the no-
2235 action alternative as truly no action as opposed to perhaps
2236 modifying or taking out a dam and then the consequence being
2237 that it would be a result of more generation that would be
2238 less environmentally friendly than hydro. But typically I
2239 think it essentially doesn't get to that. It is a long
2240 settlement process where--

2241 Mr. {Bilbray.} But you don't have a specific
2242 requirement that you have to consider offsets for shutting
2243 down a plant?

2244 Mr. {Moeller.} Not that I am aware of.

2245 Mr. {Bilbray.} Well, that is one of those things that I
2246 think we need to talk about, Mr. Chairman, more, is that, you
2247 know, when you don't improve a road improvement, you should
2248 have to offset the pollution caused by the congestion rather

2249 than always we look at all of the emissions that happen for
2250 construction. But the no-project option and the
2251 environmental and economic and social impact of that need to
2252 be considered but the environmental impact is one that if
2253 individual a real hypocrisy that you want to have offsets for
2254 the emissions caused for building the project but nobody who
2255 is stopping the project has to account for the environmental
2256 pollution by not finishing the project, and I yield back, Mr.
2257 Chairman.

2258 Mr. {Stearns.} I thank the gentleman, and the gentleman
2259 from Louisiana, Mr. Scalise, is recognized for 5 minutes.

2260 Mr. {Scalise.} Thank you, Mr. Chairman. I appreciate
2261 you holding this hearing. I appreciate all of the
2262 commissioners who have come here to participate and talk
2263 about the costs of regulations, especially how it impacts
2264 people, you know, and when you look at lot of the intent and
2265 what is usually said about regulations that come out, they
2266 all sound really good and, you know, usually the name of a
2267 bill, you can tell how bad it is by how good the name sounds.
2268 It usually an inverse proportion.

2269 And so as I talk to people, you know, our economy is
2270 still very sluggish right now, and of course, in many cases,
2271 when you talk to small business owners, when you talk to
2272 American job creators, as many of us do, the first thing they

2273 will tell you that is the biggest impediment to job creation
2274 in America are federal regulations. You know, all of the
2275 other things that get in their way, they can manage. It
2276 seems like the federal regulations have become the biggest
2277 burden to creating jobs in America today, and so when you
2278 look at some of these regulations, you definitely want to
2279 look and see what is the real impact, are they even achieving
2280 some of the results that they were intended to, and in many
2281 cases you find out they are not, and then you look at some of
2282 these agencies, and we have had a number of hearings and I
2283 appreciate the chairman having the hearings that we have had
2284 going through various agencies, even looking at the
2285 President's Executive Order, and we have seen and it has been
2286 pointed out even by some of the people implementing it the
2287 shortcomings of the President's Executive Order, how it
2288 doesn't really get at the cost of regulation, and I read,
2289 there was a report that was recently done by the Small
2290 Business Administration that is titled the Impact of
2291 Regulatory Costs on Small Firms, and this really looked at
2292 how it impacts our small businesses, the people that actually
2293 create the bulks of the jobs in our economy and, you know, I
2294 guess it is not surprising for those of us that have been in
2295 some of these hearings but they talk about the cost of
2296 federal regulations to small businesses is over \$1.7

2297 trillion, and how does that break down? I broke it down per
2298 family. Over \$15,000 per family is the cost to small
2299 businesses of these regulations. And so when you look at the
2300 regulations and when you look at the impact and how it is not
2301 only affecting jobs, it is a major impacter that is costing
2302 us jobs but it also costs every American family over \$15,000.
2303 You say where is the bang for the buck.

2304 And I want to ask Commissioner Northup, you touched on
2305 this in your opening testimony. You talked about some of the
2306 things you have seen, and you have seen businesses go under,
2307 actually go bankrupt because of some of these regulations,
2308 and in many cases had actually no health impact, you know,
2309 bills that were sold and regulations that were sold as
2310 helping the health of children had actually nothing to do
2311 with health and it just had to do with some kind of radical
2312 policy somebody had that didn't help anybody's health, it
2313 just made a company go bankrupt. Can you expand on some of
2314 the things you have seen in terms of how these regulations
2315 not only impact the businesses that you have talked about but
2316 also how in many cases there is not even a relationship
2317 between health and--

2318 Ms. {Northup.} Well, I will give you two quickly. One
2319 of them is the--in the bill that you passed, you had
2320 exclusions with the lead limit for electrical products, and

2321 we have a whole cutout for that. You had exclusion for
2322 inaccessible parts, and we have addressed that. You also had
2323 an exclusion for lead where not any lead could be absorbed.
2324 I assume you meant for some things to be included in that,
2325 perhaps screws, nuts and bolts that are holding a crib
2326 together, maybe the handlebars of a bike because lead in the
2327 handlebars, if you suck on it, unlike paint, it is trapped in
2328 that metal. You can't suck out the lead. But our agency,
2329 even though I proposed a de minimis standard where if you rub
2330 the handlebars and less than a molecule could be gotten off
2331 that, it couldn't possibly change your blood lead content,
2332 that absorbability exclusion that you wrote in the bill, I
2333 intended you meant for it to apply to something. And the
2334 rest of the commissioners decided no, and so basically they
2335 have found that even though you wrote in the non-
2336 absorbability exclusion, that it applies to nothing, that
2337 there is not one material that it applies to.

2338 If we had nuts, screws, bolts, things that can't be
2339 swallowed, things that have small amounts in them that are in
2340 lead, trapped in--excuse me--trapped in steel, that those
2341 things would have been excluded from this law. It would have
2342 made a huge difference.

2343 Mr. {Scalise.} Let me ask, and I am running out of
2344 time. I want to ask just by a show of hands how many people

2345 have actually read this report that came out just a few
2346 months ago on the impact to small businesses of the
2347 regulations? Can I get a show of hands? Not one person on
2348 the panel read this. I think it should be required reading
2349 for all regulators. But if I can ask unanimous consent to
2350 submit this into the record?

2351 A final question, if I can ask--

2352 Mr. {Stearns.} Before we put it in the record, the
2353 minority would like to look at it.

2354 Mr. {Scalise.} Sure. I will be happy to hand that
2355 over. It is a report that was published in September of
2356 2010. It cites a number of sources but goes into very good
2357 detail on sector of breakdowns, also differential between
2358 large businesses and small, how they differentially fall
2359 higher even on our small businesses.

2360 Commissioner McDowell, you gave an assessment on the
2361 things that the FCC did to take into consideration. It was
2362 looking at both net neutrality and data roaming rules. Did
2363 they look into and do proper market analysis, in your
2364 opinion, to look at the impact how that would be on our job
2365 creators?

2366 Mr. {McDowell.} There was no proper market analysis, no
2367 finding of market power. In fact, the order, the net
2368 neutrality order says as much, that there was no market

2369 analysis conducted.

2370 Mr. {Scalise.} See, that is the problem with a lot of
2371 these regulations that come down. They have dramatic impacts
2372 on job creators and they cost us jobs, run jobs to other
2373 countries, and yet it just seems like the regulators kind of
2374 go into their own shell and are oblivious to the actual
2375 impact on our economy, so hopefully we can shift that course,
2376 and I appreciate the chairman for having this hearing and
2377 more like it to get our economy back on track.

2378 Thanks. I yield back.

2379 Mr. {Stearns.} And the minority has looked at this, so
2380 by unanimous consent, this will be made part of the record,
2381 so I thank you for bringing this.

2382 [The information follows:]

2383 ***** COMMITTEE INSERT *****

|
2384 Mr. {Stearns.} The gentlelady from Tennessee, Ms.
2385 Blackburn, is recognized for 5 minutes.

2386 Mrs. {Blackburn.} Thank you all for your patience in
2387 being here.

2388 Commissioner McDowell, I want to stay with you. On that
2389 net neutrality order, no market analysis done, no look-ahead
2390 at what the cost-benefit analysis was going to be. If there
2391 had been that analysis done, do you believe the commission
2392 would have gone ahead and issued that order?

2393 Mr. {McDowell.} I think so. I think that whole
2394 proceeding was outcome based, outcome driven.

2395 Mrs. {Blackburn.} Chairman Leibowitz, I want to come to
2396 you. I am concerned about the FTC's food guidelines, food
2397 marketing guidelines. I have two grandchildren. They are
2398 age 3 and age 2. And so things of this nature really I pay a
2399 lot of attention to. You know, you think about the
2400 unintended consequences that are going to come forward with
2401 this, and I think that you may see is that an unintended
2402 consequence could be seen as hampering free speech, harming
2403 our economy and not having a significant reduction in
2404 childhood obesity, and one of the things that I have found
2405 recently is that the food currently sold through the WIC
2406 program, which is designed by USDA experts to provide a

2407 healthy diet for young children, could no longer be marketed
2408 under this proposal. So you claim these proposed food
2409 marketing restrictions are voluntary but aren't these
2410 government standards going to form the basis for NGO attacks?
2411 And then also talk about what you think--I think that you
2412 could see there should be consider about shareholder actions,
2413 so if you will address that quickly, please?

2414 Mr. {Leibowitz.} Thank you, Congresswoman. Well,
2415 first, as you know, this was an obligated requirement. We
2416 are not the only agency. We do the marketing side. We don't
2417 do the science side. You know, that is the agriculture
2418 department, the CDC and the FDA. But it was a Sam Brownback,
2419 Tom Harkin obligation in our appropriations bill. We are
2420 obligated to do what Congress tells us to do. It is
2421 voluntary. So in that sense, there is no enforcement
2422 mechanism. We are taking comments from stakeholders. And
2423 let me just say, and you recognize, as we all do, there is an
2424 obesity crisis and there are twice as many obese children as
2425 there were a generation ago, but speaking only for myself,
2426 you know, I try to take a sort of pragmatic approach here.
2427 If my kids eat Special K with yogurt in the morning which
2428 actually wouldn't quite meet the nutrition guidelines, I am
2429 pretty happy, because you know what? I think that is better
2430 than what else they might eat or better than not eating

2431 anything at all. So my understanding is that within the next
2432 week--first of all, we will be getting comments and we will
2433 be reviewing those comments very seriously from stakeholders,
2434 but within the next week, my understanding is that the food
2435 marketing companies are going to come up with some proposed
2436 standardized or uniform guidelines. If they come up with
2437 guidelines that are good, and I think they will, then we
2438 ought to take that into account going forward member of the
2439 working group, and we will.

2440 Mrs. {Blackburn.} Let me shift gears with you. I want
2441 to go to the privacy issues that are out there, and we know
2442 that the Internet online advertising is really an economic
2443 engine in this country and the industry is beginning to
2444 voluntarily enter into some self-regulatory structures when
2445 it comes to privacy. Do you believe the FTC should impose a
2446 top-down technology mandate on the Internet governing the
2447 privacy issue?

2448 Mr. {Leibowitz.} It is the last thing we want to do,
2449 no.

2450 Mrs. {Blackburn.} Okay. Thank you for that. I
2451 appreciate that. I think that just as I said with Chairman
2452 McDowell, if you were to look at the net neutrality issue, if
2453 there had been a robust review of cost-benefit analysis, I
2454 think that it would have been determined that the net

2455 neutrality order, especially paragraph 84, was going to be
2456 detrimental to our economy, and I think that a heavy hand on
2457 the privacy issue would likewise.

2458 I have got less than a minute. I want to ask each of
2459 you, just a show of hands, how many of you have read the
2460 Executive Order that we are discussing and have been through
2461 the process of reviewing that? Okay. So all of you have.
2462 All right. How many of you disagree with any part of that
2463 order? Is there any part of that order that you have
2464 disagreement with? Yes, sir, go ahead.

2465 Mr. {Kovacic.} I don't think--I think a number of the
2466 provisions aren't very well specified. I think it could have
2467 benefited from a much fuller discussion about how it intended
2468 specific tradeoffs that are implicit in the order were to be
2469 made. There has been subsequent guidance, subsequent
2470 commentary. It is a nice start.

2471 Mrs. {Blackburn.} Okay. Anyone else? Commissioner?

2472 Mr. {McDowell.} I would agree. I think it could be
2473 broader and more comprehensive and more aggressive.

2474 Mrs. {Blackburn.} Okay. Any other addition to that?
2475 Thank you all for your patience. Yield back.

2476 Mr. {Stearns.} The gentlelady's time is expired. The
2477 gentleman from Virginia, Mr. Griffith, is recognized for 5
2478 minutes.

2479 Mr. {Griffith.} Thank you, Mr. Chairman.

2480 Commissioner McDowell, it is nice for me to be able to
2481 say that in a formal setting in my new role. When I look at
2482 the FCC's merger review process under Republican and Democrat
2483 Administrations, I see a process that appears to be broken.
2484 The XM and Sirius merger took way too long. The Comcast/NBC
2485 merger took way too long. There is simply too much
2486 discretion for the commission to halt the timeline for the
2487 review of the transfer of control of licenses in an
2488 expeditious manner. Is there something we can to provide
2489 applicants with certainty regarding the timing of the FCC
2490 review process?

2491 Mr. {McDowell.} And Congressman Griffith, it feels good
2492 to say that as well, my first time saying that publicly, so
2493 congratulations. Yes, the FCC has an 180-day shot clock that
2494 is honored more in the breach than in the rule to get mergers
2495 done. I read yesterday also that the Assistant Attorney
2496 General for Antitrust, Christine Varney, is stepping down and
2497 there is a big merger, the AT&T and T-Mobile merger, that
2498 needs a fair, thorough and expeditious review, and I would
2499 hope that her stepping down doesn't delay that. I think we
2500 could get that done by the end of the year in a fair,
2501 thorough manner.

2502 But I have been in a dialog with Chairman Genachowski

2503 about making sure that we move as quickly as we can on our
2504 merger review process. I think there are a lot of problems
2505 with how the commission under both Republicans and Democrats
2506 have conducted themselves in terms of taking too long or
2507 imposing conditions that have absolutely nothing to do with
2508 the substance of the merger itself. So Congress could look
2509 at that. There could be a statutory provision certainly, but
2510 the best thing to do would be for the FCC to honor its own
2511 180-day shot clock.

2512 Mr. {Leibowitz.} So Congressman, may I just add
2513 something?

2514 Mr. {Griffith.} Yes, please.

2515 Mr. {Leibowitz.} We do from time to work with the FCC
2516 on merger reviews, and I think from our perspective, you
2517 don't deserve a particular outcome but you do deserve sort of
2518 a speedy resolution. Sometimes it takes a little longer with
2519 documents, but that is what you deserve, so I think that is a
2520 reasonable point.

2521 Mr. {McDowell.} And I agree.

2522 Mr. {Griffith.} And I think most of us would agree with
2523 that as well.

2524 Commissioner Northup, do you think Congressman Waxman's
2525 proposed legislation will actually ease any burdens under the
2526 Consumer Product Safety Improvement Act?

2527 Ms. {Northup.} No, I don't think it goes nearly far
2528 enough, and in fact, you know, he has proposed previously a
2529 functional purpose exemption which I have to say is like
2530 picking winners and losers. If you think a part--first of
2531 all, it says it can't be harmful to children and then it says
2532 if it serves a function, for example, on a bicycle and is
2533 necessary, then we can exempt it. Well, if it doesn't harm a
2534 child, why do we have to then exempt it in part by part? It
2535 means that big companies that have lots of product or big
2536 expensive products can afford to get a functional exemption
2537 because it is a very complicated petition you would have to
2538 file with us. They can afford to file the petition and all
2539 the supporting work and everything and then we can exempt
2540 them but for small needs for these same exact materials that
2541 do not harm a child, I don't think that, you know, they
2542 probably would be able to afford either the wait for us to
2543 act on it or the cost to put the petition together. So that
2544 in particular to me is, you know, not a good way to go about
2545 easing this. Making the absorbability a useful exception
2546 would make a huge difference.

2547 Mr. {Griffith.} Did you want to add onto that?

2548 Mr. {Adler.} Well, I wanted to disagree.

2549 Mr. {Griffith.} Somebody else may give you time to do
2550 that but let me--I have got one more thing I want to say and

2551 if I could take back my time because I am running out of
2552 time. I did hear from several of you as I was listening to
2553 the testimony that you all, at least a couple of you, made
2554 mention that perhaps the legislation created more of the
2555 problem than the agency created and that we should be careful
2556 when we craft legislation that that may be costing jobs as
2557 well as the regulations costing jobs that are ultimately
2558 awarded, and while in some cases it may be an agency that is
2559 pushing the envelope and some cases it is just the agency
2560 following exactly what Congress told them to do, and I do
2561 appreciate that. I yield back my time.

2562 Mr. {Stearns.} The gentleman yields back the balance of
2563 his time. The gentleman from Colorado, Mr. Gardner, is
2564 recognized for 5 minutes.

2565 Mr. {Gardner.} Thank you, Mr. Chairman, and thank you
2566 for your time and testimony today.

2567 Chairman Wellinghoff, in developing energy policies such
2568 as policies to support the integration of renewables, demand
2569 response or the deployment of smart grid technologies, does
2570 FERC evaluate the impact that increased energy price,
2571 evaluate the impact that increased energy prices resulting
2572 from the implementation of these policies will have on jobs?

2573 Mr. {Wellinghoff.} The policies that we implement
2574 aren't directed to specific technologies but rather directed

2575 to the integration of all technologies into competitive
2576 marketplace. We believe, and I think my colleague,
2577 Commissioner Moeller, I think would agree, we believe that
2578 competition is good for consumers and so to the extent that
2579 we can maximize competition, we can increase the types of
2580 resources that are available in the market, whether they be
2581 coal or nuclear or natural gas or solar, geothermal,
2582 hydroelectric or any of these resources, and also to the
2583 extent that we can do things like incorporate in demand
2584 response and energy efficiency which usually at the lowest
2585 cost resources, the whole mix of those resources in a
2586 competitive environment allowed to compete fairly in that
2587 competitive environment will in fact produce the lowest cost
2588 for consumers.

2589 Mr. {Gardner.} So do you do an analysis that these
2590 policies the impact they will have on jobs?

2591 Mr. {Wellinghoff.} We don't a specific impact on--

2592 Mr. {Gardner.} So you don't do an analysis then?

2593 Mr. {Wellinghoff.} We don't do a specific analysis.

2594 Mr. {Gardner.} A specific analysis on jobs? You do not
2595 do a specific analysis on jobs?

2596 Mr. {Wellinghoff.} We don't, but we do believe that--

2597 Mr. {Gardner.} So in terms of--

2598 Mr. {Wellinghoff.} Excuse me, if I could finish. We do

2599 believe--

2600 Mr. {Gardner.} Actually, reclaiming my time. In terms
2601 of the Executive Order, so you do not believe that the
2602 Executive Order, which I think you said you believe in the
2603 spirit of, you do not believe that it requires you to look at
2604 jobs? I understand that you are exempted from it but you
2605 believe, you said you want to follow the spirit of it. Do
2606 you think you ought to be concerned about jobs and looking at
2607 the job impact?

2608 Mr. {Wellinghoff.} I think we are always concerned
2609 about jobs to the extent that we can drive down prices in a
2610 competitive atmosphere and allow for the economy to have
2611 access to low-cost power. To the extent that we can provide
2612 low-cost competitive power within the economy, we are going
2613 to create jobs and we are going to maintain jobs.

2614 Mr. {Gardner.} But you don't do an analysis to know
2615 that or not?

2616 Mr. {Wellinghoff.} My basic economics, what I know if
2617 basic economics, tells me that if we can lower costs for
2618 electricity, we are going to have the ability to increase
2619 jobs.

2620 Mr. {Gardner.} Would you commit today to start
2621 beginning a jobs analysis when you make decisions?

2622 Mr. {Wellinghoff.} I certainly have no problem looking

2623 at jobs. I believe, for example--

2624 Mr. {Gardner.} But shouldn't that be our--

2625 Mr. {Wellinghoff.} --your colleague from Louisiana, for
2626 example, was talking about this issue with respect to jobs
2627 and regarding that, Entergy, which is one of the utilities in
2628 Louisiana, has chosen to join a competitive market, Myso. An
2629 analysis was done that showed by joining that competitive
2630 market, something over \$700 million could be saved. I think
2631 there is a lot of money if you can take that money and save
2632 it for Louisiana consumers and others throughout the region.
2633 It wasn't just Louisiana but spread out the region. That
2634 additional money in the pockets of consumers is going to help
2635 them create jobs and invest back in the economy in ways that
2636 more jobs will be created. So I think that is a very valid
2637 example of the types of things that FERC is doing to the
2638 regulations and the competitive structures that we are
2639 putting in place to ensure that in fact we can create more
2640 jobs.

2641 Mr. {Gardner.} Well, and then so what you are telling
2642 the committee then, and I believe what you just said, though,
2643 when it comes to developing energy policies like integration
2644 of renewables, demand response or the deployment or smart
2645 grid technologies, then you are saying today that you will do
2646 a jobs analysis on these decisions?

2647 Mr. {Wellinghoff.} I am saying that to the extent that
2648 it is possible to do so, we certainly will in fact look at
2649 the impact on jobs.

2650 Mr. {Gardner.} I think we ought to be looking at the
2651 impact on jobs no matter what we do so that we have an idea
2652 of--

2653 Mr. {Wellinghoff.} I absolutely agree.

2654 Mr. {Gardner.} And so Commissioner Moeller, do you care
2655 to comment on this?

2656 Mr. {Moeller.} I generally want to associate my remarks
2657 with the chairman because we are believers in competitive
2658 wholesale markets and those ultimately are what benefit
2659 consumers the most and allow more resources. I think we
2660 should always be cognizant of the employment impact we have
2661 on rising energy prices because it can be substantial.

2662 Mr. {Gardner.} Thank you, Commissioner Moeller.

2663 I see my time is expired and I yield back.

2664 Mr. {Stearns.} I thank the gentleman for his questions.
2665 I think we are completed with our first round. I think the
2666 ranking member and I have talked that we are going to ask a
2667 few more questions and then wrap up.

2668 I don't think there has ever in my experience been such
2669 a distinguished group of people that could make an impact on
2670 deregulation in America as you folks today so we are here

2671 with a certain humility in asking you what is the best way
2672 for us to move forward. As Mr. Scalise pointed out with that
2673 Small Business Administration report, had every U.S.
2674 household paid an equal share of the federal regulatory
2675 burden, each household would pay \$15,586. That was in 2008.
2676 And when you compare that with what we spent for health care
2677 costs in 2008, the federal regulatory burden exceeded by 50
2678 percent the private spending on health care, which equaled
2679 \$10,500. So it is within your power to deregulate and to get
2680 rid of burdensome regulations, which would spur the economy.
2681 So we are not talking about something insignificant.

2682 So I guess the larger question is, we passed in 1980 the
2683 Regulatory Flexibility Act. Obviously that is not applicable
2684 today and it is not working, so the question is for you is
2685 sort of a wrap-up understanding, the President reached out
2686 with his Executive Order that did not apply to the
2687 independent agencies in some of your opinions. We think Cass
2688 Sunstein's letter did imply but we don't seem to have you
2689 jumping to the forefront to try to deregulate. Should
2690 Congress should either statutes or legislation provide, one,
2691 either more flexibility to you or should we update the
2692 Regulatory Flexibility Act of 1980? So we are reaching out
2693 for you to tell us, one, should we do some of the things I
2694 mentioned, and secondly, would you be willing to help us in

2695 terms of providing us documentation on what we should do? I
2696 will start with Commissioner Adler.

2697 Mr. {Adler.} Mr. Chairman, the devil is always in the
2698 details. I would be delighted to look at anything you
2699 drafted and to respond to it.

2700 Mr. {Stearns.} So you think that we should take the
2701 Regulatory Flexibility Act of 1980 and update it in Congress?

2702 Mr. {Adler.} Actually, I am probably a bigger fan of
2703 the Regulatory Flexibility Act than some folks here. As I
2704 read it, I think it is a fairly useful tool, especially in
2705 terms of what we do when we are trying to regulate and we are
2706 looking particularly at the impact on small business. That
2707 is actually something that both Commissioner Northup and I
2708 agree on is that we do have to worry about the impact on
2709 small business.

2710 Mr. {Stearns.} Commissioner Northup?

2711 Ms. {Northup.} Yes, but unfortunately, it has no teeth
2712 in it. No matter what the regulatory analysis is, if you
2713 decide in our agency that you should go ahead and regulate,
2714 it almost has no impact on what we do. So unless we are
2715 required to justify the cost with the benefit, adding that to
2716 it, I think that would be an important improvement, but other
2717 than that, it is a box we check and it doesn't have an
2718 effect.

2719 Mr. {Stearns.} Just for your information, I checked the
2720 Consumer Product Safety Improvement Act. Everybody in
2721 Congress voted for it under the Bush Administration except
2722 one, and that was Ron Paul. So you probably would have been
2723 like most--

2724 Ms. {Northup.} I am sure I would have, and, you know,
2725 like I said, when I first read it before my confirmation, I
2726 was really very excited about it.

2727 Mr. {Stearns.} Commissioner McDowell?

2728 Mr. {McDowell.} I think statutory action is the best
2729 way to sort of cut through this Gordian knot of regulation
2730 and statutory provisions that have built up over the years
2731 and so I would be happy to work with you on something like
2732 that.

2733 Mr. {Stearns.} Mr. Wellinghoff, Commissioner, Chairman?

2734 Mr. {Wellinghoff.} Yes, Chairman Stearns. As I
2735 indicated to Congressman Barton, I don't have any specific
2736 recommendation for you. However, certainly anything that the
2737 committee decided to draft, we would be happy to work with
2738 you in any way.

2739 Mr. {Stearns.} Commissioner Moeller?

2740 Mr. {Moeller.} Mr. Chairman, I generally think a
2741 government of both legislative and regulatory bodies should
2742 periodically review legislation and regulations, so if that

2743 is in order, I would certainly endorse that. And as our
2744 chairman said, I had a specific example about hydropower re-
2745 licensing that I would be happy to provide to you. It would
2746 be quite complicated, given the number of federal laws
2747 involved, but any help that we can provide, we would be happy
2748 to do so.

2749 Mr. {Stearns.} Chairman Leibowitz?

2750 Mr. {Leibowitz.} I am also happy to work with you,
2751 although as my colleague, Commissioner Kovacic, pointed out,
2752 I think only four rules that we have actually are within reg
2753 flex but we do do, you know, reg reviews and rule reviews.
2754 In fact, we are in the middle of 23 of them now, so I will
2755 defer to my colleague, Mr. Kovacic.

2756 Mr. {Kovacic.} Mr. Chairman, if I could just underscore
2757 a couple of themes that have come up already today. One, the
2758 enormous value of having committees and the Congress all
2759 assess before the fact the likely impact in regulation
2760 writing of legislation adopted. Second, the custom you are
2761 developing in this hearing of making a regular question for
2762 all of us how much are you spending in each budget cycle to
2763 look at evaluation and the assessment of effects, not just to
2764 measure accomplishment by activity itself but looking at
2765 actual impacts and ask us how much are you setting aside in
2766 each budget cycle to do this. And last, we do an enormous

2767 amount of work as advocates for competition and better
2768 consumer protection techniques before the government
2769 agencies, before our State governments, and this perhaps
2770 provides specific suggestions that we would be happy to share
2771 with you about how adjustments in national and State
2772 legislation could improve productivity and improve economic
2773 performance.

2774 Mr. {Stearns.} I am going to yield to the ranking
2775 member, but I think each of you have indicated you will help
2776 us. You are saying something should be done. So I am going
2777 to presuppose that all of you will submit to us some
2778 specifics that we could incorporate and still working as the
2779 Energy and Commerce Committee towards this.

2780 The gentlelady from Colorado.

2781 Ms. {DeGette.} Thank you, Mr. Chairman, and I agree. I
2782 had asked them for that information earlier, and I really
2783 look forward to working with all of you because as we all
2784 said, you know--no, actually it was one of you who said the
2785 devil is in the details of these regulations. You can say we
2786 are all for regulatory reform. We also probably need to
2787 streamline some of the statutes because a lot of the
2788 regulations flow from the statutes and so I think we need to
2789 look at all of those.

2790 I have been sitting up here thinking about this lead

2791 standard with the CPSIA. I was on the conference committee
2792 with Chairman Barton and others, and Mr. Chairman, you are
2793 exactly right. There was only one no vote on that bill in
2794 the House, and Chairman Barton and Ranking Member Waxman and
2795 a bunch of us, and even the other body sat around for a long
2796 time trying to figure out what to do with this lead standard.
2797 I remember it so clearly, and when we drafted the new lead
2798 standards, what we decided was, was that determining total
2799 lead content was preferable to risk assessment because what
2800 happened with risk assessment is, it was dependent on a
2801 product-by-product determination which you couldn't do
2802 because of the large number of children's products in the
2803 marketplace, and so in addition, although with most chemicals
2804 a traditional risk-based model can work, if you have
2805 persistent bioaccumulative toxins like lead, science has
2806 demonstrated that traditional models are inappropriate and
2807 exposures inevitable, and we spent a lot of time in that
2808 conference committee talking about what we do about bikes and
2809 ATVs and things like that. So it is not like Congress never
2810 talked about these things.

2811 I think what we need to do now that we have passed this-
2812 -and it wasn't one of these provisions slipped in in the
2813 middle of the night either. We really, really hammered this
2814 out on a bipartisan, bicameral basis. So now I think what we

2815 need to do, given the experience that the CPSC has had in
2816 trying to draft the regulations, is sit down and figure out
2817 what about that new lead standard might work, what might not
2818 work, and this is what led to this effort by then-Chairman
2819 Waxman last year to develop this legislation everybody has
2820 been talking about. The staff undertook a consultative
2821 shareholder process with small business and others to try to
2822 figure out what we do about the ATVs, the bicycles, the tee
2823 shirts with the blue ink and things like that. He did
2824 release a consensus discussion draft of a document to try to
2825 figure out how to address these concerns because we need to
2826 do it but unfortunately your side of the aisle, Mr. Chairman,
2827 rejected that.

2828 And so we can sit down and talk about it. We did do
2829 that. We did that when the Republicans were in the majority
2830 in the Congress and when we had President Bush in the White
2831 House, but we can't devolve to the stage where we say okay,
2832 we are the majority, we are just going to do it our way and
2833 to heck with you, and vice versa. We really need to work
2834 together on how to make this work for small businesses and
2835 most importantly for consumers. So as someone who has
2836 fortunately or unfortunately been in those trenches,
2837 sometimes these regulations actually came from scientific
2838 basis and it is going to take some really hard work to fix

2839 it. I think every witness here would agree with that on some
2840 of these harder regulations that might be more burdensome.

2841 And just one last thing, Mr. Chairman. Ms. Christensen
2842 was asking a question about Chairman Genachowski's efforts to
2843 eliminate outdated and unnecessary regulations at the FCC,
2844 and he had sent a letter to the subcommittee, to you and to
2845 me, outlining the efforts which noted that they eliminated 50
2846 outdated regulations and identified 25 sets of data
2847 collection that are no longer necessary. So Mr. Chairman, I
2848 would like to ask unanimous consent to put that letter into
2849 the record.

2850 Mr. {Stearns.} Will the gentlelady let us take a few
2851 moments to review it?

2852 Ms. {DeGette.} Yes.

2853 Mr. {Stearns.} What is the date of this? I don't see
2854 the date on this.

2855 Ms. {DeGette.} Today.

2856 Mr. {Stearns.} Oh, it is today's date? Okay. I would
2857 say at this point there is some concern that is really
2858 perhaps some of it is applicable but there is others that is
2859 concern on this committee we talked about earlier, the fact
2860 that Chairman Genachowski was invited as chairman to come up.
2861 He said he could not come, and so it is customary if he
2862 doesn't come, we do not respectfully take his statement and

2863 make it part of the record since he didn't show, and we are a
2864 little concerned that this might in fact be part and parcel
2865 of his opening statement. So I think at this--

2866 Ms. {DeGette.} Mr. Chairman, I would just point out, it
2867 is not an opening statement, it is a letter to us, and we
2868 generally--

2869 Mr. {Stearns.} I think the staff is interpreting it as
2870 an opening statement and so I am just saying at this point we
2871 are not able to rule in favor of that and so I think we are
2872 just going to hold off and not put it part of the record.

2873 At any rate, I will close by saying that civilizations
2874 rise and fall because of burdensome regulation. It is in
2875 your hands, you people, to do as much as you can to make the
2876 small businessperson succeed so that we can have innovation
2877 in this country.

2878 I thank you for your time, and the subcommittee is
2879 adjourned.

2880 [Whereupon, at 1:07 p.m., the Subcommittee was
2881 adjourned.]