S. Hrg. 104–372

S. 219—REGULATORY TRANSITION ACT OF 1995

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

S. 219

TO ENSURE ECONOMY AND EFFICIENCY OF FEDERAL GOVERNMENT OPERATIONS BY ESTABLISHING A MORATORIUM ON REGULATORY RULEMAKING ACTIONS, AND FOR OTHER PURPOSES

FEBRUARY 22, 1995

Printed for the use of the Committee on Governmental Affairs

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S. 219–REGULATORY TRANSITION ACT OF 1995

WEDNESDAY, FEBRUARY 22, 1995

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in room SD–342, Dirksen Senate Office Building, Hon. William V. Roth, Jr., Chairman of the Committee, presiding.

Present: Senators Roth, Glenn, Levin, and Lieberman.

OPENING STATEMENT OF CHAIRMAN ROTH

Chairman ROTH. The Committee will please be in order.

Today, at the request of the minority, we are holding a hearing on S. 219, the Regulatory Transition Act of 1995. Senator Nickles, the prime sponsor of S. 219, has modified the bill to address some of the concerns raised about it and the House counterpart, H.R. 450. Major modifications include limiting the scope of the legislation to significant rules, as defined in the President's Executive Order 12866, as well as increasing the President's authority to make exceptions to the moratorium and providing some limitation on judicial review.

I want to express my appreciation to the witnesses for making themselves available today, and I would ask that each witness limit his or her oral testimony to 7 minutes. The written statement of each witness will be included in the record, and the warning light will go on when one minute remains.

Senator Glenn?

OPENING STATEMENT OF SENATOR GLENN

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

As you have indicated, we did request this hearing. We were going to markup without what I thought was adequate hearing, and I appreciate very much your calling this hearing this morning, because I think this regulatory moratorium legislation has very significant consequences for the Federal Government and for the American people.

At our first regulatory reform hearing, on February 7, I expressed sympathy for many of the reform goals mentioned by Senator Nickles, the sponsor of S. 219. Federal regulations are often promulgated with inadequate attention to their costs, and too few appear ever to be reviewed once they have been implemented.

As it came out at our hearing that day, much of the fault lies right here in Congress in the laws we pass and some of the statutory requirements we put on. I hadn't heard that case put forward

quite as well and as strenuously as it was at that particular hearing. It indicates that maybe the fault isn't quite as much over in OMB and OIRA and some of the agencies, as most of us had thought.

It also stressed that what we are trying to deal with in these rules and regulations is basically common sense, more than anything else, just plain old common sense that people don't go off and write rules and regulations in a way that was never intended here on the Hill.

When we come to putting a complete moratorium on rules as a way of solving this, I just don't think that is the way you do it. I have to draw the line on that one. Stopping the regulatory process is neither a substitute for reform nor an aid to such reform, and I believe it will only add to gridlock. I think it will employ more lawyers.

I think it will harm the public when important rules are held up, and this will further damage the government's reputation in the eyes of the public. I don't think it will make things better. The people want a government that works better. They don't want a government that does nothing at all, and that is basically what this legislation would say that we should do.

I think there are many unintended results of this legislation that can happen, and let me just give one example. I think, probably, most people here saw in the paper a few days ago in the *Washington Post,* "Bird Hunters Face Loss of Their Season". This is one example, out of the *Washington Post,* on the 17th. "Unintended results seen in regulation moratorium."

Who would ever think that the duck hunters would have a problem if we would go into a moratorium, and yet, I believe the paper says it is a $3.6 billion a year industry and 43,000 jobs depend on it. Because you have to put these regulations out every year after consultation with the States, there won't be regulations this year if we go through with a moratorium. So that is one thing that gets wiped out. That is just one little example.

Another one is subsistence hunting in Alaska, where the Eskimos, Native Alaskans, and others have subsistence hunting there. That has been held to be their right, but it is done with regulations. There will be no regulations now, so they won't be able to do that. I hope Senator Stevens shows up in a little bit. I know he will have a few words to say about that; I would be surprised if he didn't.

There is another one. A moratorium, it says, would short-circuit regulations governing last month's experimental reintroduction of wolves in Idaho and Yellowstone National Park. Those rules allow the wolves to be shot by ranchers if they prey on livestock, but with a moratorium in place, Interior officials say, the wolves would enjoy the full protection of the Endangered Species Act. A rancher who shot a wolf would then be subject to a $100,000 fine and a one-year jail term.

These are just some of the examples of things. These I bring up just to show how their unintended consequences. And that doesn't even cover things that we will have testimony later on today about, which are much more important, where human life is involved if some regulations are not permitted to go into effect.

I know the administration has set a goal of having their review of regulations done by the 1st of June. I hope that that can be done. I think the President made a statement about that, and I am sure Ms. Katzen will have some comment on that in her testimony, in having the regulation review and the recommendations for changes.

A moratorium itself doesn't change anything. If we just stop everything, then it requires regulatory review legislation later on. What if we don't get the regulatory review legislation? We just stop things for a year, and still no regulatory review legislation, I think it is very fortunate that the administration, the President, has gone ahead with an Executive Order a year ago, so that whole process is underway right now.

As the President also said yesterday, I think some of the proponents of S. 219 are trying to get by moratorium what they could not get by amendment or changes when the laws were originally passed.

My view of it right now, at least, and I am open to having my mind changed on it, is that what we have set up is a moratorium and no regulatory review. If the intention of this legislation is to shut government down, this is a great bill. Outside of that, I guess, I like it all right, outside of that.

I agree with the intention of going back and checking all the rules and regulations. I think that is good. We need that; there is no doubt about that. But doing it this way, with such a sledgehammer approach, I think, is just flat wrong. I think it is a misguided effort.

Thank you, Mr. Chairman.

Chairman ROTH. Senator Lieberman?

OPENING STATEMENT OF SENATOR LIEBERMAN

Senator LIEBERMAN. Mr. Chairman, I just walked in, but having heard just the last few sentences of Senator Glenn's comments, I think I should limit my opening remarks to, "Amen, Brother."

Obviously, none of us should have a response here of defending the regulatory status quo, because all of us know from our own experiences out in real life, outside of the beltway, when we go and visit our constituents, that the accumulation of regulation, most of it so well motivated when it started out here as legislation, not created out of the evil intention of Members of Congress but created in response to real problems that have been perceived, nonetheless, one goes from these responses to problems to legislation to regulation and then to enforcement, and the end product is often not reasonable. The cumulative effect is often quite burdensome on those who are regulated.

I think there is a broad bipartisan consensus to that effect, but to just say, "stop" endangers a lot of values and undercuts one of the fundamental roles of government, which is protection of the public from threats that they cannot protect themselves from.

We have to figure out a way to do this better, but the answer is not to stop doing it altogether. This would not be a very safe or happy society if we did that, and it is in that spirit that I want to begin this hearing.

I thank you, Mr. Chairman.

Chairman ROTH. Thank you, Senator Lieberman.

I think it is important that it be understood that the legislation before us does not stop all regulatory action. In fact, the new legislation is limited to significant rulemaking actions.

I would just point out that while there isn't a broad consensus at this stage as to exactly how to address the problem, there is a pretty broad consensus that there are bad regulations on the books.

I just point out that in the President's press conference yesterday, he, himself, admitted that there are good regulations, bad regulations, and in between regulations. He made the statement that it would stop the government from authorizing burials at Arlington Cemetery. I think if you looked at the new language before us, and one of the purposes of this hearing is to determine the adequacy of the modified language, it does not stop what are normally somewhat routine administrative actions, but it is limited, as I said, to those that are significant regulatory reforms.

As the President himself says, while there are good regulations, there are bad regulations. I think the question we want to ask the administration is how we address and deal with those bad regulations.

Senator GLENN. Mr. Chairman, could I respond just a moment? You mentioned the burials at Arlington. Let me talk about that for just one second, since you brought it up.

The rule would extend eligibility for internment at Arlington National Cemetery to any former P.O.W. who, while a P.O.W., served honorably in the active military, naval, or air service. They have been denied that before. This is not a routine administrative action. It was a brand new rule required. They are prohibited, by law, from going in there right now.

All former P.O.W.'s who die after the authorization, under a moratorium, would be denied eligibility. This would needlessly dishonor deserving veterans who died after the 1994 Authorization Act was implemented. The interim rule was published in November.

You say that is just a normal administrative action. It is prohibited, by law, to take that administrative action unless you make this change, so that is a good example.

Chairman ROTH. There is no question that, the point you made earlier, some of the laws need to be revised.

Senator GLENN. Absolutely.

Chairman ROTH. I think we share that concern. It was the hope of some of us that the President, like his predecessors, would have brought about an executive moratorium, because then he would have had the discretion and authority to avoid some of the pitfalls you are now raising.

But I think we are all in agreement, that whatever we do, whatever we finally enact, should not create the kind of problems that are raised by some of the anecdotes brought up by you, as well as others.

Senator Levin, would you like to make some opening remarks?

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Mr. Chairman, let me be very brief.

I think this bill has some massive problems, substantive, practical, theoretical, procedural. It is going to tie up huge amounts of time and resources which could be better placed in working on substantive and lasting regulatory reform. We are going to see our agency personnel tied up in knots for the length of this moratorium, trying to figure out what its meaning is, answering litigation, trying to figure out ambiguous terms. I just think that it is not a common sense approach to regulatory reform.

We need regulatory reform. We have some significant regulatory reform bills before us. But I am afraid that, instead of addressing those regulatory reform bills over the next year, we are going to be tied up trying to figure out the meaning of this moratorium, instead.

It also, I think, will do damage to a host of industries and organizations who have played by the rules, who have followed the process, and, deservedly, expect some action on rules that they have been working on.

We have a fishing industry that, I believe, is waiting for rules to be promulgated. We have a textile industry that is waiting for rules to be promulgated, that they want. At least the way I read these rules, we have rules here that are needed by many industries in order that they can proceed in ways that are important to them.

We have the fishing industry in the Great Lakes that is trying to stop ballast from being dumped into the Great Lakes from foreign sources. It has created major problems for the Great Lakes, the so-called zebra mussel, which came in in ballast, dumped into the Great Lakes. We want to stop it. There is a pending rule which will prevent that from happening with other kinds of so-called exotic species. If you put a moratorium on that, you are doing significant damage to the fishing industry in the Great Lakes.

You have shrimpers down in Alabama, Mississippi, and Louisiana who are waiting for a rule that they, at least the way I read it, want, which will prevent foreign shrimpers from having a competitive advantage over them.

We have a textile industry that is trying to prevent the rules on textiles from being circumvented by so-called country-of-origin rules. We need those rules for our own industries.

So in the name of trying to reduce regulatory burdens, we have this moratorium, which may sound good because it sounds like it is slowing down or it is anti-regulation. But it has some very negative effects on our economy, not just on the environment. That is another whole area. I am talking about our economy, the businesses that have waited and worked very hard to get rules passed which will assist them.

Mr. Chairman, again, I really hope that we will take the time to analyze this, that we will not rush to a markup and rush a bill to the floor which can have the kind of unintended consequences that I am afraid this legislation will have.

Chairman ROTH. Thank you, Senator Levin.

With that, let me welcome and thank you for being here today, the three witnesses representing the administration. Ms. Katzen, we appreciate your being here, and I would ask you to begin.

TESTIMONY OF SALLY KATZEN, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Ms. KATZEN. Thank you very much, Mr. Chairman, Members of the Committee.

I am Sally Katzen, the Administrator of the Office of Information and Regulatory Affairs at OMB. I appreciate the opportunity to discuss with you S. 219, the Regulatory Transition Act of 1995.

Two weeks ago, on February 7, at the request of the ranking member, Senator Glenn, I submitted a statement for the record on S. 219. That statement tracked the testimony I had given in the House on H.R. 450, which was virtually the same as S. 219, as originally introduced.

Since then, H.R. 450 has been marked up and reported out of government Reform and Oversight and will be coming to the House floor tomorrow.

The President spoke yesterday about the regulatory system and he talked specifically about the moratorium proposal. He said it was unacceptable. He expressed his commitment to regulatory reform and he outlined a series of specific actions that he was directing agency officials to take to bring back common sense and to reduce the hassle of regulation.

There are too many regulations. Some are too costly, too invasive, and some are simply outdated. But the solution is to look at those regulations and the statutes that produced them. A moratorium, he said, is not reform. It is rigor mortis.

As the Chairman mentioned, he also said it would stop all regulations. It would stop good regulations, bad regulations, in between regulations, all regulations.

I would like to use my limited time in oral testimony to follow up on several of the points that the President made yesterday, recognizing that, yesterday afternoon, along with your invitation to testify, I received what I understand is a staff draft of proposed revisions to S. 219 that the Chairman mentioned in his opening statement, which incorporates some changes that are responsive to some of the issues that we had identified in our earlier testimony.

First, it is important, as all of you have recognized, to acknowledge that not all regulations are bad, nor are they all good. In fact, a regulation is not inherently good or bad. It depends on how it is chosen, how it is written, and, as Senator Lieberman was mentioning, how it is enforced. Those are all part of the puzzle.

President Clinton cited yesterday his Executive Order No. 12866, which is built on two basic premises. First, the government has the responsibility to govern, including the responsibility to protect the public, through regulation, when the American people, acting in accordance with their constitutional processes, decides that it should. That is what regulation does. It implements Congressional intent.

Second, the government has the responsibility to govern wisely and carefully, regulating only when necessary, no more than needed, and only in the most cost-effective manner.

Without revisiting the past, what happened before our watch, I can say that I am proud of what this administration has been doing to begin to reform the regulatory system, but we recognize that a lot more needs to be done. We have indicated our interest

in working with the Congress to craft legislation that would improve the regulatory system. We want to move forward.

Regrettably, S. 219 does not move us forward in correcting the underlying problems. Each of you have said, there are bad regulations on the books. S. 219 will not touch one of those regulations. It will not help find them, it will not help analyze them, and it will not help eliminate them. It would substitute an arbitrary administrative process for substantive improvements. Moreover, it creates a number of traps that will only divert us from the more important work that we both want to accomplish.

The first general issue that we have discussed is coverage. Which regulations would be trapped in the moratorium? Though the staff draft limits coverage to significant regulatory action, it is still a large set, nearly 900 rules a year, under the OMB definition of that term.

And, questions will still arise about the exceptions written into the text. Does international affairs include Department of Commerce rules affecting domestic manufacturers who export products? Does public property include public lands administered by the Departments of Agriculture and Interior? Is a regulation establishing auditing procedures for tracking Federal funds an action related to grants or loans? And, does the exclusion for contracts include all procurement-related regulation?

Consider, also, the exception process. The agency head must petition, in writing, the President of the United States and send copies to the Congress, and the President must make a written finding that a waiver is appropriate under the terms of the bill, one of which is an imminent threat to human health and safety. How imminent is imminent? What are the other emergencies that are included here?

But in any event, in addition to elevating these issues to the Presidential level, the bill calls for various inventories and reports and reports and reports. This is all paperwork. This Committee, more than any other, has demonstrated its commitment to reduce paperwork, not just to save trees, but to focus our resources on what needs to be done instead of writing about it.

Part of the coverage issue is also the duration, starting well over 3 months ago, on November 9, 1994, and possibly extending until December 31, 1995, one-half of the time left until the next election, a long time.

And consider the retroactivity. The moratorium is to begin on November 9, the only significance of which is that it is the day after the last election, not even the day that the newly-elected Congressmen were sworn in. And, indeed, their predecessors reconvened and passed legislation approving the GATT treaty during the moratorium period.

How will the retroactivity work? According to the text here, for final rules, they will be suspended 30 days after enactment of this bill, which is sometime in the future. So for a final rule, it will already be in effect. Then it will be suspended, and the moratorium period will end and it will be reinstituted. I think that is going to introduce a fair amount of confusion, uncertainty, and chaos.

It also can create unfairness. Senator Levin was mentioning those who play by the rules. Some will have invested, will have

taken steps to comply. Then their competitors will be at an advantage. That is hardly the right signal to send the American people. It is better not to play by the rules.

There may even be situations where what was done cannot be undone. Senator Glenn mentioned the wolves, and he was commenting on the status of a rancher who may have shot a wolf during the moratorium period. What about the wolves themselves? They are, for better or worse, they have been released. This is in all the newspapers. Are we now to try to, during the suspension period, recapture them and put them back in their pens, keep them there until December 31? Some things, once done, cannot be undone.

My time is expiring, I see, but I wanted to emphasize that a moratorium is a distraction. It is a detour. We believe the regulatory system should be improved and we are committed to that objective. We have been working to that end on our own and we want to work with you. We want to spend the next few weeks, few months, working together to find the bad regulations and eliminate them and to improve new regulations, not to argue about what is in or out of a moratorium.

I would hope that our shared goal can be to focus on the underlying issues and join forces to bring the American people a regulatory system that improves the quality of life, promotes our health and safety, and protects the environment without undue costs, without undue burden, without undue hassle.

Thank you, Mr. Chairman. I would be happy to answer any questions you may have.

[The prepared statement of Ms. Katzen follows:]

PREPARED STATEMENT OF SALLY KATZEN

Mr. Chairman and Members of this Committee—I am Sally Katzen, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, and I appreciate your request to submit a statement for the record regarding S. 219, the "Regulatory Transition Act of 1995." The stated purpose of the bill is to establish a moratorium on new rulemaking to promote "the efficiency and proper management of government operations." Improving the nation's regulatory system is a subject about which this administration cares very much and on which I look forward to working with you cooperatively.

Before focusing on any specific legislative proposals, I would like to comment on a word that is being used a lot, but that means different things to different people. The word is "regulation." Some say regulations are all bad; some say they are all good. In fact, regulations are not *inherently* good or bad. They have the potential to be either. Well chosen and carefully crafted, they can protect consumers from dangerous products, assure equal access to markets, limit pollution, govern operation of our prisons, control immigration, provide uniform interpretations of customs and export/import laws, protect workers, and ensure that Americans have information to make informed choices. Excessive or poorly designed, however, they can cause confusion and delay, generate unreasonable compliance costs, retard innovation, reduce productivity, or distort private incentives.

Some regulations carry out legislative policies adopted by previous Congresses and signed by Presidents from both parties. Several of these policies were or are controversial, and they can and should be debated on their merits, not retarded or advanced through the guise of procedural requirements. Equally important is the fact that, in other cases, regulations are routine, administrative or ministerial, and noncontroversial. These regulations unobtrusively serve the public day in and day out, and are seldom included in what most people mean when they argue about the value of regulations. Examples include rules that establish: traffic lanes for airplanes; opening and closing times for drawbridges; reporting requirements to help trace money laundering from the drug trade; eligibility and timing requirements—as well as financial accountability practices—for small business and other loan pro-

grams; safe practices at nuclear power plants; and quarantine areas to prevent the spread of pests such as the medfly.

Regrettably, the regulatory system that has been built up over the past five decades—under both Republican and Democratic administrations—is subject to serious criticism. This administration has stated (well before the election—indeed, since its inception) that there are too many regulations, that many are excessively burdensome, that many do not ultimately provide the intended benefits, and that, consequently, many members of the public are justifiably frustrated and angry with the federal regulatory system. It was for this reason that one of the first executive orders that this President signed was Executive Order No. 12866, "Regulatory Planning and Review," which declared at the outset that the American people deserve a system that works for them, not against them.

The administration's regulatory philosophy and principles that are set forth in the Order are built upon two basic premises. First, the government has the basic responsibility to govern, including the responsibility to protect the public, through Federal regulation, where the American people—through our Constitutional representative process—decide that it should. Second, the government has the basic responsibility to govern wisely and carefully, regulating only when necessary and only in the most cost-effective manner, with full recognition of the proper role of State, local, and tribal governments.

To implement this philosophy, the Order sets forth principles emphasizing the importance of private markets; the critical role of analysis (of costs, benefits, and risks) and the use of that analysis for decisionmaking; consideration of alternatives; extensive consultation with those affected by regulation; and better consideration for the needs of small businesses and the role of State, local, and tribal governments.

In the year and a half since the Order was signed, we have made a lot of progress. We have opened the rulemaking process and increased its accessibility to the public; for example, agencies are making greater efforts, early in the rulemaking process, to seek comment from those affected by regulation. We have increased cooperation and coordination among the Federal agencies, between the Congress and the Executive Branch, and between the Federal Government and State, local, and tribal governments, businesses, and individuals. And we have seen good processes produce good decisions, both in improving new regulations and in looking back at existing regulations that may have outlived their usefulness or never operated as expected.

For example, the Department of Transportation's National Highway Traffic Safety Administration rulemaking on side-impact protection for light trucks was accompanied by a first-rate regulatory analysis that led the agency to delete a significant, expensive component of the proposed rule. In designing its rules under the Mammography Quality Standards Act, the Food and Drug Administration made the standards less burdensome on mammography facilities, which are nearly all small businesses, by incorporating existing industry standards to the maximum extent possible. The Coast Guard, in promulgating rules to alert crews about the likelihood of unanticipated oil spills, proposed allowing the use of lower cost signalling devices (*i.e.*, overfill stick gauges) rather than more costly and sophisticated alarm systems.

One of the best examples of a review of existing regulatory programs is the work currently being done by the Department of Commerce's Bureau of Export Administration to rewrite the Export Administration Regulations (EAR). This comprehensive review is intended to simplify and clarify this lengthy and complex body of regulations that establishes licensing regimes for dual-use products—i.e., those that may have both commercial and military applications—and to make the regulations more user-friendly, which they currently are not. This effort will fundamentally change the EAR by reversing the regulatory presumption—from requiring a license unless specifically exempted to authorizing export without a license unless specifically provided otherwise.

While we have done much to improve the regulatory system, there is much more that needs to be done. That is what we are talking about when we say that there is common ground and that there is a lot—both particular regulatory programs as well as regulatory methods—that we need to address. In the administration's view, S. 219 does not do this. To the contrary, a regulatory moratorium will contribute to the very problem that we are all trying to fix—overly complex administrative systems, gridlock, and endless debate on process instead of substance. In fact, the concept of a moratorium suffers from some of the same problems that often plague regulations, and, for that matter, legislation—its intentions, even if laudable, are lost in the administrative nightmare of implementation and the unintended consequences that no one in this room would want to impose on the American public.

Let me be more specific. S. 219 does not purport to place a moratorium on all regulation. It acknowledges that in certain cases regulation is necessary for the Federal Government to be able to meet its responsibilities, and in other instances it reflects

a judgment that some regulations are particularly beneficial or otherwise desirable. For example, the legislation—by its terms—excludes from the moratorium activities related to: military or foreign affairs; agency management, personnel, or public property; loans; grants; benefits; contracts; granting licenses; registrations; permitting new or improved applications of technology; and, in general, activities to streamline or narrow rules, including those that provide tax relief authorized by statute. In addition, the bill establishes an emergency exception process for activities associated with an imminent threat to health or safety or other emergency, or necessary for the enforcement of criminal laws.

This framework creates a net through which certain regulations pass and in which others are caught. However, people may disagree about whether these are the right criteria and even if they are, how do they apply in particular cases. Does "foreign affairs" include Department of Commerce rules affecting domestic manufacturers who export products? Does "public property" include public lands administered by the Departments of Agriculture and Interior? Is regulation establishing auditing procedures for tracking federal funds an action related to "grants" or "loans"? Does the exclusion for "contracts" include procurement related regulation? What exactly is "new and improved" technology (since virtually all inventors believe their inventions are new and improved)? Is a proposed regulation, 75 percent of which streamlines an existing body of rules but 25 percent of which strengthens existing requirements, subject to the moratorium? Is the 75 percent exempt, but the 25 percent caught? What if the two are viewed as a package that together provides a net reduction of 15 percent of the burden? If a rule does not fall into one of the exemption categories but is based on a rigorous cost benefit analysis and the quantified benefits clearly outweigh the quantified costs, is it to be caught in the moratorium?

The agency head will have to answer questions like these, and many others. If he or she concludes that a rule falls within one of the exclusion categories enumerated in Section 6(3)(B), the bill provides that the agency head is to certify that the moratorium is waived and to publish that finding and the waiver in the *Federal Register*. Such an action would presumably trigger the provisions of Section 7, Civil Action, which permit anyone "adversely affected" to seek relief in a civil action against the agency, thus involving the courts in the micro-detail of administering the moratorium. In other words, even where we believe the bill does not apply, the issue will not be resolved until any judicial proceeding is concluded.

The bill also provides for emergency exceptions (Section 5). Where there is an imminent threat to health or safety or other emergency, or activities necessary for the enforcement of criminal laws, the agency head must submit a written request to the President, with copies to the appropriate committees of Congress, and the President must issue an Executive Order to waive the requirements of the moratorium for that rule (Section 5(a)). This is paperwork run wild. Each year, hundreds of airworthiness directives are issued by the Federal Aviation Administration, as well as other air safety rules, such as the recent actions regarding icing on commuter planes. The Animal Plant Health Inspection Service issues scores of rules to quarantine certain regions to prevent the spread of pests that would affect our food supply. These are just two examples of the many frequent and routine regulations issued by agencies to protect public health and safety. Is the President to issue an Executive Order waiving the moratorium for each of them?

In addition, is the scope of the emergency procedure clear? Exactly how imminent is "imminent," regarding health and safety regulations? What constitutes "other emergencies"? Are emergencies that we estimate are 4 or 5 weeks distant included? Emergencies that are 4 or 5 months distant? The proposed bill would inappropriately elevate these questions to the Presidential level, creating more—rather than less—inefficiency and delay.

Furthermore, here, as above, the bill provides that the President's decision can be second-guessed by the courts, since anyone who is "adversely affected" can bring a civil action. Now, we will have all three branches micromanaging all aspects of the government's operations—clearly a costly and time consuming step backwards from the call for less government, more efficient government, and more effective government.

In addition, the bill, as drafted, does not enumerate categories for waiver or exceptions that we believe should properly be included. For example, it appears that some regulations related to the tax code (*i.e.*, those not providing "relief") would be caught in the moratorium. Is this really what we want to do? I understand that those who work in this area have argued that whether or not there are regulations, the tax code exists and the function of tax regulations is to provide clarity (and consistent interpretation) for both individuals and businesses. They assert that not only do they want tax regulations to be issued, they want them issued expeditiously.

The moratorium would also catch notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking. With rare exceptions, these actions do not have a binding effect on anyone, but instead seek the involvement of all those affected by a regulation—soliciting information on how best to meet mandates established by statute or, in some cases, by judicial interpretations of statutory requirements. Will delaying these efforts for several months help regulatory reform? Or will such delay instead place more strain on the system by preventing the receipt, review, and analysis of information from those most affected by the proposed rule, including those in the best position to help the government devise more sensible, less costly, and more effective rules?

The retroactivity of the moratorium (Section 6(2))—starting nearly 3 months ago, on November 9, 1994—would also create significant administrative problems, tie up resources, and create confusion and inefficiency. In some cases, people will already have started complying with rules that were issued and/or became effective within the period between November 9th and the present. In some such cases, those who have made an effort to comply and invested resources to comply will find themselves at a competitive disadvantage with those who made no effort to comply. Moreover, in many instances, the questions associated with the moratorium will create uncertainty in the private sector, and the costs that result from the lack of certainty. Now everyone has to ask, "Are these regulations within the scope of the moratorium? Are they within one of the exceptions? Are they subject to Agency Head/Presidential Review because they implicate health, safety, or another emergency? Who will provide clarification of the situation? And when will that occur?"

There may even be situations where what was done pursuant to a validly issued regulation cannot now be undone without inordinate expenses or adverse consequences. There has been substantial press coverage concerning the gray wolves captured in Canada and reintroduced in the wilds of Idaho. Whether or not you agree with the decision, the wolves have now been let loose. Are we to recapture them and, if successful, keep them in holding pens until June 30? Consider also the position of individuals who made year-end decisions based on tax regulations issued after November 9th. If these regulations are suspended, how are these individuals' 1994 income taxes to be calculated? And, once again, the prospect for civil litigation means that any answer will be subject to judicial review, and the absence of certainty will plague both proponents and opponents of any particular federal action.

The provisions of Section 4—waiving regulatory, statutory, and judicial deadlines—may also add to the confusion. First, waiving judicial deadlines between date of enactment and June 30th will require further administrative and legal action, again tying up resources. Second, extending deadlines that have passed by the date of enactment would create confusion in the cases where legal or judicial action has already started regarding those deadlines.

My point is that the bill raises numerous questions, some raised above and others not yet thought of, on which reasonable persons will differ. Both legislative branch and executive branch staffs will spend much of the moratorium debating what is covered and what is not, what was intended to be covered and what was not within the intent of Congress, and what should be covered and what should not. The people who will be caught up in these debates are the same officials who would otherwise spend their time working on substantive solutions to the real problems with the regulatory system. The moratorium; therefore, instead of ensuring "economy and efficiency of Federal Government operations" will generate litigation, more bureaucracy, and, in the meantime, delay the work necessary to actually change the system for the better.

Regulatory reform is underway. But it will not happen overnight, and will not be completed during the next several months. A moratorium only puts off dealing with significant issues, both in the regulatory process and in particular regulatory programs. As I noted in my response to Senator Dole, Representative Gingrich, and others regarding this issue, a moratorium is a blunderbuss approach that delays rules based on necessarily arbitrary categories rather than based on their merits. During the next few weeks and months, we should be working together to improve current regulations and the regulatory process, not arguing about what should be or should have been exempted from a moratorium. A moratorium is merely more procedure and more bureaucratic administration, diverting our collective time and energy from the difficult tasks ahead. It makes more sense to focus on the substantive sources of that frustration and try to reduce them than it does to devote our resources to the artificial promise of a moratorium, creating in effect yet another program to administer.

I am concerned that my statement raises questions emphasizing where we disagree, rather than showing where there is agreement. As I stated at the outset, we believe the regulatory system should be improved. We have been working to that

end on our own and we want to work with you. S. 219, however, is a distraction and detour from where we ought to be going. I would hope that we can join forces to bring the American people a rational regulatory system that improves the quality of life, promotes our health and safety, and protects the environment without imposing undue costs or burdens. We are committed to that objective and we hope you will join us in working towards those goals.

Thank you again for the opportunity to comment on these issues.

Chairman ROTH. Thank you, Ms. Katzen. We will have the entire panel speak first, and then ask questions.

I call next on Stephen Kaplan, who is General Counsel of the Department of Transportation.

TESTIMONY OF STEPHEN H. KAPLAN, GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION

Mr. KAPLAN. Thank you, Mr. Chairman. Good morning, members.

My name is Stephen Kaplan and I am General Counsel of the Department of Transportation, the department which, by the way, is responsible for approximately 20 percent of all Federal regulations. Therefore, we are pleased to be able to be here today to share with you some of our concerns about S. 219, a bill which, however well intended, we believe will create significant problems which may not be fully appreciated by the Congress.

We take our rulemaking responsibilities very seriously at the Department of Transportation. We were the first Federal agency to use negotiated rulemaking, reaching a consensus with the affected interests. We use advance notices, advisory committees, and public meetings in and out of Washington on a regular basis. We use evening hearings. We are implementing an electronic docket so that those outside of Washington can communicate with us on a regular basis.

We take many actions not mandated, on a process basis, by statute or Executive Order. For example, we do economic analyses on virtually every rule, whether they are of major impact or not.

At the same time, we recognize, also, that there is room for improvement. At DOT, under the leadership of the President and Secretary Pena, we have placed an emphasis on performance and partnership. Our regulatory goals are compliance and results. I can assure you, having sat through many, many meetings on rulemaking issues, that although the decisions are difficult, our process is fair and thorough.

One reason that the decisions are often so difficult is that the statutory mandates directing our actions are either highly prescriptive, or, with all due respect, sometimes vague and confusing.

We would like to work with you to identify ways to further improve the quality of our rulemaking, to identify those particular rules which are not viewed as useful or helpful.

To that end, by the way, I should advise you that the Federal Aviation Administration is in the midst of a look-back process in which it has asked industry to identify its top three problem rules. We received hundreds of comments on that, and those are being reviewed now.

The Federal Highway Administration, approximately every 2 to 3 years, does an evaluation of those rules previously promulgated

to, in fact, see whether they are working as intended and whether the costs are as predicted.

We know that well-crafted regulations can have a positive impact on a number of problems. We also know that many of our regulated industries are asking for or appreciate the need for certain rules. Let me share with you some examples.

In certain cases, we believe that rules protect and increase consumer confidence. For example, as a result of a recent series of accidents, ridership on commuter airlines fell precipitously. In response to these accidents, Secretary Pena directed an intensive effort to develop proposed rules on an expedited basis which calls for their publication on March 24, 1995. S. 219 would prevent or make it more difficult for DOT to issue such safety standards.

Without Federal regulations, many regulated industries would be subject to multiple, inconsistent State regulations that would otherwise be preempted.

There are other examples, which include harmonization with international standards, for which we have been requested to take action by industry, whether it is 3–M on hazardous materials transportation or automobile manufacturers on harmonization of brake standards.

Mr. Chairman, we know that there is a need to bring common sense into rulemaking, and Secretary Pena demonstrated that when he unilaterally decided that salad oil was not a hazardous material. We hear the American people saying, stop adopting unnecessary, burdensome, costly regulations, but we also hear the call for safer cars and planes, for oceans and rivers free from pollution spills, and for enhanced pipeline safety to prevent explosions.

As we serve the American people, we will be mindful of President Clinton's directives to listen and negotiate, to understand what people outside of Washington are saying, and we look forward to working with you. I will be more than happy to answer any questions.

[The prepared statement of Mr. Kaplan follows:]

PREPARED STATEMENT OF STEPHEN H. KAPLAN

My name is Stephen H. Kaplan, and I am the General Counsel of the Department of Transportation (DOT). I appreciate very much the opportunity to share with you our views on S. 219, a bill that would establish a moratorium on rulemaking actions. This bill would cause significant problems, many of which may not be fully appreciated by those supporting this legislation.

We at the Department of Transportation take our rulemaking responsibilities seriously and are proud of the job we do. We were the first federal agency to use the regulatory negotiation process to help us develop rules that were reached with the "consensus" of the affected interests. We use advance notices, advisory committees, and public meetings and hearings to get earlier and/or more effective public participation. We are in the process of creating an electronic docket that, among other things, will greatly ease public access to our docket and participation in our rulemaking.

We also require many actions of ourselves beyond those mandated by statute or executive order. For example, we do economic analyses of virtually every rule, not just those with major impacts. At the same time, we believe that there is room for improvement in our rulemaking process as well as the resulting rules. We recently participated in a small business forum sponsored by the Office of Management and Budget and the Small Business Administration in which we worked with other agencies and representatives of the small business community to identify improvements to make our rulemakings better for small businesses. As a result of this process, I recently wrote to each agency of the Department providing a list of steps to improve our ability to respond to the concerns of small businesses.

DOT's emphasis is on performance and partnership. Our regulatory goals are results and compliance. I can assure you—having personally sat through many meetings on a variety of rulemaking issues—that although the decisions are often very difficult, our process is fair and thorough. I must stress that one reason the decisions are often so difficult is that the statutes that mandate our rules leave us little discretion and, with all due respect, can be vague and confusing.

We would like to work with you to identify ways to further improve the quality of our rulemaking as well as the legislation on which it is based. But I strongly believe that imposing a moratorium, such as that suggested by S. 219, may cause damage to those it is intended to help, and will result in unnecessary and unintended injuries and loss of life.

We are an agency that primarily regulates safety and environmental matters. Together, the Congress and the Department of Transportation have taken steps to address those areas. No one wants to have another Exxon Valdez accident where 10.8 million barrels of oil were spilled into Prince William Sound. That is why Congress passed the Oil Pollution Act of 1990 mandating Federal rulemaking. Nor do we want another subway accident like the one in New York City in 1991 believed to be caused by a driver impaired by alcohol; that accident resulted in 5 deaths, 200 injuries and significant damage to rail cars and the structure of the station and track. These accidents were among the reasons Congress passed the Omnibus Transportation Employee Testing Act of 1991, mandating that DOT issue alcohol and drug testing rules. The moratorium would be a major set back for implementation of the drug and alcohol safety rules.

Well-crafted regulations can have a significant positive impact on problems such as those addressed by the Oil Pollution Act and the Testing Act. We recognize that if we are not careful, we can impose unnecessary burdens on regulated entities. This administration is committed to working closely with our regulated industries and the affected public. This led to our holding safety summits with a number of transportation industries such as rail, pipelines, and most recently aviation. We are forming partnerships with those affected by our rules to ensure that, when it is deemed necessary to issue rules, those rules are even better than they have been in the past.

Many of our regulated entities recognize the value of federal rules. For example:

- They help to increase consumer confidence. For example, as a result of a recent series of accidents, ridership fell on commuter airlines. In response to the accidents, Secretary Pena directed an intensive effort to develop proposed rules on an expedited basis; our schedule calls for their publication by March 24, 1995. S. 219 would prevent or make it more difficult for DOT to issue proposals or rules to increase safety standards for, and consumer confidence in, this industry.
- Without federal regulations, many regulated industries would be subject to multiple, inconsistent State regulations that would otherwise be preempted. For example, Congress has specifically provided for preemption of State and local requirements to ensure uniformity in hazardous materials transportation. Under S. 219 we could not issue such rules.
- Federal regulations can simplify matters for businesses and make it easier for them. One example involves an FRA proposed rule that we are about to issue, on the installation of grade crossing warning devices. Each State has a plan that establishes priorities for grade crossing installation. However, in the *Easterwood* case last year, the Supreme Court let stand a tort judgment against a railroad for failing to install a grade crossing at a location that was not even on the State priority list. Railroads try to comply with state priorities but in *Easterwood* the railroad was found negligent because there had been an earlier accident at the crossing involved. As a result, railroads are currently torn between the state program requirements and their need to limit their tort exposure. Our proposal would make railroad compliance with state programs mandatory. Not only would this assist safety, but it would ease the railroads burden and tort exposure. Under the moratorium, we could not issue a proposed or final rule.
- We also often must harmonize our standards with those of other countries. Overall uniformity is better, which is highly desired by industry, and for our international companies, this is a real cost savings. For example, 3M recently wrote to us supporting our proposal to align our hazardous materials regulations with international standards and authorize compliance on January 1, 1995, the effective date of the international standards, so that they would not have to comply with two sets of standards. We did so, but the moratorium would bar this.

- Many of our rules essentially establish "rules-of-the-road." Although these are not "routine administrative functions" (as that termed is used in Sec. 6(3)(B)(iii) of H.R. 450), they are needed by our regulated entities. For example, the Coast Guard may need to issue or adjust opening times for drawbridges, or establish special navigation rules to permit the America's Cup races. The FAA must issue rules about the use of airspace near airports. Some of the FAA airspace actions are issued in response to requests by the Department of Defense to create temporary zones free of civil aviation. These zones are needed so that DOD can conduct training exercises and other defense activities. S. 219 would prevent these actions.

Some of our rules achieve tremendous safety benefits at relatively low costs. For example, the National Highway Traffic Safety Administration estimates that just 1 year's delay in implementing a new vehicle standard concerning head impacts in vehicle interiors would result in a loss of 1,150–1,400 lives and in 680–820 injuries over 20 years. The cost for compliance would be $29–$49 per car and $45–$68 per light truck

The Senate bill does establish procedures for obtaining very limited exceptions "because of an imminent threat to health or safety or other emergency." However, these procedures are quite cumbersome and could result in serious harm. Even if the term "imminent threat" were greatly expanded to include the broad range of safety rules that we issue, these cumbersome procedures would still cause problems. For example, as a result of an accident, the FAA may identify a problem that needs to be remedied overnight by the issuance of an airworthiness directive. Indeed, they do not wait to publish some of these in the *Federal Register* before making them effective; they send them to affected persons by telegram or electronic means. Finally, the moratorium would bar us from working on rulemakings that would prevent deaths and injuries after the moratorium. This would considerably delay those rules and their resulting benefits.

Retroactive application of a moratorium simply creates more problems than it solves. To start requiring regulated parties to comply with a rule, stop requiring compliance for several months, then start requiring compliance again is too disruptive. It wastes resources, causes confusion, and results in lost safety, environmental, and other benefits. We do not need a retroactive moratorium to examine and, if need be change, recently-issued rules. President Clinton has committed the administration to reviewing existing rules, and this review will encompass rules effective since November of last year as well as older rules. This is the approach we should take to ensuring that only sensible rules remain in effect. Indiscriminately suspending all rules issued in the past is not sound policy.

However well-intended this legislation may be, the serious problems it will cause should be understood before it is rushed through the legislative process. We also believe that there are significant unknown and unintended consequences of this legislation which might well adversely affect the health and safety of the American people. At the speed at which the legislation has been moving, many of these problems will not even become evident until it is too late to correct them.

Secretary Pena has repeatedly stressed the need to bring common sense into rulemaking. We hear the American people saying stop adopting unnecessary, burdensome, costly regulations. We hear small businesses asking us to structure our rules to focus on performance standards, on negotiated outcomes, and to consider their special circumstances. We also hear the call for safer cars and planes, for oceans and rivers free from oil spills, and for enhanced pipeline safety to prevent explosions. As we serve the American people, we will be mindful of President Clinton's directives to listen and understand, and to negotiate, not dictate.

Thank you for the opportunity to testify today. I am ready to answer any questions you may have at this time.

Chairman ROTH. Thank you, Mr. Kaplan.

Mr. Schultz?

TESTIMONY OF WILLIAM B. SCHULTZ, DEPUTY COMMISSIONER FOR POLICY, FOOD AND DRUG ADMINISTRATION

Mr. SCHULTZ. Thank you, Mr. Chairman and Members of the Committee.

My name is William Schultz and I am Deputy Commissioner for Policy of the Food and Drug Administration. I appreciate the op-

portunity to testify about the impact of this very important legislation.

The FDA is charged with ensuring the safety and efficacy of a wide range of products, including drugs, blood and CAT scans, mushrooms, hair spray and seafood. I think the message that I want to give today is that regulations are essential to this agency to allow it to carry out its mission of protecting the public health. Let me give you two examples of regulations we have issued in the last 2 years.

In 1990, Congress made a policy decision that food sold in this country should have nutrition labeling, and that legislation was adopted unanimously in both the House and the Senate, signed by the President, and the regulations were issued 2 years ago. As a result, today, virtually every can of food you buy in the store, every package of processed food, has on it a labeling giving consumers information about fat, calories, and other nutritional information.

The legislation has wide consumer support and it is expected to contribute enormously to healthier diets and lower incidence of disease in the coming years, and yet, if this moratorium had been in place, the agency could not have issued those regulations.

Another example in a somewhat different category, a year ago, FDA investigators identified imported tissue that was inadequately screened for the HIV virus and hepatitis. This tissue posed a significant threat to patients awaiting bone, ligament, and other tissue transplants. The most effective way for us to deal with the problem was to issue regulations requiring that tissue be screened, and that was done, but there are real issues about whether it could have been done under this legislation.

S. 219 would prohibit the promulgation of similar regulations and would stop a number of important FDA initiatives that are planned for the coming year. I would like to use the rest of my testimony to just quickly give you five examples.

The first is iron toxicity. Iron pills, dietary supplements of iron, are the leading cause of poison-related deaths in infants and toddlers in this country. There are about 8,000 cases of accidental ingestion a year. The answer is not to ban iron supplements. The answer is labeling and a change in the packaging that will protect children. That regulation was worked out with the industry and with comments from consumer groups and the final regulation was published in December of 1994. Yet, that regulation could be withdrawn due to this bill.

The second example is seafood safety. There are recurrent outbreaks of seafood-related illness in this country and they have become a major concern. We have proposed regulations to ensure safe processing and importation. They are widely supported by consumers and industry. The rule would save thousands of illnesses a year, and yet would be blocked by S. 219.

The third example is mammography quality standards. A half-a-million women will die in the 1990s from breast cancer. In 1992, Congress directed us to issue regulations that would require certain standards for these exams. Those regulations would be in jeopardy.

The fourth example relates to lead in cans. American manufacturers have eliminated lead in cans in this country. Foreign manu-

facturers have not. This is an unnecessary risk to children. It is unfair to our companies, who have spent the money. We have regulations in place that would be blocked by S. 219.

The final example is bottled water standards. Bottled water ought to be at least as good and meet the same standards as the water that most of us get out of the tap. We issued final regulations in December. They are supported by industry. They would be blocked by S. 219.

In summary, if S. 219 is enacted, the Food and Drug Administration will be severely handicapped in responding to known risks that we are currently addressing and unforseen risks that we will inevitably learn about in the future.

I would be happy to answer any questions.

[The prepared statement of Mr. Schultz follows:]

PREPARED STATEMENT OF WILLIAM B. SCHULTZ

Mr. Chairman and Members of the Committees: I am William B. Schultz, Deputy Commissioner for Policy of the Food and Drug Administration. I appreciate the opportunity to discuss the impact of S. 219, the "Regulatory Transition Act of 1995," on the programs and activities of the Food and Drug Administration (FDA).

As the Members of the Committee are well aware, the FDA is a public health agency. The main statute that we are charged with implementing, the Federal Food, Drug and Cosmetic Act, is designed to ensure that products ranging from drugs, blood and CAT scans to mushrooms, hair spray and seafood, are safe, and in many cases effective. The products that we regulate account for 25 cents of every dollar that consumers in the United States spend. We do this job with fewer than 10,000 employees, and a budget of less than $1 billion per year.

As you know, FDA must often use rulemaking to carry out its mission as a consumer protection agency. Two years ago we published new regulations that implemented the Nutrition Labeling and Education Act, which instructed FDA to require nutrition labels on most food products sold in this country. Those regulations have received broad public support for providing a much needed service to ordinary consumers, and are expected to contribute enormously to healthier diets and lowered incidence of diet-related disease in the coming years.

Last year, we learned of efforts to import human tissues intended for transplantation into this country. Through our investigation we learned that many of those tissue imports were inadequately screened for the HIV virus and for Hepatitis, posing a potentially extraordinary threat to American citizens awaiting bone and ligament grafts, hip replacements, and many other such procedures. We prepared and published regulations to require donor screening and testing of such tissues, and effectively put a stop to a major public health threat.

S. 219 is intended to stop federal agencies in their tracks. If enacted, the FDA would be prevented from pursuit of a number of important initiatives. I would like to spend the remainder of my testimony providing the Committee with some examples of important regulations that could be affected by the moratorium.

Iron Toxicity Prevention—Despite child-resistant packaging, elemental iron used as a dietary supplement is the leading source of poison-related deaths in infants and toddlers. From 1986–1992, there were nearly 63,000 reports to poison control centers involving accidental ingestion of adult iron-containing products, with over 47,000 involving children under 6 years of age. FDA has proposed regulations to require label warning statements for products that supplement the dietary intake of iron, and we are now working to complete final regulations. The purpose of these regulations is to require for iron-containing products a label warning that would alert parents to the seriousness of accidental ingestion of excessive amounts of iron by small children and to warn them to keep these preparations out of reach. The regulations would also require unit-dose packaging for products that contain 30 mg. or more of iron per dosage unit. It is estimated that this rulemaking would save approximately 185 cases of childhood level poisoning per year, and yet would no way impede the use of iron supplements by adults.

Seafood Safety—The public has been concerned for years about recurrent outbreaks of seafood-related illnesses. FDA is developing final regulations to ensure the safe processing and importation of fish and fish products through the use of industry-chosen, risk-based controls in accordance with Hazard Analysis Critical Control Point (HACCP) principles. It is estimated that this final rule, which is broadly sup-

ported by the food industry and by consumers, would prevent an estimated 33,000 illnesses each year from improperly processed seafood.

Mammography Quality Standards—Nearly half a million women will die from breast cancer in the 1990's, and more than 1½ million new cases will be diagnosed. Mammography is currently the most effective method for detecting breast cancer early, and the importance of assuring high quality mammography to as many women as possible is clear. FDA is preparing final regulations to fully implement the Mammography Quality Standards Act, which requires that standards be established for mammography clinics, including quality of films produced, training for clinic personnel, recordkeeping and equipment. This legislation resulted from public response to concerns about breast cancer and to the concerns about the quality of mammography services that are relied upon for early detection of breast cancer. Using the most conservative estimate, some 200 women's lives would be saved each year by these regulations.

Medical Device User Facility Reporting—In 1990, Congress instructed FDA to promulgate regulations overseeing the reporting by hospitals and other medical device "users" of serious injuries and deaths resulting from defective devices. FDA proposed a regulation in 1991, but received many constructive comments from the affected industry. With those comments in hand, the agency has been able to prepare a new regulation that will reduce, streamline, and eliminate certain requirements in its previous proposal without compromising the quality of this important program. The new regulation is planned for publication later this year.

Lead in Food Cans—The continuing findings on the effects of lead exposure, even at low levels, on pregnant women, infants, and children have raised genuine public health concerns. In a final step toward removing one source of lead exposure, FDA is developing a final rule that would prohibit the use of lead solder to close the seams of food cans. Technological advances have made the use of lead-soldered food cans unnecessary, and American manufacturers have abandoned the use completely. The regulation would assure that imported foods are no longer packaged in lead-soldered cans, thus removing one final source of exposure and leveling the playing field for American manufacturers.

Pediatric Labeling for Drug Use—The great majority of human drugs are tested in adults, even though they are frequently used to treat children. In December 1994, FDA addressed this problem by publishing a final rule that would allow the Agency to approve drugs for use in children based on clinical studies in adults, if FDA concludes that the course of the disease is sufficiently similar in children and adults to permit extrapolation from the adult data to children. The final rule also requires the inclusion of information in drug labeling on specific hazards associated with the drug's use in children and any limitations on the pediatric indications.

Bottled Water Standards—To help ensure that bottled water is free from pesticides, heavy metals, and other contaminants, FDA published a final regulation in December 1994 that amended the standard of quality regulations for bottled water. These regulations are intended to make sure that the minimum quality of bottled water remains comparable with the quality of public drinking water prescribed in standards issued by EPA. These regulations establish or modify allowable levels of a number of organic and inorganic chemicals in drinking water and have the strong support of the bottled water industry. Additional regulations to insure that bottled water is free of hazardous contaminants are being prepared for publication this spring.

In conclusion, S. 219 would seriously impede the ability of the Food and Drug Administration to take appropriate action to reduce or eliminate risks to public health. It will freeze virtually all rulemaking in place, even where the action being proposed is urgently needed, or where it is the result of extensive consultation with the regulated industry, or where the rule has been subjected to extensive public comment and carefully tailored to reduce or eliminate risks to the public health in the most cost effective and flexible manner. We will be unable to respond both to known risks on which resources have already been devoted, and unforeseen risks that will come to light in the future. Rulemaking is the tool that we use to do that.

Chairman ROTH. Thank you, Mr. Schultz.

Let me just start out by saying that, as I listened to each and every one of you, I am somewhat concerned because the general thrust seems to be that we need more regulation, not less. I think we all agree that regulation is essential to government and there is much good that can be done, but I think there is also a general concern that the current situation leaves much to be desired, with

even the President himself admitting that many of the regulations are bad, in between, and, yes, some are good.

I think what we are trying to find is some solution that will help ensure that those regulations that continue are for the benefit of the public and that, in the process, we eliminate the bad.

I would point out that under the modified language of the legislation, it is not intended to cover those that are an imminent threat to health or safety. Perhaps the language can be improved upon, but I think that is what we are here for today, is to see how we address this problem in an intelligent fashion that will eliminate the unnecessary and bad, which, as I said, even the President admits exist.

I would like to ask you, Ms. Katzen, in the Nickles modification of S. 219, there appears in Section 6 a definition of "significant regulatory action", and that definition tracks the phrase in the President's Executive Order 12866. In other words, the regulatory moratorium would only apply to significant regulatory action, as defined by the Executive Order.

In the last calendar year, in 1994, how many regulations were issued and how many significant regulations were issued?

Ms. KATZEN. In the last calendar year—actually, I could speak to the last fiscal year, September 1993 to September 1994. There were roughly 900 regulations that were classified as significant, i.e., warranting OMB review. There were several thousand regulations in total, and what this definition does do is it eliminates the controversy with routine administrative or ministerial that haven't been a problem, with S. 219. So in that sense, this definition is clearly a step in the right direction.

The problem comes, I think, directly from your comment that some regulations are good and some are bad. We want to stop the bad. We don't want to stop the good. It is hard to legislate only good regulations. If you could write a piece of legislation——

Chairman ROTH. Let me ask you this question. It is the President who would be doing the decision making under whatever rules and regulations we enact as part of this legislation. Would you feel differently if it provided, as I think it should, that the President's decision is not subject to judicial review? Does that change your mind?

Ms. KATZEN. That is an important step. Right now, it is cast in terms of Federal agency action is not subject to judicial review, and if you were to include the President and his appointees, that would be helpful as well. That answers the question about judicial review.

Chairman ROTH. You say there were 800 significant regulatory actions during the last fiscal year. How many thousand regulations were issued?

Ms. KATZEN. My recollection is that we run roughly 4,000 a year. You have to understand that the regulations, in that sense, could be not only the 900 that we review but what I am calling ministerial or administrative. Changing the times for opening or closing the drawbridges on the Woodrow Wilson Bridge is a regulation. Those kinds of things, if you look through the *Federal Register,* you will find a whole host of administrative, ministerial types of regulations.

So the number 4,000 sounds enormous, even to me, but as you look through these, you see many of them are inconsequential or, in fact, helping the economy function as it should. Of the 4,000, 900 are significant within the terms of the Executive Order and as reflected here.

Chairman ROTH. I have heard the figure as high as 7,000, including what are characterized as administrative. I would note, also, that in the revised S. 219 that many of these areas are exempted from the regulations.

Ms. KATZEN. That is correct.

Chairman ROTH. We are only talking now about the significant regulatory proposals.

Ms. KATZEN. If I just could add one other comment, on the issue of the good regulations or the bad regulations and the President's power, with all respect, I think that is what we are doing. We may not be doing a perfect job, we may not be doing an excellent job, but we are certainly trying very hard to make those value judgments.

We do it both at the agencies, when they craft regulations, particularly those mandated by statutes, when they come to our office, we raise those questions. Is this good? Is it as good as you can do? Can you make it better? It is only when we have satisfied ourselves that we are truly implementing Congressional intent and doing it in a way that is the most sensible way that we let the regulations go.

People will differ as to whether it is a good or a bad regulation. Probably those who bear some of the burden will not see that it is a good regulation, and those who receive the benefits will not appreciate the burdens that are imposed. It is a balancing. It is a judgment factor. That is what we do every single day.

When you say, how can we make sure that the new regulations are going to be good, I think the answer has to be, to hold us to our task, you have the oversight function, which is a very important and potent force, and if we have a regulation which does not satisfy your standards of goodness and soundness of judgment, you call us to task, as you properly should. But not just say, no more regulations until we figure out a way to enact legislation that will set in concrete management techniques. It is very difficult to legislate good judgment.

Chairman ROTH. My time has run out. I have just one further question I would like to ask you. The proposed legislation does contain a definition of significant regulation. It contains four paragraphs. The first paragraph is commonly referred to as defining those which are economically significant. I know you are familiar with that phrase.

Ms. KATZEN. Yes, sir.

Chairman ROTH. How many economically-significant rules were there issued in that same fiscal year?

Ms. KATZEN. I would have to get that figure for you, but it is well less than half of the number review. I would want to supply that for the record, if I could, and I will try to get it while you are still sitting this morning, so that I could give you that information.

Chairman ROTH. I would appreciate that, Ms. Katzen.

Ms. KATZEN. Certainly.

Chairman ROTH. Senator Glenn?

Senator GLENN. Thank you, Mr. Chairman.

I think your point that there are good laws, bad laws, good regulations, bad regulations, is a point well taken, Mr. Chairman. You point out that even the President said that in his statement yesterday, but that makes the case for regulatory review, so we pick and choose. We have a regulatory review process that sets that up. We don't say just have a moratorium on everything, good and bad. That is what this legislation proposes.

There is an Executive Order dealing with this. The list of regulations that will be proposed for doing away with are supposed to be out by the 1st of June, and I think that is quite adequate for this.

Ms. Katzen, how would this affect the China sanctions? Would that be exempted somehow, or do we know? Those are being put out, rules and regulations to implement the China sanctions.

Ms. KATZEN. We were looking at the China sanctions in the light of H.R. 450 at the time, which used the term "international agreement", and this is not being imposed as an international agreement. It has a separate category for trade, but it talks about trade agreements. The China sanctions were being imposed because of the piracy of intellectual property rights, and, therefore, is not an implementation of even foreign affairs, as I read these definitions strictly.

This is part of the issue that we have. Some will argue it is covered. Others will argue it is not. The precision with which one goes about this will depend upon how much judgment there is, how much judicial review there is——

Senator GLENN. So the reading of the legislation, the way you see it right now, you don't know whether we would be prevented from implementing the China sanctions or not?

Ms. KATZEN. I haven't looked at the revised S. 219 for that purpose, but based on my earlier reading, my quick reading last night——

Chairman ROTH. I don't want to interrupt, but——

Senator GLENN. On my time.

Chairman ROTH. On my time, but I think it is important to understand that S. 219 now provides, issued with respect to matters relating to military or foreign affairs or international trade agreements, so those are an exempted category.

Ms. KATZEN. But as I understand USTR's position on this, this is not an international trade agreement.

Chairman ROTH. But this says, "matters relating to."

Senator GLENN. Maybe that is covered, then.

Ms. KATZEN. I see. If it were clarified, then that would answer that question. As it is written now, the question is present.

Chairman ROTH. It is certainly not intended to apply there.

Senator GLENN. Let me continue. We have another one. Alabama, Mississippi, Florida, Louisiana, and Texas all are affected by fishing and by shrimping in the Gulf of Mexico. We have a rule that has been proposed that would increase the domestic quota for certain types of shrimp being harvested out of those States and eliminate foreign fishing for royal red shrimp in that area.

Obviously, that is of great benefit to American fishermen. Would it be in your interpretation that this would stop implementation of that change in the regulations?

Ms. KATZEN. It would have been stopped by the original S. 219. I see in the revised S. 219, there is something about economic growth. If it is intended by "economic growth" to apply to that, then the answer would depend on what is intended by the legislation. Again, we were given this last night, and I see that they have expanded the exemptions, so it may cover that, but it would depend, I think, on the interpretation provided or the clarity of the written word.

Senator GLENN. I have another one, the scope of the nuclear nonproliferation treaty, NPT, trade ban. Some of those rules are being changed and lifted. U.S. companies feel it is going to be a benefit to them. Would this legislation stop that?

Ms. KATZEN. It would have been stopped under the original language. As the Chairman is explaining what is intended by the word "relating" here, if that were clarified to mean that, it would resolve that kind of an issue. But otherwise, as originally drafted, it would have been a problem.

Chairman ROTH. And, again, with the President having the final say.

Senator GLENN. I have another one. Senator Wellstone stopped by and asked me to put a letter in, Mr. Chairman. I would ask consent to put Senator Wellstone's into the record. It involves migratory bird hunting.

Chairman ROTH. Without objection, it will be included.

[The letter from Senator Wellstone follows:]

February 21, 1995

HONORABLE WILLIAM V. ROTH, JR.
Chairman

HONORABLE JOHN GLENN
Ranking Minority Member
Governmental Affairs Committee
U.S. Senate
Washington DC 20510

DEAR CHAIRMAN ROTH AND RANKING MEMBER GLENN: I am writing to you regarding the regulatory moratorium bill, S. 219, to ask for your assistance in eliminating what I believe would be a harmful effect of this legislation.

As you are aware, S. 219 would impose a moratorium on governmental rulemaking retroactive to last November. While I do agree that some federal rules may be needlessly intrusive, I want to bring to your attention the extreme impact this blanket moratorium would have on my state's hunting enthusiasts.

Under the Migratory Bird Treaty Act of 1918, the hunting season is closed unless the responsible federal agency opens it by regulation. Each year the U.S. Fish and Wildlife Service completes a long, complex rulemaking that opens the waterfowl hunting season and specifies the limits of the hunt. Under S. 219, the USFWS would be delayed in proceeding with this rulemaking and in opening the season in Minnesota this fall.

As Minnesota is home to some of America's best waterfowl hunting, I must oppose any legislative measure that would limit or eliminate the annual migratory bird hunting season. As introduced, S. 219 would have the effect of delaying the 1995 migratory bird hunting season for at least a month; such a delay would be tantamount to cancellation of at least part of the season (the "local shoot," when the vast majority of Minnesotans do their hunting), since Minnesota's colder climate means that the birds would likely have already migrated south.

This result would be unacceptable to Minnesotans. In Minnesota, the waterfowl hunting season is eagerly awaited by hundreds of thousands of hunting enthusiasts, in addition to being responsible for millions of dollars of economic activity. There-

fore, I request that when the Governmental Affairs Committee considers this legislation, it attach an amendment to exempt from the moratorium any rulemaking necessary and appropriate to allow the annual migratory bird hunting season to go forward as usual.

Sincerely,

PAUL D. WELLSTONE
U.S. Senator

Ms. KATZEN. That is an implementation of a treaty which precludes shooting birds on their migratory paths, and then you have the regulations which allow that to occur. It imposes bag limits, I think is the technical term, or maybe it is the jargon term, how many of these birds you can bag or put in a bag. It is that restriction that precluded it from being covered by the original language, which was limited to, and then there were some other words.

For that reason, we thought that that would have been covered by the moratorium. Whether there is a category in here that is intended to cover that that I haven't yet seen, I don't know, but I would be willing to look through this.

Senator GLENN. What would be your interpretation of the one I mentioned earlier on Alaskan hunting? The rule would allow subsistence harvesting of fish and wildlife resources on Federal lands in Alaska by native Alaskans. Obviously, they want that. That has been their custom for many generations. A moratorium would halt that subsistence fishing season, is that correct, the way you interpret it?

Ms. KATZEN. Yes. We had not been aware of an exemption under the earlier language that would have covered that. I don't know whether there is one crafted here for that particular type of activity.

Part of the issue here is we don't know. I feel as though, in some sense, we should be able to say, we know everything that is being done every day by every agency, but it is a large government with many, many mandates imposed by this body and many, many missions found in lots of statutes that the agencies faithfully carry out. When you have something like an across-the-board moratorium, one of the problems is you don't know what you are getting.

Senator GLENN. My time is running out here, but let me ask another one. Air worthiness directives, the Federal Aviation Administration puts these out. They are put out for the design of aircraft, design of wing structure, things like that. There is no imminent threat, but they are very necessary for the long-term safety. There is no imminent threat to health or safety involved. There are such things as modifications to the flight manuals that are used by pilots on certain model aircraft, all sorts of things, changes that make flight manuals more readable and so on, inspection and modification of tail cone release assemblies of McDonnell Douglas DC–9s and 980s, and so on. There is no imminent threat to health or safety.

I would presume that the rule that was published January 24, 1995, involving these and a number of other things, would be inoperative if this moratorium was put into effect. Is that correct? Would that be your interpretation?

Ms. KATZEN. That was our judgment. Steve may want to address it.

Mr. KAPLAN. Senator, I think that is correct. Again, under the previous version, I think that would be correct. It certainly creates some uncertainty. Under the new language, again, depending on how it is interpreted, those type of air worthiness directives may be viewed as exempt, but that is something that we are still looking at.

Senator GLENN. My time is up. Are we going to have a second round, Mr. Chairman?

Chairman ROTH. Yes, we will have a second round, and, of course, the record will also be open to written questions.

Senator GLENN. Thank you.

Chairman ROTH. I do want to point out that there is very broad language with respect to routine administrative actions that are an exception to the moratorium.

You can try to issue anecdotes that make it look like it won't work, but when you look at the language, which gives broad discretionary power to the President, plus the fact that it would not be subject to judicial review, I think it is pretty clear that in most of these cases, there is not a problem.

Again, one of the purposes of this hearing is to raise questions, so that if the language isn't adequate, we can ensure that it is.

Senator GLENN. Mr. Chairman, I would submit, if we are making loopholes so big that the President can dismiss anything that means anything, then we don't need the legislation. We need regulatory review.

Chairman ROTH. I would just point out that OIRA only reviews those significant regulations. There has to be a cutting back. Really, what we are trying to direct our attention and concern to are those that are significant.

Senator Lieberman?

Senator LIEBERMAN. Thank you, Mr. Chairman.

Mr. Schultz, I came today opposed to this proposal for a moratorium, but you said something that gave me pause to reconsider my position on the thought that a moratorium might suspend those nutrition labels, which have been making it hard for me to go ahead and eat those glazed doughnuts, knowing how much saturated fat is in them. [Laughter.]

Notwithstanding that momentary weakness on my part in this hearing, I feel very strongly that, even that, of course, is good for me, that regulation and those labels.

It seems to me that the questions that have been brought out on particular cases, as well as the statement that the President made yesterday, showing specifically that the moratorium would put at risk regulations that will protect people from unsafe drinking water, from unsafe food, that will prohibit the implementation of the Family and Medical Leave Act, because regulations are necessary there, all of those make the point, and we could go on and probably will, that though we ought to reform the regulatory process, that a moratorium is a crude instrument, because it does catch the good with the bad.

As one begins to try to make it less crude, as some of the amendments that have been proposed to the original bill have, it, in itself,

becomes a potential regulatory nightmare to implement. In fact, just following the last conversation, it seems to me that the final rule issued under one of the exceptions during the moratorium period would be subject to judicial review as to whether it was appropriately exempted from the moratorium.

My own conclusion is that not only is this wrong, but even if you try to make it more sensible, it is a waste of time. From the point of view of this Committee, I would certainly hope that we would focus our time on the bill which the Chairman has introduced, I think it is S. 291 as opposed to S. 219, which provides a vehicle for, as opposed to a moratorium, a longer-term reform of the whole way in which we do the business of regulation. I think that is really a better investment of our time, and, ultimately, it will produce a much more workable series of reforms.

Ms. Katzen, I did want to ask you, though, in terms of what the President said yesterday, is it possible that your office and the various executive agencies will actually be able to implement a page-by-page review of all existing rules by June 1?

Ms. KATZEN. We certainly hope so. This is not a new idea. In the Executive Order, there was a provision for a look-back, and many of the agencies have already begun to do this. He cited yesterday the examples of the Office of the Control of the Currency, which is doing an A-to-Z review, and I have been told that they are somewhere in the G's, H's, or I's and moving quickly.

The Department of Commerce has taken its export control regulations and is completely redrafting them. We are not asking that they have the process completed, because for many of these regulations, if there is to be a modification, you would have to follow the notice and comment procedures to implement that, but to go through and be able to State that these truly are appropriate or necessary and identify those that are not.

We have two representatives here from two different agencies who can speak to that question, but it is our assumption that it can and should be done.

Senator LIEBERMAN. Let me ask you, in terms of OMB's ongoing review of rules, whether you see any patterns emerging.

Ms. KATZEN. I do. I see an increased sensitivity to sensible regulations, an increased receptiveness to think twice before regulating.

The Department of Education, for example, has a program called Red Light, which they have a series of questions. Before they even think about drafting word one, they will raise the question, can we do this other than through regulation? They have an entire series of steps that they go through. That is what one department has done.

Our government is very varied. Departments use different techniques. Steve was talking about the Department of Transportation, its look-back of analysis. Those kinds of efforts are ongoing and increasing.

Senator LIEBERMAN. Let me ask you about whether there are any emerging patterns in the review of existing rules that is going on. In other words, to what extent are people concluding, in what they have already gone through, that rules are no longer necessary or that they are badly drafted?

Ms. KATZEN. There is a substantial body that is developing of regulations that are, at least, questionable. Part of them are tied to statutes. Is it worth the time and effort?

In some instances, if a regulation was promulgated 20 years ago and the capital investments have all been made, to go through the process of coming to the Congress, getting new legislation that eliminates that requirement that could eliminate the regulation may not be worth it.

We talk a lot about cost-benefit analysis. This is one area where there is a serious question. We have been discussing that with some of the agencies. Which areas are worth pursuing for net social benefits and which are on the books, they don't make a whole lot of sense, but they are not bothering anybody at this point. Those are, again, judgment calls of where you want to use your resources, how you want to approach the particular problems.

Senator LIEBERMAN. I take it that some substantial portion of the regulations that you are finding questions about really would require repeal of the initial legislation that created them, as opposed to just the reform of the particular regulations?

Ms. KATZEN. Yes, sir.

Senator LIEBERMAN. Thank you.

Thank you, Mr. Chairman.

Chairman ROTH. Senator Levin?

Senator LEVIN. Thank you, Mr. Chairman.

I want to go over some examples of rules that would be caught by this moratorium, or at least, arguably caught by the moratorium.

You, Mr. Schultz, mentioned a rule about cans. Would you repeat what you said about that, just very briefly?

Mr. SCHULTZ. Yes. It used to be that canned food had a solder to hold the pieces together that had lead in it. The lead would leach into the food and that was a problem. American manufacturers spent a lot of money to eliminate the lead years ago. Foreign manufacturers have not. The regulation that we had intended to do this year would have made the same rules apply to everybody.

Senator LEVIN. We have an administrative process which gives notice to parties that are affected prior to a rule going into effect, is that correct, Ms. Katzen?

Ms. KATZEN. Yes, we do.

Senator LEVIN. Everyone has a chance to comment, is that correct?

Ms. KATZEN. Yes, sir.

Senator LEVIN. We have what we call due process, so that, for instance, the people who want to send in those cans can argue against the rule if they want to.

Ms. KATZEN. That is correct.

Senator LEVIN. I assume the people who are lobbying for foreign canners participated fully, making their point that we should not restrict foreign cans. Isn't that part of the process?

Ms. KATZEN. Yes, it is.

Senator LEVIN. Now, all of a sudden, a bill comes along, which, I gather, the most recent version is as of last night. There is a hearing today. There was a proposed markup, as I understand it, for tomorrow, which has been delayed all of a week, at the request

of the ranking member. Are we going to be giving due process notice to the parties that are affected by our legislation so that the domestic can manufacturers can make their point, so that they can argue against Congress coming in and doing what we don't allow administrative agencies to do?

Do you know whether or not we have given notice to all of the interests affected by this moratorium so that they can come in and make their points? Do you know whether the Committee has done that?

Ms. KATZEN. I think that it is only now beginning to reach the press within the beltway, let alone outside the beltway——

Senator LEVIN. My question is, do you know whether the Committee has notified all of the people who would be affected by this moratorium so that they could express their opinion on the impact of the moratorium?

Ms. KATZEN. I don't know that.

Senator LEVIN. We will ask the Committee staff whether they have done so. It seems to me, if we are going to require agencies to apply fairness, and we should, that is the reason for the Administrative Procedures Act, so that people whose lives are affected by these rules can have a chance to comment, that before we rush pell mell into legislation which was introduced in its most recent version last night and is heard today, we should give notice to people whose lives are affected, including those can manufacturers, including the fishing industry in the Great Lakes that has been fighting against the dumping of these foreign species, which have damaged the Great Lakes, including those shrimpers down in the South, including the water bottlers and everybody else who is affected by this.

I am going to ask that the Committee, if it has not already, notify the parties and give them a chance to express their views before we have such an impact on their lives, because, I think, that is what we require agencies to do and we ought to comply with a similar approach. That is not a question. I am just telling you that I will be asking the Committee to do that before this gets to the floor.

Let me give you another example. I understand there is a rule which will restrict housing assistance to American citizens and to people who are here legally, that there is a pending rule. Do you know anything about that?

Ms. KATZEN. There are two rules out of HUD that I have a very vague familiarity with. One of them implements a Congressional intent to limit public housing to illegal immigrants.

Senator LEVIN. The restriction is so that illegal immigrants do not get public housing assistance.

Ms. KATZEN. Yes.

Senator LEVIN. The public wants us to restrict benefits to people who are here legally. We have a pending rule which will restrict housing assistance to legal immigrants. This moratorium, apparently, would just stymie that effort, which the public very strongly supports. Is that your understanding?

Ms. KATZEN. That was our understanding, yes.

Senator LEVIN. We have a proposed rule which is going to restrict the import of certain kinds of meat from Portugal. The rea-

son it is being proposed is to try to prevent the spread of a certain kind of illness to American cattle.

The U.S. beef producers want this rule. I presume the Portuguese folks don't want this rule. We have given everybody notice. There is a proposed rule. Are we going to notify the American beef manufacturers before we now put a moratorium on a rule which they have been clamoring for? I sure hope so. I would like to hear from them. Again, I will be asking the Committee to do that.

We can go on and on with this. You can give example after example of where we are having a negative effect on people without giving them notice of what we are doing, at least in terms of a reasonable period of time to deliberate. In the administrative process, we would not tolerate that for one minute.

We would never tolerate an agency promulgating a rule which has a negative effect or an impact on people's lives without giving a period for comment after public notice, and yet, some are proposing that we rush pell mell into this kind of a moratorium with all kinds of consequences on people's lives without the same kind of reasonable, deliberative notice to people who are affected that we require the agencies to give.

My time is up, and I hope there is a second round because I want to ask about some of the process problems with this, not just the substantive ones.

Chairman ROTH. Thank you, Senator Levin.

I would, of course, point out that this legislation has been much in the media and much in the press. I think most private sector companies are pretty much aware of the proposed legislation, just as a general comment. It never has been the practice of this or any other Committee to necessarily notify each and every part of the private sector that may or may not be impacted. But in any event——

Senator LEVIN. If the Chairman would yield, we have never had a——

Chairman ROTH. Let me just finish, Senator Levin.

Senator LEVIN. We have never had a proposal like this.

Chairman ROTH. I would point out that the legislation was made available late Friday. But in any event, the thing that concerns me is what we are trying to address here is the means of eliminating the bad, not the good. I think that is important to keep in mind.

I have two or three questions I would like to ask you, Ms. Katzen. Is there any form of the moratorium legislation that you believe the President would sign and would not veto?

Ms. KATZEN. It is very difficult to answer such an abstract question. Is anything possible? Something is always possible. He was commenting yesterday on language and a bill that had been marked up and is about to be voted on the floor of the House tomorrow. We had pointed out a number of serious concerns with that piece of legislation, and what was reported out did not address any, or virtually any, of those concerns.

The legislative process is a long one, and I can't, at this point, comment on what his receptiveness would be if substantial modifications were made. But this morning, I noted that, even with the revisions, we still continue to have concerns with what is before you.

Incidentally, I have the information that you had asked for, trying to be responsive, of the number of economically significant as opposed to significant regulations.

Chairman ROTH. Yes.

Ms. KATZEN. For calendar year 1994, 135, and the figure I had given you of 900 was for the fiscal year, but they are probably fairly comparable. So of roughly 900 regulations that we review for significance, about 135 or 150 are economically significant.

Chairman ROTH. Of those, 135 are economically significant?

Ms. KATZEN. Right.

Chairman ROTH. Let me ask you this question. You State that there is increased sensitivity before deciding whether to regulate now, and yet, how do you respond to the complaints that this administration is regulating more heavily than ever before?

Ms. KATZEN. There are a number of statutes that have been passed in recent years that have produced a large number of regulations. These are statutes that were passed with bipartisan support in the previous Congress and signed by previous Presidents, who were of both parties. But the last 12 years, they were all Republican Presidents who signed these pieces of legislation, and we are seeing, in the environmental area, for example, the Clean Air Act is producing, right now, a lot of regulations. In other areas, the Oil Pollution Act of 1990 has produced a significant number of regulations.

Chairman ROTH. Let me ask you this. Has this President submitted any requests for these laws that are bringing about the increased regulation to be modified or changed?

Ms. KATZEN. Yes. In the last session, we sent up administration proposals for modification of the Superfund law, Safe Drinking Water reauthorization, pesticides——

Chairman ROTH. Would they have reduced regulations?

Ms. KATZEN. Yes, sir, and they also would have made them more cost effective. One of the greatest concerns with the Superfund program is that we are spending resources and we are not receiving benefits. We proposed a reform of that which had environmentalists' support and which had industry support, and it got through virtually all of the Senate and it got stymied in the last days of a contentious Congress. But otherwise, that would have made a serious advancement in this area.

The Safe Drinking Water was——

Chairman ROTH. Many of us were supportive of the Superfund legislation.

Ms. KATZEN. And we appreciate that. But the Safe Drinking Water law that is on the books now requires, and I believe I am correct, EPA to come up with maximum contaminant levels of pollutants in water, 25 every 3 years. Those can have enormous costs for State and local governments, among others. Our proposed revision was, I think at one time, cast in terms of no more than 3 every 3 years, or only the most risky, or some other screen that was put on it. It was widely debated in the Committees here and on the floor, and a compromise was reached which would have substantially reduced the amount of regulatory activity that was called for. That bill, also, was not passed in the last days of the Congress, unfortunately.

Chairman ROTH. I am not here to defend the role of the last Congress. I do have to say, one of my concerns is that the complaints are increasing that this administration is regulating more heavily.

Let me go back to the immediate legislation, however. Should Section 5, which authorizes the President to exclude certain regulations, be exempt from judicial review? Should the exercise of Presidential authority be final?

Ms. KATZEN. I believe, absolutely no judicial review of Presidential actions in this regard.

Chairman ROTH. I agree with you, and I appreciate that answer.

Senator Glenn?

Senator GLENN. Thank you, Mr. Chairman.

I don't know whether I heard right, but I would have to take exception with the Chairman's statement that this administration is regulating more heavily. I think you have taken action over there to get things in place to go through these regulations.

As you indicated, you had proposals in last year that were caught up in that 90-day Republican filibuster in the last part of the last Congress and stopped everything dead in its tracks. Maybe we would have had this review through. I know we would have had Congressional coverage through and unfunded mandates through, had we not had that delay on the floor last fall, and maybe we would have had some of these other things through, too.

So I just can't accept the statement that this administration is regulating more heavily. I think where we saw the big increase in regulation was back in the mid-1980s when we had the Clean Air Act, Clean Water, and some of those, where there were a lot more regulations put in. I think any charting of the number of regulations would show that that is where some of these things occurred.

It has been said repeatedly here that we ought to eliminate the bad and not the good. That is what regulatory review is supposed to do. We should not just put in a whole moratorium. This approach is like the classic throwing out the baby with the bath water. You have some stuff you want to get rid of. You don't want to get rid of the baby. You want to get rid of the bad regulations. You don't want to get rid of the good regulations, and that is basically what a moratorium does.

I brought this up before, and I am not sure we finished on this one yet. Do you figure that the Alaskans can hunt or can they not hunt under the way you would interpret the regulation?

Ms. KATZEN. I haven't seen an exception in the revised draft that would allow that regulation to go forward. We thought it would have been barred under the original language.

Senator GLENN. There is no threat to imminent safety and health for issues like that, so I would presume that the Native Alaskans are no longer going to be able to hunt. That rule cleared the Department of the Interior, as I understand it, the week of February 6. I don't know whether it has been published in the *Federal Register* yet or not, but that would be stopped dead in its tracks since it occurred after the election, is that correct?

Ms. KATZEN. Yes, I believe so.

Senator GLENN. I think so, too.

Another one is the personal communications system. Everybody has a cellular phone these days. Bidding for these PCS services, as

they are called, brought in over $6 billion to the Treasury. As I understand the new bidding that will be coming up, the moratorium would require a suspension of the auction rules and a return to those previous methods. Bidders have been preparing their bidding strategies weeks and months in advance of the auction. In particular, small businesses really can't afford to get into something like this, if there is going to be a delay.

Is it your interpretation that these PCS systems, personal communication systems, would be held up, also?

Ms. KATZEN. It was our understanding under the earlier version that it would have been delayed. This raises a very interesting question that we have not discussed so far, the difference between executive branch agencies and independent agencies. OMB reviews the proposed regulations, the proposed final regulations, of executive branch agencies but not the independent agencies, and so the number that I gave the Chairman, 135 economically significant, are only for executive branch agencies.

This regulation comes from the FCC. We do not review it—I did not have it on my list—so there would be that additional increment. One of the issues with the moratorium is that we do not know what would be covered among the independent agencies, even though the independent agencies are covered.

So was the FCC's interpretation under the previous statutory language that it would have been precluded. Whether they would find that maybe fostering economic growth or some other phrase in here that has been inserted would cover that would be for them to decide, and that would, again, depend on the Chairman's interpretation, any other legislative history that would support that.

Senator GLENN. I guess the new regulations on textile import fraud would also not go into effect, so the Customs Service would not be able to do as good an investigation on textile import fraud. Is that your interpretation? That rule was published December 2.

Ms. KATZEN. That is my understanding.

Senator GLENN. San Francisco has a problem, as does all of California, with their water allocation. They have what they call a Bay Delta agreement among competing interests. It has taken years to be negotiated. It manages fresh water supply, minimizes water quality impacts on the Bay, and so on.

The final rule was published January 24. That involves billions and billions of dollars and is, in some respects, the fruit and vegetable basket of the U.S. Forty-five percent of the Nation's fruit and vegetable production comes out of there, and 20 million Californians are dependent upon this agreement.

Would that final rule be negated?

Ms. KATZEN. Apparently. I sort of breathed heavily when you talked about the Bay Delta, because we spent weeks and months pulling that together, and even Governor Wilson was applauding what had finally been worked out between the users for the Bay Delta. It involved not only EPA regulations, DOI regulations, State/Federal participants, private sector. It was a great success of bringing everyone together, and I had not remembered that one particularly, but yes, I don't see——

Senator GLENN. EPA also intends to publish the standards for nuclear waste disposal in June of 1995. I suppose those standards

for nuclear waste disposal would be out of order if this passes, is that correct?

Ms. KATZEN. Under the original terms of the language, yes. Again, I haven't gone through carefully all of the new exemptions.

Senator GLENN. There was another rule submitted in February of 1994 for drug and alcohol testing that went into effect January 1, 1995. Is it your interpretation that these new rules that require drug and alcohol testing and the means of testing, as I understand it, which is part of this, would be knocked out? It is the new procedures more than anything else.

Mr. SCHULTZ. Senator Glenn, both would be under the moratorium.

Senator GLENN. My time is up.

Chairman ROTH. Senator Levin?

Senator LEVIN. Thank you, Mr. Chairman.

Ms. Katzen, let me see if I understand the process which would be used here. First of all, does the bill, as you now read it, just stop pending significant rulemakings, or does it apply retroactively to rules that are already in effect, in some cases?

Ms. KATZEN. It applies retroactively to some that are in effect and to those that were finalized before November 9 but didn't have an effective date until after November 9. So it could have been something that was made final in August with a 90-day effective date. I think I have my time right there, or at least the basic idea. Yes, it would be retroactive.

Senator LEVIN. So it could apply to rules that were promulgated even years ago if their final phase-in effective date, for instance, came after November 9, is that correct?

Ms. KATZEN. Correct.

Senator LEVIN. It is not just like last August. It literally could apply, for instance, to a court order of a couple of years ago which said, you have to phase in certain things over a period of time and the final phase, let us say, was January 1, 1995. Then that would be undone, too, or would be under the moratorium, is that correct?

Ms. KATZEN. Correct.

Senator LEVIN. Do you know what percentage of regulations, generally, are required by law and what percentage are discretionary under law? Would you be able to give us any kind of an estimate on that?

Ms. KATZEN. A very rough guess would be well over 80 percent.

Senator LEVIN. Are?

Ms. KATZEN. Are required by statute. In some instances, the statutes are highly prescriptive and they tell you exactly what the regulations have to look like. In other instances, they will be less so, and there is some discretion within the agency or department for formulating the response.

All regulations, ultimately, come from statutes, because the executive branch is not on its own folly carrying out whatever it wishes to do. So, ultimately, all are covered, but the 80 percent figure is where what we call specifically mandated by statute, by either a particular time or a particular result or a particular process.

Senator LEVIN. Is it true that after a rule has been issued, or even in preparation for its being issued, that you have people that spend money in reliance on its being issued or having been issued?

Ms. KATZEN. Yes, that is frequently the case.

Senator LEVIN. So, for instance, let us take the rule that sets certain limits in bottled water. That was published December 1 of last year. Is it possible that the water bottling companies have made investments in order to comply with that rule? Mr. Schultz?

Mr. SCHULTZ. I think it is very possible.

Senator LEVIN. So we would be telling people who relied on the rule and have made investments in it, in fact, some people who may have very much favored the rule, that now there is a moratorium on this whole thing for some unspecified period of time? Is that your understanding?

Mr. SCHULTZ. Yes.

Senator LEVIN. Senator Glenn has said, what we are involved in is some regulatory reform. We have had a regulatory reform bill over here where we are trying to do certain things in order to improve regulation, and that is what we ought to keep our focus on. The moratorium is going to be a massive and a chaotic distraction from our ongoing regulatory reform effort.

But now, let us focus on regulatory reform. If we pass regulatory reform, which will put into law what is now in the Executive Order in terms of cost-benefit analysis, that may have some risk analysis in it, for instance. Is it your understanding that the regulatory reform bills would be prospective?

Ms. KATZEN. Yes, they are.

Senator LEVIN. What is the purpose, then, of the moratorium? If the rules that are being held up are not going to be subject to whatever new regulatory reforms we put into law, what, then, becomes the purpose of the moratorium?

Ms. KATZEN. I am not sure I am the best witness to answer that particular question.

Senator LEVIN. What would you understand, then, the purpose to be? It would seem to me that one argument might be that if you have a moratorium, if you can figure out something that works, that you want to then subject whatever rules have been held up to that regulatory reform. But if the future regulatory reform which incorporates the Executive Order or something like it on cost-benefit analysis and has some risk analysis isn't intended to apply to what you are holding up, what do you understand, then, to be the argument for the moratorium?

Ms. KATZEN. I think part of the motivation for a moratorium is to give additional time to try to begin to change some of the laws, but that, too, would be prospective, so we would be in the same position that you were describing. The sole effect would be on regulations which are in the proposed state—a notice of proposed rulemaking has already been issued, the parties have already commented, the agency is about to go final. The moratorium would cease regulatory activity in that regard.

Then, presumably, under your hypothesis, the new legislation would be passed, and, apparently, at that point, the agency would be sent back, told to return to "go"——

Senator LEVIN. Just to complete that line, then, do you know of any regulatory reform legislation which is retroactive in that way?

Ms. KATZEN. No.

Senator LEVIN. Thank you.

Chairman ROTH. Thank you, Senator Levin.

We will keep the record open for 2 days for additional questions.

Let me underscore the fact that this legislation only involves the significant regulatory rules. I think you said that there are something like 900 of them, is that correct?

Ms. KATZEN. Nine hundred a year.

Chairman ROTH. Nine hundred a year. And under this legislation, the President is able to exempt on any number of reasons, including those which principally involve international military events, routine administration, and so forth, so that the legislation does recognize and provides for situations that have been raised by a number of the Senators in their questions.

I would ask that particularly you, Ms. Katzen, but all three of you, any suggestions you have on this legislation that would improve upon it, the language and so forth, would be most helpful and we would appreciate working with you on this matter.

Ms. KATZEN. Thank you, Mr. Chairman.

Mr. KAPLAN. Thank you.

Mr. SCHULTZ. Thank you.

Chairman ROTH. Thank you very much.

Senator GLENN. Mr. Chairman, may I make just one statement?

Chairman ROTH. Yes.

Senator GLENN. I would presume, and I don't ask your response to this, that personal use of campaign funds by a Federal candidate, as defined in the Ethics Reform Act of 1989, would also be affected. The FTC recently created rules to avoid confusion over club memberships, clothing, tuition payments, mortgage and rent payments on a candidate's personal residence. These rules also would be knocked out by a moratorium, and the rules have already been submitted.

Thank you, Mr. Chairman.

Chairman ROTH. I am not sure whether that would be classified as a significant rule or not.

Senator GLENN. I think it is on Capitol Hill.

Chairman ROTH. But under the legislation.

Thank you all very much.

Chairman ROTH. At this time, it is my pleasure to call forward the second and final panel. We have C. Boyden Gray, who is Chairman of the Citizens for a Sound Economy; Thomas Donohue, who is President and CEO of the American Trucking Association; Dean McGrath, Senior Attorney, American Automobile Manufacturers Association; Sal Risalvato, who is a small business owner representing the National Federation of Independent Business, from Riverdale Texaco in Riverdale, New Jersey; David Hawkins, Senior Attorney for the Natural Resources Defense Council; and Rainer Mueller, who represents Safe Tables Our Priority.

Gentlemen, it is our pleasure to welcome each and every one of you. We would ask you to keep your statements to 7 minutes or less. Your full statement will be included as if read.

Mr. Gray, welcome. It is nice to have you here.

TESTIMONY OF C. BOYDEN GRAY, CHAIRMAN, CITIZENS FOR A SOUND ECONOMY

Mr. GRAY. Mr. Chairman, thank you very much.

I will try to be very, very brief, because I think most of the issues that I would raise have been covered, but I have just three quick points.

I think that moratoria are not that difficult to manage. President Reagan did one. President Bush did another. There were no difficulties that I am aware of, no hunting bans, no fishing bans. I believe if these exceptions are administered with common sense and they are not subject to judicial review, I don't see why there would be a huge problem in administering this.

Why is it necessary to do or why is it important to do? I think it is very important to have a time out to begin the process of reviewing existing regulations. I gather yesterday President Clinton announced that this was all going to begin, but I do think it is useful in commencing, in embarking on a process of reviewing inherited regulations that you stop, at least for a while, work on new ones, unless, of course, there is a health and safety or administrative or foreign policy reason to do so.

What are some of the rules that would be caught? I really don't believe that most of the stories that I have heard this morning would be caught, but there has been little discussion of what would be. Two examples that I would just like to mention briefly came out of the Clean Air Act and represent distortions of what I think you intended and what I think President Bush intended when the statute was enacted.

One is one that was also referenced by Dean McGrath in his testimony, the so-called California car rule, the OTC rule which affects, Mr. Chairman, your State. I believe it is a very expensive, very anti-competitive rule. It really ought to be stopped. It really ought to be looked at. If it goes into effect before your legislation or some other regulatory reform legislation is adopted, I am afraid that it will be lost forever, and many of the reforms that you have proposed would simply be lost. This is too big a rule, too important a rule, involves too much money, many, many billions of dollars. It is too important to let go into effect before it can be reviewed under your legislation.

The same is true of the permitting rule. The flexibility portion of it was reproposed in the current administration. If you are worried about regulating regulators, which there is some concern this bill would do, take a look at the permitting rule and see how regulators will be regulating everything that businesses do. You couldn't expand, you couldn't put on an additional shift without having notice and comment, even if the increase in emissions, which always accompanies any expansion, would not violate any existing standards.

So I think these rules should be looked at very, very carefully, and they should be subject to the legislation that you will be considering this year. Thank you.

[The prepared statement of Mr. Gray follows:]

PREPARED STATEMENT OF C. BOYDEN GRAY

Good morning. Mr. Chairman and Members of the Subcommittee: My name is C. Boyden Gray, and I am a partner at Wilmer Cutler & Pickering, and I am Chairman of Citizens for a Sound Economy, a 250,000 grassroots research and education organization that advocates market-based solutions to public policy problems. Thank you for inviting me here today to discuss the importance of regulatory reform and

the "Regulatory Transition Act of 1995." This legislation would implement a moratorium on regulations that would suspend certain significant regulator actions by federal agencies. The moratorium would end on December 31, 1995 or when Congress enacts comprehensive regulatory reform legislation (whichever is earlier).

Regulatory reform has a long history of bipartisan support, as was evidenced by efforts in the previous Congress to reduce the regulatory burden on consumers and businesses in the United States through sound risk assessment and other reforms. The new 104th Congress is continuing these reform efforts with regulatory reforms bills in both the House and Senate. The "Regulatory Transition Act of 1995" includes a temporary moratorium on new regulations so that agencies may more carefully assess the impact of their regulatory agendas. Agencies would have the opportunity to take stock of their current regulatory programs while, at the same time, Congress would have time to enact new tools for regulatory reform that will improve the regulatory review process and rationalize the regulatory burden imposed on the public. However, the moratorium legislation is careful to allow those regulations required for imminent health or safety problems, for administrative regulations, for military or foreign affairs, and for rules that are necessary to streamline the government.

A Temporary Hold on Regulations Makes Good Sense

Americans currently face an annual regulatory burden of more than $500 billion, or $5,000 per household. In addition, the public spends more than six billion hours a year complying with federal information requests. Excessive paperwork and burdensome regulations can thwart economic growth and hamper the global competitiveness of the U.S. economy. The Clinton Administration's *Regulatory Plan and Unified Agenda of Federal Regulations,* issued November 14, 1994 identifies over 4,300 rulemakings throughout the Federal Government. With such a large number of rulemakings underway, it is difficult for agencies to allocate the personnel and resources necessary to conduct a thorough review of existing regulations. The regulatory moratorium would provide federal regulators the time to review existing regulations without the pressure to simultaneously move forward with rulemakings in the agenda. (It also eliminates the pressure created by judicial and statutory deadlines by extending them for five months.) A moratorium would be the ideal opportunity to prune unnecessary and outdated federal regulations.

President Reagan and President Bush relied on a regulatory moratorium to review existing regulations before undertaking any further regulatory initiatives. President Bush's regulatory moratorium, which was announced in his January 1992 State of the Union address, identified opportunities for a number of regulatory improvements. The moratorium generated substantial benefits for consumers, including: accelerated approval of new drugs by the FDA, improved regulation of biotechnology products, and the development of market-based incentives to comply with the Clean Air Act. The Regulatory Transition Act of 1995 will allow another look back at regulatory burdens.

Improving the Regulatory Review Process

Both the Senate and the House are moving forward with a series of regulatory reforms, such as risk assessment and the use of sound science, enhanced cost-benefit requirements, a stronger Paperwork Reduction Act, and the use of market-based incentives in the regulatory process. A moratorium would allow Congress the opportunity to enact these regulatory reforms. In turn, federal agencies could then use these important tools when reviewing current rulemakings.

When regulatory review was first formalized by the Reagan Administration in Executive Order 12291, benefit-cost analysis provided the foundation for evaluating federal regulations. Coupled with centralized review of agency regulations by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget, the regulatory burden was reduced substantially, saving consumers billions of dollars. In effect, regulators were required to demonstrate a clear need for regulatory action, determine that the benefits of regulation were commensurate to their costs, and that the least-cost alternative was used to achieve regulatory objectives.

President Clinton continued the tradition of centralized regulatory review with presidential oversight in his Executive Order 12866. However, an expanded definition of benefits increases agency discretion and weakens the benefit-cost analysis. Procedural changes also reduced the number of rules submitted to OIRA by the agencies. Although the executive order required agencies to use risk assessment and market-based incentives when developing regulations, there appears to be some reluctance to adopt these regulatory tools.

A regulatory moratorium provides an opportunity to determine the extent to which the federal agencies are implementing market incentives and risk assessments required by President Clinton. The Clinton executive order also included requirements to review existing regulations; to date, the review has not been completed. While evaluating these concerns under the moratorium, the regulatory reform agenda in Congress will be moving forward with new approaches to regulation that will provide greater benefits to the public.

Risk Assessment

The new Congress understands the importance of risk assessment as a means of reducing the hidden tax of regulation. Establishing a risk assessment process that incorporates the best available scientific knowledge while clearly explaining the underlying assumptions will provide an important addition to cost-benefit analysis that can be used to reduce the burden of excessive regulations that provide marginal reductions in negligible risks at very high prices. Risk assessments will ensure that scarce resources are allocated towards reducing those hazards that pose the greatest risk to the public. Reforms currently underway in Congress require agencies to devote their regulatory resources to just such problems.

Risk assessment should be viewed as an important complement to benefit-cost analysis. Health and safety regulations are the fastest growing component of the federal regulatory burden. While benefit-cost analysis was successful in identifying excessive economic regulations, it is not as well suited for identifying excessive health and safety regulations. Risk assessment allows a more careful evaluation of hazards and the benefits of regulation that can be used in conjunction with benefit-cost analysis to develop sensible regulations.

Market-Based Incentives

Properly designed market incentive programs provide the flexibility needed to fulfill regulatory objectives in the most cost-effective manner. Traditional command-and-control regulations establish broad programs that cannot take into account the particular circumstances of individual firms or different production processes. Market-based regulations, on the other hand, reward innovations that reduce the cost of regulatory compliance. Typically, market-based regulations encourage voluntary exchanges and entrepreneurial responses to meeting regulatory goals. The Reagan and Bush Administrations had a number of programs that relied on market-based incentives: takeoff and landing rights at congested airports, allocating the radio spectrum, and the uniform lead content standard, which allowed the EPA to accelerate the phaseout of lead while generating $250 million in savings.

Perhaps the best known example of a market-based approach to regulation is the Acid Rain Allowance Trading Program. The Clean Air Act of 1990 established a cap of 8.95 million tons of SO_2 emissions per year, which is 10 million ton per year reduction over 1980 levels. By establishing an allowance market based on trading, this regulatory objective was achieved at a greatly reduced cost and much quicker than was possible using traditional command-and-control regulatory policies. The cost per unit of emissions was initially estimated at $1,500 per ton in the statute. However, through market trades, significant innovations have emerged and the cost has fallen to $150 per ton, saving consumers billions of dollars. In addition, the clean up is 40 percent ahead of the statutory schedule.

Market-based incentives provide an alternative to command-and-control regulations that can provide much lower compliance costs in the marketplace and fewer administrative costs within the federal agencies. The record to date suggests significant gains can be made through a greater reliance on market incentives.

Identifying Substantive Regulations

Another important reason to implement a moratorium is to revisit current rulemakings using the regulatory reforms being examined by the Congress. There are a number of significant rules in the 4,300 rulemakings listed in the administration's regulatory agenda. Incorporating risk assessment and market-based incentives into the regulatory review process and avoid unnecessary regulations that do not provide benefits commensurate to their costs. Some examples of current rules that would benefit from the review and application of new procedures are as follows:

The California car regulation for the Northeast, issued by the EPA just before Christmas and thus covered by the proposed moratorium, is a rule that demands careful scrutiny whether or not the moratorium is enacted. Although the agency has endorsed trading programs in the past, its comments on the California car suggest a different approach: "EPA believes that information is not yet sufficient to support an intersector trading approach." The rule ignores the regulatory lessons of the last two decades, especially the experience with the Acid Rain program, and it violates the spirit of the 1990 Amendments to the Clean Air Act.

The rule mandates that the Northeast require the sale of the so-called California car to address ozone levels. In so doing, it encourages the car companies to trade their resulting emission reduction responsibilities among themselves, but prohibits them from trading with utilities, who are elsewhere encouraged also to trade among themselves, but not with the care companies. By thus artificially fragmenting these emission markets, EPA has engineered one of the costliest rules in history. EPA's refusal to use market-based incentives represents a significant departure from earlier statements by the EPA support for market based trading: "The Agency is very supportive of efforts to trade emission reductions among mobile and stationary sources. . . .

The leading broker in SO_2 allowances under the Acid Rain Program, CACM, has calculated the costs as follows, using data published by the car companies, oil companies, and utilities themselves. By the year 2007, when the California car rule will be fully effective, the cost to the Northeast will be $4.7 billion a year. The cumulative cost to that date will be $20 billion. CACM calculates, however, that if the car companies could purchase their reductions in the marketplace as utilities are entitled to under the Acid Rain Program, the California car would cost only $157 million annually beginning in 2007. This represents a savings of $4.6 billion per year.

By ignoring the lessons of the Acid Rain Program, the EPA rule will also lose all the benefits of innovation that market incentives provide. It is thus a throwback to 1960s-style command-and-control regulation, and a most discouraging precedent for those seeking the most cost-effective solutions to environmental problems.

A preliminary list of additional burdensome regulations should also include (among others):

1. The Great Lakes Initiative Clean Water Quality Guidance. This EPA rulemaking would establish uniform water quality standards for eight different states. EPA estimates the costs between $190 million to $505 million per year, although some economists predict the costs could be as high as $2.7 billion. In addition, many have raised concerns that this rulemaking will not provide significant environmental benefits. The rulemaking has a court-ordered deadline of March 13, 1995.
2. Race and Gender Disclosure Requirements. The Federal Reserve Board would not be allowed to move forward with a requirement that thrifts and banks collect race and gender information for business loans less than $1 million. The rulemaking has its origins in the Community Reinvestment Act; however, it contradicts other Federal Reserve requirements that prohibit collecting such data on loan applications.
3. Clean Air Enhanced Monitoring Rule. The EPA is working to meet an April 30, 1995 deadline to complete a rulemaking that would revamp 25 years worth of state emissions monitoring standards. The EPA estimates compliance costs of $1 billion per year, but private sector economists suggest the costs will be much higher.
4. OSHA Ergonomics Protection Standard. A Notice of Proposed Rulemaking is expected this spring that would implement dollar rule new standards to reduce repetitive motion injuries. Among other things, this multi-billion dollar rule would require employers to modify work stations and develop written plans.
5. Indoor Air Quality. The Occupational, Safety, and Health Administration would not be able to move forward with indoor air quality rulemaking that was first proposed in April 1994. The rule would require restaurants, retailers, and others to implement indoor air quality programs and ventilation plans. The rule is estimated to cost over $8 billion per year.
6. Clean Air Permitting Rule. The moratorium would keep EPA from finalizing a costly permitting rule that goes far beyond the congressional purpose behind Title V of the 1990 amendments to the Clean Air Act. Changes made by EPA over the last two years make this a prime example of a costly and burdensome regulation. While providing few, if any, environmental benefits, the rule would stifle industrial innovations, impede economic growth, and empower state and federal bureaucrats to micro-manage industrial production.

A regulatory moratorium would allow these rules to be re-assessed in light of the regulatory review initiatives being considered by Congress. This will allow the agencies to improve their rulemakings, ensuring Americans that identifiable and harmful risks are being addressed, and that the regulations to control these risks generate benefits commensurate to their costs.

Conclusion

"The Regulatory Transition Act of 1995" provides the opportunity to move forward with refinements in the regulatory process. Congressional initiatives for regulatory reform can be debated and enacted before the end of the moratorium. In turn, these new regulatory tools would be in place to review the regulations on hold during the moratorium. This would facilitate the identification of potentially costly rules while providing the public with greater information concerning the benefits of any given rule. With enhanced tools for regulatory review, the rules under discussion during the moratorium can be implemented in a more beneficial manner. The regulatory moratorium provides the time necessary to introduce new tools for regulatory review while allowing agencies the time to review their current regulatory agendas. I will be happy to answer any questions you have on these issues. Thank you, Mr. Chairman and Members of the Committee.

Chairman ROTH. Thank you, Mr. Gray.

Mr. Donohue?

TESTIMONY OF THOMAS J. DONOHUE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN TRUCKING ASSOCIATIONS, INC.

Mr. DONOHUE. Thank you, Mr. Chairman.

Let me just tell you a little bit about the trucking business. We are the Nation's largest transportation mode. We employ 7.8 million people. We represent 5 percent of the gross domestic product, earning more than $312 billion in 1993. Eighty percent of all the trucking companies in your State and in our country are small, very small entrepreneurial businesses.

Yesterday, Mr. Chairman, something very special happened that doesn't happen very often in our industry. The entire transportation community, land, sea, and air, joined together to speak with one voice on the subject of regulatory reform. Our forum was a live press conference and discussion broadcast over Transat, the American Trucking Associations satellite network. In addition to the leaders from trucking, railroad, automobiles, ports, and air transport, four former Secretaries of the Department of Transportation participated, as did Representative David McIntosh and a distinguished Member of the Senate, Senator Don Nickles.

What brought this vast array of leaders together is very simple: the fact that Federal regulators are strangling transportation in this country. The Federal rulemaking process has spun out of control and it is costing American jobs, strangling small businesses, and raising prices for every one of us. Confusion and contradiction have infected the Federal rulemaking process, and some regulators approach their task like punishers when they should be acting like problem solvers. They have created, in my opinion, a crisis in confidence between the people and the government, and the cynicism and distrust felt by everyday Americans is growing day by day.

From the perspective of the trucking industry, trucking pays $8.5 billion annually just to comply with regulations. That is more than $6,500 per large truck. But more than that, the future is what concerns us. However, I am convinced through a little more sensible approach to Federal rulemaking, trucking could create tens of thousands of additional good-paying jobs for Americans without jeopardizing the health and safety of the drivers or the drivers of cars on our roads.

That is why we support S. 219, a bill to freeze implementation and promulgation of Federal regulation and put the brakes on runaway Federal rulemaking.

But once that is done, we need to move forward, Mr. Chairman, and complete an overhaul of the Federal regulation process that includes cost-benefit analysis, risk assessment, and private property protection.

We recognize fully that some regulation is always going to be necessary. In fact, the trucking industry has a solid record of aggressive action to improve safety. We fought hard for the commercial drivers license. We pushed for random drug testing for drivers and a ban on the use of radar detectors. These regulations not only make sense, but have led to a 37 percent decline in the fatality rate while the amount of miles we drive have gone up 41 percent.

There are three examples of the type of thing that is significantly affecting our business.

The California Federal implementation plan put out by the Environmental Protection Agency, which would have cost that State $50 billion and 500,000 jobs, would basically have shut down trucking in that part of the country and would have impeded air and rail travel. It made no sense. We have spent a fortune in time and energy on that, and, thankfully, last week, it appears we are beginning to get some reprieve from EPA.

OSHA, an organization that has affected, particularly in Senator Glenn's State, the activities of many companies and manufacturers, was about to come out with a rule dealing with ergonomics, a very complicated subject, but it was going to say that nobody in our industry could pick up something, unaided, that weighed more than 25 pounds. Senator Glenn's briefcase weighs more than 25 pounds. We can't have this kind of foolishness.

At DOT, we support drug and alcohol testing. In fact, we had to fight hard to get drug testing. But the alcohol testing rules, which contain pre-employment alcohol testing, were put out in a way that forced us to begin testing before the DOT even finished their own rulemakings of how we were to go about this. By the way, when you employ 7.8 million people and you hire as many as we do every year, testing is a matter of a couple hundred million dollars. When you get down to a pre-employment alcohol test, it is a stupidity test. If you are going to come looking for a job drunk, you are not going to get it.

We think it is time to stop and pause a minute and say, S. 219, if put in place, will accelerate the process of passing meaningful regulatory reform.

I did pause for a minute as I listened this morning to a lot of the questions from a group of members of the panel who are probably opposed to the legislation and from representatives of the President, who have clearly been told to be opposed to the legislation. A few points were missed. Generally, if the cost of the regulation is not more than $100 million, it doesn't get covered, and most of the things I heard talked about are not $100 million.

This issue stops regulations that have not yet been put out, like that 25-pound OSHA regulation. If that doesn't get out because of S. 219, I am happy, because then it would have to pass a cost and reasonable science test before it could be implemented.

I think it is a very simple issue here. By passing S. 219, we hold off unnecessary regulation, we accelerate the process of review and consideration, and we move forward to doing something in this country that is very, very important. Let us restore the confidence of those who are regulated in the government who is regulating us.

Thank you very much, sir.

[The prepared statement of Mr. Donohue follows:]

PREPARED STATEMENT OF THOMAS J. DONOHUE

I. INTRODUCTION

A. ATA REPRESENTS THE TRUCKING INDUSTRY

I am Thomas J. Donohue, President and Chief Executive Officer of the American Trucking Associations (ATA), the national trade association of the trucking industry. The ATA federation includes over 34,000 motor carriers, an affiliated association in every State, and 11 conferences representing individual segments of the industry. The ATA federation represents every type and class of motor carrier in the country.

Thank you for moving ahead on the proposal to freeze the implementation and promulgation of federal regulations. This freeze is absolutely essential to give Congress the window of opportunity to fundamentally improve Federal rulemaking. ATA is committed to work with you to enact the freeze and to require cost-benefit analysis, risk assessment with good science, and private property protections in all regulations issued at the Federal level.

In our view, there is nothing you could do this year that would leave a stronger legacy for our country or produce more economic opportunity for our people than regulatory reform.

B. THE TRUCKING INDUSTRY SERVES AMERICA

Trucking is the nation's largest freight transportation mode. The trucking industry employs 7.8 million people throughout the country in jobs that relate to trucking activity—a number that exceeds the population of 42 of our 50 States. The industry has gross freight revenues equal to nearly 5 percent of the Gross Domestic Product—a total of $312 billion in 1993. Trucks account for 78 percent of the Nation's freight bill and transport 45 percent of total tonnage shipped by all modes—3.1 billion tons of freight annually.

C. THE TRUCKING INDUSTRY IS HEAVILY REGULATED

This year alone, government regulations will cost the trucking industry $8.5 billion (an average $6,571 per truck, or 7.5 percent of the truck's annual gross receipts). The Federal Government regulates virtually every aspect of how we operate our business, focusing on three major areas: safety and engineering, the environment, and labor and human resources. There are rules telling us how to mark our trailers, how to maintain our trucks, how to determine if our drivers are qualified, and how our drivers must operate their vehicles. There are even regulations that make truckers responsible for water pollution caused when it rains on our properties.

The trucking industry is committed to safety and a clean environment and we have a record of voluntary action to prove it. ATA has consistently supported reasonable regulations such as the Commercial Driver's License, random drug testing of drivers, and clean air provisions. We recognize that in the pursuit of those goals some regulation is necessary. However, our industry cannot sustain the burden of continued excessive regulation that does nothing to improve safety or productivity. Nor can the country.

Right now, the U.S. Department of Transportation (USDOT) has more than 500 people who work just on trucking issues. They write rules, publish rules, enforce rules, and change rules. Similar people are working at a host of other Federal agencies that have the power to regulate the trucking industry, including: the Department of Labor, the Interstate Commerce Commission, the Environmental Protection Agency (EPA), and the Internal Revenue Service, to name just a few.

Equipment standards alone cost the industry over $430 million a year. New emission standards to meet clean air requirements will raise the price of a vehicle 10 to 20 percent, costing our industry $2 billion a year. And if the government mandates anti-lock brakes for heavy trucks, you can add another $120 million in annual expense.

In addition to these truck-specific costs, there are others—like labor costs—which all businesses share, but which fall harder on labor-intensive industries like trucking. We suffer disproportionately the cost of complying with regulations governing employment, workplace safety and health, and benefits.

Because 75 percent of the nation's communities depend exclusively on trucks for their freight, the economy cannot prosper without a healthy trucking industry. Trucking companies, on average, eke out just a 2 percent profit margin. Overregulation is especially difficult for the 88 percent of trucking companies that are small businesses.

II. ATA SUPPORTS SWIFT PASSAGE OF S. 219

A. ATA SUPPORTS THE MORATORIUM

ATA supports S. 219, which would freeze promulgation and implementation of federal regulations from November 9, 1994 until December 31, 1995 and delay deadlines by 5 months, or until comprehensive regulatory reform legislation is enacted. This freeze would provide Congress the time to consider and enact comprehensive regulatory reform that would require agencies to make sure that the benefits of the regulation will exceed the costs and that there will be an assessment of risks that incorporates peer review and good science.

Let me give you some examples of the kinds of foolish and shortsighted regulations that have been promulgated or will be made effective between November 9 and last December 31 that directly affect the trucking industry.

1. Random Alcohol Testing Required Before the Rules were Written.

On January 1, 1995, trucking companies with over 50 drivers were required to begin randomly testing drivers for alcohol. Unfortunately for the industry, USDOT had not finished writing the rules establishing how the test must be administered.

This has led to confusion and unnecessary costs. Motor carriers have been forced to implement an expensive testing system when decisions made in the next few months could allow a much cheaper—and just as effective—solution.

USDOT had been petitioned in October to delay implementation for all types of alcohol testing until the rules were finished. The Department did not act on that petition until the 11th hour—just 2 days before implementation of the regulation—and they did not publicize their action until January 5. USDOT agreed that its failure to finalize the rules was justification for delaying the beginning date for preemployment alcohol testing until May 1, 1995, but did not agree to delay random testing, which must be done by motor carriers at their own expense.

USDOT's response to these objections was illogical and would not survive a cost-benefit test. We have given DOT a reasonable option by supporting random, roadside testing, which proved successful in a four-state pilot program in 1993.

2. Documentation of Forbidden Tests.

If you're looking for a prime example of the contradictory and confusing nature of federal rulemaking, consider this: on December 2, 1994, USDOT prohibited trucking companies from using blood to test for alcohol impairment. This decision went against our recommendation and left thousands of motor carriers with fewer options to use to test their drivers.

Yet USDOT went a step further by requiring companies to document the name, address, and telephone number of blood testing facilities they could have used if USDOT had allowed it. Over 500,000 trucking companies will be required to uncover this information and produce it at any time that they are unable to use a breath testing device for reasonable suspicion or post-accident testing. Of course, because USDOT prohibited blood testing in the first place, the number of testing facilities carriers can find does not reflect what would be available if blood testing were permitted!

We believe that freezing this requirement and then subjecting it to cost-benefit analysis would reduce our costs without impairing safety.

3. Micro-managing Physical Activity.

OSHA is planning to issue new regulations on ergonomics in the near future. OSHA had sought in the last Congress to obtain specific legal authority for a provision that would require employers to redesign or completely eliminate work-related tasks that cause so-called "repetitive strain injuries," or "cumulative trauma disorders." Congress did not act favorably on the legislation, so the agency is now using its regulatory powers.

Among the tasks that OSHA could require employers to eliminate is lifting more than 25 pounds. My briefcase weighs more than 25 pounds and imagine yours does

too, Mr. Chairman. Such an intrusion into the operations of American business is unprecedented. Even the Americans With Disabilities Act doesn't go that far. In fact, we believe that if issued, OSHA's ergonomics standard will be one of the most costly and complicated regulations ever issued by the Federal Government. We estimate the costs of compliance to the trucking industry alone will be in the billions of dollars—not only in direct compliance costs, but also in additional costs associated with workers' compensation claims.

We believe that this regulation should be delayed and should be subjected to a rigorous assessment of the science behind the risk and a demonstration that the benefits of this regulatory intrusion are worth the costs.

4. Irrational Clean Air Dictates.

EPA is under a court order to issue a "Federal Implementation Plan" for parts of California. EPA estimates these rules will cost the California economy $6 billion a year. The "FIP" that was proposed by EPA earlier this year would require trucks to drive out of California and return before they could make a second pick-up or delivery. It would have cut back on the number of aircraft flights by ⅓ and even require the gas from cows eating grass to be controlled.

I am pleased to say that EPA recently agreed to a 2 year delay in the effective date in the start of the FIP. If nothing else, this gives California's state plan, which contains many features supported by the industry, a chance to go forward. However, EPA still issued final rules last week that will, in effect, put the industry in a hostage situation if the government fails to approve the California plan.

B. THE CONGRESS MUST ACT QUICKLY

We urge Congress to enact S. 219 as soon as possible. We understand that S. 219 would freeze regulations that we're promulgated or made effective even before the bill becomes law. However, as each day goes by, the number of regulatory burdens on industry increases. We do not want to incur the problems and the costs of complying with these new regulations if the impact of the regulatory reform provisions will require them to be totally reanalyzed.

III. RECONSIDER JUDICIAL REVIEW

We encourage the Committee to take a closer look at the proposal in the latest staff draft that would prohibit judicial review of the President's decisions to exempt certain regulations from the moratorium. We believe the latest draft of the bill provides a great deal of flexibility to the administration by listing eight types of regulations that the President can exclude from the moratorium. However, we are concerned that the President's decisions cannot be reviewed in court, and are therefore "above the law." And nobody should be above the law.

This is more than just a philosophical issue. For example, the President can exclude a regulation from the moratorium that "has as its principal effect fostering economic growth." This could be construed to mean practically anything, and yet the President's decision—or interpretation—could not be challenged in court.

The current Regulatory Flexibility Act has a provision that insulates the Executive Branch from court review of its decisions as they affect small business rules. The regulatory reform proposals before Congress would close this loophole. We think judicial review is an important element of overall regulatory reform.

IV. CONCLUSION

ATA supports S. 219 which would freeze promulgation and implementation of federal regulations until December 31 and extend deadlines for 5 months. We encourage the Congress to move swiftly on this legislation.

Let me underscore a point I made at the outset. If you do nothing else this year, enact the moratorium followed by comprehensive regulatory reform legislation. This would be far more significant than any tax cut because it would permanently change the relationship between government and business. Change that relationship, and you will trigger an explosion of economic opportunity for Americans without compromising health or safety.

That would be a real revolution.

Thank you for the opportunity to testify. I would be pleased to answer any questions.

Chairman ROTH. Thank you.

Mr. Mueller, thank you for being here.

TESTIMONY OF RAINER MUELLER, BOARD MEMBER, SAFE TABLES OUR PRIORITY

Mr. MUELLER. Thank you, Mr. Chairman.

Hello. My name is Rainer Mueller and I have traveled here from Oceanside, California. I am currently on the National Board of Directors of Safe Tables Our Priority. STOP is a grassroots organization headquartered in Carlsbad, California, which was started in the wake of the Jack-in-the-Box E. coli outbreak on the West Coast, when hundreds of people became sick and over half-a-dozen died from eating contaminated hamburger meat.

Thank you for the opportunity to address this panel on S. 219, the Regulatory Transition Act of 1995. I am here to tell you about the dire consequences that would result in the enactment of this moratorium.

In the fall of 1993, my 13-year-old son died from eating a cheeseburger. A new meat inspection rule which could have prevented his death would be stopped by this legislation. My son paid the ultimate price for eating one of his favorite foods.

This is in a country rapidly approaching the 21st century, considered by many to be a world leader, but its meat inspection laws are holdovers from the 19th century. The meat industry currently uses the old-fashioned poke-and-sniff meat inspection system, which does not adequately detect deadly bacteria. There are nearly five million illnesses and 4,000 deaths every year due to the ingestion of tainted meat and poultry.

Could you imagine if the FAA still utilized the same aviation regulations from the age of the Wright brothers with today's jet travel? Consumers wouldn't stand for it. Now, it is the same with government meat inspection.

Death by E. coli and hemolytic uremic syndrome is a very painful and torturous death. As a parent, standing by and watching my only son go through incredible agony and pain before he lost consciousness and died was something I don't even want to wish on my worst enemy. Immediately before slipping into unconsciousness, my son screamed, "Get my dad." Those were the last words he ever said. I couldn't do anything for him. I am haunted daily by this incredible, totally senseless tragedy.

The day Eric came down with bloody diarrhea, I rushed him to our clinic, where he was diagnosed with appendicitis. He was immediately admitted to our local hospital, where an appendectomy was performed. His appendix was normal. Two days later, he was sent home.

Two days later, he was admitted to the hospital because his health was steadily declining. His kidneys were beginning to fail. As I was to learn much later, this is the first sign of hemolytic uremic syndrome, also known as HUS.

After 2 days, Eric's pediatrician ordered him transferred to Children's Hospital in San Diego, where he was admitted to the pediatric intensive care unit under the care of the chief of pediatrics. He was placed on a respirator, and that evening, he was again operated on, this time for an ileostomy and a brain shunt to relieve pressure from brain swelling. By the time they were finished with Eric, he had over a dozen different tubes, IVs, and monitors stuck into his body.

Eric, who was his class president, on the school's honor roll, captain of his soccer team, assistant coach of his sister, Nikki's, soccer team, a member of the school surfing team, a member of the school band, and a member of the city all-star Little League baseball team, was now a vegetable.

After a conference with the doctors and our family, on November 3, 1993, we decided to remove Eric's life support systems. He died a short time later.

I used to serve on the board of directors of the local Jaycees, the Chamber of Commerce, and the soccer club. I even served two terms as the president of Nikki's and Eric's elementary school PTA. Today, I am only affiliated with one organization, STOP.

Eric's life was needlessly and tragically cut short, but I have made it my mission that Eric will not have died in vain. I never want to see another person go through the suffering that Eric did. I never want to see another family go through the terrible agony our family continues to go through today whenever we walk past Eric's bedroom, see his photograph, or even hear the name "Eric". Eric's friends no longer stop by. I know it is too hard for them.

On January 31, 1995, the USDA released a proposed Hazardous Analysis Critical Control Point, or HACCP regulations, to improve meat and poultry inspection. This rule would mandate rigorous sanitation requirements and scientific testing for bacteria in meat and poultry processing.

Ten years ago, the National Academy of Sciences, in its "Meat and Poultry Inspection: The Scientific Basis of the Nation's Program" report, recommended that the USDA adopt HACCP for meat and poultry inspection. The meat industry petitioned USDA to mandate the program. Now, the implementation of HACCP is threatened by S. 219, the proposed regulatory moratorium bill.

S. 219 would freeze regulation, effectively maintaining a broken meat and poultry system taxpayers do not deserve. S. 219 would sanction government inaction where delay has already been too costly. S. 219 is the affirmation of the status quo, that it is good enough. But, as you can see today, it definitely is not.

I am a Republican, but yesterday, I gladly sat in the front row as President Clinton addressed the Nation on this issue. I sat with a father and son whose lives were saved by air bags. I sat with a woman whose brother died needlessly because worker protection laws on enclosed places had not yet been enacted. I sat with a mother who lost her son due to cancer and whose family members continue to suffer from the horrible effects of cancer in a region of Long Island known as the cancer center of the United States. Laws that would prevent the exposure to cancer-causing pollution were not in place.

These citizens are an excellent example of the necessity of government safeguards, but, clearly, the laws that are needed to protect them from preventable death and injury may not be caused by something a court would find to be an imminent threat to health and safety. Any delay on such vital laws which can save lives is absolutely not tolerable. Thank you.

[The prepared statement of Mr. Mueller follows:]

PREPARED STATEMENT OF RAINER MUELLER

Hello, my name is Rainer Mueller and I have traveled here from Oceanside, California. I am currently on the national board of directors of Safe Tables Our Priority. Thank you for the opportunity to address this panel on S. 219, the Regulatory Transition Act of 1995. I am here to tell you about the dire consequences that would result in enactment of this moratorium. In the fall of 1993 my 13 year old son died from eating a cheeseburger. A new meat inspection rule which could have prevented his death would be stopped by this legislation.

More than anything in the world, I wish I didn't have to be here . . . but I do. No, I'm not afraid of Washington, D.C. or public speaking. I wish I didn't have to be concerned about E. coli 0157:H7 or this organization called S.T.O.P. I wish I could be home with my family enjoying the warm California sunshine. But I can't. You see, I'm a victim of E. coli. Oh, you can't see any outward signs? You probably won't. Why? Because on November 3, 1993, my thirteen-year-old son, Eric Jackson Mueller, died after eating an E. coli infested cheeseburger from one of the national burger chains in his own hometown of Oceanside.

Eric's Story

My son paid the ultimate price for eating one of his favorite foods. And this is in a country rapidly approaching the 21st century, considered by many to be a world leader. But its meat inspection laws are holdovers from the 19th century. Could you imagine if the FAA still utilized the same aviation regulations from the age of the Wright brothers with today's jet travel? Consumers wouldn't stand for it! And so it is now with government meat inspection.

Death by E. coli and hemolytic uremic syndrome is a very painful and tortuous death. As a parent standing by and watching my only son go through incredible agony and pain before he lost consciousness and died, was something I don't even wish on my worst enemy. Immediately before slipping into unconsciousness, Eric screamed, "Get my dad!" Those were the last words he ever said. I couldn't do anything for him. I am haunted daily by this incredible, totally senseless tragedy.

The day Eric came down with bloody diarrhea, I rushed him to our clinic where he was diagnosed with appendicitis. He was immediately admitted to our local hospital where an appendectomy was performed. His appendix was totally normal. Baffled, the doctors ordered culture tests which then erroneously detected amebiasis. With this diagnosis Eric was prescribed the powerful drug, Flagyl, and 2 days after his appendectomy, he was sent home. This was a Friday night. He wasn't getting any better during the weekend, in fact he was getting sicker and sicker.

On Monday morning my wife called the doctor's office, informing him that Eric wasn't getting any better, and seemed to be getting worse. These concerns were dismissed as postoperative symptoms. Finally after the third phone call to the doctor's office, the doctor relented and told her to bring him to his office. Upon examination, Eric was immediately readmitted to the hospital. His health was steadily declining, and his kidneys were beginning to fail.

As I was to learn later, this is the first sign of hemolytic uremic syndrome, also known as HUS.

The doctors at our local hospital were still baffled as to what was happening with Eric. In desperation we called in Eric's pediatrician who had known him all his life. He knew things weren't going right, and that the drug Flagyl wasn't doing anything for him. And after 2 days he ordered Eric transferred to Children's Hospital in San Diego. Where he was admitted to the pediatric intensive care unit, under the care of the chief of pediatrics.

That first evening in P.I.C.U., the chief of pediatrics and another doctor consulted with me at the foot of Eric's bed. He's got HUS they said, but nowhere in the medical records anywhere could they find a single confirmed case of amebiasis causing HUS. They remained baffled.

He was placed on a respirator, and that evening he was again operated on, this time for an ileostomy and a brain shunt to relieve pressure from brain swelling. By the time they were finished with Eric, he had a dozen different tubes, IV's and monitors stuck in his body.

Eric, who had been his class president, on the school's honor roll, captain of his soccer team, an assistant coach of Nikki's soccer team, a member of his school's surfing team, a member of the school band, and member of the city's all-star Little League baseball team, was now a vegetable.

After a conference with the doctors and our family, on November 3, 1993 we decided to remove Eric's life support systems. He died a short time later.

I used to serve on the board of directors of our local Jaycees, our chamber of commerce, and soccer club. I served two terms as the president of Eric and Nikki's elementary school PTA. But today I am only affiliated with one organization, S.T.O.P.

Eric's life was tragically and needlessly cut short. But I have made it my mission that Eric did not die in vain. I never want to see another person suffer like Eric did. I never want to see another family go through the agony our family continues to go through today whenever we walk past Eric's bedroom, see his photograph or hear the name Eric. Eric's friends no longer stop by, I know it's too hard for them.

What is HACCP?

On January 31, 1995, USDA released proposed Hazardous Analysis Critical Control Point (HACCP) regulations to improve meat and poultry inspection. The HACCP System is a quality control management program. Under HACCP, likely hazards in a production system are regularly monitored on the basis of risk. Risks are identified, their controls determined and monitored, and end products are periodically sampled to check the HACCP process.

Under HACCP, emphasis is placed on the process rather than the end product. Instead of monitoring every carcass for a defect, plant employees will regularly monitor the processing of carcasses: the temperature of the storage areas, the cleanliness of the equipment, or the consistency of carcass washes or other solutions used. The employees will keep records of their observations. Samples of end products will be tested to ensure that the process is working properly and the government will review company HACCP records.

HACCP has been endorsed by the United Nations, World Health Organization, the General Accounting Office, National Food Processors Association, National Broiler Council, American Meat Institute, and the Safe Food Coalition. Ten years ago the National Academy of Sciences, in its *Meat and Poultry Inspection: the Scientific Basis of the Nation's Program* report, recommended that USDA adopt HACCP for meat and poultry inspection. Industry petitioned USDA to mandate the program. Now the implementation of HACCP is threatened by S. 219, the proposed regulatory moratorium bill.

How S. 219 Would Affect the Implementation of HACCP

USDA's meat and poultry inspection laws were written in 1906. Federal inspectors are limited to touching, smelling, and visually inspecting carcasses to determine whether they are fit for consumption. Everyone knows inspectors are not going to find harmful bacteria without microscopes and microbial tests. Clearly, the nation's meat and poultry inspection program should be updated. Americans currently pay $600 million for an inefficient and ineffective meat and poultry inspection program.

I think meat and poultry inspected under the current system poses a threat to American consumers. Unfortunately, policy makers and the meat and poultry interest groups have not shared my concern. There were 20 E. coli 0157:H7 outbreaks between 1982 and 1992, yet USDA did not promulgate regulation to improve the system. After the massive 1993 West Coast E. Coli 0157:H7 outbreak, USDA officials continued to insist that E. coli 0157:H7, Salmonella, and other food borne bacteria were not adulterants. When USDA declared E. coli 0157:H7 an adulterant in October 1994 and implemented a sampling program, meat and poultry interest groups sued USDA to prevent sampling and recall the adulteration definition. House Agriculture Committee Chairman Pat Roberts says he will try to prevent implementation of the sampling program.

S. 219 would freeze regulation, effectively maintaining the broken meat and poultry system taxpayers do not deserve. S. 219 would sanction government inaction where delay has already been too costly. S. 219 is an affirmation that the status quo is good enough. But as you see today, it definitely is not.

Yesterday I sat in the front row as President Clinton addressed the Nation on this issue. I sat with a father and son whose lives were saved by air bags. I sat with a woman whose brother died needlessly because a worker protection law on enclosed spaces had not yet been enacted. I sat with a mother who lost her son to cancer and whose family continues to suffer the horrible effects of cancer in a region of Long Island referred to as the cancer capital of the United States. Laws which prevent exposure to cancer causing pollution were not in place. These citizens are an excellent example of the necessity of government safeguards. But clearly the laws that are needed to protect them from preventable death and injury may not be caused by something a court would find to be an "imminent" threat to health and safety. Any delay on such vital laws which can save lives is absolutely not tolerable.

Chairman ROTH. Thank you, Mr. Mueller.

Mr. McGrath?

TESTIMONY OF C. DEAN McGRATH, JR., SENIOR ATTORNEY, AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION

Mr. MCGRATH. Mr. Chairman, Senator Glenn, my name is Dean McGrath and I am here today on behalf of the American Automobile Manufacturers Association. Our members are Chrysler, Ford, and General Motors.

The auto industry is one of the most heavily regulated industries in the country, and that is why we have long supported efforts to reform our government's regulatory system. Quite simply, the way our government implements and administers its laws is extremely costly and ineffective.

Our industry is rife with examples of good legislative intentions gone awry in the regulatory process. Implementation of the Clean Air Act comes quickly to mind.

If we are to achieve a smaller, less intrusive, and more efficient government, it is clear that the U.S. Government's regulatory regime must be reformed. There must be better analysis and justification for regulatory actions. This includes balancing the costs and benefits, setting regulatory priorities, coordinating the often-conflicting regulatory mandates of different agencies, evaluating the impact on international competitiveness, and ensuring that collateral consequences are considered before acting. A regulatory moratorium is an important first step towards such reforms.

Unless there is a clean break with past practice, the current regulatory process will simply grind on. It is clear to us that the focus of the regulatory process must change so that the burden is on the government to show why a particular regulation is needed. The presumption should not be on industry to prove that further regulation is not necessary, yet that is precisely the current State of affairs.

Virtually every agency presumes that additional regulation of the auto industry is justified. No matter what the subject, no matter what the cost, no matter what the benefits, the presumption has been that additional regulation is justified and that the industry can simply bear the cost. That is simply unrealistic, particularly for an industry like ours that faces intense foreign competition.

This is not to say that many, or even all, regulations are not capable of being justified, but that justification must be made on the merits of the particular regulation, not the fact that it involves a particular industry or issue.

While we applaud the President's efforts to improve the regulatory process, we believe that the moratorium, coupled with the prospect of real regulatory reform, is needed to help change the current regulatory environment.

We are fully aware of the fact that there are concerns that a moratorium could undermine legitimate health and safety concerns. That is why we wholeheartedly support the proposed legislation's exception for regulations dealing with imminent threats to health and safety.

We also support applying the moratorium retroactively. This will address the concern that has been expressed that some rules were issued simply to avoid contrary direction from the new Congress. Eliminating this potential political perception problem can only enhance the integrity of the regulatory process.

One regulatory action covered by the moratorium that is of vital interest to the auto industry is EPA's approval of the petition submitted by the Northeast States and the District of Columbia that would mandate the adoption of California's auto emissions program in the Northeast States. The rule has been characterized by one of my fellow panelists as one of the most cost-ineffective, anti-competitive, and anti-market rules ever issued by an agency.

EPA approved this rule, despite the fact that the auto industry has proposed a Nationwide alternative that even EPA has acknowledged is environmentally superior. This is exactly the type of regulatory action that would have benefitted from more careful review and analysis.

I would also like to comment briefly on EPA's enhanced monitoring rulemaking. The proposed rule would impose substantial additional monitoring requirements without regard for cost, technical feasibility, or environmental benefit. Industry and the States have been working with EPA to improve this proposal, and the moratorium would permit these discussions to continue by extending the court-imposed deadline for EPA action.

In closing, I would like to emphasize that the auto industry believes that the time has come to rethink the regulatory process, and we believe the moratorium is a useful step toward that end.

Thank you, Mr. Chairman and Members of the Committee.

[The prepared statement of Mr. McGrath follows:]

PREPARED STATEMENT OF C. DEAN MCGRATH, JR.

Good morning. Mr. Chairman and Members of the Committee, my name is C. Dean McGrath, Jr. and I am here today on behalf of the American Automobile Manufacturers Association (AAMA). Our members are Chrysler Corporation, Ford Motor Company and General Motors Corporation.

The auto industry is one of the most heavily regulated industries in the country. We have long supported efforts to reform our government's regulatory system. Quite simply, the way our government implements and administers its laws is extremely costly and inefficient. Our industry is rife with examples of good legislative intentions gone awry in the regulatory process (implementation of the Clean Air Act, particularly EPA's approval of the petition of the Northeast States and the District of Columbia relating to adoption of California's auto emissions program and EPA's action on enhanced monitoring are two examples that come quickly to mind). If we are to achieve a smaller, less intensive and more efficient government, it is clear that the U.S. Government's regulatory regime must be reformed. There must be better analysis and justification for regulatory actions. This includes balancing the costs and benefits; setting regulatory priorities; coordinating the often conflicting regulatory mandates of different agencies; evaluating the impact on international competitiveness; and ensuring that collateral consequences are considered before acting. A regulatory moratorium is an important first step toward such reforms.

Unless there is a clean break with past practice, the regulatory process will grind on. It is clear to us that the focus of the regulatory process must change so the burden is on the government to show why a particular regulation is needed. The presumption should not be on industry to prove that further regulation is not necessary. Yet that is precisely the current state of affairs. Virtually every agency presumes that additional regulation of the auto industry is justified. No matter what the subject, no matter what the cost, no matter what the benefits, the presumption has been that additional regulation is justified and that the industry can simply bear the cost. This is simply unrealistic, particularly for an industry like ours that faces intense foreign competition.

This is not to say that some, many or even all regulations are not capable of being justified; but that justification must be based on the merits of the particular regulation—not the fact that it involves a particular industry or company. While we applaud the President's efforts to improve the regulatory process, we believe that the moratorium, coupled with the prospect of real regulatory reform, is needed to help change the current regulatory environment.

We are fully aware of the fact that there are concerns that such a moratorium could undermine legitimate health and safety concerns. That is why we support the proposed legislation's exception for regulations dealing with imminent threats to health and safety and other emergencies.

We also support applying the moratorium retroactively. This will address the concern that has been expressed that some rules were issued simply to avoid contrary direction from the new Congress. Eliminating this potential "political" perception problem can only enhance the integrity of the regulatory process.

One regulatory action covered by the moratorium that is of vital interest to the auto industry is EPA's approval of the petition submitted by the Northeast States and the District of Columbia that would mandate the adoption of California's auto emissions program in the Northeast States. The rule has been characterized by one of my fellow panelists as "one of the most cost-ineffective, anti-competitive, and anti-market rules ever issued by an agency." And EPA approved the rule despite the fact that the auto industry has proposed a nationwide alternative that even EPA has acknowledged is environmentally superior. This is exactly the type of regulatory action that would have benefited from more careful review and analysis.

I would also like to comment briefly on EPA's enhanced monitoring rulemaking, which would also be covered by the moratorium. The Clean Air Act requires EPA to develop rules requiring certain stationary sources periodically to submit compliance certifications. The Act also provides that EPA require "enhanced monitoring," when necessary, to support these certifications. EPA has leveraged the two-word reference to "enhanced monitoring" into one of the lengthiest and most complicated regulations ever proposed. The proposed rule would impose substantial additional monitoring requirements without regard for cost, technical feasibility, or environmental benefit. In addition, enhanced monitoring could be imposed without regard for its effect on the stringency of existing substantive emission standards. In other words, substantive emission standards that were developed by national rulemaking may be made more stringent at individual sites by the imposition of enhanced monitoring. Industry and the States have been working with EPA to improve the proposal. The moratorium would permit these discussions to continue by extending the court-imposed deadline for EPA action.

In closing I would like to emphasize that the auto industry believes that the time has come to rethink the regulatory process and we believe the moratorium is a useful step toward that end. I will be happy to try and answer any questions you may have.

Thank you Mr. Chairman and Members of the Committee.

Chairman ROTH. Thank you.

Mr. Hawkins?

TESTIMONY OF DAVID G. HAWKINS, SENIOR ATTORNEY, NATURAL RESOURCES DEFENSE COUNCIL

Mr. HAWKINS. Thank you, Mr. Chairman, Senator Glenn, Senator Levin.

Thank you very much for inviting the Natural Resources Defense Council here today. We also oppose moratorium bills, including S. 219, and we do so because we believe these bills will prevent adoption of needed protections. We also oppose them because they are the wrong tool for improving regulation, whether new or old.

I would like to submit my statement and just try to make three points, briefly.

The first is that these moratorium bills will delay important, needed public protections. There is a temptation to assume that a 6- or a 9-month delay really can't do that much harm, but consider the case of the Consumer Product Safety Commission's rules requiring child-resistant packaging. CPSC estimates that about 200 kids' lives a year are being saved as a result of those packaging changes, compared to what the poisoning rate was before those rules were adopted. If that rule were adopted since November 9, delaying it for 6 months would cause 100 deaths. Delaying it for 9 months would cause 150 deaths.

This is the kind of effect that a moratorium can have. Its flaw, its fundamental flaw, is that it prevents the adoption of beneficial rules as well as the adoption of rules about which there may be some question and reason to evaluate.

Let me address, quickly, how the revised draft would affect these conclusions. In my view, the revised draft does not correct this fundamental flaw. The revised draft focuses on big rules, rules that are significant under the Executive Order, but by focusing on big rules, the revised draft also stalls rules with big benefits.

For example, EPA has rules which would be stalled by this bill for municipal waste incinerator and medical waste incinerator toxic air pollutants. Each of these costs more than $100 million, but together, they will cut harmful toxic air pollutants by over 200,000 tons a year. That is an enormous amount. It is an enormous amount to continue to allow to be emitted into the air for the time period that would be added by the moratorium.

The original S. 219 would have gone after all rules, much like a hunter shooting at every bird in the air. The revision targets only the eagles. That is not a reason to praise it for selectivity. It is going to hurt the big rules with the big benefits.

I have mentioned seven rules in my prepared statement that would deliver health, environment, and safety benefits. All of them would continue to be snared by the revisions to S. 219. They are all significant rules, under the Executive Order.

The second point about this change in focus, these significant rules are the rules that undergo the best analysis. Why target a moratorium on the rules that are the most carefully analyzed and most carefully studied? These are the rules that agencies know will be evaluated by OMB review. They are the ones they know have to be the most defensible and the most thoroughly analyzed and have the best defined benefits. Why should those be the rules that are stopped?

Third, targeting significant rules creates an incentive to classify rules as not significant. It is important to realize that OMB has discretion in making decisions about whether a rule is or is not significant. If the implication of classifying a rule as significant is that it will be stalled for 9 months or more by the moratorium, then there is an enormous incentive to call it not significant, and the result is that a rule that might otherwise have been analyzed, under the moratorium bill will go forward without being analyzed because it will be classified as not significant.

Let me turn to the health issue, because supporters of the moratorium have said that the imminent threat exception is adequate to deal with the problem. In our view, it is not. The imminent threat exception is a narrow exception. If it were not a narrow exception, why have the word "imminent" in there? It raises all sorts of possibilities of challenge.

The Chairman has said that the President's determination on exemptions should not be subject to review, which would be an important improvement, but it doesn't stop the fact that the President is charged, under the Constitution, with faithfully executing the laws, and if you pass a bill that limits the President's authority to imminent threat, I think you have to assume that the President is going to read some meaning into those words.

What it will mean is that programs which are designed to protect against death and serious illness that occurs 1 or 2 years from now and would be delayed for another 1 or 2 years may not be classified as imminent threats, but those lives will be lost, and the fact that they may be lost in 1996 rather than 1997 will be no comfort to the families of those who suffer as a result of the moratorium.

On the judicial review, just let me mention briefly, Section 7 of the revised bill prohibits a private right of action. It does not preclude judicial review of the final agency rule, in our view, which means that issues such as exemptions and other unauthorized actions could be raised in challenge to a rule when it was promulgated in final form. This has tremendous potential for creating uncertainty and delay.

I mention in my testimony the fact that an agency, one of the prohibited acts is issuing a proposed rule during the moratorium. The moratorium relates back to November. Agencies have already issued proposed rules. How do they cure that illegality? That is an illegal action under the moratorium provision. When the rule becomes final a year or 2 or 3 from now, is there anything they can do about it? Do they have to go back and repropose? What exactly does the moratorium mean?

Also, the moratorium creates an extension, and I see my time is up, but that extension creates a ripple effect through all sorts of provisions of law that could affect contracts, could affect investments, and could affect public health protection.

Thank you very much.

[The prepared statement of Mr. Hawkins follows:]

PREPARED STATEMENT OF DAVID G. HAWKINS

Thank you for inviting NRDC to testify today on pending regulatory moratorium bills, including S. 219, the Regulatory Transition Act of 1995. NRDC is a national membership organization dedicated to environmental protection. In our work we have sought to improve the effectiveness and responsiveness of all levels of government in dealing with environmental threats to human health and enhancing the quality of our environment.

The moratorium bills would bar federal agencies from taking any regulatory rulemaking action, other than specifically excepted actions, between now and the end of the moratorium period: July 1, 1995 under S. 219 as introduced, and as late as December 31, 1995 under the House companion bill, H.R. 450, as reported out of committee. In addition the bills would suspend the effectiveness of regulatory rulemaking actions taken since November 1994.

The bills would halt not only final rules but also advance notices of proposed rulemaking, notices of inquiry, notice of proposed rulemaking and *any other action taken in the process of rulemaking* (except a cost benefit analysis or risk assessment). The bills would override deadlines in existing law and even attempt to override existing court orders, setting the stage for one court ordering an agency to act while another orders it not to act.

Mr. Chairman, NRDC respectfully opposes enactment of these bills. We oppose them because they prevent the government from protecting the public against identified harms. We oppose them because they are the wrong tool to improve regulation, new or old.

We acknowledge that anecdotes of apparently unneeded or unduly complex requirements in existing rules abound. But the case has not been made that the "peril" of scheduled rules is so great that it justifies a declaration of martial law against programs to protect the public. A reality check is in order.

In many respects, America has the best environmental quality in the world and it has achieved that status in large part because of rules; rules that cannot be frozen without damaging their effectiveness. America also is in its fourth quarter of economic recovery; strong evidence that the recent pattern of government rulemaking has not done the damage claimed by some of the moratorium's supporters.

Congress did not act in haste in its decisions to attack remaining problems, like toxic air pollution, ozone depletion, or drinking water contamination. For example, reauthorization of the Clean Air Act consumed the attention of five Congresses between 1981 and 1990. Elected officials, including President Bush were persuaded that additional actions by the federal government were needed to make progress on clean air. Of the Members of this Committee who were in the Senate in 1990, all but one voted for its passage. But the moratorium would, without analysis, countermand the actions called for by Congress in 1990.

The supporters of the moratorium have not identified the particular problems it is intended to address or described how the moratorium will solve or ameliorate these problems. The impacts of the moratorium are unknown. Will Congress know before it votes on these bills what desirable rulemaking actions would be delayed? Will Congress know what adverse impacts such delays would cause?

Federal regulations serve important needs for which every opinion survey shows continued strong support. Clean drinking water, food that is fit to eat, lakes and streams where it is safe to swim, boat and fish, air that we can breathe without harm, workplaces where employees are free from discrimination and unreasonable risks of physical injury—these are just a few of the qualities of daily life that Americans depend on their governments to help them secure.

DELAYING BETTER PUBLIC PROTECTION

The moratorium bills would do harm by delaying needed protections. There is a temptation to assume that a 6-month or 9-month delay in implementing a new rule cannot cause that much harm. But consider the case of child-resistant caps on medicines and poisonous household products. According to the Consumer Product Safety Commission, this rule is saving about 200 kids' lives per year, compared to poisoning rates before the caps were required. Delaying a rule like this for 6 months would result in 100 deaths that were avoidable; a 9-month delay would cost 150 lives.

I will provide a few examples of important protections that would be delayed. But members should ask themselves and be prepared to answer, how many other important actions would be affected by this sweeping bill that have not even been identified.

Cryptosporidium Drinking Water Contamination—The Milwaukee Mauler.

Cryptosporidium is a parasite that has caused several major waterborne disease outbreaks in the U.S. including a 1993 outbreak that made over 400,000 people sick and killed over 100 people in Milwaukee, Wisconsin. This parasite has been found in 80 to 90 percent of the surface waters used for drinking water tested in the United States, and is currently not regulated.

Under a negotiated rulemaking, representatives of State and local governments, the water industry, and public health and environmental organizations agreed in 1994 to the issuance of an "information collection rule" that will require nationwide testing for cryptosporidium and certain other dangerous contaminants. The purpose of the rule is to gather enough data to inform policy makers and the public about the extent of the problem, so that final controls can expeditiously be adopted for this waterborne menace. EPA is now working to put its 1994 proposal in final form.

The moratorium would bar EPA from taking any interim steps to complete this rulemaking (e.g. sending a draft final rule to the reg neg participants or to OMB for review) and would delay EPA's final rule, resulting in water systems missing the early 1996 testing cycle. This would cause a year or more delay in issuance of final rules to protect the public from cryptosporidium, which is widely agreed to pose a serious public health threat. This rule likely would not be allowed to go forward under the "imminent threat" exemption of the moratorium bills.

Already the private sector recognizes public concern about cryptosporidium is great enough to warrant prompt action. Recently a bottled water distributor ran a half-page ad in the *New York Times,* urging people to drink its product to avoid the threat of cryptosporidium.

Is this the brave new world of better government? Should we just post a sign at EPA: "Let them drink designer water, the government's closed until further notice"?

Unfortunately, there are many families who have not and cannot plan to make room in their budgets for the expense of bottled water. They have paid their taxes and expect something in return from their government; at the very least, tap water that's safe to drink.

Meat and Poultry Inspection

Two years ago, in response to the deaths of four children from eating meat at a fast food restaurant, USDA began a review of its meat and poultry inspection system. Proposed rules were published several weeks ago to implement:

(1) Basic sanitation requirements
(2) Short-term interventions to reduce contamination (such as rinsing and sampling).
(3) Hazardous Analysis and Critical Control Points Identification and Plans to require each processing plant to identify hazards in their operations (chemical, physical and microbiological bacteria), identify points where these hazards might be controlled, and create plants to control the hazards.
(4) Microbial testing and monitoring.

If implemented, these rules would help prevent or reduce the 20,000 illnesses a year and 500 deaths a year from E. Coli. But this important rule would be delayed by S. 219.

Medical Waste Incinerator Toxic Air Emissions

Currently medical waste incinerators, if regulated at all, are subject only to a patchwork of state and local rules that fail to cover important toxins. This important rule would result in large reductions in dioxin, lead, mercury, soot, and carbon monoxide. Dioxin is a pollutant that is persistent in the environment and causes adverse reproductive and developmental effects. This proposed rule was signed February 1, 1995 but its protections would be delayed by S. 219.

Municipal Waste Incinerators

Municipal waste incinerators also have spotty requirements for control of air pollution. EPA has proposed a rule to reduce dioxin, mercury, cadmium, lead, and soot from these large sources. EPA's final rule is scheduled for September 1995 but would be delayed because S. 219 bars EPA from taking the steps needed to meet that schedule.

Petroleum Refinery Air Toxics

Refineries release large quantities of toxic air pollutants and smog-forming compounds. This rule will substantially reduce those dangerous pollutants. The final rule is scheduled for June 1995 but would be stalled by S. 219.

Municipal Landfill Emissions

Municipal landfills are large sources of smog-forming and other toxic air pollutants. To the extent rules for these sources are delayed States may have to regulate other smaller sources more strictly. EPA's final rule is scheduled for publication in the next 2 to 3 months.

Community Right to Know

The Toxic Release Inventory—an EPA database documenting pollution discharges to air, land, and water—has been hailed by industries, state governments and citizen groups as a useful vehicle to promote voluntary prevention and control of pollution. On November 30, 1994, EPA issued final rules to ease reporting requirements for small emissions sources, and to require reporting of some 286 additional toxic chemicals, including pesticides, water pollutants, and air contaminants. The final rules would provide communities with basic information about discharges of chemicals to the air residents breathe and the water they drink, while reducing the reporting burden on industries that release only small quantities to the environment. S. 219 would suspend the public's right to receive this information.

THE INADEQUATE "IMMINENT THREAT" EXEMPTION

The supporters of the moratorium bills claim that the exemption for "imminent threat to health or safety" will allow certain health-based rules to go forward. In fact, the bills will delay these rules too. S. 219 (and H.R. 450 as introduced) contains a narrow and unworkable provision requiring a Presidential Executive Order to exempt a rule based on an "imminent threat." The term is undefined but suggests a high threshold for exemption; and the Executive Order procedure is unreasonable.

In response to examples of food inspection and drinking water rules that could be delayed, the House Committee has substituted an OMB finding for the Executive Order and has added a definition that defines "imminent threat" to include an expectation of human death, serious illness, or severe injury "during the moratorium period." These changes do not solve the fundamental flaws of the moratorium.

First, the requirement that the harm be expected to occur "during the moratorium period" means that rules which are intended to prevent deaths, serious illness, and severe injury after the close of the moratorium will not be exempt. For example, a rule intended to prevent 100 accidental deaths per year, scheduled to be proposed in May 1995 and made final in May 1996, would not be exempt. But because the

moratorium bills define rulemaking action to apply to nearly all *preparatory* action in the rulemaking process, this final rule would be delayed for at least the length of the moratorium; thus, the avoidable deaths would continue for another 6 to 9 months in 1996 or later because of the moratorium.

Second, the OMB finding raises the prospect of wasted resources and logjams as nonexpert paperpushers review agency conclusions that a rule should be exempt. How many OMB analysts are qualified to judge whether an illness is "serious" or an injury "severe"?

Third, the terms "serious illness" and "severe injury" are an invitation to legal hairsplitting; how bad must an illness be to be "serious"? The House Committee's attempt to shed light on this issue is not encouraging. In the Report on H.R. 450 the majority opines that rules to prevent repetitive motion injuries would not be exempt while rules to address bacterial contamination of food would be. H. Rep. No. 104–39, Part 1 at 24. The majority doesn't share the basis for its apparent conclusion that repetitive motion injuries are not severe. To make things clearer still, the majority then mentions rules relating to labelling of irradiated meat and announces it "reserves judgment" on whether these rules would be eligible for an exemption! *Ibid.* Just when will the House Committee render judgment on this and other ambiguities?

Fourth, lawsuits are allowed to challenge any violation of the moratorium, including the exemption of a rule. This is explicit under S. 219 and also appears to be permitted under H.R. 450 as reported. In H.R. 450, §7 expressly preserves legal remedies otherwise available under any other law. Thus, when a final rule is issued, a person can challenge the rule not only on its merits, but based on a claimed violation of the moratorium legislation; i.e., that the rule should not have been exempted. The possibility that an exempted rule could be overturned long after the moratorium ends is likely to cause agencies to be excessively conservative in applying the "imminent threat" test. Some may argue this is good. But it is bad because it is likely to cause agencies to delay issuing rules that could have prevented deaths, illness, and injury.

Fifth, even if the meaning of "imminent threat", exemption were clear, the test is unreasonably narrow. Why should government be prevented from addressing harms that fall outside these boundaries if a need for action has been documented? Why should taxpayers have to wait an additional 6 to 9 months or more for protections from "mere" injury, consumer fraud, discrimination, rules requiring disclosure of pollution releases, or other needs that Congress has authorized?

FOMENTING LITIGATION AND UNCERTAINTY

The prospect of litigation is not limited to the imminent threat exemption. The bills will cast a cloud of uncertainty not only over exempted rules but over all rules on which any work is performed during the moratorium period. Both S. 219 and H.R. 450 define a rulemaking action to include preliminary actions like an advance notice of proposed rulemaking and "any other action taken in the course of the process of rulemaking (except a cost benefit analysis or risk assessment, or both)". S. 219, §6(3)(A)(ii). The breadth of this definition of prohibited actions combined with the opportunity for later judicial review, creates a potential for innumerable challenges to rules based on a claimed transgression of the moratorium.

As you know, the rulemaking process for a particular rule can often consume 2 to 5 years. In the typical industrial pollution case, initial steps may involve the letting of contracts to collect information about a hazard, followed by an assessment of the causes of the problem, and the industrial and other sources contributing to the harm. Then the industrial processes that release the pollutant are analyzed; methods for reducing releases are identified, and costs of adopting different methods are estimated and compared. These initial steps may take 2 or more years. After completing this stage of data collection and evaluation, the agency is ready to begin the development of regulatory and nonregulatory options.

Are all of these actions prohibited during the moratorium period? Or are some of them within the intended exemption for cost benefit analyses and risk assessments? The House Committee Report on H.R. 450 seems to limit the exemption to evaluations of rules that are already proposed: "Obviously, such an analysis or assessment would not be conducted where a regulation has not yet been issued or proposed. . . ." H. Rep. at 20. While this statement is factually incorrect, it suggests an intent to bar all preproposal activities.

The bills' broad definition of rulemaking action means that courts years from now will be faced with challenges to a rule based on a claim that back in 1995, the agency violated the moratorium by conducting some prohibited action (perhaps limited to writing an internal memo setting a revised schedule for carrying out data collec-

tion). To assess these claims the courts will have to pore over poorly documented histories of agency activities to determine what they were, whether they are prohibited, whether they are linked to the rule under challenge, and a variety of other issues that will emerge after passage of this hastily drafted legislation. Then the courts will have to decide the remedy for a prohibited action; is the entire rule vacated? What steps would the agency have to take to reinstate the rule? Would the agency have to redo a data collection; republish a report?

Or suppose an agency issues a proposed rule during the moratorium period based on a conclusion that the rule is exempt. What are the consequences if a court reviewing the final rule some years from now concludes the exemption was incorrectly granted? Will the final rule be invalidated? If so, would the agency have to repeat the proposed rulemaking?

Section 3 of S. 219 and H.R. 450 prohibits agencies from taking any regulatory rulemaking action during the moratorium period and the "moratorium period" extends back to November 1994. Thus, agencies who have issued advance notices or proposed rules since November 1994 would be in violation of the law immediately upon enactment. What does this mean about the ultimate legality of the rules that are tainted by such "violations"? Assuming the agency immediately calls a halt to further actions on a rule, how does it cure the violations that have already occurred?

The bills' provisions for extending deadlines also will create broad confusion and uncertainty stretching far into the future. Section 4 extends by 5 months any deadline "relating to" any regulatory rulemaking action authorized to be taken before the end of the rulemaking period. Because nearly all agencies are currently "authorized" to take the actions covered by the bill's definition of rulemaking, this provision potentially affects every deadline in every statute, regardless of how far in the future the deadline occurs. Maybe this won't cause any problems but who has analyzed its impacts? For example, under §407 of the Clean Air Act EPA is authorized to revise certain emission limits for electric utility plants but it must complete any revision by January 1, 1997. Utility companies must meet the original or revised rules by January 1, 2000. Since EPA is "authorized" to issue a proposed rule for this revision during the moratorium period does this fact mean the agency need not complete the revision until May 1997? Would this provision also change the utilities' January 1, 2000 compliance date or not?

Clearly some of these problems could be cured by better drafting and some cannot. Given the hasty schedule for this legislation (House floor action February 23 and markup in this Committee on February 28, just a few days after the only Senate hearing on the bill) it is unlikely that the flaws in the bills can be corrected even if the attempt were made. New problems are certain to be discovered but unless more time is taken, the moratorium may be law before its other adverse effects are understood.

DELAYING RULE REFORMS

Ironically, S. 219 would also suspend and delay adoption of rules that improve existing regulations. To exempt a rule from the moratorium an agency head must certify the rule is "limited to" repealing, narrowing, streamlining, or reducing regulatory burdens. However, many rules that on balance greatly streamline existing rules, may also contain some provisions that create new or additional duties.

The bills' exemption for streamlining actions, while demonstrating the unbalanced approach of the legislation, also provides fertile ground for litigation. What does the phrase "*limited to* . . . streamlining a rule" mean? S. 219, §6(3)(B)(i) (emphasis added). Does this mean only changes that eliminate obligations or can a rule replace current duties with new, less onerous requirements and still be exempt? Can any rule that contains a "streamlining" provision be exempt regardless of what else it contains? If not, who is to do the "aggregate net burden" calculation to determine whether the rule should be exempt? You guessed it—the courts.

The House Committee labors to mention in its report those rules that it apparently believes should be covered by the bill's exemptions. H. Rep. at 21–24. Have they found all the rules that the majority believes should receive special treatment? Doubtful. While some special interests have already made their mark felt, many others are still waking up and probably won't be beating on your doors until well after the bills pass, given the intended speed for legislative action. If you pass this bill you can be sure that someone you care about will show up completely exasperated because the agency it needs action from is citing the moratorium law you passed as prohibiting action. Where action is taken, a competitor or other interested person will be empowered to use the courts to challenge that action.

Since S. 219 allows any person to file suit for an alleged transgression of the moratorium, even if all parties to the rulemaking, OMB, and your Committee agree that

the rule should go forward, a single individual can go to court to overturn it. Here are a few examples of streamlining rules that might be challenged.

Revised Acid Rain Allowance Rules

EPA's initial acid rain rules were challenged by both the electric utility industry and environmental organizations. In May 1994 all parties—industry, EPA, and environmental groups—reached agreement on several key provisions for compliance with the law's sulfur dioxide allowance requirements. EPA issued a final rule incorporating this negotiated agreement on November 22, 1994. While it contains some streamlining provisions, it is not purely "deregulatory" and probably would be snared by S. 219 and H.R. 450. Suspension of this rule could both increase pollution and create costly compliance uncertainties for electric utilities.

Two additional acid rain settlement agreements have been reached between industry, environmental groups and EPA but the EPA rulemaking to implement these agreements would be delayed by the moratorium bills.

Permits Applications for Sewage Treatment Plants

This revision to permit application forms would reduce the transaction costs of state permitting programs, creating a "one-stop-shopping" information transmittal system, to replace two or more un-coordinated ones (one for sludge, one for sewage, another for combined sewer overflows).

States and POTWs have had significant input into the drafting process for these revisions to the permit application. However, the rule cannot be styled pure "streamlining" or burden reduction because it asks for certain new information on toxics and other matters that will help to establish better permits. The proposal is scheduled to be proposed about March 1995.

Definition of Wetlands

EPA plans to revise the definition of wetlands subject to Clean Water Act regulation. The clarifications would exempt from CWA coverage certain artificial waters, and non-tidal irrigation and drainage ditches that are excavated in uplands.

These clarifications will help to avoid regulatory confusion and battles over wetlands regulation. They cannot be characterized as "streamlining" exclusively, because they will be implemented through revised delineation procedures. But their net effect will be a reduction in regulatory burden on those whose waters will be exempted from current definitions. Scheduled to be proposed in March 1995, it would be delayed by S. 219 and H.R. 450.

S. 219 AND H.R. 450: THE WRONG TOOL FOR THE WRONG PROBLEM

One of the themes of current political discourse is that Congress should legislate when the case has been made that a new law is necessary and after due consideration that the new law is appropriately designed to remedy the problem it addresses. S. 219 and H.R. 450 are at odds with both these principles.

Let me touch on a few of the justifications we have heard for the moratorium.

Too Many Pages

Moratorium advocates say there are too many pages in the *Federal Register*. Let's hope there are more reliable indices of the impacts of regulation, good and bad, than this. As you know, the typical *Federal Register* is made up of three types of documents: notices of meetings, Presidential documents, and rulemaking documents.

In the rulemaking documents each agency explains why it is proposing or adopting a rule and responds to comments on its proposals (the "preamble") and then prints the proposed or final rule.

I am not aware of any exhaustive survey that compares the length of the explanatory material in the *Federal Register* to the length of the rules themselves but the rules I am familiar with almost always take more space to explain the rule, provide information on which the rule is based, and respond to comments, than they do to print the rule itself.

Counting *Federal Register* pages to prove an excess of regulation suggests that the lengthier the government's explanation of its actions, the more abusive government is. However, most of the regulatory reform initiatives of the past two decades have encouraged or required the government to provide more information and analysis to justify its decisions. A summary of those analyses and discussion of comments appears in the *Federal Register* so it is no surprise that preambles have increased in length. One can argue about whether this is good or bad—a long explanation is not necessarily a good one—but it seems off the mark to assume that preamble page length is a sign of an abusive rule.

Wacky Rules

I have mentioned the tales of apparently stupid rules. Doubtless there are provisions in existing rules that are not effective or are needlessly complex. We are being treated to many examples by supporters of the moratorium and I do not propose to debate these "horror stories." Rather, let me put a more fundamental question: how will a moratorium on new rules help identify and fix defects in existing rules? Some will point out provisions in pending new rules that they disagree with and claim should be stopped or modified. But a moratorium on *all* new rules except pure deregulatory actions (and rules the President finds are needed to address "imminent threats") is a meat axe approach that is no model for good government.

For existing rule defects, the challenge is to come up with a reasonable and workable process to fix provisions that legitimately require change. A moratorium on new rules simply is a distraction that makes actual reform more controversial and adversarial than it needs to be. Past invitations to nominate rules that should be changed have produced a feeding frenzy from regulated interests that lumped together critically important rules that the public supports with provisions that both agencies and the public would agree could be changed. This approach has generated controversy but not as much change as could have occurred.

For pending new rules, moratorium supporters have not made the case why existing regulatory comment and review procedures are inadequate to deal with their concerns.

All rulemaking actions go through notice and comment procedures and important rules are subject to executive branch review processes at both the proposal and final rule stages. Judicial review of final rules is also available. Moratorium supporters seem to argue that these safeguards are not good enough but they have not shown why.

Sending a Message

The last argument for the moratorium is that it will send a message. The question is whether it will be the one its supporters intend. NRDC opposes the moratorium because it is bad policy. But others could just as easily oppose it as bad politics.

S. 219 and H. R. 450 would send a message that the new Congress can't be bothered with such niceties as an intelligent discussion of which new rules, if any, warrant more extensive review than that provided under current law. Based on claims that some new rules may contain problems, S. 219 and H.R. 450 would lock up all or most new protections against health, safety, and environmental threats; and not only new final rules but also initial steps like *proposed* rulemakings.

The message the moratorium would send is that Congress is willing to call a 5-month or 9-month halt to all efforts by the government to carry out existing laws to protect the public, without knowing what important health, safety, food, drug, and environmental protections may be delayed.

The moratorium is an easy target for critics of the new Congress. By design it substitutes a sweeping edict for a reasoned remedy. Stories will continue to be written about the unintended adverse consequences of the law: maybe the migratory bird hunting season will be cancelled, maybe it won't. You can be sure if the law does pass, it will not be the end of such examples. If the law passes, Congress will be held responsible for its consequences but the size that liability will not be known when you vote on the bill.

A moratorium is unnecessarily confrontational. Perhaps it is a way of showing that Congress is under new management but why not explore paths that are less destructive? Believe it or not, most groups like the one I represent are not seeking the adoption of rules that are complex, intrusive and focused on trivia. We are interested in effective use of limited government resources to achieve protection of values that generally require some action by government, whether through a traditional rule, a "market-based incentive," or some combination. Needlessly complex rules not only frustrate regulated firms, they also disenfranchise our members—the average concerned citizen who cannot make the time to master the equivalent of a new language that is found in some existing programs.

We want government actions to be workable and easy to follow. That is one reason we have engaged increasingly in alternative processes like regulatory negotiation to frame rules that meet everyone's needs. These efforts have produced important successes. All of us should focus on building on those successes rather than returning to the hardened positions of old battle lines.

There is ground where environmental, health, and safety groups can agree with advocates for more efficient government but a moratorium distracts all from finding that ground. Opponents of the moratorium regard it as a mindless exertion of power without responsibility, that will do real harm. If the law passes only time will tell how much harm in fact occurs. None of the real issues of better government will

be solved if the debate is shifted to proving and disproving evidence of the damage done by a moratorium once enacted. Why take hasty action that will polarize the issue of regulatory reform?

By encouraging sweeping efforts that ignore the value of "good" rules, previous regulatory relief campaigns have prevented attention from being focused in the right place. Public attention and agency resources have been devoted to defending the many important rules under assault, not to supporting changes in the rules that make up industry's "horror stories." By being more discriminating, regulatory critics will have a chance of hitting legitimate targets.

Enactment of a moratorium is exactly the wrong way to pursue reform objectives. A law that tells government employees who are paid to protect the public to do nothing for 5 to 9 months, rather than proceeding with important programs needed to protect the public, will do little other than harm citizens, waste their tax dollars, and burn bridges to cooperation.

Chairman ROTH. Thank you.

Mr. Risalvato?

TESTIMONY OF SAL RISALVATO, SMALL BUSINESS OWNER, REPRESENTING THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, RIVERDALE TEXACO, RIVERDALE, NEW JERSEY

Mr. RISALVATO. Thank you, Mr. Chairman, Senator Glenn, and Senator Levin. Good morning.

My name is Sal Risalvato. I am the owner of Riverdale Texaco in Morris County, New Jersey. I am here this morning on behalf of the National Federation of Independent Business. I would like to thank you for allowing me the opportunity to explain to you about the need and effect for regulatory reform.

While no one expects this regulatory moratorium to be the ultimate solution to the crushing regulatory burden facing small businesses every day, it is a first aid strongly supported by small business owners that will reduce some of the bleeding until significant, broad regulatory process reform, like strong judicial review of the Regulatory Flexibility Act, and cost benefit analysis, and, of course, a 5-year regulatory sunsetting, are enacted.

NFIB strongly endorses S. 219. I hope to make a few points here this morning to give you an example of what a small business owner like myself goes through with regulatory burdens.

The first point I would like to make is what regulation has cost me and may cost me in the future.

The second is the benefits to both myself, my employees, and the economy in general that would exist if regulations were better thought out or, perhaps, never existed.

The third is how what seems to be an intelligent business decision can be rendered stupid by unforseen government regulatory curve balls.

In 1986, the service station that I had been leasing for the previous 8 years became a victim of the real estate boom of the 1980s. The value of the property was much greater as something else other than a service station. The landlord evicted me and sold the property, and I was left to look for a new location. Of course, I was never going to lease again, so I wanted to purchase my own location.

I spent approximately a year looking for a suitable site. One of the selections was a piece of property that was run down, the building was inadequate, but had tremendous potential to expand. An-

other great asset of the piece of property that I finally selected was the fact that the underground storage tanks were brand new. They had just been installed. I paid a premium for this property. I made a $500,000 decision, based on the fact that my environmental concerns should have been behind me, and I was wrong. That was an intelligent decision that I thought that I had made that was rendered stupid by the EPA.

Within 5 years, I had to spend $95,000 to make changes to the underground storage system, not completely replace the tanks, but make changes to the underground storage system. That $95,000 was $95,000 I didn't have. I was already in a position where I had borrowed from family members to purchase this piece of property, because I didn't sell my previous business, I lost my previous business, and I was starting all over again.

That $95,000 was $95,000 that I would have liked to spend expanding the facility. Now, I am faced with the possibility of spending between $40,000 and $100,000, depending on how the EPA makes up its mind, based on the fact that they want the State of New Jersey to implement new emissions control standards. I am in the automobile inspection business.

We inspect cars for both safety and emissions standards. I have a piece of equipment that cost $15,000. It works perfectly. It tests emissions. It can tell whether a car is polluting the air or not.

The EPA is now telling the State of New Jersey, and, in fact, holding a gun to my Governor's head, to my head, and to the head of all of the motorists in my State, because they are saying we have to invest in this new equipment to make new standards for auto emissions. The Governor is in a very precarious position, because if she doesn't conform with EPA standards, the State of New Jersey stands to lose over $200 million in highway funds.

These regulations are not being thought out properly. A moratorium on present regulations would be very useful to rethink some of the regulations we have already put in place and to possibly provide us time to come up with new laws that would provide for better thought-out regulation in the future.

What could I have done with the money that I have already spent plus the money that I may have to spend in the very near future? A quick calculation, that total is between $135,000 and $200,000. My dream, when I purchased my location, was to add on three more service bays, an employee room, service room, and an office.

The office is a big priority with me. Since I have gone into my location, I have housed my offices in an office trailer. This does not sit well with the town fathers. In fact, it is prohibited in my town. I was given a temporary variance because I had taken some of my own money, put it into the property to spruce it up a bit. The place that I bought was a junkyard. It was dilapidated, and I had every intention of fixing this place up. But the money that I have spent on government regulation has prevented me from expanding my business.

Recently, the town asked me to come before the Board of Adjustment again to get another temporary variance to keep the office. They have given me 2 years, and they did that on the basis that I proved to them what government regulation forced me to spend.

At the time, I knew full well that government regulation may cost me another $40,000 to $100,000, but I did not have the heart to tell them. Now, they have given me these 2 years, and I am hoping that, some way, somehow, I will be able to come up with the kind of money that I need and that I will be able to expand my facility.

I see my time is up, but very quickly, I would like to just add that if my facility were expanded, I would be employing at least four more full-time employees and probably some part-time employees, and that includes office help as well as technicians. This was my dream when I purchased this location, and, again, what seemed like an intelligent decision at the time has been rendered a stupid decision, based on government regulation.

[The prepared statement of Mr. Risalvato follows:]

PREPARED STATEMENT OF SAL RISALVATO

Good morning. I am Sal Risalvato, owner of Riverdale Texaco, a gasoline service station in Morris County, New Jersey and a member of the National Federation of Independent Business (NFIB), where I currently serve as Chairman of the NFIB/New Jersey Guardian Advisory Council. I have been in the service station business since 1978 and have been affected by many government regulations. These regulations have touched every aspect of my business from the sale of petroleum products to the service we provide in our repair shop.

Thank you for allowing me the opportunity to explain to you about the need and the effect of regulatory reform. On behalf of NFIB, I am pleased to endorse S. 219, the Regulatory Transition Act of 1995, which temporarily suspends certain significant regulatory actions taken by Federal agencies until December 31, 1995, unless exempted by the President or because of an imminent threat to human health or safety. NFIB will actively fight for passage of this important legislation.

While no one expects the regulatory moratorium to be the ultimate solution to the crushing regulatory burden facing small businesses every day, it is a first-aid, strongly supported by small business owners, that will reduce some of the bleeding until significant, broad regulatory process reform—like strong judicial review of the Regulatory Flexibility Act, cost benefit analysis and 5-year regulatory sunsetting—are enacted.

Although we are here today to discuss only a moratorium on any regulatory rule making, the net result may be to alter future burdensome regulations. I would like to accomplish two things today. First I would like to tell you about the most costly regulations Congress imposed on me and the negative effects they have had on me. Second I would like to describe to you a positive scenario that would likely exist if these regulations had not been imposed upon me. I would also like to point out to you how a decision that seem intelligent at any point in time, can be rendered a stupid one, by government regulatory curve balls, that cannot be detected with anything less than a crystal ball.

In 1986, the service station that I had been leasing for the previous 8 years was lost to the real estate boom of the 80's. My lease was up with the landlord and the property was too valuable to remain as a service station and the owner evicted me and built a group of retail stores. I lost my business. I spent the next year along with my brother Vinny, who had become my partner, looking for a suitable and affordable location. Of course there wasn't any way I was going to lease again. After looking at over 100 locations in northern New Jersey, my brother and I finally found a location that met our requirements. Due to rising environmental concerns, one of our most stringent requirements was that the integrity of the underground storage tanks at any location we investigated must not be compromised. Making what seemed to be an intelligent decision, we purchased a location that had new underground tanks installed 1 year prior to our purchase. We paid a premium price for the location because it had new tanks. Our crystal ball was not working correctly when we made that decision.

Within 5 years, unexpected government regulations altering the standards and requirements for underground storage tanks, picked my pocket for $95,000. Please keep in mind that after losing my business in 1986, I was left with virtually nothing. At the time I lost my business I still had 6 months left to pay on the note that I owed the bank when I purchased the business 9 years earlier. When I purchased the second location in 1987, I had to borrow from family members and banks using my dad's home as collateral. Finding $95,000 in order to meet new EPA regulations

was not going to be easy. Fortunately, between borrowing more money from family members, and funds advanced by Texaco in exchange for a supply contract, I obtained the money to meet the new government regulations. This really amounted to extortion, since I would not have been allowed to remain in business had I not met these requirements.

In fact many service stations have been forced to close or have stopped selling gasoline simply because they could not find the capital necessary to meet the EPA requirements.

One would think that the EPA has inflicted enough pain and torture on my business. Not so. The new regulatory agenda is now attempting to blackmail me, my governor, the motorists of my State, and my fellow service station owners in New Jersey.

The State of New Jersey probably has the best motor vehicle inspection system in the nation. Presently motorists must have their cars inspected on an annual basis by either a State inspection facility or a licensed private repair facility such as mine. Vehicles are inspected for safety items such as brakes, lights, tires, and mirrors. Inspection of the vehicle emissions system are also conducted. Presently, New Jersey is faced with losing its inspection system because the regulators at the EPA are demanding a tougher emissions test be performed on all vehicles.

What does this mean? It means that in order to meet EPA requirements, the State of New Jersey will have to invest millions in new equipment at the State inspection facilities. It also means that if private facilities are to be permitted to continue performing inspections, they will have to invest in new equipment valued at $40,000 to $100,000. This decision making process has been in the making by EPA for the past 2 years and has paralyzed the decision making of the owners of private repair facilities. Once again, a faulty crystal ball that tries to unravel the logic of the bureaucrats and regulators could prove costly.

One concern of the State is the length of time it will take to perform the new type of inspection. So far, estimates of the time needed to fulfill EPA requirements, will cause far more lengthy lines at State run facilities. Also, due to the amount of time required to perform the emissions tests, the safety inspection that is the class of the Nation will have to eliminated.

Since there will obviously be a large number of private inspection facilities that will be unable to meet the capital requirements needed to purchase the new mandated equipment, more motorists will be forced to visit the State facilities, thereby lengthening the already longer lines. The net result is this. Motorists will be far more inconvenienced that they already are. They will be expected to pay more for an inspection, including inspections at the State lanes which are currently free. Their time and money will be rewarded with less value since now there will not be a safety inspection. Small business such as mine will be forced to either give up an important profit center, or make purchases of equipment that are virtually unaffordable. I am running out of family members that have any capital, and those family members that do have it are running out of it, always loaning it to me.

The new Governor of New Jersey, Christie Whitman, has been negotiating with EPA in order to lessen the burden on our State. Presently she is being forced to make a hasty decision because EPA is threatening to impose sanctions against the State. If the State does not adopt an inspection system that is suitable to EPA, then the Department of Transportation will withhold $217 million of Federal Highway funds. This decision is likely to harm businesses like mine and the motorists who use our services.

Aside from the debate that is held trying to decide if the public interest is being served by any of these regulations, there is an awful lot of good that can be had without them. Let's assume that the previous regulations regarding underground storage tanks were less stringent. Let's also assume that the current threat of EPA regulations governing motor vehicle inspection are eliminated. A quick calculation gives my business between $135,000 and $195,000 to expand. Make no mistake about it, when we purchased this location, our dream was to add on three or four service bays and a sales room, employee room, sufficient storage space, and sufficient office space. Presently in order to utilize space inside the main building, our offices are housed in an office trailer on the side of my building. This has caused great stress with the municipal fathers, and twice in 7 years we needed to receive temporary variances from the local Board of Adjustment in order to keep our office. Each time we appease the Board by promising to expand the existing building. We explain to them that if not for costly government regulation, we would already have had the expansion complete. Our most recent appearance before the Board was this past November. We received temporary and final approval for another 2 years. I did not have the courage to tell them the EPA was holding another gun to my head. I pray a lot.

If our physical facility was expanded to the size we wish, there would be employment for at least three more full-time technicians, and three part-time assistants. There would also be a position for at least one full-time office person.

Please do not think that I have little regard for the environment. That would be false. I drink the same water and breathe the same air as everyone else. I have no desire to see the quality of either jeopardized. I do believe, however, that the downside of burdensome regulation must be properly evaluated relative to any benefits that may be derived from it I am convinced that in my case the bad effect has outweighed the benefits.

Chairman ROTH. Thank you, gentlemen. We will now begin the area of the questions.

Mr. Gray, all the examples in your testimony are, I believe, what is called economically significant rules. Would many of the problems raised by my colleagues this morning be answered by limiting the bill only to economically significant rules? Would that, in your mind, be an improvement?

Mr. GRAY. It could be, Mr. Chairman, but two of the examples that are in the list, while they are economically significant, that is, the two that I referred to in my oral testimony, the OTC petition and the permitting rule, they are also environmental. They also have an environmental underpinning. They are implementation of the Clean Air Act. But at the same time, they do not involve imminent or even remote threats to health.

I believe that you could achieve the objectives that I see important in this legislation by limiting it, but I just wanted to point out that if you redraft it, just to bear in mind that some of these, like the permitting and California car, are implementations of an environmental statute.

Chairman ROTH. I would like to ask both you and David Hawkins, and anybody else that wants to answer, how much judicial review of agency and Presidential determinations should there be under the bill? If there is none, then the bill cannot be enforced. If there is no limit at all on judicial review, we, of course, can get mired down in litigation. I would like to know what your advice is.

Mr. GRAY. My advice, Mr. Chairman, is that it should not be judicially reviewable, because I do not see how you can really get judicial resolution within the time frames that are involved with this statute, namely, by the end of the year or the earlier of the passage of the reform legislation.

I think that the enforcement must come from this Committee and corresponding Committees in the House to hold the administration's feet to the fire, to hold Sally Katzen to her job.

As much as I am in favor of judicial review, limited review in connection with your legislation, and I don't want my comments to be read as affecting that, for this purpose, given the short time frame, I believe that enforcement must be limited to the court of public opinion and to legislative oversight.

Let me quickly add that Presidential action is not reviewable. David Hawkins may have a point, though, about the provision, the civil action provision. I am not sure that eliminates all judicial review that might otherwise be available under the Administrative Procedures Act. I would have to do a little research, but I think there is a valid point on that, that some of the determinations would be made by OMB and might be reviewable, notwithstanding that provision.

Chairman ROTH. Mr. Hawkins?

Mr. HAWKINS. Yes, Mr. Chairman. I also think that judicial review should not be provided. Having judicial review would add to the harm.

However, precluding judicial review would not eliminate the harm caused by this bill. As I said, one of the fundamental problems with the bill is that it prevents the executive branch from going forward with bills that will demonstrably provide important public health, safety, and environmental benefits, but they can't be proven to meet the "imminent threat to health or safety" test. Those are important benefits and they will be a casualty of any moratorium bill, even if judicial review is completely precluded.

Chairman ROTH. Mr. Donohue?

Mr. DONOHUE. Mr. Chairman, our written testimony raises the question of judicial review, but let me say, I think, with or without it, this bill ought to move forward and regulatory reform right behind it.

I agree with Mr Gray that, in the optimum situation, that we move forward on our business and the moratorium is then taken away. There wouldn't be time for lawyers to begin to write their briefs.

But I do think it is important for the Committee to consider the judicial review question. As we move forward, simply keep in mind that the actions of government ought to be considered by every means possible to give some sort of relief to those that are being regulated.

But I would suggest that, with or without it, this legislation should be moved forward at a very quick rate.

Chairman ROTH. Would anyone else care to comment?

[No response.]

Chairman ROTH. Mr. Gray, the definition of moratorium period provides that the period ends on the earlier of December 31, 1995, or the date of enactment of comprehensive regulatory reform legislation.

Suppose the reform bill has a delayed effective date. In that event, suspended regulations might go into effect before the new regime takes effect, and the purpose of the moratorium is frustrated.

To correct this, should the date of enactment be changed to the effective date or the day after the effective date?

Mr. GRAY. I think it should be the day after the effective date.

Chairman ROTH. My time is up.

Senator Glenn?

Senator GLENN. Thank you, Mr. Chairman.

Those of you who oppose this, I agree with everything you have said, every single one of you. I agree with everything you have said. This bill doesn't do regulatory review. You want regulatory review, and I have had hearing after hearing that I chaired before we lost the management around here last fall. Senator Levin and I have been on regulatory review matters. I have legislation in on regulatory review matters. Senator Roth has legislation in. Senator Dole has legislation in. That isn't what this is all about.

This throws out the baby with the bath water, as I said a while ago. This legislation does not require anything. It doesn't give any

new standards to apply. It doesn't give any new review criteria. It just says it will be addressed.

The Chairman makes a very good point. What if regulatory review doesn't pass and we have done a moratorium? All we have done is back up a gridlock of legislation.

Another point I wanted to make, too, as Ms. Katzen said a little while ago, they estimate that 80 percent of the regulations are done pursuant to the way laws were written here on the Hill that said, you will put so and so into regulation. Eighty percent of it is our fault. If we want to see 80 percent of who the problem is here, look in the mirror, and we don't do that.

We say, oh, it must be somebody else's fault. It couldn't be our fault. We passed these things with all sorts of good intentions up here and we passed them over to the agencies and then they thought they were carrying out what we wanted. Eighty percent of what they did was what we required them to do. Then we raise cain and say, oh, now we are going to put a big moratorium in, as though that was going to solve things. It doesn't. I just don't see that it really solves much of anything at all.

So I agree completely with the need for regulatory review. This Committee has addressed regulatory review in the past and will continue to address it until we get something through, I am sure, under Chairman Roth's leadership.

But this bill doesn't say that. We are faced with a different problem. Are you going to let the Alaskans hunt? Are you going to let the bird hunting rules that generate $3.6 billion a year, is that going to go? No, that is going to get knocked out.

And what about the meat inspection rules that Mr. Mueller addressed so eloquently here a while ago—he had trouble speaking and I had trouble looking at him at that time. He feels very strongly about this. Those are meat inspection rules. Are we going to hold those rules up? You can't call these problems an imminent threat to health and safety. That doesn't qualify for imminent, necessarily, when you are passing a regulation for something in the future.

Nuclear waste disposal, we have been wrestling with that issue on this Committee for the last 15 years, literally. I am not joking about that. I have been very much involved with that. Hazardous material transportation, Mr. Donohue. You want to have your truckers out there safe and we want those rules out there to say that HAZMAT is carried according to rules and regulations that everybody abides by. It is going to protect your people as well as the people whose highways are being used.

Air worthiness standards—we all fly on airplanes. We hold up on rules like that? Immigration political asylum rules, FEMA, and so on. These are the things that would be stopped dead in their tracks for a year unless there is something new written about this that is not in the legislation so far, as I understand it.

That is our problem. We agree with you on the regulatory review, 100 percent, and this Committee has taken action on this in the past and had hearings on it. We have tried to be a leader in this area. But what this bill does, this bill says there will be no regulation. I don't think, with the things that we are talking about here, I just don't see how we can do that.

It is also very difficult to do this, when 80 percent of the problem is our own fault here. We ought to go back through the laws on the Hill, here, and have our own people plowing right through them to see where we have gone wrong. That would do more than anything else.

Mr. Gray, I know you, in your previous incarnation, have been before the Committee before. I think, before, you wanted regulatory review but you didn't want that in statute. You wanted to leave it up to the President to administer that. Is that correct, or do I not remember correctly? Did you want regulatory review required by OIRA and OMB, or was this something that you wanted the President to have the authority to do without it being in statute?

Mr. GRAY. I think that the position I held when I was in government was represented by S. 1080, the old Reagan-Laxalt regulatory reform bill, which did have a schedule of reviews required by the statute.

Senator GLENN. Were they required by statute?

Mr. GRAY. I believe so.

Senator GLENN. I am glad you corrected me on that, then, because that wasn't the way I recalled it.

Mr. GRAY. If I could make a comment, Senator Glenn, about the discretionary versus non-discretionary, yes, many of these rules, especially in my own testimony, were required by the Congress, but the way they have been written was not required by the Congress. A moratorium would be a very useful device for holding hearings, oversight hearings, on some of these measures, even if regulatory reform legislation never passed.

Senator GLENN. You are Senator Gray now. How would you handle bird hunting rules, zebra mussels, meat inspection, nuclear waste, and all the rest of these things? Are you just going to let those go for a year?

Mr. GRAY. The hunting rules puzzle me, because, as I said, I experienced two moratoria and I never had any questions raised with me, as the lawyer involved in both cases, with hunting or fishing.

Senator GLENN. Let us make it more serious, like Mr. Mueller's problem with meat inspection.

Mr. GRAY. But the nuclear example and the tragedy of the witness to my right, these are all imminent threat cases. Even if David Hawkins says the threat is a year away, that is still an imminent threat. It may be delayed a year, but, if I were President, I would have no difficulty whatsoever in letting those rules go through.

Mr. DONOHUE. Senator Glenn, one other issue, if I might just ask you to focus on, concerns OSHA. If the moratorium were in place today, OSHA could not issue the ergonomic rules. If it were not in place, they could issue them and then subsequent regulatory reform legislation very well may not be applied against the rules that have now been issued.

There is a residual benefit here that I think we could agree on. The moratorium can impede the agencies from pushing regulations out the door because they are worried that cost-benefit tests will affect their rules. I think we would agree that that is one very positive matter that we might find in a moratorium.

Senator GLENN. My time is up. I agree with you on everything you are talking about on regulatory review. I am with you on that 100 percent, and we have to get that through.

But, I think, these examples we have given this morning here—we didn't cover all of them this morning—of unintended results of this moratorium concern me. I am sure that a more careful screening of rules by the agencies would result in a catalog full of examples of unintended results along the same lines as we have heard this morning, and that is what concerns me.

I think we have to do regulatory review. We ought to look in the mirror here and go back through these laws and correct those problems that are Congress-generated. We should take the responsibility for that. We have let stuff go through that we shouldn't let go through.

I think to just say, all the good and the bad goes out together, to me, doesn't make any sense.

Thank you, Mr. Chairman.

Chairman ROTH. Thank you.

Mr. Levin?

Senator LEVIN. Thank you, Mr. Chairman.

Mr. Donohue, let me ask you about the drug and alcohol testing rules. As I understand, the original rule was issued by the Department of Transportation in 1988. Is that correct? That was for railroad, motor carrier, and airline personnel?

Mr. DONOHUE. Yes, for drug testing, sir. We pushed for that random, mandatory drug testing rule.

Senator LEVIN. Then in 1991, we passed a law, as I understand it, requiring drug and alcohol testing and that they be expanded. Is that correct, we had a new law in 1991?

Mr. DONOHUE. Yes, I believe at the end of 1991, yes, sir.

Senator LEVIN. Did your Association support that law?

Mr. DONOHUE. Yes. We support reasonable, cost-effective drug and alcohol testing. Drug testing is very simple to do, because what you basically do is use an outside contractor.

Senator LEVIN. I understand that. You supported the 1991 law?

Mr. DONOHUE. Yes.

Senator LEVIN. In 1992, as I understand it, the Department of Transportation issued a rule implementing the 1991 law, is that correct, with new guidelines for testing?

Mr. DONOHUE. I believe that is correct. It might be the end of the year, again, yes. It was just a proposed rule.

Senator LEVIN. And they said that it was going to be effective to big businesses in January of 1995 and to small businesses in 1996?

Mr. DONOHUE. That is the way it was finally promulgated.

Senator LEVIN. Are those the rules that you have trouble with?

Mr. DONOHUE. Yes, sir.

Senator LEVIN. So it is the 1992 February rules that you object to?

Mr. DONOHUE. Yes, sir.

Senator LEVIN. Did you object to them at that time?

Mr. DONOHUE. Yes, sir.

Senator LEVIN. At that time, we had an Executive Order. President Bush was in office. Mr. Gray, I think, was there with him.

The Executive Order required a cost-benefit analysis, is that correct?

Mr. DONOHUE. I would have to let Mr. Gray say exactly what the Executive Order required. I don't know.

Senator LEVIN. Mr. Gray, did that require a cost-benefit analysis?

Mr. GRAY. It did.

Senator LEVIN. So we had an Executive Order, cost-benefit analysis, and the ATA opposed the rules at that time, and presumably argued that the benefits weren't worth the costs?

Mr. DONOHUE. In the pre-employment, yes, sir, that is right, because it just doesn't do any good.

Senator LEVIN. I understand that, but you made your case to what then would be the Department of Transportation, and there were regulatory appeals to the OMB at that time, were there not?

Mr. DONOHUE. Yes, that is right.

Senator LEVIN. Did you make your appeal?

Mr. DONOHUE. We continued to discuss this with the OMB.

Senator LEVIN. And that was to Mr. Gray, wasn't it?

Mr. DONOHUE. It was to his administration.

Senator LEVIN. And they didn't agree with you?

Mr. DONOHUE. They left office, sir, and we kept right on appealing.

Senator LEVIN. But, apparently, they promulgated this in 1992, is that correct?

Mr. DONOHUE. In 1992, the rule was proposed. In February of 1994, the final rule was promulgated. It was a different administration.

Mr. GRAY. This was not our rule.

Mr. DONOHUE. Nobody wants this rule, Senator.

Senator LEVIN. Whose rule was this?

Mr. DONOHUE. This legislation came out of the Senate Commerce Committee. The present administration at DOT is operating under an assumption, which they have articulated to us on numerous occasions, that they have no choice under the statutory wording but to require pre-employment testing. This is their position even though many of them at DOT do not agree with the way the Congress laid it out.

We are in Federal Court in Richmond asking the Court to explain to the DOT that, in fact, they are not mandated under the wording of the legislation to act in the way in which they did.

Senator LEVIN. Let me just go back and get it chronologically.

Mr. DONOHUE. Yes, please.

Senator LEVIN. The rule you object to, however, is a 1992 rule, is that correct, or not?

Mr. DONOHUE. It is a 1994 rule. In 1991, the legislation passed. The final rule came out on February 15, 1994.

Senator LEVIN. Was the rule proposed in 1992?

Mr. DONOHUE. Yes.

Senator LEVIN. Do you have any problem with the way the cost-benefit analysis was implemented under Executive Order?

Mr. DONOHUE. I have a very significant problem about cost-benefit under Executive Order versus cost-benefit under statute.

Senator LEVIN. As I understand this, my recollection is that President Reagan promulgated an Executive Order that required a cost-benefit analysis. President Bush also carried on that tradition, and President Clinton has carried on that tradition, too. Are you saying that that is inadequate?

Mr. DONOHUE. Yes, sir. It is inadequate for this reason. An executive order does not control language in a statute. We want cost-benefit tests in statute, so we can go and pursue it judicially to protect our interests under the direction provided by the Congress.

Senator LEVIN. Did the OMB let this rule that you object to be issued as it was proposed in 1992?

Mr. DONOHUE. The proposed rule in 1992 had more options available to us, the Clinton Administration reduced the number of options.

Senator LEVIN. So the objections——

Mr. DONOHUE. One of the options that they had in 1992 was for roadside testing, which, by the way, is the thing that makes all the sense in the world. When they finally issued the rules, they took away that option and gave us the responsibility to do what we are not competent or legally allowed to do.

Senator LEVIN. Did you object to the 1992 rule, as it was proposed?

Mr. DONOHUE. Yes. We continued to object, continued to point out what made sense and what would work.

Senator LEVIN. So you objected to the OMB in 1992, to the rule, but it was proposed anyway?

Mr. DONOHUE. Yes, that is right. The final rule was worse than what was proposed.

Senator LEVIN. You objected to it as it was proposed?

Mr. DONOHUE. Yes.

Senator LEVIN. Mr. Gray, is it your understanding that the regulatory review, when we adopt it, will be prospective or retroactive?

Mr. GRAY. I think there are two parts to that question. The first part, as I understand the discussion that you had earlier, retroactivity would include, in your understanding, these rules that would be caught by this legislation.

Part of the reason for this moratorium is to stop rules so that if and when the new legislation is passed, it can be applied to these rules.

Senator LEVIN. But this legislation also applies to rules which have now taken effect, which are in effect right now.

Mr. GRAY. That is correct. It reopens them, in effect, if they were promulgated after whatever the date is.

Mr. DONOHUE. The 30th.

Mr. GRAY. The 30th of November, or whatever.

Senator LEVIN. No, November 9.

Mr. GRAY. November 9.

Senator LEVIN. Which is, just coincidentally, the day after the election.

Mr. GRAY. There is a different date in the House, yes, sir.

Mr. DONOHUE. They moved the date in the House, sir, to accommodate some particular rule.

Senator LEVIN. You got it. You put your finger right on it, to accommodate a particular rule. Then there may be a rule on Decem-

ber 2 that everybody likes, and so then it is going to be changed over to December 3. You put your finger right on it, which is that if you want to play by a set of rules, we ought to play by a set of rules. We have that set of rules. It is an Executive Order. It has a cost-benefit analysis. We ought to change it, put that cost-benefit analysis into law. I am all for it.

Mr. DONOHUE. Good.

Senator LEVIN. But to make that retroactive and to undo rules which have taken effect is to change people's expectations after they have played by the rules, and that is the part that I have the most trouble with in this legislation, the retroactivity. I have trouble with other parts of it, but this legislation is retroactive to rules which are in effect right now, that people have had their say on, that people have invested money in the implementation of——

Mr. DONOHUE. Senator, I very much understand that and have a lot of concern for that, as well. There are some pretty good rules that we have that would be very helpful such as hazardous materials and others.

The point I made to Senator Glenn, I think, is very, very important. The value of the moratorium, is it says to OSHA—just for an example—fellows, don't rush to publish that new rule. You can't put that up until we get the new cost-benefit rules in place. That is our major concern, because we are talking about tens and tens of billions of dollars to our industry. That ergonomics rule alone would cost the United Parcel Service $3 billion in California.

Mr. GRAY. Senator Levin, the OTC petition rule would impact your State in a very direct, material way, and I don't think anyone would be really surprised to see that reopened in the event you pass the reform legislation.

Senator LEVIN. My time is up. Thank you.

Chairman ROTH. Gentlemen, thank you very much for being here today. We appreciate your testimony.

The record will remain open through Friday, if there are additional questions.

Thank you again. The Committee is in recess.

[Whereupon, at 12:37 p.m., the Committee was adjourned.]

APPENDIX

II

Calendar No. 33

104TH CONGRESS
1ST SESSION

S. 219

[Report No. 104–15]

To ensure economy and efficiency of Federal Government operations by establishing a moratorium on regulatory rulemaking actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 12 (legislative day, JANUARY 10), 1995

Mr. NICKLES (for himself, Mr. BOND, Mrs. HUTCHISON, Mr. DOLE, Mr. GRASSLEY, Mr. ASHCROFT, Mr. COVERDELL, Mr. ABRAHAM, Mr. THOMPSON, Mr. BURNS, Mr. SHELBY, Mr. MCCONNELL, Mr. FAIRCLOTH, Mr. THOMAS, Mr. SMITH, Mr. MCCAIN, Mr. CRAIG, Mr. COATS, Mr. SANTORUM, Mr. MACK, Mr. GREGG, Mr. MURKOWSKI, Mr. LOTT, Mr. KYL, Mr. THURMOND, Mr. HATCH, Mr. HELMS, Mr. INHOFE, Mr. SIMPSON, Mr. GRAMM, Mr. FRIST, Mr. GRAMS, Mr. BENNETT, Mr. KEMPTHORNE, Mr. D'AMATO, Mr. STEVENS, and Mr. COCHRAN) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

MARCH 16, 1995

Reported by Mr. ROTH, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To ensure economy and efficiency of Federal Government operations by establishing a moratorium on regulatory rulemaking actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Transition Act of 1995".

SEC. 2. FINDING.

The Congress finds that effective steps for improving the efficiency and proper management of Government operations will be promoted if a moratorium on new rule making actions is imposed and an inventory of such actions is conducted.

SEC. 3. MORATORIUM ON REGULATIONS.

(a) MORATORIUM.—During the moratorium period, a Federal agency may not take any regulatory rulemaking action, unless permitted under section 5. Beginning 30 days after the date of enactment of this Act, the effectiveness of any regulatory rulemaking action taken during the moratorium period but before the date of the enactment shall be suspended until July 1, 1995, unless an exception is provided under section 5.

(b) INVENTORY OF RULEMAKING.—Not later than 30 days after the date of enactment of this Act, the President shall conduct an inventory and publish in the Federal Register a list of all regulatory rulemaking actions covered by subsection (a) and pending on the date of enactment.

SEC. 4. SPECIAL RULE ON STATUTORY, REGULATORY AND JUDICIAL DEADLINES.

(a) IN GENERAL.—Any deadline for, relating to, or involving any action dependent upon, any regulatory rulemaking action authorized or required to be taken before the end of the moratorium period is extended.

(b) EXTENSION PERIOD.—Any deadline covered by subsection (a) shall be extended for 5 months or until July 1, 1995, whichever is later.

(c) DEADLINE DEFINED.—The term "deadline" means any date certain for fulfilling any obligation or exercising any authority established by or under any Federal statute or regulation, or by or under any court order implementing any Federal statute or regulation.

(d) IDENTIFICATION OF POSTPONED DEADLINES.—Not later than 30 days after the date of enactment of this Act, the President shall identify and publish in the Federal Register a list of deadlines covered by subsection (a).

SEC. 5. EMERGENCY EXCEPTIONS; EXCLUSIONS.

(a) EMERGENCY EXCEPTION.—Section 3(a) or 4(a), or both, shall not apply to a regulatory rulemaking action if—

(1) the head of a Federal agency otherwise authorized to take the action submits a written request to the President, and a copy thereof to the appro-

priate committees of each house of the Congress; and

(2) the President finds, by Executive Order, that a waiver for the action is—

(A) necessary because of an imminent threat to health or safety or other emergency; or

(B) necessary for the enforcement of criminal laws; and

(3) the Federal agency head publishes the finding and waiver in the Federal Register.

(b) EXCLUSIONS.—The head of an agency shall publish in the Federal Register any action excluded because of a certification under section 6(3)(B).

SEC. 6. DEFINITIONS.

For purposes of this Act—

(1) FEDERAL AGENCY.—The term "Federal agency" means any "agency" as that term is defined in section 551(1) of title 5, United States Code (relating to administrative procedure).

(2) MORATORIUM PERIOD.—The term "moratorium period" means that period of time beginning November 9, 1994, and ending June 30, 1995.

(3) REGULATORY RULEMAKING ACTION.—

~~(A) IN GENERAL.—The term "regulatory rulemaking action" means any rule making (as defined in section 551(5) of title 5, United States Code) on any rule normally published in the Federal Register, including—~~

~~(i) the issuance of any substantive rule, interpretative rule, statement of agency policy, notice of inquiry, advance notice of proposed rulemaking, or notice of proposed rulemaking, and~~

~~(ii) any other action taken in the course of the process of rulemaking (except a cost benefit analysis or risk assessment, or both).~~

~~(B) EXCLUSIONS.—The term "regulatory rulemaking action" does not include—~~

~~(i) any agency action that the head of the agency certifies is limited to repealing, narrowing, or streamlining a rule, regulation, or administrative process, to issuing or promulgating a rule required to make effective tax relief provided by statute, or otherwise reducing regulatory burdens, or~~

~~(ii) any action that the head of the agency certifies is limited to matters relat-~~

ing to military or foreign affairs functions or agency management, personnel, or public property, loans, grants, benefits or contracts.

(4) RULE.—The term "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. Such term does not include the approval or prescription, on a case-by-case or consolidated case basis, for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing. Such term also does not include the granting of an application for a license, registration, or similar authority, granting or recognizing an exemption, granting a variance or petition for relief from a regulatory requirement, or other action relieving a restriction, or adopting a rule necessary to permit new or improved applications of technology.

SEC. 7. CIVIL ACTION.

In addition to any remedy otherwise available, whoever is adversely affected by any conduct of a Federal

~~agency in violation of section 3 or 4 may in civil action against that agency obtain appropriate relief. The court may award a prevailing plaintiff in an action under this section reasonable attorney's fees.~~

~~SEC. 8. SEVERABILITY.~~

~~(a) APPLICABILITY.—This Act shall apply notwithstanding any other provision of law.~~

~~(b) SEVERABILITY.—If any provision of this Act, or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act, shall not be affected thereby.~~

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Transition Act of 1995".

SEC. 2. FINDING.

The Congress finds that effective steps for improving the efficiency and proper management of Government operations will be promoted if a moratorium on certain significant regulatory actions is imposed and an inventory of such actions is conducted.

SEC. 3. MORATORIUM ON REGULATIONS.

(a) MORATORIUM.—During the moratorium period, a Federal agency may not take any significant regulatory action, unless permitted under section 5. Beginning 30 days

after the date of enactment of this Act, the effectiveness of any significant regulatory action taken during the moratorium period but before the date of the enactment shall be suspended until the end of the moratorium, unless an exception is provided under section 5.

(b) INVENTORY OF RULEMAKING.—Not later than 30 days after the date of enactment of this Act, and on a monthly basis thereafter, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget shall conduct an inventory and publish in the Federal Register a list of all significant regulatory actions covered by subsection (a), identifying those which have been granted an exception as provided under section 5.

SEC. 4. SPECIAL RULE ON STATUTORY, REGULATORY AND JUDICIAL DEADLINES.

(a) IN GENERAL.—Any deadline for, relating to, or involving any action dependent upon, any significant regulatory action prohibited or suspended under section 3 is extended for 5 months or until the date occurring 5 months after the end of the moratorium period, whichever is later.

(b) DEADLINE DEFINED.—The term "deadline" means any date certain for fulfilling any obligation or exercising any authority established by or under any Federal statute

or regulation, or by or under any court order implementing any Federal statute or regulation.

(c) IDENTIFICATION OF POSTPONED DEADLINES.—Not later than 30 days after the date of enactment of this Act, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget shall identify and publish in the Federal Register a list of deadlines covered by subsection (a).

SEC. 5. EXCEPTIONS.

(a) IN GENERAL.—Except as provided in subsection (b), section 3(a) or 4(a), or both, shall not apply to a significant regulatory action if—

(1) the head of a Federal agency otherwise authorized to take the action submits a written request to the President, and a copy thereof to the appropriate committees of each house of the Congress;

(2) the President finds, in writing, the action is—

(A) necessary because of an imminent threat to human health or safety or other emergency;

(B) necessary for the enforcement of criminal laws;

(C) related to a regulation that has as its principal effect fostering economic growth, re-

pealing, narrowing, or streamlining a rule, regulation, administrative process, or otherwise reducing regulatory burdens;

(D) issued with respect to matters relating to military or foreign affairs or international trade;

(E) principally related to agency organization, management, or personnel;

(F) a routine administrative action, or principally related to public property, loans, grants, benefits, or contracts;

(G) limited to matters relating to negotiated rulemaking carried out between Indian tribes and the applicable agency under the Indian Self-Determination Act Amendments of 1994 (Public Law 103-413; 108 Stat. 4250); or

(H) limited to interpreting, implementing, or administering the internal revenue laws of the United States; and

(3) the Federal agency head publishes the finding in the Federal Register.

(b) INAPPLICABILITY OF EXCEPTIONS.—The authority provided under subsection (a) shall not apply to any action described under section 6(B)(ii).

SEC. 6. DEFINITIONS.

For purposes of this Act—

(1) FEDERAL AGENCY.—The term "Federal agency" means any "agency" as that term is defined in section 551(1) of title 5, United States Code (relating to administrative procedure).

(2) MORATORIUM PERIOD.—The term "moratorium period" means that period of time beginning November 9, 1994, and ending on December 31, 1995, unless an Act of Congress provides an earlier termination date for such period.

(3) SIGNIFICANT REGULATORY ACTION.—The term "significant regulatory action" means any action that—

(A)(i) consists of the issuance of any substantive rule, interpretative rule, statement of agency policy, guidance, guidelines, or notice of proposed rulemaking; and

(ii) the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget finds—

(I) has an annual effect on the economy of $100,000,000 or more or adversely affects in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public

health or safety, or State, local, or tribal governments or communities;

(II) creates a serious inconsistency or otherwise interferes with an action taken or planned by another agency;

(III) materially alters the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(IV) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866; or

(B)(i) withdraws or restricts recreational, subsistence, or commercial use of any land under the control of a Federal agency, except for those actions described under paragraph (4) (K) and (L); or

(ii) is taken to carry out—

(I) the Interagency Memorandum of Agreement Concerning Wetlands Determinations for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act (59 Fed. Reg. 2920) (referred

to in this clause as the "Memorandum of Agreement"); or

(II) any method of delineating wetlands based on the Memorandum of Agreement for purposes of carrying out subtitle C of title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) or section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344).

(4) RULE; GUIDANCE; OR GUIDELINES.—The terms "rule", "guidance", or "guideline" mean the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. Such term shall not include—

(A) the approval or prescription, including on a case-by-case or consolidated case basis, for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(B) any action taken in connection with the implementation of monetary policy or to ensure the safety and soundness of federally insured de-

pository institutions, any affiliate of such an institution, credit unions, the Federal Home Loan Banks, or Government sponsored housing enterprises, or to protect the Federal deposit insurance funds;

(C) any action taken to ensure the safety and soundness of a Farm Credit System institution or to protect the Farm Credit Insurance Fund;

(D) any action taken in connection with the reintroduction of non-essential experimental populations of wolves before the date of the enactment of this Act;

(E) any action by the Environmental Protection Agency that would protect the public from exposure to lead from house paint, soil, or drinking water;

(F) any action to provide compensation to Persian Gulf War veterans for disability from undiagnosed illnesses, as provided under the Persian Gulf War Veterans' Benefits Act (title I of Public Law 103–446; 108 Stat. 4647) and the amendments made by that Act;

(G) any action to improve aircraft safety, including such an action to improve the airworthiness of aircraft engines;

(H) any action that would upgrade safety and training standards for commuter airlines to the standards of major airlines;

(I) the promulgation of any rule or regulation relating to aircraft overflights on national parks by the Secretary of Transportation or the Secretary of the Interior pursuant to the procedures specified in the advanced notice of proposed rulemaking published on March 17, 1994, at 59 Fed. Reg. 12740 et seq., except that this subparagraph shall not apply to any such overflight in the State of Alaska;

(J) any clarification of existing responsibilities regarding highway safety warning devices;

(K) any action that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity relating to hunting, fishing, or camping, if a Federal law prohibits such activity in the absence of agency action; or

(L) the granting of an application for or issuance of a license, registration, or similar au-

thority, granting or recognizing an exemption, granting a variance or petition for relief from a regulatory requirement, or other action relieving a restriction, or taking any action necessary to permit new or improved applications of technology or allow manufacture, distribution, sale, or use of a substance or product.

(5) LICENSE.—The term "license" means the whole or part of an agency permit, lease, certificate, approval, registration, charter, membership, statutory exemption, or other form of permission, including any such form of permission relating to hunting and fishing.

(6) PUBLIC PROPERTY.—The term "public property" means all property under the control of a Federal agency, other than land.

SEC. 7. EXCLUSIONS.

This Act shall not apply to any significant regulatory action that establishes or enforces any statutory rights that prohibit discrimination on the basis of race, religion, sex, age, national origin, handicap, or disability status.

SEC. 8. CIVIL ACTION.

No determination under this Act or agency interpretation under section 6(4) shall be subject to adjudicative review before an administrative tribunal or court of law.

SEC. 9. SEVERABILITY.

(a) APPLICABILITY.—This Act shall apply notwithstanding any other provision of law.

(b) SEVERABILITY.—If any provision of this Act, or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act, shall not be affected thereby.

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