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WASHINGTON, DC

Public Interest Comment<sup>i</sup> to the National Economic Council on  
The President's Executive Order 13725

## Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy

The George Washington University Regulatory Studies Center

Sofie E. Miller, Daniel R. Pérez, Susan Dudley, & Brian Mannix<sup>ii</sup>

May 12, 2016

The George Washington University Regulatory Studies Center works to improve regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess regulatory proposals from the perspective of the public interest, including impacts on consumer welfare.

This comment in response to President Obama's Executive Order 13725 provides recommendations to the National Economic Council on how agencies can reduce regulatory barriers to competition and improve outcomes for American consumers. This comment does not represent the views of any particular affected party or special interest, but is designed to evaluate the effects that existing and forthcoming regulatory actions may have on overall consumer welfare through the lens of enhancing competition and improving innovation.

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<sup>i</sup> This comment reflects the views of the authors, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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# Regulatory Reforms to Enhance Competition

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## Recommendations for Implementing Executive Order 13725

Sofie E. Miller, Daniel R. Pérez, Susan E. Dudley, & Brian Mannix<sup>1</sup>

### Regulation & Competition

Since the formation of the U.S. federal regulatory system, regulations have had a significant influence on marketplace competition. Regulations often seek to improve competition by restraining monopolies; others tend to reduce competition by establishing one-size-fits-all standards for consumer products or acting as nontariff barriers limiting competition from foreign trade partners. Recognizing the importance of this relationship, on April 15<sup>th</sup> President Barack Obama signed an Executive Order instructing federal agencies to identify and address barriers to competition. This Executive Order provides agencies with a valuable opportunity to reevaluate existing rules that create barriers to competition.

According to EO 13725, promoting competitive markets can ensure that “consumers and workers have access to the information needed to make informed choices.” The new Executive Order encourages executive branch agencies to contribute to this goal by engaging in “pro-competitive rulemaking and regulations, and by eliminating regulations that create barriers to or limit competition.”<sup>2</sup>

The Council of Economic Advisors (CEA) recently published an Issue Brief discussing both the benefits of competition and several indicators that suggest a consistent decline in the level of competition within the U.S. economy.<sup>3</sup> The Brief focuses on instances where government agencies can intervene in the market to prevent anticompetitive behavior by firms (e.g., colluding with rivals), but also mentions that agency interventions can be the source of reduced competition. Competition is important for incentivizing long-term productivity growth and

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<sup>1</sup> This comment was originally published as a Regulatory Insight by the George Washington University Regulatory Studies Center on May 11, 2016. <https://regulatorystudies.columbian.gwu.edu/regulatory-reforms-enhance-competition-recommendations-implementing-executive-order-13725>

<sup>2</sup> Executive Order 13725. “Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy.” April 15, 2016. Available at: <https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers>

<sup>3</sup> Council of Economic Advisors Issue Brief. “Benefits of Competition and Indications of Market Power.” April 2016. Available at: [https://www.whitehouse.gov/sites/default/files/page/files/20160414\\_cea\\_competition\\_issue\\_brief.pdf](https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf)

raising the standard of living for society; its benefits for consumers include more choices of products at higher quality and lower prices. Competition can also lead to increased wages as firms compete to attract and retain workers from the labor market.

The federal government has a long track record of issuing regulations that create barriers to competition. While it was intended to curb natural monopolies, the economic regulation that prevailed prior to the mid-1970s was the “principal cause” of monopolies in the telecommunications and transportation sectors.<sup>4</sup> Federal rulemaking has largely moved past the prescriptive economic regulations of the last century—however, many social regulations still have the side-effect of limiting competition by acting as barriers to entry or reducing the number of product options available to consumers. Regardless of the motivation for regulating an industry, there is a strong tendency for the details of regulation to reflect influence, and often the interests, of the industry’s largest incumbents. Consumers’ interests (which are more likely to be taken into account in an open, competitive marketplace) do not always get their due in the regulatory process. This Insight suggests several areas of regulatory policy where federal regulations have hindered, rather than helped, competition, and recommends that agencies take this opportunity to reduce these regulatory barriers to competition.

## **Existing Opportunities to Enhance Competition**

### **DOE’s Energy Efficiency Standards**

EO 13725 instructs agencies to use their existing authorities to “arm consumers and workers with the information they need to make informed choices, and eliminate regulations that restrict competition without corresponding benefits to the American public.”<sup>5</sup> The Department of Energy’s (DOE’s) Energy Conservation Program could benefit from following this guidance. Too often, the program uses product bans rather than better information to change consumer behavior. These rules, which often have very high upfront costs, limit competition between products and reduce choices available to consumers.

Before finalizing a new energy efficiency rule, DOE is required to consider “the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result

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<sup>4</sup> Susan E. Dudley. “President Obama’s Competition Executive Order Could Benefit from a History Lesson.” *The George Washington University Regulatory Studies Center*. April 19, 2016. Available at: <https://regulatorystudies.columbian.gwu.edu/president-obama%E2%80%99s-competition-executive-order-could-benefit-history-lesson>

<sup>5</sup> Executive Order 13725. “Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy.” April 15, 2016. Available at: <https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers>

from the imposition of the standard.”<sup>6</sup> This evaluation is conducted by the Antitrust Division within the Department of Justice (DOJ).

However, even if the DOJ finds that an energy efficiency rule will be anti-competitive, DOE is not necessarily bound by this determination. For example, DOJ found that DOE’s 2009 efficiency standards for lamps would have anti-competitive impacts on the incandescent reflector lamps industry.<sup>7</sup> However, DOE promulgated the standards despite DOJ’s warning that the standards could adversely affect competition. This example illustrates two things: DOE’s rules can have a significant effect on competition, and there is room for improvement in how DOE structures its rules to avoid anti-competitive impacts.

### **Measuring the Effects on Competition: Retrospective Review**

While DOJ’s prospective competition evaluation is issued before a rule goes into effect, it is also important to measure anti-competitive effects after an energy efficiency rule is implemented to determine the actual market response. The Energy Policy and Conservation Act, as amended by the Energy Independence and Security Act, requires DOE every six years to review its standards to determine whether they can be amended.<sup>8</sup> This provides an ideal opportunity for DOE to revisit the effects of its far-reaching standards on competition.

DOE may want to consult with DOJ in the process of evaluating its existing rules. As Sofie E. Miller recommended in her comments to DOE,<sup>9</sup> the Department should consider applying the Herfindahl-Hirschman Index (HHI), which DOJ uses to evaluate the anti-competitive effects of mergers, to measure concentration in the affected industries pre- and post-enforcement of the standards in question.<sup>10</sup> Recently, Batkins et al. employed this methodology to review market concentration as a result of regulation in the health care, energy, airline, and telecommunication sectors.<sup>11</sup>

In addition to affecting the number of firms competing in the market for appliances, these standards limit competition in the number and type of product available to consumers.

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<sup>6</sup> 42 U.S.C. 6295(o)(2)(B)(i)(V). <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap77-subchapIII-partA-sec6295.pdf>

<sup>7</sup> 79 FR 24136

<sup>8</sup> Energy Independence and Security Act of 2007. *SEC. 305. IMPROVING SCHEDULE FOR STANDARDS UPDATING AND CLARIFYING STATE AUTHORITY*. <https://www.gpo.gov/fdsys/pkg/PLAW-110publ140/pdf/PLAW-110publ140.pdf>

<sup>9</sup> Sofie E. Miller. “Recommendations to DOE on Reducing Regulatory Burden.” *The George Washington University Regulatory Studies Center*. July 17, 2014. Available at: <https://regulatorystudies.columbian.gwu.edu/recommendations-doe-reducing-regulatory-burden>

<sup>10</sup> “Herfindahl-Hirschman Index.” *Antitrust Division: Public Documents: Merger Enforcement*. U.S. Department of Justice, n.d. Web. 27 June 2014.

<sup>11</sup> Sam Batkins, Curtis Arndt, & Ben Gitis. “Market Concentration Grew During Obama Administration.” *American Action Forum*. April 7, 2016. Available at: <http://www.americanactionforum.org/research/market-concentration-grew-obama-administration/>

Compliance with DOE’s standards limits competition among firms for other product qualities consumers value. As it plans for retrospective review of its efficiency regulations, DOE should commit to measuring any anti-competitive effects, and to examining changes in the HHI upon implementation of its standards. Understanding the regulations’ effects on market structure and product choice will be important to understanding whether the rules achieve their stated objectives, and the benefits and costs associated with implementation. This should inform the public about any unintended anti-competitive effects of DOE’s energy efficiency standards, and improve DOE’s analysis of future standards.<sup>12</sup>

## Regulations Affecting International Trade and Investment

International trade increases the level of competition within an economy as domestic firms compete with international rivals to provide goods and services to consumers. Unnecessary differences in regulatory regimes and approaches between trade partners often act as technical barriers to trade, reducing the benefits of competition.

Many of these differences are the result the unique mix of political judgements across countries regarding how governments can best use regulations to protect the public. However, countries have become increasingly engaged in international regulatory cooperation as a means of avoiding costly and unnecessary differences in the treatment of goods across borders. Cooperation can provide more information to regulators concerning existing international standards and practices they may consider prior to issuing new regulations.<sup>13</sup>

President Obama signed Executive Order 13609 in an effort to improve the process of international regulatory cooperation. It includes requirements for executive regulatory agencies to “ensure that significant regulations that [each agency] identifies as having significant international impacts are designated as such in the *Unified Agenda of Federal Regulatory and Deregulatory Actions...*” The requirement to flag these rules is intended to expand public participation during notice-and-comment periods by providing advanced notice to both foreign and domestic audiences of regulations currently under consideration that are likely to affect international trade and investment.

## Improve Agency Performance in Flagging Rules

An analysis by Daniel R. Pérez estimates that agencies are, on average, identifying fewer than 30% of their rules in the *Unified Agenda* that are likely to have significant impacts on

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<sup>12</sup> Sofie E. Miller. “Recommendations to DOE on Reducing Regulatory Burden.” *The George Washington University Regulatory Studies Center*. July 17, 2014. Available at: <https://regulatorystudies.columbian.gwu.edu/recommendations-doe-reducing-regulatory-burden>

<sup>13</sup> Pérez et al. “US-EU Regulatory Cooperation: Lessons and Opportunities” *The George Washington University Regulatory Studies Center*, April 26, 2016. Available at: <https://regulatorystudies.columbian.gwu.edu/us-eu-regulatory-cooperation-lessons-and-opportunities>

international trade and investment.<sup>14</sup> The results indicate that there is much room for improvement in notifying trade partners and expanding stakeholder participation to improve the outcomes of rulemaking and avoid the creation of unnecessary barriers to trade that result in reduced competition.

## **EPA's Renewable Fuel Standards**

Regulations that dictate use of certain products at levels above consumer demand harm consumers because they replace the natural competitive market process with one-size-fits-all mandates that don't represent consumer preferences. The Environmental Protection Agency's (EPA's) Renewable Fuel Standards (RFS), which mandate the production and use of biofuels like corn ethanol and biomass-based diesel, illustrate how federal regulations override consumers' preferences and impede competitive markets.

The RFS program requires refiners to blend specific amounts of renewable fuels into transportation fuel, such as gasoline and diesel. The RFS program was created in 2005 to reduce both American dependence on foreign oil and domestic gasoline consumption. To accomplish these goals, EPA's December 2015 final rule mandates the production of 18.11 billion gallons of total renewable fuel in 2016, a 1.18 billion gallon increase from the last published standards promulgated for 2013.<sup>15</sup>

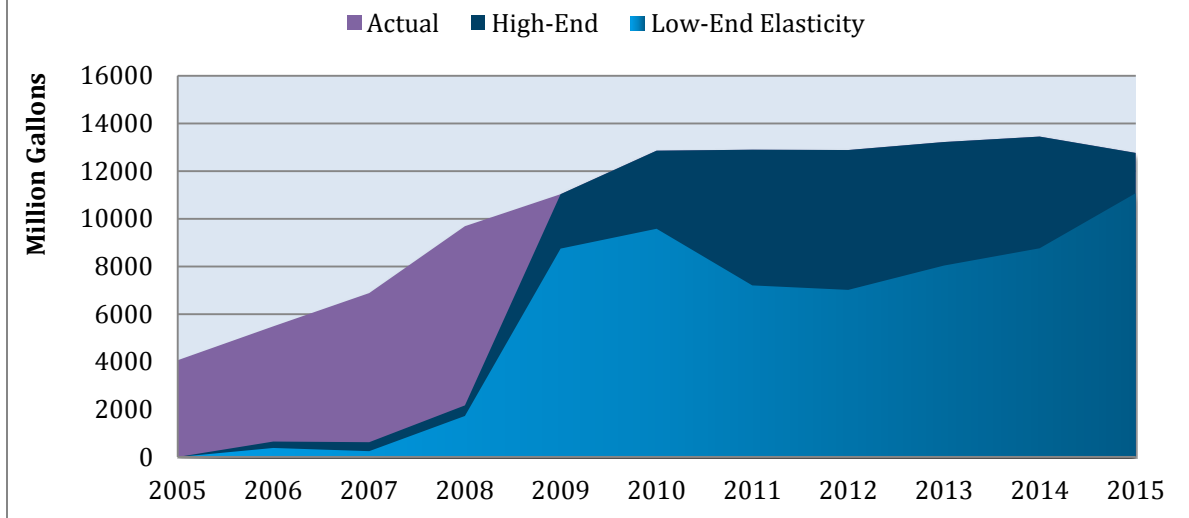
There was some demand for biofuels such as corn ethanol prior to the creation of the RFS program; however, because corn ethanol is a substitute for gasoline, demand for ethanol is extremely responsive to the price of gasoline. When the RFS program was created in 2005, ethanol was a relatively attractive substitute due to the high price of gas. But major drops in the price of gasoline since 2008 put consumers at a disadvantage by requiring them to pay for a substitute that costs more than the gasoline it is intended to displace. The below graph shows that most, if not all, of current ethanol consumption is driven by harmful federal policies rather than pure market demand and competition.

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<sup>14</sup> Daniel R. Pérez. "Identifying Regulations Affecting International Trade and Investment: Better Classification Could Improve Regulatory Cooperation." *The George Washington University Regulatory Studies Center*. November 10, 2015. Available at: <https://regulatorystudies.columbian.gwu.edu/identifying-regulations-affecting-international-trade-and-investment-better-classification-could>

<sup>15</sup> Sofie E. Miller. "Oversight of the Renewable Fuel Standard." Prepared statement for the record for the U.S. Senate Environment and Public Works Committee Hearing 'Oversight of the Renewable Fuel Standard.' February 24, 2016. Available at: <https://regulatorystudies.columbian.gwu.edu/oversight-renewable-fuel-standard>

## Portion of Ethanol Demand Due to Government Policies



Author's calculation based on the cross-price elasticities of gasoline and ethanol (Anderson 2010, "The Demand for Ethanol as a Gasoline Substitute." *National Bureau of Economic Research: Working Paper 16371.*)

While these mandates are harmful to American consumers—and the environment<sup>16</sup>—they are highly profitable for the domestic soybean and corn industries, who can sell their crops at inflated prices to produce uncompetitive biofuels. For example, EPA estimated that its 2012 biodiesel rule would raise the price of soybeans by 18 cents per bushel, which would have yielded soybean farmers a \$707 million increase in revenues in 2015 alone.<sup>17</sup> The price of soybean oil was also expected to rise by 3 cents per pound, adding up to a \$1.2 billion increase in revenues for soybean oil producers. While these benefits are concentrated to a specific few groups, the costs are borne by all Americans who buy products incorporating soy, from soap to beef.<sup>18</sup>

Advocates of biofuels like to justify these mandates by arguing that they are necessary to support an infant industry in a competitive marketplace; however, biofuels have existed for over a century, and their inability to gain a hold in the market has less to do with their "infant" status and more to do with uncompetitive pricing and unattractive product features. "After a century, the success of biofuels as a competitive fuel source should not depend on legislated mandates or

<sup>16</sup> See, for example, the literature review on environmental impacts in Sofie Miller's February 24, 2016 statement for the record: <https://regulatorystudies.columbian.gwu.edu/oversight-renewable-fuel-standard>

<sup>17</sup> Calculated using the USDA's estimate of 3.93 billion bushels of soy produced in 2015. <http://www.usda.gov/nass/PUBS/TODAYRPT/cropan16.pdf>

<sup>18</sup> Sofie E. Miller, "Crony Environmentalism." *Regulation Magazine*, Spring 2013.

costly subsidies. Rather than encouraging healthy competition, which provides incentives for innovation and efficiency, the mandates encourage political rent-seeking, and harm the environment, consumers and taxpayers in the process.”<sup>19</sup>

## CAFE Standards for Trucks

Executive Order 12866, signed by President Clinton, directs agencies to analyze the benefits and costs of regulations, and to try to maximize the excess of the former over the latter.<sup>20</sup> It is a sound principle, but it needs to be applied with an appropriate measure of humility. Regulators may be tempted to think that they can use benefit-cost analysis to determine what is “best” for the economy, and then simply mandate it. Industry incumbents may encourage this approach; they are often willing to accept expensive regulation as long as it can be used to create barriers to entry that protect them from competition. The collateral damage to competition and innovation can easily turn an otherwise well-intentioned rule into an economic disaster.

The problem can be illustrated by looking at fuel-economy standards jointly proposed this year by EPA and the Department of Transportation’s National Highway Traffic Safety Administration (NHTSA), which will apply to companies that manufacture, sell, or import heavy duty trucks, including tractor-trailer trucks.<sup>21</sup> The proposed standards appear to have been developed in close consultation with industry incumbents, and incorporate prescriptive requirements that are likely to create barriers to entry. Rather than encouraging innovation, the standards are likely to make innovation very difficult. Even the proposed exemptions for small manufacturers incorporate production caps and grandfather features that appear to be designed to suppress new entry and competition.<sup>22</sup>

EPA and NHTSA claim that, in the early years, the proposed standards can be achieved using existing technologies. In later years, however, the standards are technology-forcing—that is, the agencies assume innovations will be developed to allow the industry to comply with standards that, today, are not technically achievable. Compliance with the standards will be determined through a complex array of computer modeling plus on- and off-road testing. Because of the cost and complexity of the testing, the standards will allow manufacturers to comply by installing certain pre-certified technologies on their vehicles.

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<sup>19</sup> Susan E. Dudley. “Renewable Fuel Mandates Harm the Environment, Consumers, and Taxpayers.” *The George Washington University Regulatory Studies Center*. March 26, 2013. Available at: [https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley\\_biodiesel\\_03262013.pdf](https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_biodiesel_03262013.pdf)

<sup>20</sup> Executive Order 12866. “Regulatory Planning and Review.” September 30, 1993.

<sup>21</sup> “Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles—Phase 2; Proposed Rule.” *Federal Register* Vol. 80, No. 133, July 13, 2015 (Book 2 of 3 Books), pp. 40137–40766. Available at: <http://www3.epa.gov/otaq/climate/regs-heavy-duty.htm>.

<sup>22</sup> For more detailed commentary on the proposed standards, see Mannix’s Public Interest Comment, available at: <http://regulatorystudies.columbian.gwu.edu/public-interest-comment-epa-and-nhtsas-proposed-rule-greenhouse-gas-emissions-and-fuel-efficiency>.



As an example, consider cab-mounted fairings—the air deflectors mounted on top of the cabs of tractors, in order to reduce the aerodynamic drag of the trailer in a tractor-trailer vehicle. These are commonly used in the industry, but the proposed standards will not allow just any old fairing. The Draft Regulatory Impact Analysis (RIA) goes into great detail<sup>23</sup> on the advantages of a particular thermoplastic fairing design, SABIC Roof Fairing Technology, that delivers just the right combination of weight and aerodynamic performance. After 2018 it will be nearly impossible to put a truck on the road that does not include one of these fairings, and it will be illegal for any person to remove the fairing as long as the truck is in service.

Such regulatory specification of a particular technology can be especially damaging when the technology is proprietary, because the law simultaneously locks out competitors and locks in customers. In this case the two agencies worked closely with SABIC, the fairing’s manufacturer, to develop the standards. It seems likely that SABIC will patent the mandated design: “Saudi Arabia Basic Industries Corporation (SABIC) has passed the milestone of having more than 10,000 patents either issued or pending approval, making it the largest owner of intellectual property in the Middle East.”<sup>24</sup>

EPA and NHTSA seem unconcerned about the danger to competition: “We are currently coordinating with SABIC on future efforts to determine feasibility and capability of this concept on additional areas of the tractor (e.g., bumper, hood, fuel tank/chassis skirt fairings, cab side extenders).”<sup>25</sup> The two agencies appear to be dramatically increasing our dependence on proprietary intellectual property, even “as we take another big step to grow our economy and reduce America’s dependence on foreign oil.”<sup>26</sup>

## Curbing Innovation: Controlling Vehicle-to-Vehicle Communications

In 2014, NHTSA published an advanced notice of proposed rulemaking seeking public input on the possibility of requiring new passenger cars and light trucks to be equipped with vehicle-to-vehicle (V2V) communication technology.<sup>27</sup> NHTSA predicted that adoption of V2V technology across the vehicle fleet could lead to large benefits by preventing accidents that result in death, injury, and property damage.<sup>28</sup>

However, NHTSA’s plan to regulate V2V technologies may come at the expense of innovations that would have been developed through the competitive market process. As Gerald Brock and

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<sup>23</sup> Draft Regulatory Impact Analysis (RIA), p. 2-19. EPA-420-D-15-900, June 2015. Available at: <http://www3.epa.gov/otaq/climate/regs-heavy-duty.htm>.

<sup>24</sup> Arab News, “SABIC becomes region’s largest patent developer,” 13 June 2014.

<sup>25</sup> RIA, p. 2-20.

<sup>26</sup> [Remarks by the President on Fuel Efficiency Standards for Medium and Heavy-Duty Vehicles](#), Feb. 18, 2014.

<sup>27</sup> National Highway Traffic Safety Administration. “Federal Motor Vehicle Safety Standards: Vehicle-to-Vehicle (V2V) Communications.” August 20, 2014. 79 FR 49270

<sup>28</sup> 79 FR 49270

Lindsay M. Scherber note in their comment to NHTSA, car manufacturers are already exploring many technologies that would accomplish the safety goals that NHTSA outlines, including V2V communication capabilities, driverless cars, “Super Cruise” technologies, left-turn assist capabilities, blind spot information systems, and automated brake support.<sup>29</sup> By proposing a universal V2V communication specification, NHTSA disregards major advancements that are already being developed through competitive market processes; any mandated single technology has the potential to override the gains to consumers of private sector innovation.

NHTSA’s draft proposed rule on V2V communication technologies is currently under review at OMB,<sup>30</sup> and according to the Fall 2015 Unified Agenda, NHTSA plans to publish it this May.<sup>31</sup> As the Agency moves forward with this proposal, it should bear in mind the success of other innovated network technologies<sup>32</sup> and avoid using a heavy hand to regulate. Doing so may forfeit the consumer benefits that would come with the innovative technologies that competition in private markets is already encouraging.

## Resurgence of Economic Regulation

The first regulatory agencies in the United States, formed during the New Deal and earlier, generally issued “economic regulations.”<sup>33</sup> That is, they regulated a broad array of activities within particular industries using economic controls such as price ceilings or floors, quantity restrictions, and service parameters.<sup>34</sup> By the early 1970s, scholarship in the fields of economics, antitrust, and law generally supported the idea that this type of regulation tended to keep prices

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<sup>29</sup> Gerald Brock & Lindsay Scherber. “Public Interest Comment on the National Highway Traffic Safety Administration’s Advance Notice of Proposed Rulemaking: Federal Motor Vehicle Safety Standards: Vehicle-to-Vehicle (V2V) Communications.” *The George Washington University Regulatory Studies Center*. October 20, 2014. Available at: <https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Brock-Scherber-NHTSA-2014-0022.pdf>

<sup>30</sup> “Search of Regulatory Review.” Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President. Accessed May 4, 2016. <http://www.reginfo.gov/public/do/eoAdvancedSearchMain>

<sup>31</sup> “View Rule: Federal Motor Vehicle Safety Standard (FMVSS) 150—Vehicle to Vehicle (V2V) Communication.” Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President. Accessed May 2, 2016. <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=2127-AL55>

<sup>32</sup> Gerald Brock & Lindsay Scherber. “Public Interest Comment on the National Highway Traffic Safety Administration’s Advance Notice of Proposed Rulemaking: Federal Motor Vehicle Safety Standards: Vehicle-to-Vehicle (V2V) Communications.” *The George Washington University Regulatory Studies Center*. October 20, 2014. Available at: <https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Brock-Scherber-NHTSA-2014-0022.pdf>

<sup>33</sup> Susan E. Dudley. “Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future.” *Case Western Reserve Law Review*, Vol. 65 Issue 4. 2015.

<sup>34</sup> See Murray L. Weidenbaum, *Business and Government in the Global Marketplace* 23–41 (6th ed. 1999) (discussing the development and rationale of U.S. regulation).

higher than necessary, to the benefit of regulated industries, and at the expense of consumers.<sup>35</sup> Policy entrepreneurs in the Ford, Carter, and Reagan Administrations, in Congress, and at think tanks were able to link this knowledge to the problem of inflation by showing that eliminating economic regulations and fostering competition would lead to reduced prices.<sup>36</sup> Bipartisan efforts across all three branches of government eventually led to the abolition of whole agencies such as the Civil Aeronautics Board and the Interstate Commerce Commission, and removal of unnecessary regulation in several previously regulated industries, with resulting improvements in innovation and consumer welfare.<sup>37</sup>

The transportation and telecommunications deregulation that took place in the 1970s and 1980s is generally regarded as a success, having lowered consumer prices and increased choices. Deregulation and consumer choice have aligned service quality with customer preferences. Competitive markets have generated real gains—and not just reallocated benefits—for consumers and society as a whole, and markets have evolved in beneficial ways that were not anticipated before deregulation.<sup>38</sup>

Recent years have seen a resurgence of the anti-competitive “economic regulation” that the U.S. successfully abandoned almost 40 years ago. Regulations under the Affordable Care Act and Dodd-Frank Act, for example, limit prices, control entry, and constrain service quality. The Federal Communications Commission’s net neutrality rules<sup>39</sup> and the Department of Labor’s fiduciary rules may limit the arrangements that could emerge from competitive markets, and harm innovation.<sup>40</sup>

The GW Regulatory Studies Center’s annual review of the budgets and staffing of regulatory agencies indicates that those responsible for economic forms of regulation have grown at a faster rate than social regulatory agencies in recent years. Based on data presented in the annual fiscal

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<sup>35</sup> George J. Stigler. “The Theory of Economic Regulation.” *The Bell Journal of Economics and Management Science*, Vol. 2 Issue 1, 3 (1971).

<sup>36</sup> Susan E. Dudley. “Alfred Kahn 1917–2010.” *Regulation*, Spring 2011, at 8.

<sup>37</sup> Martha Derthick & Paul J. Quirk. *The Politics of Deregulation* 5 (1985); ICC Termination Act of 1995, Pub. L. No. 104–88, § 101, 109 Stat. 803, 804 (1995).

<sup>38</sup> Clifford Winston. “U.S. Industry Adjustment to Economic Deregulation.” 12 *J. Econ. Persp.*, 89, 89–90, 97 (1998).

<sup>39</sup> Gerald Brock. “Vague Net Neutrality Rule Impedes Innovation.” *The George Washington University Regulatory Studies Center*. April 21, 2015. Available at: <https://regulatorystudies.columbian.gwu.edu/vague-net-neutrality-rule-impedes-innovation>. Maureen K. Ohlhausen. “Net Neutrality vs. Net Reality: Why an Evidence-Based Approach to Enforcement, and Not More Regulation, Could Protect Innovation on the Web.” 14 *Engage J. Federalist Society Practice Groups* 81, 2013. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2670816](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2670816)

<sup>40</sup> Singer & Litan’s analysis concludes that the rule will impose net costs “largely from (1) small savers losing access to human financial advisors (because small accounts would become uneconomic to serve, and expose advisory firms to new liability risks), (2) small savers being forced into fee-based advisory relationships that cost more than current commission-based arrangements, and (3) small savers and firms not being encouraged to save more, take full advantage of employer matches, or create retirement plans in the first place.” <http://www.ei.com/support-proposed-fiduciary-rule-proposed-fiduciary-rule/>

budget presented to Congress, the reports estimate that over President Obama’s 8-year term (FY 2010 – FY 2017) the staff at these economic regulatory agencies increase by 30 percent, and their outlays by 40 percent.<sup>41</sup>

## Encouraging Competition in Labor Markets

In discussing competition, policymakers can tend to forget that labor is a good that also responds to price signals and is affected by regulatory barriers to entry. Recent—and forthcoming—administrative actions apply economic forms of regulation to labor markets. These merit additional attention as agencies evaluate the effects of their rules on competition.

For example, President Obama’s executive orders 13673, 13658, and 13502 alter competition in labor markets by restricting the contractors who can apply for federal procurement contracts, establishing an hourly minimum wage for federal contractors, and prioritizing federal procurement firms with project labor agreements, respectively. Agencies’ actions to implement these executive orders will erect barriers to entry for both firms and individual workers.

## Looking Ahead: Licensing Tax Preparers

Beyond the current regulatory frameworks being considered and implemented by regulatory agencies, there are additional anti-competitive policies on the horizon that policymakers should be aware of. Congress is currently considering a hurdle to competition in the Tax Return Preparer Competency Act, which would require paid tax preparers to become licensed by the Internal Revenue Service. The President’s latest budget suggests the administration does not plan to wait for Congress to pass this bill however; it would grant the Treasury Department the authority to regulate paid tax preparers.<sup>42</sup>

This development is especially disappointing given the findings of the President’s own Council of Economic Advisers (CEA), which concluded in a July 2015 report that “the current [occupational] licensing regime in the United States also creates substantial costs, and often the requirements for obtaining a license are not in sync with the skills needed for the job. There is evidence that licensing requirements raise the price of goods and services [and] restrict employment opportunities.”<sup>43</sup>

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<sup>41</sup> Regulators’ Budget 2017, GW Regulatory Studies Center and Weidenbaum Center at Washington University. forthcoming.

<sup>42</sup> “Obama Budget Includes Tax Increases and Tax Preparer Regulation.” *The Greater Washington Society of CPAs*. Accessed April 30, 2016. <http://www.gwscpa.org/Content/news/Obama-Budget-Includes-Tax-Increases-and-Tax-Preparer-Regulation.aspx>

<sup>43</sup> Department of the Treasury Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor. *Occupational Licensing: A Framework for Policymakers*. July 2015. [https://www.whitehouse.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf)

The President's—and Congress'—push for additional occupational licensing won't just hurt independent tax preparers, it will also help the bottom lines of large tax preparing companies, like H&R Block, which has been lobbying for additional licensing requirements.<sup>44</sup> As the President's own CEA concluded, consumers suffer the most when competitors are pushed out of the market by regulations that mandate registration and licensing.

## Recommendations

Whatever their particular mission, regulators need to be mindful that competition is the most important regulator of our economy. It is ubiquitous, ever vigilant, and ever faithful to the interests of consumers. It constantly pursues both lower costs and higher quality in the goods and services we produce and consume. At the same time, it is never rigid: it is always open to new entry and to new ideas. It can be harsh, driving companies out of business without so much as a hearing; but it does so only when something better is there to replace them. It works without a queue for licenses, without an encyclopedia of rules, and without an army of inspectors.

Although several measures indicate that competition within the U.S. continues to decline, it is worth noting that not all instances of firms increasing their market shares have detrimental effects on the economy. Competition can result in firms that gain market share because they offer products and services that consumers enjoy; this creates incentives for firms to innovate, offer new products, and pursue gains in productivity that are conducive to long-term economic growth.

While there are legitimate regulatory goals that require licenses and rules and inspectors, regulators need to be very careful, in pursuing those goals, that they do not displace the competition that governs the larger marketplace.<sup>45</sup> To that end, in addressing competition via regulation, agencies should use an open process that provides consumers, competitors, and potential entrants with an opportunity to identify regulations that limit choice or erect barriers to competition. Such a process would create an opportunity for real consumer gains through increased choices and better information about products that serve the needs of consumers.

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<sup>44</sup> James Sherk. "This Company Wants to Make It Harder for You to File Taxes." *The Daily Signal*. March 18, 2016. Available at: <http://dailysignal.com/2016/03/18/this-company-wants-to-make-it-harder-for-you-to-file-taxes/>

<sup>45</sup> Brian Mannix. "The Tension between Optimization and Competition in Rulemaking: The Case of Proposed Fuel-Efficiency Standards for Trucks." *The George Washington University Regulatory Studies Center*. October 8, 2015. Available at: <https://regulatorystudies.columbian.gwu.edu/tension-between-optimization-and-competition-rulemaking-case-proposed-fuel-efficiency-standards>