Executive Order No. 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. 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 are 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 the Environmental Protection Agency (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. 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.

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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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 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.”

President Obama directed the two agencies to issue these standards in order “to drive down our oil imports even further. That reduces carbon pollution even more, cuts down on businesses’ fuel costs, which should pay off in lower prices for consumers. So it’s not just a win-win, it’s a win-win-win. You’ve got three wins.” Certainly it seems to be a win for Saudi Arabia, which looks to gain a legally mandated virtual monopoly on American trucks.

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).” 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.”

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

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5 Remarks by the President on Fuel Efficiency Standards for Medium and Heavy-Duty Vehicles, Feb. 18, 2014.

6 RIA, p. 2-20.

7 President’s remarks.
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.

We do have other legitimate regulatory goals that require licenses and rules and inspectors; but we need to be very careful, in pursuing those goals, that we do not displace the competition that governs the larger marketplace.