REGULATION NATION: THE OBAMA ADMINISTRATION'S REGULATORY EXPANSION VS. JOBS AND ECONOMIC RECOVERY

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

SEPTEMBER 20, 2012

Serial No. 112–148

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

76–032 PDF WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
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REGULATION NATION: THE OBAMA ADMINISTRATION'S REGULATORY EXPANSION VS. JOBS AND ECONOMIC RECOVERY

THURSDAY, SEPTEMBER 20, 2012

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10:06 a.m., in room 2141, Rayburn Office Building, the Honorable Lamar Smith (Chairman of the Committee) presiding.

Present: Representatives Smith, Coble, Goodlatte, Lungren, Chabot, King, Jordan, Griffin, Marino, Adams, Conyers, Scott, Jackson Lee, Cohen, and Chu.

Staff present: (Majority) Richard Hertling, Staff Director and Chief Counsel; Travis Norton, Counsel; Daniel Flores, Counsel; John Hilton, Counsel; David Lazar, Clerk; (Minority) Perry Apelbaum, Staff Director and Chief Counsel; Danielle Brown, Counsel; James Park, Counsel; and Susan Jensen-Lachmann, Counsel.

Mr. SMITH. The Judiciary Committee will come to order.

Without the objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone here today. I am going to recognize myself for an opening statement, then the Ranking Member, then we will introduce the witnesses.

Four years into the Obama administration, the outlook for jobs in the American economy is disheartening and bleak. There are fewer jobs in America than when President Obama took office. Unemployment has been over 8 percent for a record 43 straight months. The percentage of American workers who are unemployed or underemployed is nearly 15 percent.

In August alone, 368,000 workers abandoned the workforce. The percentage of Americans who participate in the workforce is the lowest since 1981.

In 2008, the U.S. economy was rated the most competitive in the world. Since then, it has fallen to 7th place. The United States' credit rating has been downgraded and another downgrade has been threatened. This is not what the Obama administration promised for economic recovery when it took office. President Obama stated during an interview in 2009, "If I do not have this done in 3 years, then there is going to be a one-term proposition."

Why is unemployment still so high? A large part of the answer can be found in the Administration's historic expansion of regulations and business owners' uncertainty over what regulations might come next. In his 2011 State of the Union Address, President Obama promised to fix "rules that put an unnecessary burden on businesses." And in his September 2011 address to a Joint Session of Congress, the President declared that "We should have no more regulation than the health, safety, and security of the American people require."

But his actions speak louder than his words. Rather than lighten regulatory burdens to promote recovery, President Obama has turned America into a regulation Nation. We need to encourage small businesses to expand, not tie them up with red tape. America's job creators do not need more government regulation. They need fewer burdens, lower costs, and an environment in which they can predict whether they can hire and make a profit.

A Heritage Foundation study found that in his first 3 years in office, President Obama adopted 106 major rules that impose $46 billion in additional regulatory costs on the private sector. That is a new record. To make matters worse, the Administration's latest regulatory agenda identifies over 200 major rules that are planned or have just been completed. Each of these rules will affect the economy by $100 million or more every year.

A recent Gallup poll found that among the 85 percent of U.S. small business owners who are not hiring, nearly half of these cited being "worried about new government regulations" as the reason they are not hiring.

To help solve America's economic troubles, the House Judiciary Committee passed a comprehensive package of regulatory reform bills this term of Congress. These bills have all passed the House as well. They promise to lower regulatory costs and uncertainty and still protect public health, safety, and welfare. The Regulatory Accountability Act, for example, requires agencies to show that the benefits of new regulations justify their costs when the regulations are adopted.

The Judiciary Committee's legislation also includes the Regulatory Freeze for Jobs Act, which halts unneeded new major rules unless unemployment drops to 6 percent; the Regulatory Flexibility Improvements Act, which makes sure agencies account for the needs of small businesses before they adopt new rules; the Sunshine for Regulatory Consent Decrees and Settlements Act, which prevents collusion between special interests and agencies to force new regulations on the public; the REINS Act, which restores Congress' accountability for new major regulations; and the RAPID Act, which streamlines permitting for new construction projects.

America's economic recovery depends on job creators, not Federal regulators. We need to lift the burden on small businesses and free them up to spend more, invest more, produce more, and create more jobs. Despite his promises to lighten the regulatory load, President Obama has threatened to veto every one of these bills. And the Senate has not taken any up any of them. But the Judiciary Committee will continue to push for their enactment because of America's urgent need for new jobs and economic growth.

Now that concludes my opening statement. And the gentleman from Michigan, the Ranking Member of the Judiciary Committee, is recognized for his.

Mr. CONYERS. Thank you, Chairman Smith. It is understandable that the political atmosphere would force the Chairman into a very unusual state of affairs. This is the 16th anti-regulatory hearing that we have conducted in the 112th Congress, and I ask unanimous consent to put them in the record.

[A list of the hearings follows:]

List of Anti-Regulatory Hearings During the 112th Congress

1/24/11	The REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations
2/10/11	H.R. 527, "Regulatory Flexibility Improvements Act of 2011"—Unleashing Small Businesses to Create Jobs
2/28/11	The APA at 65—Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?
3/8/11	H.R. 10, the "Regulations From the Executive in Need of Scrutiny Act of 2011"
3/29/11	Raising the Agencies' Grades—Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need
5/4/11	Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits
5/31/11	Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability
7/11/11	The Role of Social Security Administrative Law Judges

10/25/11	H.R. 3010, the "Regulatory Accountability Act of 2011"
2/3/12	H.R. 3041, the "Federal Consent Decree Fairness Act," and H.R. 3862, the "Sunshine for Regulatory Decrees and Settlements Act of 2012"
2/27/12	H.R. 4078, the "Regulatory Freeze for Jobs Act of 2012"
3/21/12	Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform under the Obama Administration
4/25/12	H.R. 4377, the "Responsibly And Professionally Invigorating Development (RAPID) Act of 2012"
7/12/12	Clearing the Way for Jobs and Growth: Retrospective Review to Reduce Red Tape and Regulations
9/12/12	The Obama Administration's Abuse of Power
9/20/12	Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery

The hearings referred to in the list can be accessed at: http://judiciary.house.gov

Mr. SMITH. Without objection.

Mr. CONYERS. And I want to welcome the majority witnesses. One is an economic advisor for Mitt Romney campaign, and he also co-founded a group called Economists for Romney. Welcome, sir.

We have another witness who has contributed $50,000, which is his right, to Restore our Future, a Romney campaign PAC.

And then we have another witness who we welcome and who is the chair of the North Carolina Catholics for Romney Committee.

So you can see what we are in for this morning, and I am perfectly willing to indulge in the tactics of the Chairman of this Committee.

Now, today's hearings are based on a premise and assumptions that are simply false. The majority makes or the Chairman makes the first assumption that regulations inhibit job creation even though there is absolutely no credible evidence so far establishing the fact that regulations have any substantive impact on job creation. That is not my opinion. This is what a senior political analyst in the Reagan and George H.W. Bush administration, Mr. Bruce Bartlett, explains. And this is a quote: "Republicans have a problem. People are increasingly concerned about unemployment." This is him saying that. This is a quote. "But Republicans have nothing to offer them. The GOP opposes additional government spending for jobs programs, and, in fact, favors big cuts in spending that would be likely to lead to further layoffs at all levels of government."

This is quote, too. The quote continues: "These constraints have led Republicans to embrace the idea that government regulation is the principal factor holding back employment. They assert that Barack Obama, [the President], has unleashed a tidal wave of new regulations which has created uncertainty among businesses and prevents them from investing and hiring."

The quote continues. It is italicized. *"No hard evidence is offered for this claim, it is simply asserted as self-evident and repeated endlessly throughout the conservative echo chamber."* That is the end of the quotations.

All of that I have been citing is from the senior policy analyst in the Reagan and George H.W. Bush administrations, Bruce Bartlett, a senior policy analyst.

Now the majority's own witness, distinguished though he is, clearly debunked the myth that regulation stymie job creation at a legislative hearing held last year. Christopher DeMuth, with the American Enterprise Institute, stated in his prepared testimony that the "focus on . . . jobs can lead to confusion in regulatory debates." The quote continues, "the employment effects of regulation, while important, are indeterminate."

Another unsubstantiated claim that the majority claims in support of its anti-regulatory agenda is that regulatory uncertainty is hurting the business community. Once again, Bruce Bartlett, the senior economic official for the Reagan and Bush administrations, responds. "Regulatory uncertainty is a canard invented by Republicans that allows them to use current economic problems to pursue an agenda supported by the business community year in and year out. In other words, it is a simple case of political opportunism, not a serious effort to deal with high unemployment." So make no mistake, ladies and gentlemen.

Today's hearing is yet another example of the political opportunism recognized and described by Mr. Bartlett. And perhaps the biggest canard in the majority's argument for so-called regulatory reform is the purported $1.75 trillion dollar cost of regulation based on a single study. Please give me a break. This figure is utterly unreliable and meaningless.

Again, this is not just my opinion. The non-partisan Congressional Research Service conducted an extensive examination of the study and found much of its methodology to be flawed. Moreover, the Congressional Research Service noted that the study's authors themselves acknowledged that their analysis was "not meant to be a decision making tool for lawmakers or Federal regulatory agencies to use in choosing the 'right' level of regulation."

Our witness today has published well-researched material that will go further into it. So I hope my colleagues on both sides of the aisle will listen very closely to the testimony that she presents. And I conclude, and I thank the Chairman for the additional time he has generously afforded me.

I conclude with the final reason to reject this meaningless figure. It completely and blatantly ignores the overwhelming benefits of the regulations, which is 25 times more than the net benefits during the 3 years of the George W. Bush administration.

I will insert the rest of my statement in the record, and again thank Chairman Smith for the generous time that he has afforded me.

Mr. SMITH. Thank you, Mr. Conyers. That was a fulsome statement, but always appreciate your comments.

Let me proceed to introduce our witnesses today. And our first witness is Professor John Taylor. He is the George P. Schultz Senior Fellow in Economics at the Hoover Institution, and Professor of Economics at Stanford University. He was director of the Stanford Institute for Economic Policy Research and founding director of Stanford's Introductory Economic Center.

Professor Taylor has a distinguished record of public service. He served as a member of the President's Council of Economic Advisors from 1989 to 1991, and as Under Secretary of the Treasury for International Affairs from 2001 to 2005. He has been a member of the California Governor's Council of Economic Advisors. I want Mr. Conyers to be aware of the fact, Professor Taylor, that you are bipartisan when it comes to your good economic advice.

Professor Taylor received a Bachelor's degree in economics from Princeton University and a Ph.D. in economics from Stanford University. In recognition of his many achievements, in 2010, he received the prestigious Bradley Prize.

Our next witness, Ambassador C. Boyden Gray, served as White House Counsel for President George H.W. Bush. During the Reagan administration, he served as counsel to then-Vice President George H.W. Bush and as counsel to the Presidential Task Force on Regulatory Relief. More recently, he served as Special Envoy for Eurasian Energy Diplomacy and Special Envoy for European Union Affairs, as well as U.S. Ambassador to the European Union in Brussels.

Ambassador Gray practiced as a partner at the Wilmer, Cutler, Pickering, Hale, and Dorr law firm in Washington, D.C. Currently, he is a founding partner of the D.C.-based law firm, Boyden Gray and Associates, LLP.

He earned his Bachelor's degree from Harvard University and his Juris Doctor from the Law School of the University of North

Carolina at Chapel Hill. Following his graduation, Ambassador Gray served in the U.S. Marine Corps. After law school, he clerked for Earl Warren, Chief Justice of the United States Supreme Court.

Our next witness, Lisa Heinzerling, is a Professor of Law at Georgetown University. Her specialties include environmental and natural resources law, administrative law, the economics of regulation and food and drug law.

From 2009 to 2010, Professor Heinzerling served first as Senior Climate Policy Counsel to the Administrator of the U.S. Environmental Protection Agency, and later as Associate Administrator of the EPA's Office of Policy. She has been a visiting professor at Harvard, Vermont, and Yale Law Schools. She clerked for Justice William J. Brennan, Junior, of the U.S. Supreme Court and Judge Richard A. Posner of the U.S. Court of Appeals for the 7th Circuit.

She received her Bachelor's degree from Princeton University and her J.D. from the University of Chicago.

Our final witness, Robert L. Luddy, is the Founder and Chairman of CaptiveAire Systems, Inc., a leading manufacturer of commercial kitchen ventilation systems, and a leader of the Job Creators Alliance. CaptiveAire employs over 600 people and maintains over 80 sales office in the U.S. and Canada.

Mr. Luddy is a lifelong entrepreneur. At the age of 20, while attending LaSalle University in Philadelphia, Mr. Luddy opened a fiberglass manufacturing business. Later, Mr. Luddy purchased a sheet metal shop and transformed it into CaptiveAire Systems, Inc.

In 2006, he won the Ludwig von Mises Institute's first ever "Mises Entrepreneurship Award" for 3 decades of leadership at CaptiveAire and for exemplary "dedication to learning, prosperity, and freedom."

And we welcome you all, and, Professor Taylor, we will begin with you.

TESTIMONY OF JOHN B. TAYLOR, GEORGE P. SCHULTZ SENIOR FELLOW IN ECONOMICS AT THE HOOVER INSTITUTION, AND PROFESSOR OF ECONOMICS AT STANFORD UNIVERSITY, CA

Mr. TAYLOR. Thank you very much, Chairman Smith, Ranking Member Conyers, other Members of the Committee, for inviting me.

Mr. CONYERS. Pull your mic up a little closer, sir.

Mr. SMITH. Before you begin, Professor Taylor, I want to recognize a colleague, Randy Hultgren, who just joined us. He is sitting on the front row. He has been a leader in Congress when it comes to regulatory reform legislation. We appreciate his attendance and his leadership, again, on that issue.

Professor Taylor, please begin.

Mr. TAYLOR. So I am going to begin with, in some sense, the obvious, and that is the economy is in very bad shape. Growth is under 2 percent. Unemployment stays high, especially long-term unemployment. We have a very weak recovery compared to other deep recessions, and I point to the recovery in the early 80's in my testimony quite extensively where growth was 5.7 percent over that period, and it has only been 2.2 in this period.

Many people have tried to understand what the reasons for this very poor economy are. Some say it is because we had a deep recession. I do not agree with that because generally speaking in American history, deep recessions are followed by very fast recoveries. Some people says it is because there was a big financial crisis. I do not see that either because previous history shows that even recoveries from financial crises are much more rapid than this one.

So considering all the possibilities, I have come to the conclusion that government policy is a source of the very weak recovery, and in particular, part of government policy as a regulatory policy.

My colleagues and I have just finished a book on this called Government Policies and the Delayed Economic Recovery. In that book, there are studies, for example, by Baker, Bloom, and Davis, which have tried to quantify the impact of the policy uncertainty that is associated with government policy. In my testimony, I have some examples of the data they use, tax uncertainty in particular. And they find it has a negative effect on growth. Correlations are not always causation, but they have looked at the timing, and I think it is convincing.

Another piece of research in this project is by Ellen McGrattan and Edward Prescott. They give examples of the regulatory expansion both in terms of the amount spent and in terms of the number of workers involved in regulatory activities in the Federal Government, and point to that correlation with a very weak recovery. And again, I have in my testimony a chart—it is on page 6, Mr. Chairman—which shows the real, I think, explosion in terms of the number of Federal workers involved in regulatory activity. I tried to take out the TSA workers and control for that, and you can really see what a remarkable increase. There is of course a lot of corroborative research that supports the work in that book.

In looking over the legislative record of this Congress, in particular this session, I have noted a lot of efforts to contain this expansion of regulation. The Red Tape Reduction and Small Business Job Creation Act, which of course includes 7 different bills, including this moratorium proposal that aims at the unemployment rate, extending cost benefit analysis requirements to the SEC and CFTC, dealing with the unfunded mandates simply by being transparent about them. It seems to me these bills and the ones in the previous session emphasize transparency, accountability, the use of cost benefit analysis and sound data. These are the kind of things that good government requires. I think they are important.

By blocking these bills, it seems to me those people who have blocked them have really blocked jobs bills effectively.

I want to just give some data. Economists refer to data all the time, and you sometimes do not how to interpret it. But I made a big point in my testimony and a just a minute ago about how weak this recovery has been compared to the strong recovery from an equally deep recession in the early 80's—5.7 percent then, 2.2 percent now.

Think of what has happened in the regulatory area. The number of Federal workers involved in regulatory activities in that expansion period in the early 80's declined by 22,000. In this recovery in this period in the last 5 or 6 years, they have increased by 54,000. If you look at the number of pages in the Federal Register, in the previous period basically where we had a good recovery, the number of pages in the Federal Register each year went down by 24,000. Recently that has gone up by 4,000.

If you look at data like that, it makes you worry that this activity, this regulatory expansion, is holding back on the economic expansion. And it seems to me every effort that the Congress can take to be careful about this, to contain this regulatory expansion, will make it better to have a stronger economic expansion.

Thank you very much.

[The prepared statement of Mr. Taylor follows:]

Government Regulatory Policies and the Delayed Economic Recovery

John B. Taylor[1]

Testimony before the
Committee on the Judiciary

United States House of Representatives

September 20, 2012

Chairman Smith, Ranking Member Conyers, and other members of the committee, thank you for the opportunity to testify at this hearing on "Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery."

In order to address this important issue systematically, I first discuss the disappointing economic recovery and resulting weak job growth. Second I consider the role of the recent expansion of regulations and other government actions in delaying the recovery and job creation. Third, I review the legislation that has been put forward to control the regulatory expansion.

Jobs and the Economic Recovery

The persistently high unemployment rate—especially long term unemployment—is one of the most disturbing aspects of today's economy The high unemployment rate is mainly the result of the slow pace of economic growth, which has failed to bring the economy and the labor market back to their potentials. Slow economic growth means that firms are not expanding or hiring many workers. Hence, slow economic growth means slow job growth, and that is what we are seeing now. In addition, many people are dropping out of the labor force. If they had not dropped out and thus were still counted as unemployed, the unemployment rate would be even higher than the current 8.1 percent.

While some jobs are being created, the pace of job creation is barely enough to keep pace with the growing working-age population. For example, during the past two years, employment increased by 3.1 million. This may sound ok, but really is quite poor for a recovery from a deep recession. Over the same two year period, the working age population (16 and over) increased by 5.7 million, which is about the same percentage growth as employment. With employment growing at about the same pace as the working age population, the percentage of the working age population that is actually working has not increased as it does in most recoveries.

The following chart illustrates this. It shows the change in the percentage of the working age population that is working and compares it with the recovery from the previous deep recession in the early 1980s. Note that there is little or no improvement in the employment-to-population ratio in this recovery. It is still lower than it was at the bottom of the recession. It is

[1] Mary and Robert Raymond Professor of Economics at Stanford University and George P. Shultz Senior Fellow in Economics at Stanford's Hoover Institution

as if the typical lift-off has been delayed. In comparison, the percentage of the population with jobs rose much more rapidly during the recovery from the back-to-back recessions of 1980 and 1981-82.

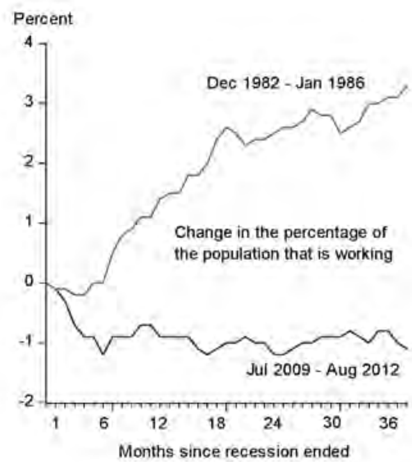

Figure 1: The Delayed Recovery in Historical Perspective

The current recovery began in the third quarter of 2009, and it was weak from the start. By its second anniversary, the recovery was still so weak that I called it "a recovery in name only, so weak as to be nonexistent." The normal rebound in job creation and economic growth was delayed. Now the recovery has been delayed yet another year. It's the worst recovery from a deep recession since the recovery from the Great Depression, and perhaps in American history—a tragedy that should not be minimalized.

Figure 2 shows real GDP during the 12 quarters since the end of the recession. It also shows CBOs estimate of potential GDP. Clearly the economy has not yet recovered back to its potential. This delay is very unusual. Throughout American history, recoveries from deep recessions have tended to be been much faster than recoveries from shallow \recessions, as Milton Friedman (1988) showed long ago and Michael Bordo and Joseph Haubrich (2012) have recently confirmed. The recovery of the economy back to potential GDP in the 12 quarters following the 1981-82 recession was much quicker.

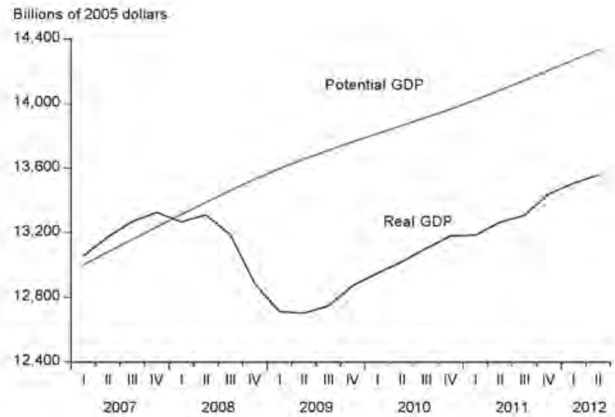

Figure 2: Economic Growth Is Too Slow to Close the Gap

The two recoveries can also be compared by examining real GDP growth rates in the recovery periods. The growth rates in each of the 12 quarters of the two recoveries are shown in Figure 3. The comparison is striking. Economic growth averaged 2.2 percent in the recent 12 quarters compared with 5.7 percent in the 1980s recovery.

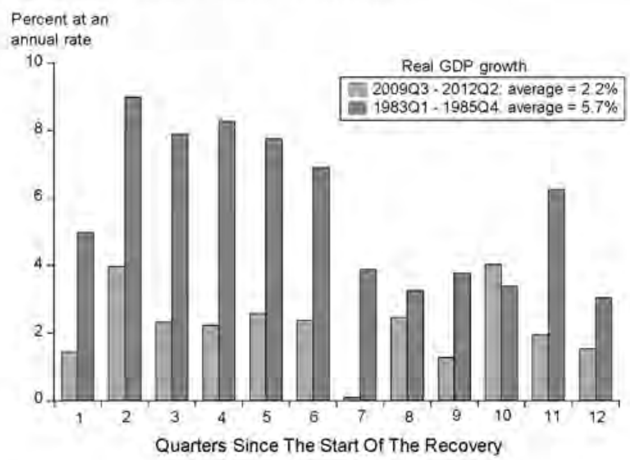

Figure 3: Recent Slow Growth in Historical Perspective

Unfortunately recent data are even more disappointing. In the months of July and August alone—the most recent data we have—518 thousand people have given up looking for work and have dropped out of the labor force, while the number employed has dropped by another 314 thousand. With economic growth slowing to 1½ percent in the second quarter of this year, perilously close to another recession, it is not surprising that few firms are hiring.

Why the Delayed Recovery?

Some argue that the weak recovery is due to the seriousness of the preceding financial crisis where people took on too much debt and now must cut back on consumption to pay back debt, commonly called deleveraging. However, the stronger recovery in the early 1980s occurred while people were consuming a much smaller fraction of their income than in the recent recovery. The saving rate was as much as 10 percent then and only 3 to 4 percent now.

Others argue that the slow recovery is due to the weak housing market. But strong recoveries frequently have weak sectors, and housing is less of a drag now than other sectors, such as foreign trade, were in the strong 1980s recovery. Still others point to Europe, but the recovery has been continuously weak from the start even as the European situation has had its ups and downs. Moreover, through most of the recovery, economic growth in most of the world has been strong, and net exports have not been a drag on the economy.

Having considered the various explanations, I have come to the conclusion that the delayed recovery is due to poor government policies, of which regulatory expansion and policy uncertainty are a substantial part. Indeed, this is the general conclusion of a number of researchers whose findings we have collected in the just released book: *Government Policies and the Delayed Economic Recovery* (see Ohanian, Taylor and Wright (2012)). As discussed in the book's Introduction, "the delayed recovery has been due to the enactment of poor economic policies and the failure to implement good economic policies.... The clear implication is that a change in the direction of economic policy is sorely needed. Simply waiting for economic problems to work themselves out, hoping that growth will improve as the Great Recession of 2007-2009 fades into the distant past, will not be enough to restore strong economic growth in America." Here is a summary of some of the findings:

Scott Baker, Nick Bloom, and Steve Davis (2012) investigate whether policy uncertainty could be a factor in the recent slow growth. They develop a quantitative index of policy uncertainty. For example, they include the number of provisions in the tax code which expire each year. Indeed, this type of temporary tax change is making the entire tax and regulatory system unpredictable, as I illustrate in Figure 4 below using data collected in the years shown by the Joint Committee on Taxation.

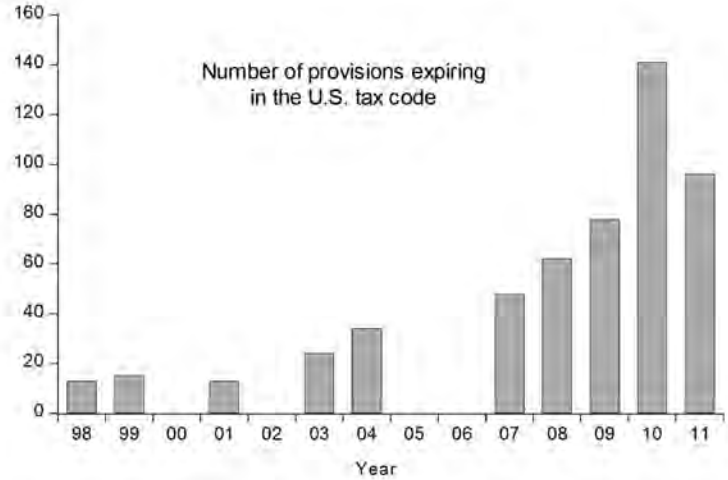

Figure 4: The Increase in Tax Policy Uncertainty

Baker, Bloom and Davis use statistical techniques to test whether changes in their overall index are correlated with changes in economic growth over time. They find that increases in the index—greater policy uncertainty—tend to be associated with reductions in economic growth. The effect is statistically significant and the timing indicates that increases in the index lead to reductions in economic growth, suggesting causation. They found that this overall policy uncertainty reduced GDP by 1.4 percent in 2011 alone, and that restoring pre-crisis levels of certainty would add 2.3 million jobs in 18 months.

Using an entirely different approach Greenspan (2012a) presents empirical evidence that too much policy activism has been a major factor holding back economic growth in the recent recovery. Additional corroborating evidence that policy uncertainty has reduced growth and employment comes from work at the research department of the Federal Reserve Bank of San Francisco, where Leduc and Liu (2012) find that "higher uncertainty is estimated to have lifted the U.S. unemployment rate by at least one percentage point since early 2008."

McGrattan and Prescott (2012) provide data on the increased federal government regulations which suggest that these regulations are a source of the slow economic growth. They look at spending on regulatory activities and the number of federal workers involved in these activities. Figure 5 below illustrates the type of data they use, which shows a recent expansion of regulatory activities. The chart uses data from research by Susan Dudley and Melinda Warren (2012). It takes their series on the number of "full time equivalent" federal employees in regulatory activities and subtracts out the number of Transportation Safety Administration (TSA) workers. (The years 2002 and 2003 when TSA was expanding and moving from DOT to DHS are interpolated). There has been a 25 percent increase just since 2007. And these data barely reflect the increased regulations from the health care and financial reform legislation.

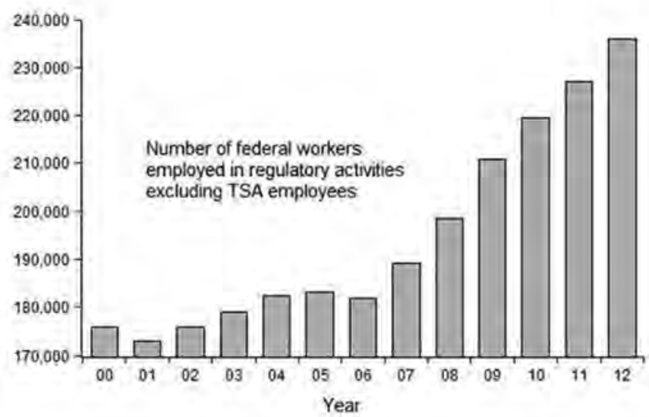

Figure 5: The Recent Government Regulatory Expansion

To test their results McGrattan and Prescott develop a model of the economy that features intangible capital investment and technological change. They then show that intangible investment declined in the recent recession and has not yet recovered. Thus actual economic growth is likely to have experienced a negative shock which is correlated with the increase in regulations. Using a formal economic model, Herkenkoff and Ohanian (2012) also find that employment has not recovered because various government interventions have depressed labor markets by negatively impacting the incentives for business to hire workers and for workers to accept offers.

Alan Greenspan (2012b) considers some of the economic impacts of the regulatory expansion. He argues that the Wall Street Reform and Consumer Protection Act of 2010 is largely un-implementable based on his knowledge of how the Federal Reserve and other regulatory agencies operate. This act requires more than 200 rulemakings by the Federal Reserve and other agencies, far more than they had to implement in comparable periods in the past. The general regulatory principles are put in the law but the detailed regulations must be implemented by the regulatory agencies. The bill is riddled with many new regulations that are not related to the crisis. These require very complex rulemakings to implement, and the very complexity makes them difficult to enforce. As Greenspan put it, "There are innumerable hidden problems like this in the law and the sooner we decide to start from scratch, the better off this country will be." A far better way to deal with the risks that led to the financial crisis would be to make sure that financial institutions have adequate capital and that the regulations in the books are rigorously enforced by the regulators.

Quantitative reports from the Office of Management and Budget (OMB) show that the costs of regulation have been growing over the past few years. The Government Accountability Office reports that federal agencies issued 43 major new rules in fiscal year 2010, including 15 in the financial area, 10 in the environmental area, and 5 in the health care area. See Gattuso (2011). Many more regulatory rules are in the process of being written and issued, including from the Patient Protection and Affordable Care Act of 2010. While Washington is worried about a fiscal cliff, a regulatory cliff is also looming.

Earlier this year, *The Economist* magazine published a report entitled the "Over-Regulated America" which provides specific examples of how the United States "is being suffocated by excessive and badly written regulation," and data support these examples. It focusses on the "flaws in the confused, bloated law passed in the aftermath of America's financial crisis." The sheer complexity of the regulations increases uncertainly which holds back investment and firm expansion.

Legislative Efforts to Slowdown the Regulatory Expansion and Raise Economic Growth

The House of Representatives recently passed a number of regulatory reform bills. Perhaps most significantly the House passed the Red Tape Reduction and Small Business Job Creation Act of 2012 (H.R. 4078), a comprehensive package of seven regulatory reform bills, which, as I briefly describe below, are designed to contain the recent regulatory expansion.

- Regulatory Freeze for Jobs Act of 2012 (H.R. 4078)
  - The bill would create a moratorium on new significant regulations until the national unemployment rate stabilizes at or below 6 percent.
  - As I testified in February (Taylor (2012), in order to help strengthen the weak economic recovery, I joined several other economists—George Shultz, Michael Boskin, John Cogan, Allan Meltzer—with a similar moratorium recommendation, but for three years. We regret that a moratorium did not become law.
  - But the 2012 bill has an advantage over the three-year moratorium because it is tied to unemployment, which should be a major focus of government policy now.
  - Under the proposed legislation, the President could waive the moratorium for national security, but would have to explain the need for the waiver in writing, and the regulation would be subject to judicial review.

- Midnight Rule Relief Act of 2012 (H.R. 4607)
  - This act would prohibit agencies from proposing or finalizing significant regulations from the day after the November election to inauguration day.
  - This period has traditionally been one where costly regulations are promulgated.

- Sunshine for Regulatory Decrees and Settlements Act of 2012 (H.R. 3862)

   - This act would help cut down on the "sue and settle" practice whereby special interest groups seeking new regulations sue regulatory agencies and then settle with a new regulation that is often quite costly.
   - The bill would require that the consent decrees and settlement agreements and attorneys' fees be published. In addition, any proposed consent decree or settlement agreement would have to be published in the Federal Register 60 days prior to filing with the court.

- Unfunded Mandates Information and Transparency Act of 2011 (H.R. 373)
   - This bill would help cut down on the practice whereby Congress mandates that business firms or state and local governments carry out tasks rather than creating and funding a federal program to carry out the task directly.
   - The bill simply requires that the costs of unfunded mandates on firms for local governments be disclosed.

- Responsibly and Professionally Invigorating Development (RAPID) Act of 2012 (H.R. 4377)
   - This bill would streamline the permitting process for infrastructure projects.
   - It would require that developers be able to obtain environmental permits and approvals for their projects in a timely and efficient manner.

- SEC Regulatory Accountability Act (H.R. 2308)
- Commodity Futures Trading Commission–Cost-Benefit Analysis Legislation (H.R. 1840)
   - These two bills would require the SEC and the CFTC to perform cost benefit analysis much as executive branch agencies are required to do.
   - Basic economics says that these agencies should follow cost benefit analysis in their rule making, just as executive branch agencies. A report of the President's Job Council found that many rules issued by the SEC did not undergo comprehensive cost benefit analysis as in executive branch agencies.
   - An extension would be to apply the requirements for cost-benefit analysis and centralized review to all independent agencies, including the Federal Reserve. Assuming that the centralized review can occur in a timely manner this reform would reduce the costs and uncertainty of regulation on the economy.

As this summary shows, a common feature of these bills is that they increase transparency, accountability, serious cost-benefit analysis, and use of sound science and reliable data. The same is true of regulatory bills passed by the House in the last session: the Regulatory Flexibility Improvements Act of 2011, the Regulatory Accountability Act of 2011, and the Regulations From the Executive in Need of Scrutiny Act of 2011. Good government bills like these are essential for controlling the regulatory process. Because the regulatory expansion along with other government policies is a likely cause of the poor economic growth and job performance, they should also be an essential part of an economic recovery program.

Conclusion

I have argued in this testimony that the weak recovery and high unemployment have been caused by poor economic policy of which the recent expansion of costly regulations is a part. If the bills reviewed here and passed by the House had also been passed by the Senate and signed into law by the President, the regulatory process would have become far more streamlined and far less costly to the American economy. To the extent that the bills would have halted or mitigated the regulatory expansion, the economic recovery would have been stronger. In other words, they are as much jobs bills as they are regulatory reform bills. The actions to block them have adversely affected the high priority goal of increasing growth and creating jobs.

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Mr. SMITH. Thank you, Mr. Taylor.
Ambassador Gray.

TESTIMONY OF C. BOYDEN GRAY, BOYDEN GRAY AND ASSOCIATES, WASHINGTON, DC

Mr. GRAY. Thank you, Mr. Chairman, Mr. Conyers, for the opportunity to appear. I appreciate coming after John Taylor because as an economist, he is in a better position to give you the quantification of how regulation impacts adversely the economy. But my simple point is it is a huge wet blanket on economic growth. And it does not mean that you do not have any regulation. It means that you do it in a much smarter way.

I think in terms of quantification, I am going to give a couple of examples at the end of where history I think makes clear how big a problem this is.

The problem is at least two-fold. You have regulatory costs that are imposed on businesses here that may not be imposed in China or in other competing countries. So you have a question of pricing ourselves out of international markets in the global economy. That does not mean you get rid of regulation. It just means you do it better.

We tried to market incentives with the acid rain program in the Clean Air Act of 1990. The costs came in at about a fifth of what they were supposed to come in at, what command and control would have provided. And it did not harm or pull back on the recovery that turned out to be one of the greatest booms in America history throughout the 90's and the first decade of this century.

The other problem is uncertainty. Again, hard to quantify, but I cite a study of a team of Stanford and Chicago economists on page of my testimony trying to quantify what this uncertainty does in terms of economic growth. I do not want to waste time giving the facts here, but it is there at page 3.

There is a tendency, and this is partly, I think, Congress' fault, a tendency to delegate huge amounts of unlimited discretion to bureaucrats because it is easier than resolving it here in the Committees that have jurisdiction over the various substantive statutes. And the result is unfortunately a lack of guidance to the business community. They do not know what it is going to take to comply.

You have Mr. Cordray at the Consumer Bureau saying I am not going to go and issue rulemaking to give people notice in advance of what conduct is expected of them. That fair notice is really the heart of the Administrative Procure Act. That is the heart of our administrative law system. I am going to do it by enforcement. I am going to do it after the fact. I am going to let you know what it is when I think I have seen it. This is not conducive to job growth or investment.

There are some good answers to this: not wiping out regulation, but making it better. There are many bills pending in Congress here in the House. Some of them have been discussed already by the Chairman. They would include suggestions that John Taylor has made: clear cost benefit analysis and requirements; clear guidance, and instruction, and details from the Congress itself to inform the regulatory agencies how to issue rulemaking to give the kind of guidance and notice to the public that is affected; the use of market incentives and performance standards so as to reduce the discretionary micromanagement by agencies, and give the complying public the choice of how to meet the goals that should be clearly stated rather than left to the discretion of the executive branch.

Now what examples would I choose? I served in the Reagan administration. We went through a really bad recession, double-digit inflation, double-digit interest rates. It is kind of hard to believe how bad it was. But the Reagan program of regulatory reform I think works, and we snapped back with one of the greatest recoveries and greatest booms in U.S. history.

As a result of my service in Europe, I am fond of asking the question who was the sick man of Europe when I first went there. The sick man of Europe in 2006 was Germany. Now it became the colossus of Europe in less than a year, year and a half. Why? Because of regulatory reform, a little bit of Reagan/Thatcher, a little bit of labor law, a little bit of welfare reform, and a little bit of labor law restrictions lifted. And now it has rocketed. And that is all Germany wants the rest of Europe to try to emulate. And if it did and we corresponded and worked with the Europeans transatlantically to reduce regulatory burdens, you could add 1 or 2 points of GDP growth, and this has been documented by the OECD.

So we have examples of how this works, and I think we ought to get on with it. And I appreciate your interest in this subject matter. Thanks.

[The prepared statement of Mr. Gray follows:]

Hearing before the
U.S. House of Representatives
Committee on the Judiciary

"REGULATION NATION: THE OBAMA ADMINISTRATION'S REGULATORY EXPANSION VS. JOBS AND ECONOMIC RECOVERY"

September 20, 2012

Statement of Amb. C. Boyden Gray

I am pleased to have been asked to testify before the Committee on the question of the current regulatory burden on the national economy. This is the single most pressing domestic policy matter of the day, and I am honored to contribute to the discussion.

As it is so often said, "history never repeats itself, but it rhymes." This seems to be one of those moments. Thirty years after President Reagan campaigned in large part on a platform of regulatory reform, and successfully reformed much of the administrative state, we find ourselves largely back where we began. Regulatory agencies once again rival the tax code and monetary policy in their ability to retard economic growth. And they are doing so at the worst possible opportunity—when we need economic growth more than ever.

Fortunately, while we have encountered these problems before, we also know from experience the best remedies: require regulatory agencies to subject their rules to the rigors of meaningful cost-benefit analysis; erect administrative law procedures that are transparent, predictable, and reliable; maximize the fruits of market-based solutions; and craft substantive statutes that give clear direction to—and place clear limits upon—the agencies that will administer them.

The solution is not just to "roll back some regulations, and call me in the morning," as President Obama glibly mischaracterized in his speech to the Democratic Party's convention earlier this month. Rather, the question is how we can best structure the administrative state to make its regulations both effective and efficient. It is not a question of deregulation; it is a question of *smart* regulation.

I. The Costs of Regulation and of Regulatory Uncertainty

I am a lawyer, not an economist, and so I defer largely to the economic analysis offered by my esteemed co-panelist, Professor John Taylor of Stanford and the Hoover Institution. That said, even a lawyer can recognize the basic facts of regulatory burden on the economy.

First, the Obama Administration's regulations impose immense costs on the economy. By their own estimate, their regulations have cost up to $32.1 billion—but that figure covers just forty-five so-called "major rules" issued in 2009, 2010, and 2011.[1] Of course, we should view the Administration's self-serving estimates of regulatory costs and benefits with a skeptical eye: as Susan Dudley, former Administrator of the White House Office of Information and Regulatory Affairs ("OIRA") and now Director of George Washington University's Regulatory Studies Center, noted recently in *Business Economics*,

> Agencies have strong incentives to demonstrate through analysis that their desired regulations will result in benefits that exceed costs. . . . A better baseball analogy might note that, as the regulatory game is now structured, OIRA is the umpire—the sole judge of the balls and strikes pitched by the agencies. When the umpire boasts with such

[1] See OIRA, "Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," at p. 19 (Mar. 2012), *at* http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf.

> enthusiasm about his team's score, one has to wonder who will ensure that the game is played fairly.[2]

In sharp contrast to the Administration's own estimate, the American Action Forum (led by Douglas Holtz-Eakin, former chief economist of the President's Council of Economic Advisers and director of the Congressional Budget Office) estimates that this Administration's regulatory burden on the economy exceeds $450 billion.[3]

Second, regulators impose costs not just through the regulations that they directly impose, but also through the problem of regulatory uncertainty. While some assert that regulatory uncertainty is a "canard,"[4] a team of Stanford and Chicago economists recently demonstrated the impact of policy uncertainty, analyzing data that "foreshadows drops in private investment of 16 percent within 3 quarters, industrial production drops of 4 percent after 16 months, and aggregate employment reductions of 2.3 million within two years"—findings that "reinforce concerns that policy-related uncertainty played a role in the slow growth and fitful recovery of recent years[.]"[5]

Of course, the problem is not "regulatory uncertainty" in the abstract. Uncertainty beats certainty when the certainty in question is a massively costly regulation

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[2] Susan E. Dudley, "Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation," *Business Economics* 47:3, at p. 175 (2012)

[3] *See* "President's Regulatory Record in the Courts" (Aug. 21, 2012), *at* http://americanactionforum.org/topic/president's-regulatory-record-courts.

[4] *See, e.g.*, Jonathan Cohn, "The GOP's Uncertainty Canard" (Oct. 4, 2011), *at* http://www.tnr.com/blog/jonathan-cohn/95748/republican-regulation-uncertainty-business-data-cantor-mishel-bartlett.

[5] Scott R. Baker, Nicholas Bloom, and Steven J. Davis, "Measuring Economic Policy Uncertainty" (June 4, 2012), *at* http://faculty.chicagobooth.edu/steven.davis/pdf/PolicyUncertainty.pdf.

with no benefits. Rather, the problem is costly, inefficient regulation, and the possibility of still more costly, inefficient regulation.

II. Regulatory Reform's Record

As I noted at the outset of this testimony, our present problems are challenging but not wholly unprecedented. The present economic malaise deservedly draws comparisons to the malaise of the 1970s, when heavy regulation combined with other headwinds to prevent economic growth. To the credit of economist Alfred Kahn, lawyer Stephen Breyer, and others, the Carter Administration and Congress began to wake up to those problems in the late 1970s. But Ronald Reagan truly understood the challenge, and he campaigned vigorously in 1980 on a platform of regulatory reform. Once elected, he put his mandate into effect by commissioning a serious reform effort.

I was privileged to participate in that process, which culminated with the landmark Executive Order 12291, creating the Office of Information and Regulatory Affairs and requiring executive branch agencies to subject regulations to meaningful cost-benefit analysis under OIRA's direction, among other things. President Reagan's Republican successors, Presidents George H.W. Bush and George W. Bush, continued to support and expand upon those reforms. And even Reagan's Democratic successor, President Clinton, largely maintained those reforms in Executive Order 12866.

To be clear, the Reagan reforms were not perfect. Most significantly, E.O. 12291 limited its requirements to *executive* agencies (the Environmental Protection Agency, Labor Department, and so on) but did not touch the so-called "independent" agencies—the Securities and Exchange Commission, National Labor Relations Board, and others. Even though the President has constitutional authority to impose such rules on the independent agencies, the Reagan Administration stayed its own hand. It was a prudential decision: at that time, independent agencies' regulatory impact was much less than it is today.

The results were overwhelming, as seen in the economic growth that followed. But aside from the well-known statistical evidence, my favorite illustration of the success of Reagan's regulatory reforms is a personal anecdote. A couple of years after President Reagan promulgated his reforms, when the economy was in recovery, I encountered the wife of the C.E.O. of one of the Big Three U.S. auto companies. She said her husband attributed the recovery to the regulatory reform program—not just because of the revision of old regulations but because of the signal that new regulations would be efficient and transparent enough to enable the companies to focus less on Washington and more on cars and consumers.

III. Regulatory Reform Recedes

Unfortunately, in politics few victories are truly permanent, and regulatory reform is no exception. In recent years, the benefits of past reforms have been eroded by a number of developments.

First, and as I just noted, the so-called "independent" agencies have come to impose a much greater burden on the economy. The Securities and Exchange Commission, National Labor Relations Board, and other longstanding agencies wield immensely more power than they once did. Once-sleepy agencies such as the Commodity Futures Trading Commission were given vast new powers by the Dodd-Frank Act and other new laws. And Dodd-Frank created another new independent agency, the Bureau of Consumer Financial Protection ("CFPB"), which threatens economic costs of its own. While the Obama Administration has made much of the fact that it nominally asked independent agencies to review the costs and benefits of their regulations, the executive branch has not taken serious steps to actually align the costs and benefits of independent agencies' regulations. Moreover, Congress is increasingly unwilling to oversee those agencies, as demonstrated by the Dodd-Frank provisions preventing Congress even from reviewing the budget of the self-funded CFPB.

Second, the executive branch's control of cost-benefit analysis increasingly lacks credibility, as Professor Dudley's aforementioned article demonstrates. The Administration's self-serving claims that its regulatory benefits far exceed the costs of unprecedented environmental regulations should be met with serious suspicion. One notorious case study is the Administration's proposed valuation methodology for power plants' "cooling water intake" facilities. To establish the value of fish harmed by those facilities, the EPA conducted a survey asking respondents how much they would be "willing to pay" to save certain species of fish. Of course such a study is wildly hypothetical, even ridiculous—few citizens are ever presented with a real-life situation in which they would pay real money to save real fish. And so the results, garnered from well-meaning respondents, were predictably skewed in favor of high values. That flimsy methodology might next be used to support costly regulations on the nation's energy producers.

Furthermore, too much of the current Administration's regulations are driven not by transparent notice-and-comment rulemakings, but through backroom deals. Perhaps the most notorious example of this is the Administration's "bailout" of the auto industry. Seizing upon the industry's 2008-2009 crisis, the White House and EPA coerced auto companies into agreeing to accept overwhelmingly burdensome greenhouse gas regulations before a single word of the proposal was ever drafted—a disturbing incident recounted forcefully in the House Oversight and Government Reform Committee's new report.[6] To the extent that the Administration forced this deal upon private industry, it was a serious abuse of power; to the extent that some inside the industry welcomed the arrangement, to the detriment of other auto companies and the economy at large, it was a textbook case of the "crony capitalism," backroom deals, and logrolling inherent in a regulatory process that lacks true transparency. As regulations proliferate, so do the opportunities for secret deals.

IV. Regulatory Reforms To Solve Our Modern Problems

Given those and other problems, the basic solutions clearly present themselves. Regulatory cost-benefit analysis requirements must be extended to independent agencies. And the framework for such review can no longer be designed and executed exclusively by the executive branch, without outside oversight.

In the last two years, Congress has seen many legislative reforms incorporating these solutions. In fact, the bills considered and passed by this Committee, described below, constitute a comprehensive set of reforms that would solve many or all of the problems at hand.

First, the Regulatory Accountability Act (H.R. 3010) takes the cost-benefit analysis currently required of agencies pursuant to executive orders and applies it to *all* agencies, executive and "independent" alike, as a matter of federal statutory law. By requiring agencies to analyze costs and benefits on the record, it gives the public an opportunity to comment upon the estimates of those costs and benefits, ultimately improving the final calculations by increasing the amount and quality of information in the

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[6] "A Dismissal of Safety, Choice, and Cost: The Obama Administration's New Auto Regulations" (Aug. 10, 2012), *at* http://oversight.house.gov/wp-content/uploads/2012/08/CAFE-Report-8-10-12-FINAL.pdf

administrative record. Furthermore, the Act would generally require agencies to choose the lowest-cost rulemaking alternative that meets the objectives of the underlying substantive statute—it would not supersede the requirements of, *e.g.*, the Clean Air Act, but rather it would simply require regulators to select the regulatory framework that achieves those requirements at the lowest possible cost. And the Act preserves agency discretion to choose a higher-cost alternative if necessary to protect the public health, safety, and welfare, so long as the additional benefits justify the additional cost.

The Regulatory Accountability Act would also require agencies to consider market-based alternatives to command-and-control rulemaking. This is a particularly laudable proposal. During my time in the Reagan and Bush Administrations, some of the government's greatest legislative successes promoted market-based solutions. The Clean Air Act, for example, fostered a system of emissions trading that allowed the free market to solve some of the most vexing regulatory challenges presented by air pollution. (That genuine cap-and-trade system stands in marked contrast to the phony "market-based" cap-and-tax solution promoted more recently by climate-change activists.) Unfortunately, recent legislation has trended in the other direction—for example, much of the regulatory mandates imposed by Dodd-Frank, to end the problem of "Too Big To Fail" banks, are counterproductive and destined to fail, whereas simple capital requirements would allow the market to solve the problem itself. The Regulatory Accountability Act will help to correct this trend, by restoring market-based solutions to a central place in regulatory policymaking.

By requiring — not merely inviting — the White House to impose cost-benefit analysis requirements on "independent" agencies, and then subjecting that review to deferential-yet-meaningful judicial review, the Act would ensure that the President and

OIRA will take responsibility for independent agencies, with the further oversight provided by judicial review of the agency's eventual output.

The Regulatory Flexibility Improvements Act (H.R. 527) targets the problems that regulatory agencies currently create for small businesses. By requiring agencies to account for the total impact of regulations—their cumulative direct and indirect impacts—and by requiring the agencies to open the door to small businesses to advise on the real-world effects of regulation, the Act would create a process to prevent regulators from placing heavy regulations on the nation's job creators without first exercising due care and prudence. True to its name, this bill improves the existing Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act, to finally achieve those laws' original aims.

The "REINS" Act (H.R. 10) would restore Congress's constitutional responsibility as the nation's sole repository of legislative power, by requiring Congress to vote for major regulations before they go into effect. For the past century, Congress has delegated more and more power to regulators, raising serious constitutional concerns. Even if such delegations will not be remedied in the courts under the old "Nondelegation Doctrine," they *certainly* can be remedied by Congress itself. The REINS Act is a laudable attempt by Congress to prevent itself from abdicating its constitutional responsibilities, refocusing accountability on legislators who—unlike federal bureaucrats—are directly accountable to the People.

The Regulatory Freeze for Jobs Act (H.R. 4078, Title I) recognizes that the current economic malaise calls for immediate action. To that end, the Act would freeze regulations costing more than $100 million until the unemployment rate finally reaches 6 percent. The Act, which includes exceptions necessary to protect national security and public health, safety, and welfare, would create the "breathing room" necessary to repair the economic injuries exacerbated by over-burdensome regulations. We need to grow the economy, not the *Federal Register*.

The Sunshine for Regulatory Decrees and Settlements Act (H.R. 4078, Title III) would help to solve the longstanding collusion between activist groups and sympathetic regulators, which use sham ("sue and settle") litigation and resultant "consent decrees" to constrict or prevent true transparency in the regulatory process. By requiring greater public notice, tougher judicial scrutiny, a more open judicial process, and (in the Attorney General's office) direct accountability at the highest levels of the Executive Branch, this Act would ensure that "public interest" litigation truly promotes, not impairs, the public interest.

Finally, the "RAPID" Act (H.R. 4078, Title V) recognizes that the burdens of regulation are not limited to the rulemaking process. Countless federal statutes require companies to apply for permits before undertaking job-creating projects. And too often, regulators, aided by activist groups, now seem to think that the goal of the permitting process is not to get safe, sound projects approved, but to block projects for political, ideological, or even fundraising reasons. The RAPID Act would streamline the permitting process, directing agencies to work together in a single, coherent process that promotes efficiency and accountability, including meaningful deadlines for the completion of administrative reviews and for the filing of suits challenging permit approvals.

Some have argued that those legislative reforms are too heavy-handed, placing too much power in the hands of federal judges to micromanage regulatory or economic decisions better left to experts. I disagree. These reforms do not prescribe any substantive outcomes; they do not nullify substantive statutes governing finance or the environment; rather, they merely erect procedures that will require the White House and agencies to seriously consider costs, benefits, and alternatives. This is a light burden and, given the burdens that agencies place on persons and businesses, an entirely proportionate one.

The best example of how these reforms would work in practice is the D.C. Circuit's recent decision in *Business Roundtable v. SEC*,[7] an appeal of the S.E.C.'s "proxy access rule." A federal statute required the S.E.C. to consider the costs and benefits of that rule. When the proxy access rule was appealed in the D.C. Circuit, the court did not try to undertake its own economic analysis, or even micromanage the agency's own substantive review; rather, the court reviewed only whether the S.E.C. had sufficiently considered the evidence in the record before the agency, and whether the agency had meaningfully considered and replied to affected parties' arguments. Because the agency clearly had failed to satisfy those minimal requirements, the court vacated the rule and remanded the matter to the agency—it gave the agency another bite at the apple. The court did not prohibit the S.E.C. from reaching the same substantive outcome; it simply required the agency to satisfy the applicable procedural requirements.

Some have argued that these statutes would make regulators' work too difficult. Last autumn, when this committee convened a hearing on the Regulatory Accountability Act (H.R. 3010), a group of law professors wrote that "the procedural and analytical requirements added by" the Act "would be enormously burdensome."[8] I could

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7 647 F.3d 1144 (D.C. Cir. 2011).

8 *See* https://www.law.upenn.edu/blogs/regblog/Letter%20to%20House%20Judiciary %20Committee%20on%20HR%203010.pdf

not myself devise a better parody of the myopic, regulator-centric view of the regulatory state. Administrative agencies place enormous burdens on American companies every day; those burdens, not procedural requirements placed on bureaucrats, are the problem that cries out for immediate alleviation.

And again, reforms of the kind reflected in *Business Roundtable v. SEC* do not impose unreasonable burdens on either regulators or the courts. Indeed, the caseload of the D.C. Circuit, which is the principal reviewing court, appears to be declining, not growing.[9] And within that shrinking caseload, the court's regulatory docket is declining even faster.[10]

* * *

In closing, let me note that the Reagan Administration's successes are not the only examples worth considering. In the 1990s and early 2000s, the "sick man of Europe" was Germany—perhaps a difficult fact to recall, considering that Germany is today the engine of European economic growth and the continent's best hope for economic stability. Germany saved itself first and foremost through regulatory reform in 2003-2005, especially with respect to labor law restrictions, and the reforms worked very quickly to turn Germany's recovery around.

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9 *See, e.g.*, "Judicial Business of the United States Courts," 2011 Annual Report of the Director of the Administrative Office of the U.S. Courts, at p. 59 (http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf).

10 *See, e.g.*, Hon. Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 GEO. J. L. & PUB. POL'Y 1, 2 (2012) ("The number of cases filed in the D.C. Circuit has declined more or less continuously over the last twenty-five years. More surprising, the number of administrative law cases filed in our court also has declined over that period, again consistently, and the percentage of administrative law cases on our docket is lower now than it has been in all but two of the last twenty-five years.").

Germany's resurgence has shaped much of the modern political-economic debate, not just on questions of European bailouts but also on the issue of the proposed U.S.-E.U. free trade agreement—a treaty that could dramatically reduce transatlantic over-regulatory friction.

But amidst all of that, we must not neglect the lessons relevant to the issues before this committee today. Germany's Chancellor Merkel is urging Europe to recognize that structural reform is needed to rescue the continent from economic disaster. We should heed her warnings as well, and begin by reforming the structure of the administrative state.

Mr. SMITH. Thank you, Mr. Gray.
Professor Heinzerling.

TESTIMONY OF LISA HEINZERLING, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Ms. HEINZERLING. Mr. Chairman, Mr. Conyers, Members of the Committee, thank you very much for giving me this opportunity to testify here today.

As has become typical in discussions criticizing regulation, we have heard this morning about the cost of regulation, but very little about the benefits. Yet regulation promotes multiple and diverse human interests and prevents multiple and diverse human harms.

Regulation is, after all, just another word for "law," and law is, given humans' propensity to hurt each other in the absence of constraints on their behavior, a predicate for freedom. Regulation saves consumers money, prevents human illnesses, saves lives, and much more.

To have a conversation about regulation without talking first about what regulation is for is not very illuminating. Consider the example of the Clean Air Act, one of the more embattled sources of regulatory authority in government today. The terms "public health" and "public welfare" appear like mantras throughout the Act. At its core, the Act aims to protect people from dying, or falling ill, or suffering other harm, such as damage to water, soils, crops, property, vegetation, and more due to air pollution. What is more, by targeting specific sources of pollution and by generally requiring that these sources do their level best to control their pollution, the Act aims to prevent the people in charge of these sources, the ones who choose and control the mechanisms of pollution, from hurting other people.

Seen in this light, the Clean Air Act and other like modern laws, follow in a direct line from our framers and their ambitions for government by constraining human behavior in a way that promotes human freedom. To the extent the debates over the scope and shape of the regulatory state ignore these benefits of regulation, they will lead us badly astray.

On the other side of the ledger, overstating the costs of regulation has become a dismayingly effective way of making regulation look foolish, but that does not make the overstatements any more accurate. A recent example is the one we have heard about already this morning, the study commissioned by the Small Business Administration's Office of Advocacy. This study claims that Federal regulation costs $1.75 trillion per year in this country. This figure has been widely cited and credulously accepted. It is has been wheeled both to try to defeat new regulatory initiatives and to scale back existing ones.

The report is not, however, a credible account of the costs of regulation in this country. There are many, many flaws in the report. They are detailed in my written statement and the attachment to that statement.

I will rest with one example here. For environmental regulation, the report tallies up the costs and benefits of major rules as reported in annual reports issued by the Office of Management and Budget. The trouble is many of these rules do not exist. Many have been withdrawn. Some have been overturned by the courts. Some were issued decades ago and are fully implemented at this time.

The report is simply not a credit account of what we spend on regulation in this country today. To the extent that critiques of the regulatory state rely on such flawed statistics, they are not credible.

We have heard this morning about a cascade of bills passed in this chamber, which we are told would improve upon the supposedly dismal state of regulation in this country. The bills pile procedure on procedure and analysis on analysis in a system already overburdened with procedural dictates and analytical complexity. The regulatory system, we are told, is too uncertain and too complicated, and produces just to many pages in the Federal Register.

Cost benefit analysis, we are also told, just cannot be trusted any more now that the Obama administration is in charge. But the praised this morning would do little except add to the uncertainty, complexity, and sheer prolixity of the regulatory system. And they would deepen, rather than limit, the system's reliance on the cost benefit analysis elsewhere critiqued.

The challenge then, I think, is to answer the question, what would these bills do. One answer is clearly right: they would slow down, complicate, maybe even paralyze the system we have for making rules governing harmful human behavior. Thank you very much.

[The prepared statement of Ms. Heinzerling follows:]

TESTIMONY
OF
LISA HEINZERLING

PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY LAW CENTER

BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON
REGULATION NATION:
THE OBAMA ADMINISTRATION'S REGULATORY EXPANSION VS.
JOBS AND ECONOMIC RECOVERY

SEPTEMBER 20, 2012

Mr. Chairman and Members of the Committee, thank you for giving me the opportunity to testify before you today.

I am a Professor of Law at the Georgetown University Law Center. My primary expertise is in environmental law and administrative law. My work in these areas includes four books and dozens of law review articles and book chapters. From January 2009 to December 2010, I took a leave of absence from Georgetown to serve first as Senior Climate Policy Counsel and then as head of the Office of Policy at the U.S. Environmental Protection Agency.

I. Introduction

We are in the midst of a contentious and high-stakes debate over the proper role of regulation in our society. Reasonable people can disagree about the appropriate scope, shape, and pace of regulation, and a debate on these matters is surely healthy. Unfortunately, however, the debate over regulation is often not framed in a reasonable or even honest way. All too often, in fact, the debate recklessly ignores the many benefits of regulation and inaccurately reports its costs.

The title of this morning's hearing is a case in point. In apparently pitting regulation against jobs and the economy, implying that they are in tension with each other or even mutually exclusive, the framing for today's discussion dismisses the economic (and noneconomic) benefits of regulation and inflates its costs. In such a setting, it is worthwhile to return to first principles: why do we regulate? My remarks thus begin with a review of the benefits of regulation, and then turn to a prominent recent example of dissembling on the matter of regulatory costs.

II. The Benefits of Regulation[1]

It is hard to improve upon James Madison's reminder about why we have both government and constraints on government: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[2] Yet recent debates over the scope and shape of the regulatory state have fixed on the second insight in Madison's famous passage while ignoring the first. Proposals to rein in administrative agencies – to slash their budgets, veto their rules, undo their legal authority – are offered as though rules governing human behavior produce all costs and no gains. They proceed as if people will not hurt other people if government

[1] The discussion in this section draws heavily on an Issue Brief I wrote in November 2011 for the American Constitution Society; this Issue Brief is available at https://www.acslaw.org/sites/default/files/Heinzerling_-_Missing_a_Teachable_Moment.pdf.
[2] The Federalist No. 51 (1787).

steps aside. People are angels, in other words, outside of government; they mostly just go about their business, not trying to hurt anybody. We gain nothing by constraining their behavior.

Lost in this vision are three simple facts.

First, people are not angels. It is not just that people can be cruel and vindictive. It is also that they can be greedy, selfish, careless, and callous. Even when they do not set out to harm other people, they can end up doing so through greed and neglect. The financiers who helped bring the U.S. economy to its knees did not mean to hurt anyone; BP and Transocean did not want the workers on the Deepwater Horizon oil rig to die; U.S. utilities would surely prefer that the pollution from their power plants did not kill thousands every year. A great deal of human suffering, in fact, has nothing to do with maliciousness and everything to do with avarice and indifference. But pursuing profit in the face of a known risk to others is not angelic.

Second, given that people are not angels, a basic purpose of government is to protect people from being hurt by other people. And, far from illegitimately constraining freedom, law actually promotes freedom when it protects people from being hurt by other people. As John Locke – whose views on the purposes of government greatly influenced this country's founding generation – put it: "Where there is no law, there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is no law." Discussants in current debates over the regulatory state seem to forget that "regulation" is just another word for "law," and that law is a predicate for human freedom.

Third, protecting people from being hurt by other people is also the predominant purpose of the kinds of regulation now under the most vociferous attack – health, safety, consumer, and environmental regulation. Consider the example of the Clean Air Act, perhaps the most embattled source of regulatory authority in government today. The terms "public health" and "public welfare" appear like mantras throughout the Act; at its core, the Act aims to protect people from dying or falling ill, or suffering other, welfare-based harms such as damage to water, soils, crops, and wildlife, due to air pollution. What is more, by targeting specific sources of pollution and by generally requiring that these sources do their level best to control their pollution, the Act aims to prevent the people in charge of these sources – the ones who choose and control the mechanisms of pollution – from hurting other people. Seen in this light, the Clean Air Act and other like modern laws follow in a direct line from the framers and their ambitions for government, by constraining human behavior in a way that promotes human freedom.

In explaining why we regulate and what regulation does for us, it is also important to describe the exact harms that will befall people if we do not regulate.

That is, in addition to discussing the human role in creating these harms, we should also identify the harms themselves.

These harms are many and varied.

One category of harms avoided through regulatory intervention is an especially clear-cut counterpoint to the economic costs of regulation: sometimes, consumers and others directly lose money in the absence of regulation. Or, put another way, regulation sometimes *saves people money*. When the Federal Trade Commission sued a marketer of dietary supplements for offering "free trials" of dietary supplements that came paired with recurring charges that were very difficult to avoid, it took aim at a problem that cost consumers over $30 million in one year alone; and this is just one of some 60 like cases brought by the FTC in the last decade.[3] Likewise, when the FTC cracked down on companies making false promises of employment and business success to people who were unemployed or otherwise falling behind in the economic downturn, it sought to control practices that also cost consumers tens of millions of dollars; the agency charged that one company alone had bilked consumers out of $40 million.[4] Rules issued in the last 20 or so years by the Department of Energy, setting efficiency standards for household appliances, will have saved consumers over $100 billion by 2030.[5] Far from taking money out of consumers' pockets, these kinds of legal efforts put money back in them – or make sure it doesn't leave in the first place.

Regulation can also save people money more indirectly. When a person does not have to go to the hospital because a rule has reduced the air pollution that would have made her sick, or when she does not miss work for the same reason, the rule has saved her the expense of a hospital visit or wages lost due to missed work. Similarly, when a person does not have to go to the hospital or miss work because – although she has been in a car accident – a vehicle safety feature mandated by a rule protected her from serious injury, the rule has saved her money. Indeed, in examples too numerous to list here, rules that protect health and safety also protect pocketbooks, as they alleviate the costs of doctor's visits, medicines, hospital stays, lost work days, and other interventions and disruptions associated with ill health and inadequate safety.

Beyond saving money, directly and indirectly, regulation also protects people from harms that are not fully captured as "money saved." Cancers of all kinds, heart attacks, asthma attacks, and more are prevented by environmental rules. Occupational safety rules can help prevent people from being electrocuted or crushed by heavy equipment. Vehicle safety rules can help drivers not back over

[3] FTC news release, available at http://www.ftc.gov/opa/2010/08/acaicolon.shtm.
[4] FTC news release, available at http://www.ftc.gov/opa/2011/03/emptypromises.shtm.
[5] DOE, The Standard Setting Process, available at http://ees.ead.lbl.gov/node/2.

people (especially children) who are difficult to see in an ordinary rearview mirror. The full range of human illness and suffering alleviated by regulation is huge.

Regulation also, of course, often prevents (or at least forestalls) the ultimate adverse event, death. In this domain, it is especially important to remember the link between human behavior and human harm; our legal and ethical norms make proceeding in the face of known and avoidable risks of death an especially egregious form of behavior. Yet sometimes even large numbers of saved lives fail to persuade the anti-regulatory crowd that regulation is a good idea; some embattled EPA rules, for example, are expected to save many thousands of lives every year, yet embattled they remain.

Strangely, statistics alone can sometimes be more lulling than moving. A peculiar inversion can occur when one tries to speak in numerical terms about the benefits of regulation, especially health, safety, and environmental regulation: the more people who are protected from dying or falling ill, the less we seem able to grasp the magnitude of the problem. It is easy to understand an intervention that saves the life of someone right in front of us. It is unthinkable not to save the little girl trapped in the well. But to save thousands from dying due to air pollution? The temptation, often indulged by anti-regulatory forces, is to act as though the thousands endangered by air pollution somehow do not exist. But they do.

To summarize: regulation promotes multiple and diverse human interests and prevents multiple and diverse human harms. To the extent that current debates over the scope and shape of the regulatory state ignore these benefits of regulation, they will lead us badly astray.

II. The False Narrative About Regulatory Costs[6]

Keeping regulation at bay requires hard work. Disastrous failures of regulation lie just beneath such spectacularly bad problems as the financial breakdown, the oil spill in the Gulf, the climate crisis, and more. It takes constant vigilance to prevent a public outcry for more and better regulation. It also often takes phony numbers.

Often, the phony numbers relate to regulatory costs. Here, one of the latest and biggest phony numbers being circulated by the anti-regulatory crowd is the figure of $1.75 trillion—supposedly the amount we in the United States spend every year on federal regulations. This figure has been widely cited and credulously accepted. It has been wheeled out both to try to defeat new regulatory initiatives and to scale back existing ones. It has also been deployed in the service of a

[6] This discussion is drawn from Lisa Heinzerling and Frank Ackerman, The $1.75 Trillion Lie, 1 Mich. J. Envtl. & Admin. Law 127 (2012). This article is provided as an attachment to this testimony.

legislative agenda aimed at hamstringing the regulatory agencies responsible for these purportedly massive costs.

The number comes from a report commissioned, reviewed, edited, and, despite withering criticisms of it, defended by the Office of Advocacy of the U.S. Small Business Administration (SBA). Authored by Lafayette College economists Nicole V. Crain and W. Mark Crain, the SBA-sponsored report concludes that $1.75 trillion is the combined annual cost of complying with economic regulations, environmental regulations, the federal tax code, occupational safety and health regulations, and homeland security regulations.[7]

The Crain and Crain report is, however, not a credible account of the costs of regulation in this country. Several critiques of the report have pointed out that not only does the report completely omit discussion of the benefits of regulation—thus providing an entirely one-sided picture of regulatory consequences—it also uses evidence not intended, nor suitable, for the purposes to which Crain and Crain put it.[8] It also explains away its own potential cost overestimation by asserting—contrary to existing evidence[9]—that regulatory agencies tend to underestimate regulatory costs. The nonpartisan Congressional Research Service (CRS) undertook its own regression analysis using almost the same data, but much sounder methods than those used by Crain and Crain, and found that, with those adjustments, a central component of Crain and Crain's analysis (the "regulatory quality index" developed by the World Bank for a different purpose) ceased having the effect Crain and Crain claimed for it.[10]

The economist Frank Ackerman and I have taken another, even deeper plunge into Crain and Crain's estimates of costs, and have found even more troubling problems. We focused on Crain and Crain's estimates of the costs of economic regulation, environmental regulation, and workplace safety and health regulation. Together, these categories account for approximately $1.6 trillion of Crain and Crain's $1.75 trillion estimate.

For economic regulation, we found that Crain and Crain come up with a breathtaking $1.24 trillion in estimated aggregate costs—seventy percent of their

[7] Nicole V. Crain & W. Mark Crain, The Impact of Regulatory Costs on Small Firms (2010).

[8] For a detailed critique, see Sidney A. Shapiro et al., Setting the Record Straight: The Crain and Crain Report on Regulatory Costs (2011), available at http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf.

[9] Shapiro et al., at 7–9; Isaac Shapiro & John Irons, Regulation, Employment, and the Economy: Fears of Job Losses Are Overblown 21-23 (2011), available at http://www.epi.org/files/2011/BriefingPaper305.pdf.

[10] Curtis W. Copeland, Cong. Research Serv., R41763, Analysis of an Estimate of the Total Costs of Federal Regulations 27–28 (2011).

entire numerical picture of regulatory burden—from a single, poorly designed equation which they built on a misinterpretation of a World Bank database. They take this equation as proof that better "regulatory quality" causes higher incomes; and they read the World Bank data quite incorrectly to say that there is a well-defined maximum for regulatory quality which the United States falls far below. Ackerman and I identified several serious errors in the Crain and Crain treatment of economic costs; each of these errors alone is sufficient to invalidate their analysis.

Ackerman and I also found that Crain and Crain's estimates of the costs of environmental regulation are deeply troubled as well. For environmental rules issued before 1988, they rely on a single study published in 1991 that uses a general equilibrium model to spin out a conjecture about a possible impact of early 1980s regulations as a whole: if regulatory costs raise prices in general, then real wages will drop; at lower real wages, textbook economics implies that workers will choose to work less, reducing output and incomes. For regulatory costs of environmental rules issued after 1988, Crain and Crain—among other mistakes—claim costs for regulations that no longer exist because the agency itself pulled them back; they include costs of rules that no longer exist because the courts overturned them; they double count by including sets of rules that all have the same regulatory end; and they include the costs of regulations issued many years, sometimes decades, ago, the current costs of which (if they still even exist) cannot be fairly attributed to regulatory programs.

In estimating the cost of workplace rules, Crain and Crain rely—indirectly, after laundering it through several more recent studies from marginally less partisan sources—on a study done in 1974 by the National Association of Manufacturers. Beyond reliance on an outdated and highly partisan source, Crain and Crain's estimates of the costs of workplace rules also suffer from the same flaws embodied in their estimates of the costs of environmental rules.

Added to the numerous flaws revealed by other commentators, the problems Frank Ackerman and I found with Crain and Crain's estimate of regulatory costs raised a disturbing possibility: the mistakes were so many, cut in only one direction so thoroughly, and could have been discovered by the authors so easily, that one is pressed to conclude that the study was *designed* to produce a really big number. The number is a rhetorical device, a talking point, a trope; it is not the product of sound analysis.

The development and wide circulation of misleading statistics, supposedly showing the foolishness of regulation, is not a new phenomenon. Previous periods of discontent with the scope and content of regulatory activity have also featured arresting statistics that, all by themselves, appear to make the case for regulatory reform: federal regulations spend hundreds of millions, even billions, of dollars to save a single human life;[11] regulation "statistically murders" 60,000 people a year by directing limited resources to very expensive life-saving measures rather than to cheaper ones;[12] once a regulation costs more than a certain amount (estimates ranged from $3 to $50 million) to save a life, people are killed through this cost alone because it prevents spending money on other life-saving measures like health care.[13] Just as the $1.75 trillion figure has recently been served up now as Exhibit 1 in the case for regulatory reform, so these previous statistics were offered to prove that the regulatory system had gone badly awry. The trouble was, these statistics were no more reliable than the statistics Crain and Crain have offered.[14]

The specific numbers change from time to time, but the game remains the same: make regulation look outlandish by claiming costs for it that are not real. This is not a sound basis on which to evaluate the regulatory state.

Attachment: The $1.75 Trillion Lie

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[11] John F. Morrall III, A Review of the Record, Regulation, Nov.-Dec. 1986, at 25, 30-31.

[12] Tammy O. Tengs & John D. Graham, The Opportunity Costs of Haphazard Social Investments in Life-Saving, in Risks, Costs, and Lives Saved: Getting Better Results from Regulation 167, 172 (Robert W. Hahn ed., 1996).

[13] Randall Lutter et al., The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations, 37 Econ. Inquiry 599 (1999); W. Kip Viscusi, Risk-Risk Analysis, 8 J. Risk & Uncertainty (Special Issue) 5 (1994).

[14] For previous critiques, see Frank Ackerman & Lisa Heinzerling, Priceless: On Knowing the Price of Everything and the Value of Nothing (The New Press 2004); Lisa Heinzerling, Five Hundred Life-Saving Interventions and Their Misuse in the Debate Over Regulatory Reform, 13 Risk, Safety & Env't 151 (2002); Lisa Heinzerling & Frank Ackerman, The Humbugs of the Anti-Regulatory Movement, 87 Cornell L. Rev. 648 (2002); Lisa Heinzerling, Regulatory Costs of Mythic Proportions, 107 Yale L.J. 1981 (1998).

THE $1.75 TRILLION LIE

Lisa Heinzerling[*]
Frank Ackerman[**]

A 2010 study commissioned by the Office of Advocacy of the U.S. Small Business Administration claims that federal regulations impose annual economic costs of $1.75 trillion. This estimate has been widely circulated, in everything from op-ed pages to Congressional testimony. But the estimate is not credible. For costs of economic regulations, the estimate reflects a calculation that rests on a misunderstanding of the definition of the relevant data, flunks an elementary question on the normal distribution, pads the analysis with several years of near-identical data, and fails to recognize the difference between correlation and causation. For costs of environmental regulation, the bulk of the estimate relies on decades-old studies of decades-old rules, suggesting that voluntary *unemployment is the real culprit in today's regulatory environment. The remainder of it is filled with nonexistent rules and other phantoms—as is the flawed estimate of the costs of workplace safety and health rules.*

It would be bad enough if this were a private study, undertaken with private funds. Even then, the viral spread of the utterly unfounded $1.75 trillion estimate would be worrying enough. But this is a study requested, funded, reviewed, and edited by a government agency, the Small Business Administration's Office of Advocacy. The Office of Advocacy's sponsorship and official embrace of the study—including defense of the study in testimony before Congress even after it had been severely criticized—embroils this public agency in an unwholesome blend of ineptitude and bias. The Office of Advocacy should acknowledge the study's many failings and publicly disavow it.

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INTRODUCTION

Keeping regulation at bay requires hard work. Disastrous failures of regulation lie just beneath such spectacularly bad problems as the financial breakdown,[1] the oil spill in the Gulf,[2] the nuclear meltdown in Japan,[3] the climate crisis,[4] and more.[5] It takes constant vigilance to prevent a public outcry for more and better regulation. It also often takes phony numbers.

The latest and biggest phony number being circulated by the anti-regulatory crowd is the figure of $1.75 trillion—supposedly the amount we in the United States spend every year on federal regulations.[6] This figure has been widely cited and credulously accepted. It has been wheeled out both to try to defeat new regulatory initiatives and to scale back existing ones.[7] It has also been deployed in the service of a legislative agenda aimed

1. *See, e.g.*, Anthony Faiola et al., *What Went Wrong*, WASH. POST, Oct. 15, 2008, at A1.

2. *See, e.g.*, John Wyeth Griggs, *BP Gulf of Mexico Oil Spill*, 32 ENERGY L.J. 57, 66, 79 (2011).

3. *See, e.g.*, James Glanz & Norimitsu Onishi, *Japanese Rules for Nuclear Plants Relied on Old Science*, N.Y. TIMES, Mar. 27, 2011, at A1 (discussing underestimation of tsunami risk to nuclear reactors by Japanese regulators and industry); Daniel Kaufmann & Veronika Penciakova, *Preventing Nuclear Meltdown: Assessing Regulatory Failure in Japan and the United States*, BROOKINGS (Apr. 1, 2011), http://www.brookings.edu/opinions/2011/0401_nuclear_meltdown_kaufmann.aspx.

4. *See, e.g.*, Lisa Heinzerling, *Health Regulation and Governance: Climate Change, Human Health, and the Post-Cautionary Principle*, 96 GEO. L.J. 445, 455-58 (2008) (discussing years of missed opportunities to act on climate change).

5. SIDNEY SHAPIRO ET AL., SAVING LIVES, PRESERVING THE ENVIRONMENT, GROWING THE ECONOMY: THE TRUTH ABOUT REGULATION 7-9 (2011), *available at* http://www.progressivereform.org/articles/RegBenefits_1109.pdf (discussing the cost of various failures to regulate).

6. NICOLE V. CRAIN & W. MARK CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS, at iv (2010). The study was developed under contract number SBAHQ-08-M-0466 for the Small Business Association's (SBA) Office of Advocacy.

7. As the blog for the Center for Progressive Reform has observed, one recent congressional hearing prominently featured the $1.75 trillion figure. Ben Somberg, *Debunked SBA Regulatory Costs Study Front and Center at House Energy & Commerce Committee*

at hamstringing the regulatory agencies responsible for these purportedly massive costs.[8] It has even become part of the rhetoric of the race for the presidency.[9]

The number comes from a report commissioned, reviewed, edited, and, despite withering criticisms of it, defended by the Office of Advocacy of the U.S. Small Business Administration (SBA). Authored by Lafayette College economists Nicole V. Crain and W. Mark Crain, the SBA-sponsored report concludes that $1.75 trillion is the combined annual cost of complying with economic regulations, environmental regulations, the federal tax code, occupational safety and health regulations, and homeland security regulations.[10]

The Crain and Crain report is, as Obama regulatory czar Cass Sunstein put it in recent congressional testimony, "deeply flawed."[11] Several previous

Hearing, CPRBLOG (July 15, 2011), http://www.progressivereform.org/CPRBlog.cfm?idBlog=2E0DC7E3-B914-9703-69CC0D539EF8EC34; *see also The Views of the Administration on Regulatory Reform: Hearing Before the H. Comm. On the Energy and Commerce, Subcomm. On Oversight and Investigation*, 112th Cong. 3 (2011) (statement of the U.S. Chamber of Commerce by William L. Kovacs, Senior Vice President, Environment, Technology and Regulatory Affairs); Thomas M. Arnold & Jerry L. Stevens, *Mixed Agendas and Government Regulation of Business: Can We Clean Up The Mess?*, 45 U. RICH. L. REV. 1059, 1073 (2011); James L. Gattuso et al., *Red Tape Rising: Obama's Torrent of New Regulation*, HERITAGE FOUND. BACKGROUNDER, Oct. 26, 2010, at 1, *available at* http://thf_media.s3.amazonaws.com/2010/pdf/bg2482.pdf; Phil Kerpen, Op-Ed., *Regulatory State Needs More Than a Trim*, WASH. TIMES, Jan. 24, 2011, at B3; Mark R. Warner, Op-Ed., *Red-Tape Relief for a Sluggish Recovery*, WASH. POST, Dec. 13, 2010, at A19; Glenn Kessler, *Is Obama Bad for Business?*, WASH. POST (Jan. 14, 2011, 6:00 AM), http://voices.washingtonpost.com/fact-checker/2011/01/is_obama_bad_for_business.html (quoting Thomas Donohue, President of the U.S. Chamber of Commerce, and Rep. Darrell Issa (R-Calif.), Chairman of the House Oversight Committee, who both cite Crain and Crain's study).

8. *See, e.g.*, Wayne Crews & Ryan Young, Op-Ed., *Regulation Without Representation*, INVESTOR'S BUS. DAILY, Feb. 9, 2011, at A13; Thomas A. Hemphill, *REINing in Regulation*, AM. ENTERPRISE INST. (Nov. 22, 2010), http://www.american.com/archive/2010/november/reining-in-regulation.

9. *See, e.g.*, Mitt Romney, Op-Ed., *Romney: My Plan to Turn Around the U.S. Economy*, USA TODAY, Sept. 6, 2011, at A11 ("With scant regard for the costs imposed on consumers and businesses, President Obama has vastly expanded the regulatory reach of government. The federal government has estimated the price tag for its regulations at $1.75 trillion."); Tim Pawlenty, Former Governor of Minnesota and Former 2012 Presidential Candidate, Economic Policy Remarks at the University of Chicago: A Better Deal (June 7, 2011) (transcript available at http://blogs.wsj.com/washwire/2011/06/07/text-of-pawlentys-speech-on-his-economic-plan/) ("But the fact is—federal regulations will cost our economy 1.75 trillion dollars this year alone. It's a hidden tax on every American consumer. Built into the price of every good and service in the economy.").

10. CRAIN & CRAIN, *supra* note 6, at iv, 5.

11. *See, e.g.*, Jessica Randall, *OIRA Administrator Sunstein Calls Crain & Crain Report 'Deeply Flawed,'* OMB WATCH (June 23, 2011), http://www.ombwatch.org/node/11742 (discussing the oral testimony given by Sunstein on June 23, 2011 at the hearing before the Senate Committee on Homeland Security and Governmental Affairs).

critiques of the report have pointed out that not only does the report completely omit discussion of the benefits of regulation—thus providing an entirely one-sided picture of regulatory consequences—it also uses evidence not intended, nor suitable, for the purposes to which Crain and Crain put it.[12] It also explains away its own potential cost overestimation by asserting—contrary to existing evidence[13]—that regulatory agencies tend to underestimate regulatory costs.[14] The nonpartisan Congressional Research Service (CRS) undertook its own regression analysis using almost the same data, but much sounder methods than those used by Crain and Crain, and found that, with those adjustments, a central component of Crain and Crain's analysis (the "regulatory quality index" developed by the World Bank for a different purpose) ceased having the effect Crain and Crain claimed for it.[15]

Our Article takes another, even deeper plunge into Crain and Crain's estimates of costs, and finds even more troubling problems. We focus on Crain and Crain's estimates of the costs of economic regulation, environmental regulation, and workplace safety and health regulation. Together, these categories account for approximately $1.6 trillion of Crain and Crain's $1.75 trillion estimate.[16]

For economic regulation, we find that Crain and Crain come up with a breathtaking $1.24 trillion in estimated aggregate costs—seventy percent of their entire numerical picture of regulatory burden—from a single, poorly designed equation which they built on a misinterpretation of a World Bank database. They take this equation as proof that better "regulatory quality" causes higher incomes; and they read the World Bank data quite incorrectly to say that there is a well-defined maximum for regulatory quality which the United States falls far below. We will identify four serious errors in the Crain and Crain treatment of economic costs; each of these errors alone is sufficient to invalidate their analysis.

Crain and Crain's estimates of the costs of environmental regulation are also deeply troubled. For environmental rules issued before 1988, they rely

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12. *See, e.g.*, Austin Goolsbee, *A 21st Century Regulatory System*, WHITE HOUSE BLOG (June 23, 2011, 3:08 PM), http://www.whitehouse.gov/blog/2011/06/23/21st-century-regulatory-system. For a detailed critique making these and other points, see SIDNEY A. SHAPIRO ET AL., SETTING THE RECORD STRAIGHT: THE CRAIN AND CRAIN REPORT ON REGULATORY COSTS (2011), *available at* http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf.

13. *See* SHAPIRO ET AL., *supra* note 12, at 7–9; ISAAC SHAPIRO & JOHN IRONS, REGULATION, EMPLOYMENT, AND THE ECONOMY: FEARS OF JOB LOSSES ARE OVERBLOWN 21-23 (2011), *available at* http://www.epi.org/files/2011/BriefingPaper305.pdf.

14. CRAIN & CRAIN, *supra* note 6, at 27, 28 n.27.

15. CURTIS W. COPELAND, CONG. RESEARCH SERV., R41763, ANALYSIS OF AN ESTIMATE OF THE TOTAL COSTS OF FEDERAL REGULATIONS 27–28 (2011).

16. CRAIN & CRAIN, *supra* note 6, at 31 tbl.6.

on a single study published in 1991[17] that uses a general equilibrium model to spin out a tortuous conjecture about a possible impact of early 1980s regulations as a whole: if regulatory costs raise prices in general, then real wages will drop; at lower real wages, textbook economics implies that workers will choose to work less, reducing output and incomes. For regulatory costs of environmental rules issued after 1988, Crain and Crain—among other mistakes—claim costs for regulations that no longer exist because the agency itself pulled them back; they include costs of rules that no longer exist because the courts overturned them; they double count by including sets of rules that all have the same regulatory end; and they include the costs of regulations issued many years, sometimes decades, ago, the current costs of which (if they still even exist) cannot be fairly attributed to regulatory programs.

In estimating the cost of workplace rules, Crain and Crain rely—indirectly, after laundering it through several more recent studies from marginally less partisan sources—on a study done in 1974 by the National Association of Manufacturers.[18] Beyond reliance on an outdated and highly partisan source, Crain and Crain's estimates of the costs of workplace rules also suffer from the same flaws embodied in their estimates of the costs of environmental rules.

Added to the numerous flaws already revealed by other commentators, the problems we have found with Crain and Crain's estimate of regulatory costs raise a disturbing possibility: the mistakes are so many, cut in only one direction so thoroughly, and could have been discovered by the authors so easily, that one is pressed to conclude that the study was *designed* to produce a really big number. The number is a rhetorical device, a talking point, a trope; it is not the product of sound analysis.

We have been here before. Previous periods of discontent with the scope and content of regulatory activity have also featured arresting statistics that, all by themselves, appear to make the case for regulatory reform: federal regulations spend hundreds of millions, even billions, of dollars to save a single human life;[19] regulation "statistically murders" 60,000 people a year by directing limited resources to very expensive life-saving measures rather

17. *Id.* at 25 (noting their reliance on Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233 (1991) for cost estimates on environmental regulations).

18. *Id.* at 30 n.29 (noting that they rely on Joseph M. Johnson, *A Review and Synthesis of the Cost of Workplace Regulations*, *in* CROSS-BORDER HUMAN RESOURCES, LABOR AND EMPLOYMENT ISSUES 433 (Andrew P. Morriss & Samuel Estreicher eds., 2005)). Johnson's study relies on HARVEY S. JAMES, JR., ESTIMATING OSHA COMPLIANCE COSTS (1996), a policy study conducted for the Center for the Study of American Business, which, finally, directly relies on the 1974 study by the National Association of Manufacturers.

19. John F. Morrall III, *A Review of the Record*, REG., Nov.-Dec. 1986, at 25, 30-31.

than to cheaper ones;[20] once a regulation costs more than a certain amount (estimates ranged from $3 to $50 million) to save a life, people are killed through this cost alone because it prevents spending money on other life-saving measures like health care.[21] Just as the $1.75 trillion figure is being served up now as Exhibit 1 in the case for regulatory reform,[22] so these previous statistics were offered to prove that the regulatory system had gone badly awry.

We have challenged the empirical basis for these previous numbers at length elsewhere,[23] and we will not repeat our criticisms here. It is worth noting, though, that in our long experience with fantastical numbers offered in the service of an anti-regulatory agenda, we have not seen anything quite like Crain and Crain's number. The new high figure for regulatory costs marks a new low in anti-regulatory analysis.

I. GETTING TO NO: HOW CRAIN AND CRAIN REACH $1.75 TRILLION

Before turning to our critique, we need to explain how Crain and Crain reached their estimates of regulatory costs.

Crain and Crain divide regulatory costs into several different categories (economic regulations, environmental regulations, the federal tax code, occupational safety and health regulations, and homeland security regulations), and use several different methodologies, depending on the category, for estimating these costs.[24] We assess the estimates pertaining to economic regulations, environmental regulations, and occupational safety and health regulations. Together, these categories make up over ninety percent of Crain and Crain's overall estimate of annual United States regulatory costs.[25]

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20. Tammy O. Tengs & John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Life-Saving*, *in* RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION 167, 172 (Robert W. Hahn ed., 1996).

21. *E.g.*, Randall Lutter et al., *The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations*, 37 ECON. INQUIRY 599 (1999); W. Kip Viscusi, *Risk-Risk Analysis*, 8 J. RISK & UNCERTAINTY (SPECIAL ISSUE) 5 (1994).

22. *See supra* note 7 and accompanying text.

23. FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004); Lisa Heinzerling, *Five Hundred Life-Saving Interventions and Their Misuse in the Debate Over Regulatory Reform*, 13 RISK, SAFETY & ENV'T 151 (2002) [hereinafter *Five Hundred Life-Saving Interventions*]; Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981 (1998); Lisa Heinzerling & Frank Ackerman, *The Humbugs of the Anti-Regulatory Movement*, 87 CORNELL L. REV. 648 (2002).

24. CRAIN & CRAIN, *supra* note 6, at 31 tbl.6.

25. *See id.*

A. Economic Regulations

The $1.24 trillion supposedly lost to economic regulations is described as an estimate of the costs of compliance, but no specific regulations are described in any detail, and no costs are presented for any actual compliance activities. Rather, the entire $1.24 trillion comes from a single equation formulated by Crain and Crain, using comparative international data on per capita incomes and a World Bank "regulatory quality index" (RQI), among other variables.[26] The equation finds a positive relationship between income per capita and the RQI. The United States received a very good, but not perfect, score on the RQI; if it had received a perfect score, the equation seems to imply that GDP would have been $1.24 trillion higher.

The RQI is one of six "governance indicators" calculated by World Bank researchers Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi.[27] They define "regulatory quality" as "capturing perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development."[28] The other five indicators are voice and accountability, political stability and absence of violence, government effectiveness, rule of law, and control of corruption. Values of these six indicators are available for more than 200 countries, starting in 1996 and appearing annually since 2002.[29]

As explained in their paper on methodology, Kaufmann, Kraay, and Mastruzzi collect information from thirty-one different data sources, including commercial business information providers, surveys, NGOs, and public sector sources.[30] Each individual observation is converted into a numerical score, with higher values for better outcomes.[31] The authors then make what they call the "innocuous" assumption that the true quality of governance in each area (the quality of regulation, for the RQI) is "a normally distributed random variable with mean zero and variance one. This means that the units of our aggregate governance indicators will also be those of a standard normal random variable, i.e. with zero mean, unit standard deviation, and ranging approximately from -2.5 to 2.5."[32] The final portion of this quotation simply reflects a well-known mathematical result:

26. *See id.* at 21-22.

27. *Worldwide Governance Indicators*, WORLD BANK GRP., http://info.worldbank.org/governance/wgi/pdf/wgidataset.xls (last visited Nov. 19, 2011).

28. Daniel Kaufmann et al., *The Worldwide Governance Indicators: Methodology and Analytical Issues* 4 (World Bank Dev. Research Grp., Policy Research Working Paper No. 5430, 2010), *available at* http://siteresources.worldbank.org/INTMACRO/Resources/WPS5430.pdf.

29. *Worldwide Governance Indicators*, *supra* note 27.

30. Kaufmann et al., *supra* note 28, at 2.

31. *Id.* at 8.

32. *Id.* at 9.

about ninety-nine percent of the time, a random variable with a normal distribution falls within 2.5 standard deviations of the mean.

Crain and Crain evidently misread this statement; they reported that the RQI "is scaled to have values that range from -2.5 to 2.5."[33] Since they reported[34] that the United States had a RQI of 1.579 in 2008, it appeared to them that it would have been possible to improve our regulations up to a level that received a 2.5. Therefore, they constructed a regression analysis to estimate the economic benefit that would result from improving the U.S. RQI from 1.579 to 2.5.

The equation used in Crain and Crain's regression analysis expresses GDP per capita as a function of the RQI and several other variables: foreign trade as a share of GDP, total population, primary school enrollment as a share of the eligible population, and broadband subscribers as a share of the population. This selection of variables is explained only by the statement that they "are drawn from the empirical literature that examines differences in economic levels across countries and over time."[35] The equation is estimated using seven years of annual data, from 2002 through 2008, for twenty-five countries that belong to the Organization for Economic Cooperation and Development (OECD)—an organization whose membership is roughly, though no longer exactly, synonymous with high-income, developed countries.

The regression results show that GDP per capita is positively related to the RQI, to the share of foreign trade in GDP, and to the proportion of broadband subscribers in the population. It also shows that GDP per capita, in this data set, is significantly *negatively* related to the fraction of the population in primary education.[36] Thus if this regression were accurate, and if correlation always implied causation, GDP per capita could be increased by raising the RQI, the dependence on foreign trade, or the number of broadband subscribers, or by decreasing enrollment in primary education. Judging by Crain and Crain's regression results, the relationship between broadband connections and per capita income is by far the most reliable of these links.[37]

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33. CRAIN & CRAIN, *supra* note 6, at 21.

34. The World Bank Group updates RQI data from time to time; the United States' RQI for 2008 is now 1.550 per the data we downloaded in November 2011. *Worldwide Governance Indicators*, *supra* note 27.

35. CRAIN & CRAIN, *supra* note 6, at 21–22.

36. *Id.* at 23 tbl.2.

37. Table 2 in Crain and Crain's report shows a *t* statistic of 8.89 for the relationship of broadband subscription rates to GDP per capita, far above any other *t* statistic in the table. *Id.* The *t* statistic is a measure of the statistical significance of a relationship: the larger the *t* statistic, the less likely it is that the observed relationship occurred by chance.

Using these regression results and holding all other data constant, Crain and Crain reported that an increase of 0.92 in the RQI (from 1.579 to 2.5) would correspond to an 8.7% increase in GDP per capita, or a $1.236 trillion increase in total U.S. GDP in 2008, measured in 2009 dollars.[38]

B. Environmental Regulations

Crain and Crain estimate the current annual cost of United States environmental regulation to be $281 billion.[39] To reach this number, Crain and Crain add up all of the costs presented in the Office of Management and Budget's (OMB) 2001 to 2009 reports on the costs and benefits of federal regulations (and adjust them for inflation).[40] OMB's reports from 2002 through 2009 estimate the total costs and benefits of the previous year's regulations by compiling estimates—with some adjustments—from agencies' Regulatory Impact Analyses (RIA) for rules costing $100 million or more per year.

OMB's 2001 report, relied upon by Crain and Crain for the vast bulk of the costs they attribute to environmental regulation,[41] took a different tack. In this report, OMB estimated costs for rules issued from the beginning of the modern environmental era all the way through the first quarter of the year 2000.[42] For rules issued prior to 1989, OMB based its high-end estimate on a 1991 article by Robert Hahn and John Hird,[43] which itself relied on a 1990 study by Michael Hazilla and Raymond Kopp.[44] Almost half of Crain and Crain's estimate of the current annual costs of environmental regulation—$132 out of $281 billion—comes from Hahn and Hird's estimate of the costs of rules issued over twenty-five years ago.[45]

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38. *Id.* at 24. The actual calculation of $1.236 trillion is not well explained. Our attempt to reproduce it, using their assumptions, yielded $1.30 trillion.

39. *Id.* at 31 tbl.6 (reporting costs in 2009 dollars).

40. *Id.* at 26 tbl.3.

41. *Id.* (reporting high-end cost estimates of almost $192 billion (in 2001 dollars) based on OMB's 2001 report; this is approximately $230 billion in 2009 dollars).

42. OFFICE OF MGMT. & BUDGET, MAKING SENSE OF REGULATION: REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 10 n.7, 11 tbl.2 (2001) [hereinafter OMB 2001 REPORT]. OMB's 2001 report actually relies on OMB's 2000 report for this estimate. *Id.* at 11 tbl.2 (referring, in the source note, to OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS tbls.1, 2 & 3 (2000) [hereinafter OMB 2000 REPORT]).

43. CRAIN & CRAIN, *supra* note 6, at 25; Hahn & Hird, *supra* note 17, at 256 tbl.2.

44. Michael Hazilla & Raymond Kopp, *The Social Cost of Environmental Quality Regulations: A General Equilibrium Analysis*, 98 J. POL. ECON. 853, 865 tbl.2 (1990).

45. *See* CRAIN & CRAIN, *supra* note 6, at 27 (utilizing the high end of the cost range provided in Hahn & Hird, *supra* note 17, at 256 tbl.2); OMB 2000 REPORT, *supra* note 42, at 20 tbl.1 (reporting a high-end cost estimate of $99 billion (in 1996 dollars) for environmental

Hazilla and Kopp used general equilibrium analysis to estimate the costs of environmental regulation. They modeled the economy as it existed from 1958 to 1974 in order to establish a pre-regulation baseline. They then re-ran the model, this time incorporating the Environmental Protection Agency's (EPA) 1984 estimate of the costs of compliance with the Clean Air Act and the Clean Water Act, based on the regulations in place as of December 1982. In their analysis, the direct costs of regulation raise prices throughout the economy. Higher prices cause lower real wages, inducing workers to work less (in the language of economics, households choose to substitute leisure for labor). The reduction in labor decreases income, consumption, and savings, relative to the pre-regulation baseline. Lower savings means less investment, slowing the economy's rate of growth and causing decreases in production that are compounded over time. Simulating outcomes from 1981 through 1990, Hazilla and Kopp estimated that household labor supply would decrease by about 1%, and real (inflation-adjusted) gross national product would decrease by 2.4% in 1981, and 5.8% in 1990.[46]

For the environmental rules issued between 1989 and 2000, OMB's 2001 report (and, by extension, Crain and Crain) relied on OMB's 2000 report, which itself relied on a report OMB issued in 1996 (estimating costs for rules issued from 1987 to 1994), along with estimates of the costs of rules from 1995 to 1999.[47]

C. Workplace Regulations

Crain and Crain estimate costs of $64.313 billion for occupational safety and health regulations issued prior to 2001, and $471 million for such regulations issued between 2001 and 2008.[48] For the costs of rules issued before 2001, Crain and Crain rely on an analysis published in 2005 by Joseph M. Johnson.[49] Johnson estimated the costs of workplace safety and health rules by multiplying earlier estimates of these costs by 5.55, based upon findings in a 1974 study conducted by the National Association of Manufacturers.[50] For the costs of rules issued between 2001 and 2008, Crain and Crain use an aggregate estimate provided in OMB's 2009 report on the costs and benefits of federal regulation.[51] OMB's estimate is based

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rules as of 1988 based on Hahn and Hird, *supra* note 17; in 2009 dollars, this is $132 billion); *infra* note 82 and accompanying text.

46. Hazilla & Kopp, *supra* note 44, at 867 tbl.3.
47. OMB 2001 REPORT, *supra* note 42, at 11 tbls.1 & 2.
48. CRAIN & CRAIN, *supra* note 6, at 30 tbl.5 (reporting costs in 2009 dollars).
49. *Id.*
50. Johnson, *supra* note 18, at 455 & n.37.
51. CRAIN & CRAIN, *supra* note 6, at 30 tbl.5.

on the RIA the Occupational Safety and Health Administration (OSHA) filed for major rules issued in the relevant years.

II. The Many Shortcomings of Crain and Crain's Estimate

Crain and Crain's study is littered with misunderstandings, mistakes, and double counting. At every step of the way, they choose data and assumptions that make the costs climb higher and higher. At every step of the way, they also make outright, objective errors that have the same effect. The result is a mix of apparent bias and ineptitude that make their estimate of $1.75 trillion wholly unreliable.

We begin by discussing the flaws in Crain and Crain's estimate of the costs of economic regulation, and then turn to the flaws in their estimates regarding environmental and workplace regulations.

A. Economic Regulation

Crain and Crain's one-equation analysis of economic regulation has at least four fatal flaws, any one of which would be enough to destroy its prediction of a $1.24 trillion loss. First, Crain and Crain have misunderstood the scale of the RQI and the meaning of the number they treat as a perfect score. Second, they have inappropriately lumped together seven years of extremely similar data in the same equation, creating a spurious appearance of statistical significance. Third, there is in fact no correlation between the RQI and per capita income among high-income countries. Fourth, correlation is not causation: if the RQI does show that the United States has a higher quality of regulations than some middle-income countries, this could mean either that better regulations create higher incomes, or that higher incomes allow the creation of better regulations.

1. Why Be Normal?

The normal distribution—also known as the Gaussian distribution or the bell curve—is one of the most familiar and frequently used distributions in statistics. As is well known, it has no maximum or minimum value; rather, values farther and farther away from the mean become less and less probable. Thus it is common to describe the probability of a normally distributed variable falling within a certain distance from the mean. For example, there is a ninety-five percent probability that a randomly chosen value of a normally distributed variable falls within 1.96 standard deviations of the mean. Or, in the example used by the authors of the RQI, there is a ninety-nine percent probability of such a variable falling within about 2.5 standard deviations of the mean.

Crain and Crain missed this elementary fact about normal distributions, and assumed that 2.5 standard deviations is an absolute upper limit and -2.5 is an absolute lower limit. They are wrong both in theory and in the empirical description of the RQI (which, as noted above, is defined as a normally distributed variable with a mean of zero and standard deviation of one). For the 207 countries for which the World Bank researchers reported an RQI value for 2008, the RQI ranged from -2.66 in Somalia to 1.98 in Hong Kong. The highest RQI on record is 2.23 for Singapore; since 2002, no country has received an RQI of 1.99 or higher.[52] If, instead of the arbitrary target of 2.5, Crain and Crain had assumed that the best the United States could do was to match the best existing performance on the RQI—reaching the state of regulatory nirvana achieved by Hong Kong—then the potential improvement, and hence the estimated costs of economic regulation, would have been cut roughly in half. That is, even if one accepted the rest of their methodology, about $600 billion of Crain and Crain's supposed costs of regulation would be eliminated, with no change in information about any United States regulations, simply by reading the international RQI data in a more measured and defensible manner.

More broadly, Crain and Crain use the RQI with little thought about its limitations. As two of the developers of the World Bank's governance indicators (including the RQI) have written, "Governance indicators can be used for regular cross-country comparisons . . . [but] they often remain blunt tools for monitoring governance and studying the causes and consequences of good governance at the country level."[53] They further caution users, noting:

> All governance indicators include measurement error and so should be thought of as imperfect proxies for the fundamentals of good governance . . . . Whenever possible, such margins of error should be explicitly acknowledged, as they are in the WGI [the database that includes the RQI], and taken seriously when the indicators are used to monitor progress on governance.[54]

The RQI estimates are published with standard errors, implying that the authors of the database believe that about two-thirds of the time, the true value will fall within one standard error of the reported value. For the United States in 2008, the RQI is 1.55 and the standard error is 0.22, implying that there is a two-thirds probability that the "true" United States

52. *See Worldwide Governance Indicators*, *supra* note 27.

53. Daniel Kaufmann & Aart Kraay, *Governance Indicators: Where Are We, Where Should We Be Going?*, 23 WORLD BANK RES. OBSERVER 1, 25 (2008).

54. *Id.* at 26.

RQI is between 1.33 and 1.77.[55] Of the 207 countries with RQI values for 2008 reported in the World Bank database, there were only fourteen with RQI above the United States value of 1.55, and just six with RQI above 1.77, the upper limit of the United States confidence interval: Denmark, Hong Kong, Ireland, New Zealand, Singapore, and the United Kingdom.[56] The evidence is meager that the United States lags significantly behind other countries in the quality of its regulations as measured by the World Bank's RQI. Yet the unexplained hope for a great leap forward in the RQI, well beyond all worldwide experience to date, is the fulcrum for most of Crain and Crain's estimated regulatory costs.

The RQI is just one of the World Bank's regulatory indicators; another one, the "doing business indicator," is explicitly designed to measure how easy it is to set up and run a business in 183 countries around the world.[57] The doing business indicator confirms that the United States is close to the top, ranking fifth in the world behind Singapore, Hong Kong, New Zealand, and the United Kingdom.[58] The ranking is purely ordinal, with no theoretical maximum. The United States could aspire to be number one, but there is no way to tell what economic consequences, if any, might be associated with making it easier to do business here than in all 182 other countries in the database, rather than just 178. Thus a broader look at the World Bank's regulatory indicators provides no basis for Crain and Crain's presumption that measurable increases in the United States' regulatory quality could boost our rate of economic growth.

2. Padding the Evidence

Crain and Crain use seven years of data, annually from 2002 through 2008, on the RQI, per capita incomes, and other variables. This artificially boosts the reported significance of the results; it is a violation of standard statistical practice, which makes the regression results misleading.

To see why this matters, consider the results of a coin toss. Suppose that a penny is flipped once and lands heads up. This is clearly not a statistically significant result; it is a random event, expected to occur half the time. Now suppose that a penny is flipped seven times in succession, landing heads each time. In contrast to the single toss, seven identical tosses are very significant. The chance of getting seven heads in a row is one in 128;

55. *See supra* note 34 and accompanying text.

56. *See Worldwide Governance Indicators*, *supra* note 27.

57. The "doing business indicator" is a tool developed by the Doing Business Project and is available at DOING BUSINESS, http://www.doingbusiness.org (last visited Nov. 4, 2011).

58. *Economy Rankings*, DOING BUSINESS, http://www.doingbusiness.org/rankings (last visited Sept. 19, 2011).

in other words, we are more than ninety-nine percent sure that seven successive tosses will not all be heads. Spend all day flipping pennies, and seven successive heads will probably happen at some point; but if it happens on the first seven flips, it might lead to questions about whether the penny is weighted or the experimenter is biasing the results.

Now imagine a research paper reporting seven separate observations of a single coin toss as if they were independent events. This would misleadingly convert an ordinary, random event—the single toss—into something that appears to be highly significant and unlikely to occur by chance alone.

Crain and Crain combine seven years of annual data for twenty-five OECD countries on GDP per capita, the RQI, and other variables. Both GDP per capita and the RQI, however, change very little from year to year. For the OECD countries, the correlation between GDP per capita in 2007 and 2008 has an adjusted r^2 of 0.999;[59] even for the first and last years in the Crain and Crain sample, 2002 and 2008, the correlation between GDP per capita has an adjusted r^2 of 0.982. Thus, the seven years of data on GDP per capita, treated by Crain and Crain as separate observations, contain virtually identical information about the relative affluence of OECD countries. The RQI is also highly correlated from year to year: for the OECD countries, the correlation between the 2007 and 2008 RQIs has an adjusted r^2 of 0.944, falling to 0.815 for the RQIs of 2002 versus 2008.[60]

In short, the data used by Crain and Crain are much more like seven observations of the same coin toss, not seven independent observations of new information about the world. As a result, the correlation they report between RQI and GDP per capita is spuriously high.

There are econometric techniques designed for datasets like this with serial correlation between observations. Crain and Crain mention, with little explanation, that they included country fixed effect variables.[61] This might be part of an appropriate methodology, but it alone is far from sufficient. Readers interested in pursuing this question should consult the CRS study, which repeats the Crain and Crain analysis with a rigorous econometric methodology—and finds no significant relationship between GDP per capita and RQI.

59. In an ordinary regression analysis, r^2 measures how much of the variation in one variable (shown on the left-hand side of the equation) can be predicted by assuming a linear relationship with the other variables in the equation. The adjusted r^2 of 0.999 reported here means that 99.9% of the variation among OECD countries in GDP per capita in 2008 can be predicted from their GDP per capita in 2007.

60. These calculations are based on GDP per capita at market exchange rates downloaded from the World Bank website in January 2011 and RQI data downloaded in November 2011 for all thirty-four OECD member nations. *See Worldwide Governance Indicators*, *supra* note 27. Adjusted r^2, discussed *supra* note 59, is used here to adjust for a small sample size. The more familiar, unadjusted r^2 would be larger in every case.

61. CRAIN & CRAIN, *supra* note 6, at 22.

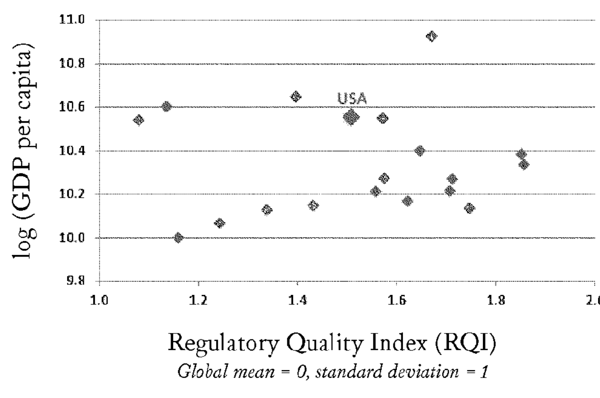
3. Inside the OECD

Crain and Crain focus on countries in the OECD, which is often taken to be synonymous with high-income, industrialized countries. The organization, however, has diversified its membership to include a number of middle-income countries, including Turkey, Mexico, Chile, and several eastern European nations. Some of the middle-income OECD members, notably Turkey and Mexico, do have much lower RQI scores. Within the high-income OECD member countries, on the other hand, there is literally no relationship between income and RQI.

If we restrict our attention to the nineteen OECD countries with per capita GDP above $20,000 in 2008[62]—including northern and western Europe, Australia, Canada, Israel, Japan, and the United States—then the correlation between RQI and the logarithm of per capita GDP (the form of the data used by Crain and Crain) for 2008 has an adjusted r^2 of -0.06. This puzzling result means that there is less relationship between these two data series than would be expected by chance alone; the unadjusted r^2 is 0.000003.[63]

A graph of the data, highlighting the position of the United States, is presented in Figure 1. The absence of a trend is visible in these data.

FIGURE 1 — GDP PER CAPITA VS RQI, 2008: HIGH-INCOME OECD COUNTRIES



62. *See GDP per Capita (Current US$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.PCAP.CD (last visited Nov. 4, 2011).

63. In the regression of *log* GDP per capita versus RQI for these countries, the slope has a t statistic of -0.008 and a p value of 0.99, implying there is an ninety-nine percent probability of getting a relationship at least this good by chance alone, e.g., when comparing two series of random numbers. In general, a negative value for adjusted r^2 means that there is a better than fifty percent probability of getting a relationship this good by chance alone.

4. Correlation Is Not Causation

A correlation can be found between RQI and income only by comparing countries at very different income levels;[64] we have seen that this relationship disappears within the world of countries above about half the United States' level of income.[65] Suppose, for the sake of the argument, that the RQI measures something meaningful about the quality of regulation (determining exactly what the RQI measures is an important issue which we do not address). Turkey and Mexico, two of the lowest-income members of the OECD, also have the lowest RQI scores in the OECD. This does not tell us that the quality of regulation makes a country richer or poorer; the reverse could equally well be true.

The United States is much richer than Turkey or Mexico, and, according to the RQI, has much better regulations. Does this mean that better regulation made the United States richer? Or does it mean that being richer enabled the United States to adopt better regulations? Or, since the RQI is based on the *perception* of regulatory quality by a number of observers, does the greater wealth of the United States lead to a perception that it has better regulations than Turkey or Mexico? Even if the Crain and Crain calculation was reliable and problem free (which it definitely is not, as seen above), it would founder on this shoal: their estimate of regulatory costs depends on the unstated premise that causation is all one way, from regulatory quality to income. If, instead, wealth creates better regulation, their entire argument sinks beneath the waves.

If correlation implied causation, in the manner assumed by Crain and Crain, then their curious finding of negative correlation between GDP per capita and primary school enrollment would suggest another low-cost route to wealth: throw kids out of school. We almost hesitate to mention this, given the viral spread of Crain and Crain's implausible conclusions throughout current political debates. We trust that it is self-evident that the

64. OECD membership now includes thirty-four countries at varying income levels. Crain and Crain used twenty-five of these countries in their analysis; the CRS study used thirty. *See* COPELAND, *supra* note 15, at 27; CRAIN & CRAIN, *supra* note 6, at 21. Neither study reported which countries they included. The previous section of this Article referred only to the nineteen highest-income OECD members—a group that corresponds, we believe, to the common (mis)understanding of OECD membership as a synonym for high income. This section discusses our exploration of the data for all thirty-four countries; it does not include the other explanatory variables used by Crain and Crain and by the CRS study, so it is not directly comparable to those results.

65. United States GDP per capita was $38,345 in 2008, according to the World Bank. *GDP per Capita (Current US$)*, *supra* note 62.

error lies in giving credence to Crain and Crain's calculations, not in the idea of educating children.[66]

B. Environmental Regulation

Crain and Crain's estimates of the costs of environmental regulations likewise suffer from several basic flaws. First, they are based on evidence—and regulations—so old as to be unreliable, as OMB itself has acknowledged.[67] Second, they rely heavily on an outdated version of general equilibrium analysis, analysis which, even if updated to reflect the current state of the art, would nonetheless remain deeply problematic in its assumptions. Third, these estimates contain objective errors, such as double counting of the same costs and inclusion of costs for rules that do not exist.

1. Old Data on Old Rules

Crain and Crain's estimates of the costs of environmental regulations come from OMB's 2001–2009 reports on federal regulation. The earliest of these reports provide estimates of regulatory costs going back decades. In 2003, OMB stopped providing such estimates for the costs of regulations that had been issued more than ten years before, explaining that long-ago estimates were not reliable guides for current policy.[68] Several years before, OMB had explained that it was hard to justify continuing to debit such costs to the federal government's regulatory program, as it was unlikely that if the regulations were pulled, businesses would actually withdraw whatever protections they had installed in response to the relevant regulations.[69] In its 2002 report, moreover, OMB had cast a skeptical eye on aggregate cost estimates that attempted to announce an overall figure for the costs of old and new regulations, observing:

66. Crain and Crain never precisely defined their educational enrollment variable, but they reportedly told CRS that their negative coefficient on educational enrollment could reflect "aging pyramid" effects. COPELAND, *supra* note 15, at 27. If lower-income OECD nations such as Turkey and Mexico have younger populations than other OECD members, then school-age children, and hence school enrollment, may be a larger percentage of the total population in the lower-income countries. This could create a negative correlation between educational enrollment and income per capita in the Crain and Crain dataset.

67. *See* OFFICE OF MGMT. & BUDGET, STIMULATING SMARTER REGULATION: 2002 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 40 (2002) [hereinafter OMB 2002 REPORT] (describing plans for subsequent reports).

68. *See id.*; *see also* COPELAND, *supra* note 15, at 21.

69. COPELAND, *supra* note 15, at 24–25 (citing OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS (1997)).

> We included these aggregate estimates in the appendix rather than the text to emphasize the quality differences in the two sets of estimates. The estimates of the costs and benefits of Federal regulations over the period of April 1, 1995, to March 31, 2001, are based on agency analyses subject to public notice and comments and OMB review under E.O. 12866. The estimates . . . for earlier regulations were based on studies of varying quality. Some are first-rate studies published in peer-reviewed journals. Others are non-random surveys of questionable methodology. And some estimates are based on studies completed 20 years ago for regulations issued over 30 years ago, whose precise costs and benefits today are unknown.[70]

By 2003, these older estimates had disappeared entirely from OMB's report, and they have not come back.

Despite OMB's admonition against using cost estimates that are over ten years old, Crain and Crain use OMB estimates of regulatory costs going back more than twenty years. In using Hazilla and Kopp's estimates for rules issued prior to 1988, they go back to the very beginning of United States environmental law. As OMB itself has observed, costs going back this far are unreliable.[71] The great bulk of Crain and Crain's estimate of the costs of environmental regulation comes from numbers generated so long ago that OMB does not now use them in its own calculations. Crain and Crain should not have used them either. If Crain and Crain had followed OMB's cautions about the unreliability of these old estimates, and eliminated them from their estimate, the total cost of environmental regulation would have fallen from $281 billion to $48 billion.[72]

As we explain below, even this much smaller figure contains large errors.

2. Is Our Real Problem Voluntary Unemployment? Really?

Crain and Crain's calculations for rules adopted before 1988 relied on the Hazilla and Kopp study[73]—which is, strictly speaking, an estimate of potential economic consequences, from 1981 through 1990, of major environmental rules in effect in 1982. To make that estimate, Hazilla and Kopp applied a general equilibrium framework, familiar in textbook economics, in which economic changes are often governed by household responses to

70. OMB 2002 REPORT, *supra* note 67, at 39.
71. *Id.* at 40.
72. This is based on converting Crain and Crain's estimate of costs "through 2000" to 2009 dollars. *See* CRAIN & CRAIN, *supra* note 6, at 26 tbl.3.
73. Hazilla & Kopp, *supra* note 44, at 856–57.

small price differentials, including the (voluntary) choice between leisure and labor.[74]

Even within the narrow field of abstract economic models of regulatory costs, Hazilla and Kopp's 1990 paper no longer represents the state of the art. Newer work has identified many subtleties in the modeling of environmental regulations, and leads to a surprisingly wide range of possible outcomes, including ones quite different from Hazilla and Kopp's estimates.[75] Nonetheless, Crain and Crain chose to rely on Hazilla and Kopp, not on newer work in this field.

Although the Hazilla and Kopp estimate of regulatory costs is driven by a decrease in employment, this is not involuntary unemployment, of the sort seen in recessions and all too well known in reality today. The general equilibrium framework used in economics typically assumes that all markets clear—that is, supply equals demand for every commodity and for factors of production such as labor.[76] Instead, the reduction in employment of interest to Hazilla and Kopp stems from a voluntary choice: looking at the higher prices, and consequently lower real wages, that result from environmental protection costs, households decide that they would prefer to reduce their aggregate hours of work by about one percent.[77] Leisure is presumably just as rewarding as ever, but labor is slightly less rewarding at the slightly lower real wages, so rational utility maximizers (the only species of human beings found in the model) choose to work slightly less. For someone working a forty-hour, fifty-week year, one percent less work is a reduction of twenty hours, or 2.5 days, per year. All the costs of pre-1989

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74. Hazilla and Kopp's description of their model begins with a discussion of the importance and the challenge of modelling household preferences correctly, and cites numerous other economic models in a similar vein. *Id.* at 857–62. They observe that their model "is suitable for assessing long-run impacts of regulatory programs on neoclassical economic growth," i.e., impacts on abstract economic models. *Id.* at 859.

75. *See, e.g.*, Don Fullerton & Garth Heutel, *The General Equilibrium Incidence of Environmental Mandates*, AM. ECON. J.: ECON. POL'Y, Aug. 2010, at 64.

76. Hazilla and Kopp are not explicit about their labor market assumptions. The paper they cite as the source of their model includes the possibility of involuntary unemployment, but does not discuss it. It does, however, highlight the household decision about voluntary leisure time. Edward A. Hudson & Dale W. Jorgenson, *U.S. Energy Policy and Economic Growth, 1975-2000*, 5 BELL J. ECON. & MGMT. SCI. 461 (1974).

For a discussion on the limitations of general equilibrium models for policy analysis, with an emphasis on trade policy, see Frank Ackerman & Kevin Gallagher, *The Shrinking Gains from Global Trade Liberalization in Computable General Equilibrium Models: A Critical Assessment*, 37 INT'L J. POL. ECON. 50 (2008). For a discussion on the limitations of the underlying economic theory, see Frank Ackerman, *Still Dead After All These Years: Interpreting the Failure of General Equilibrium Theory*, 9 J. ECON. METHODOLOGY 119 (2002).

77. Labor supply in the environmental cost scenario is 0.84% lower than in the no-regulation baseline in 1981, and 1.18% lower in 1990. Hazilla & Kopp, *supra* note 44, at 867 tbl.3.

regulations, for Crain and Crain, are consequences of this minor, voluntary adjustment in working hours.

Since it is a voluntary choice, why complain about workers choosing more leisure? The problem, for Hazilla and Kopp, is as old as the Protestant ethic: more work means more income, some of which is saved and can be invested in capital goods, leading to faster economic growth—but more leisure just means another 2.5 days at the beach. In the folkloric tradition of kingdoms lost for a nail, it is the imposition of environmental regulations—which raised prices, which lowered real wages, which made workers choose more leisure, which lowered incomes, which lowered savings, which lowered investment, which caused slower economic growth—which imposed such burdensome costs on the economy.

What's wrong with this long and winding tale of economic causation? One might well question the real-world relevance of a model of automatic full employment. In a world with business cycles and involuntary unemployment, it is quite possible that regulatory costs could lead to increased expenditures and employment.[78] Beyond such fundamental questions about general equilibrium modeling, there are several additional problems with the Hazilla and Kopp analysis.

For one thing, there is no sign of awareness of any possible benefits of regulation—to human health, to nature, or even to the economy. Hazilla and Kopp analyzed the economic impact of the earliest regulations adopted under the Clean Air Act and the Clean Water Act—rules that save thousands of people per year from dying of lung disease, prevent rivers from catching fire, and keep lead out of gasoline. Is the main economic impact of these sweeping changes in our conditions of life really a slight increase in prices that inspires workers to do one percent less work? Even in narrowly economic terms, healthier people, with fewer respiratory diseases, are more productive workers, and children growing up free of exposure to lead have, on average, higher IQs and higher lifetime earnings prospects.[79]

More broadly speaking, the benefits of clean air and clean water are immensely valuable, and widely valued. In EPA's retrospective cost-benefit analysis of the early stages of the Clean Air Act, the estimated value of the benefits is more than forty times the costs, and more than enough to

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78. When, as at present, businesses are earning significant profits but not investing them due to a lack of demand for their products, regulations could force businesses to spend some of those profits on pollution controls; that spending would create an economic stimulus.

79. *E.g.*, SHAPIRO ET AL., *supra* note 5, at 11 (estimating that regulation saves $76 billion in child healthcare costs, $38 billion dollars in municipal charges, and thousands of lives); EPA, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT: 1990 TO 2010, at 75 (1999), *available at* http://www.epa.gov/oar/sect812/1990-2010/chap1130.pdf (estimating the benefits of Clean Air Act regulations to be $110 billion).

outweigh Hazilla and Kopp's estimates of regulatory costs.[80] Crain and Crain, following in Hazilla and Kopp's footsteps, were happy to use calculations based on EPA's estimates of the costs of regulation, but entirely ignored EPA's much larger estimates of the benefits of the same rules.[81]

Another problem is that Hazilla and Kopp's projections of the costs of regulations grow rapidly over time, and should by now be vastly—but laughably—larger than Crain and Crain's estimate. The number used by Crain and Crain to represent the current costs of environmental regulations adopted before 1989 is in fact Hazilla and Kopp's estimate of costs as of 1985 (adjusted for inflation), mislabeled as the cost in 1988.[82] There is, however, no reason to stop in 1985: the Hazilla and Kopp cost estimate is much larger for 1990, the last year in their analysis, than for 1985[83]—and the logic of their model implies that the costs resulting from 1980s regulations should have continued to escalate, considerably faster than inflation, beyond 1990.

The rapid, ongoing escalation can be seen in a comparison of Hazilla and Kopp's social cost projections to EPA's estimates of direct compliance costs. The true social cost of early 1980s clean air and clean water rules, according to Hazilla and Kopp, was 67% of EPA's estimate of direct compliance costs in 1981, rising to 126% in 1985 and 258% in 1990.[84] Hazilla and Kopp's social costs were lower than direct compliance costs in 1981, the first year of the rules they analyzed, because they subtracted the assumed value of the increase in leisure. Yet, over time, the cumulative, dynamic effects of reduced labor become steadily more important. Every year that workers work less, thereby reducing income, savings, investment, and growth, the next year's GDP becomes smaller than it would have been. As time goes on, the reductions in income and growth are compounded, so the regulatory cost scenario falls farther and farther behind the no-regulation baseline. As a result, the social cost of regulation, defined as the gap between the baseline and regulatory cost scenarios, grows ever larger.

80. *See Retrospective Study—Study Design and Summary of Results*, EPA, http://www.epa.gov/air/sect812/retro.html (last visited Nov. 4, 2011).

81. The OMB reports on which Crain and Crain rely for their estimates of the costs of rules issued after 1988, CRAIN & CRAIN, *supra* note 6, at 26 tbl.3, themselves rely on EPA's estimates of costs as reflected in their RIAs for major rules. *Id.* at 25.

82. The error in dates occurs in Hahn and Hird's treatment of the Hazilla and Kopp estimate. In the appendix explaining their numbers, Hahn and Hird recognized that they were using an inflation-adjusted version of Hazilla and Kopp's estimate for 1985. Hahn & Hird, *supra* note 17, at 272 & n.224 (explaining their $77.6 billion figure). In the body of their article, however, Hahn and Hird inserted the same number, without comment or adjustment, into a table of regulatory costs and benefits in 1988. *Id.* at 256 tbl.2.

83. Hazilla and Kopp, *supra* note 44, at 865 tbl.2.

84. Calculated from *id.*

From 1981 to 1985, Hazilla and Kopp's social cost estimate, measured in constant (inflation-adjusted) dollars, grows by an average of 20.5% per year. From 1985 to 1990, the growth rate is only slightly slower, at 18.8% per year.[85] Nothing is said in the article (or in the subsequent articles citing it) about what growth rates to expect beyond 1990; two hypothetical examples, however, demonstrate the importance of this question. First, if the post-1985 rate of growth, 18.8% annually, continued into the future, then by 2009 the social cost of early-1980s environmental regulation would have reached $8.8 trillion, well over half of the GDP. Second, if the rate of growth continued to decline by 1.7 percentage points every five years, as it did from the early- to late-1980s in Hazilla and Kopp's analysis, then the social cost of early-1980s regulations would have been "only" $4.5 trillion by 2009, nearly one-third of the GDP.[86] Surely these numbers are large enough to fail the laugh test: they are humorously, absurdly wrong on their face. In order to make sensible, contemporary use of the Hazilla and Kopp estimates, it would be necessary to explain why their growth decelerates or stops—an explanation which is not present in Hazilla and Kopp, or in Crain and Crain.

Within the (limited, as we have seen) logic of this model, what prevents the costs of a fixed set of regulations from growing without limit? Hazilla and Kopp are not alone in having missed an obvious answer: high initial costs of regulatory compliance create an incentive for innovation, which lowers future costs. General equilibrium analyses frequently focus on the implications of consumers' and workers' responses to small price changes, such as the one percent reduction in working hours modeled by Hazilla and Kopp. Yet they typically omit the comparable response of engineers and entrepreneurs to regulations: if compliance costs are high enough, there are profits to be made by inventing cheaper alternative technologies. Why should entrepreneurs, who are in the business of seeking out new opportunities for profits, be less sensitive to price incentives than households? Innovation may seem less predictable than changes in consumer purchases or workers' desire to work—but the assumption that regulation creates an incentive for innovation makes sense out of the repeated empirical finding that regulatory costs turn out to be lower than predicted in advance.[87]

The argument that regulations create important incentives for innovation exists in economics literature. The "Porter hypothesis" claims that

85. Calculated from the "Social Cost" estimates, *id.*, converted to constant dollars.

86. Calculated by applying the indicated growth rates to the Hazilla and Kopp estimate of social costs in 1990, *id.*, converted to 2009 dollars.

87. *See e.g.*, SHAPIRO ET AL., *supra* note 5, at 2; Frank Ackerman, *The Unbearable Lightness of Regulatory Costs*, 33 FORDHAM URB. L.J. 1071, 1083 (2006); Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 1998 (2002).

well-designed regulations can prompt enough innovation to increase the competitiveness of regulated firms.[88] This idea has been controversial among economists, since it implies that, prior to regulation, the firms were not maximizing profits. There is, however, extensive empirical evidence to support the hypothesis. At a macro level, Germany's large, longstanding trade surplus suggests that the country's famously strict regulations do not destroy competitiveness.[89]

The article introducing the Porter hypothesis cites Hazilla and Kopp as an example of a study that is biased against regulation by its failure to consider the incentives it creates (as well as the failure to evaluate any benefits of regulation).[90] A more empirically-grounded account of the economic impact of 1980s regulations, the subject of Hazilla and Kopp's analysis, would include, for example, the unexpectedly low cost to society of removing lead from gasoline, since the catalytic converters introduced by automobile manufacturers at about that time required unleaded gasoline.[91] By the 1990s, unleaded gasoline had become the universal standard, and it was no longer meaningful to say that its costs were higher than the baseline (as assumed in the Hazilla and Kopp cost estimates). Once there was no longer any leaded fuel option available on the market, no one could save money by going back to it; the only baseline worth talking about was the new, healthier world of unleaded gasoline.[92]

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88. Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 J. ECON. PERSP. 97, 97-98 (1995).

89. For a historical analysis of Germany's institutional framework and its positive relationship to economic growth, see Wendy Carlin, *West German Growth and Institutions*, *in* ECONOMIC GROWTH IN EUROPE SINCE 1945, at 455 (Nicholas Crats & Gianni Toniolo eds., 1996). For an attempt at quantitative analysis of the effects of German regulations on economic growth, finding a positive effect on growth from environmental regulations and a negative effect from capital market regulations, see Helge Berger, *Regulation in Germany: Some Stylized Facts About its Time Path, Causes, and Consequences*, 118 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND SOZIALWISSENSCHAFTEN [J. APPLIED SOC. SCI. STUD.] 185 (1998) (Ger.).

Germany's trade surplus is documented in the numerous statistical reports available from the WORLD TRADE ORG., http://www.wto.org (last visited Nov. 19, 2011). For example, in 2009, Germany had a merchandise trade surplus of $188 billion, second only to China's $196 billion. *See* WORLD TRADE ORG., INTERNATIONAL TRADE STATISTICS 2010, at 13 tbl.I.8 (2010), *available at* http://www.wto.org/english/res_e/statis_e/its2010_e/its2010_e.pdf.

90. Porter & van der Linde, *supra* note 88, at 108.

91. *See e.g.*, Frank Ackerman et al., *Applying Cost-Benefit Analysis to Past Decisions: Was Environmental Protection Ever a Good Idea?*, 57 ADMIN. L. REV. 155, 164-65 (2005); Jamie Lincoln Kitman, *The Secret History of Lead*, NATION, Mar. 20, 2000, at 11.

92. The Clean Air Act banned the sale of leaded gasoline as of 1996, and other countries around the world took similar actions. As of June 2011, the only countries relying exclusively on leaded gasoline were Myanmar (Burma) and Afghanistan; the only other countries still selling any leaded gasoline for road use were Algeria, Iraq, North Korea, and Yemen. Robert Taylor & Zac Gethin-Damon, *Countries Where Leaded Petrol is Possibly Still*

Yet phony numbers have a life of their own; repetition of Hazilla and Kopp's estimate, passed from Hahn and Hird to OMB to Crain and Crain, continued even as the innovative processes of the real-world economy eliminated the costs that were estimated, so long ago, in such a biased manner.

3. Piling On: Crain and Crain's Use of OMB Reports on the Costs of Environmental Rules

In their tallies of total costs, Crain and Crain always use the high end of the range of OMB's cost estimates. They explain that agencies underestimate costs and that this justifies use of high-end estimates.[93] But the empirical evidence that exists on actual regulatory costs—limited though it may be—does not support Crain and Crain's assertion that agencies underestimate regulatory costs. Indeed, the evidence that exists tends to point in the opposite direction.[94] Although the refrain that agencies have an incentive to underestimate costs pervades discourse on the costs of regulation,[95] in fact at least EPA often has exactly the opposite incentive. Much environmental regulation stems from laws directing EPA to set limits based on the best available technology for pollution control.[96] A primary consideration in determining which technology is available is economic affordability.[97] In anticipating the inevitable legal challenge to a rule generated within this legal framework, EPA has an incentive to overestimate rather than underestimate the costs of the technology. If the technology is affordable even based on an overly-high cost estimate, then it should survive legal attack.[98] Whether EPA does more harm than good to itself when it deliberately highballs its estimates of costs, the fact remains that it does so, and this belies the claims that the agency aims at the low end in estimating costs.

Sold for Road Use as at 17th June 2011 [sic], THE LEAD GRP. (June 17, 2011), http://www.lead.org.au/fs/fst27.html.

California banned the sale of leaded gasoline in 1992, four years earlier than the federal government, and found that the initiative had no statistically significant effect on the price of gasoline in California. Hayley H. Chouinard & Jeffrey M. Perloff, *Gasoline Price Differences: Taxes, Pollution Regulations, Mergers, Market Power, and Market Conditions*, 7 B.E. J. ECON. ANALYSIS & POL'Y 1, 12, 20 tbl.5 (2007).

93. CRAIN & CRAIN, *supra* note 6, at 27.

94. *See, e.g.*, SHAPIRO ET AL., *supra* note 5, at 7; Ackerman, *supra* note 87, at 1083.

95. *See, e.g.*, Morrall, *supra* note 19, at 29.

96. *See, e.g.*, Cass R. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 627-31.

97. *See, e.g.*, Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category, 74 Fed. Reg. 62,996, 63,002 (Dec. 1, 2009) (to be codified at 40 C.F.R. pt. 450); Effluent Limitations Guidelines and New Source Performance Standards for the Airport Deicing Category, 74 Fed. Reg. 44,676, 44,678 (Aug. 28, 2009) (to be codified at 40 C.F.R. pt. 449).

98. SHAPIRO ET AL., *supra* note 12, at 7 (citing McGarity & Ruttenberg, *supra* note 87, at 2011, 2044–45).

It must be remembered, moreover, that the cost estimates in EPA's RIAs always go through OMB review.[99] OMB has no incentive to allow EPA to underestimate costs, and, indeed, OMB stands ready to direct the agency to change cost estimates in the RIAs that accompany major rules sent to OMB for review. OMB staff members are not shy about insisting on significant changes to RIAs as a condition of OMB clearance.[100] Thus, although the cost estimates in OMB's recent reports all come from the agency's own RIAs, those RIAs reflect OMB's prior input; they are not the work product of the agency alone.

Crain and Crain also justify the use of high-end estimates by emphasizing that OMB's annual reports count the costs only of major rules that cost $100 million or more per year, and exclude regulatory programs (like Superfund) that do not rely on rules as their predominant regulatory mechanism.[101] Crain and Crain are correct in saying that OMB's reports do not cover the regulatory waterfront. Insofar as OMB estimates only the costs and benefits of major rules, it does not capture the costs and benefits either of rules costing less than this or of regulatory programs that are not primarily implemented through rulemaking.

But OMB itself has concluded that major rules account for the "vast majority" of the total costs of federal rules.[102] And Crain and Crain themselves tell only a tiny part of the story. As others have observed, they completely omit regulatory benefits, as if federal regulatory programs cost money but give us nothing in return.[103] More subtly, they completely ignore the fact that many federal programs in fact provide money to, rather than just taking money from, the very industries covered by the regulatory programs they criticize. Direct and indirect subsidies cost taxpayers billions of dollars every year, yet these costs do not figure at all in Crain and Crain's report.[104]

Then there are outright errors that further inflate Crain and Crain's figures on regulatory costs. Table 3 of the study reports the costs of rules

99. By definition, RIAs are done for economically significant rules, and OMB reviews economically significant rules.

100. For a particularly dramatic example of changes made to an RIA during OMB review, see Sidney Shapiro, *Back to the Future: OMB Intervention in Coal Ash Rule Replicates the Bush Administration's Way of Doing Business*, CPRBLOG (Jan. 1, 2010), http://www.progressivereform.org/CPRBlog.cfm?idBlog=1DDEA50F-E885-B550-C04BDE576F2C0B6E.

101. CRAIN & CRAIN, *supra* note 6, at 4, 26.

102. OMB 2002 REPORT, *supra* note 67, at 38.

103. COPELAND, *supra* note 15, at 12–13; SHAPIRO ET AL., *supra* note 12, at 1–2, 6.

104. *See, e.g.*, AUTUMN HANNA ET AL., GREEN SCISSORS 2011: CUTTING WASTEFUL AND ENVIRONMENTALLY HARMFUL GOVERNMENT SPENDING (2011), *available at* http://heartland.org/sites/default/files/_Green_Scissors_2011_Web_(2)_pdf; Lisa Heinzerling, *New Directions in Environmental Law: A Climate of Possibility*, 35 HARV. ENVTL. L. REV. 263, 268–69 (2011).

issued "[t]hrough 2000, Q1" *and* the costs of rules issued from April 1999 to September 2001. This double counts the costs of rules issued between April 1, 1999 and March 31, 2000. It is difficult to know exactly how large a difference this double counting makes in Crain and Crain's estimates because the OMB reports from which Crain and Crain draw do not provide annualized costs for all of the rules issued in the period of overlap.[105] But we do know the difference is large. Just considering the costs of the rules for which OMB does provide annualized cost estimates, we can see that the costs Crain and Crain double count amount to over $3 billion (in 2009 dollars).[106] And this does not include two rules that together, several years out, were estimated to cost almost $10 billion.[107] For the period October 2003 to October 2004, Crain and Crain report the costs of *all* federal rules and not just EPA rules.[108] The cost of this mistake is just over $1 billion.[109] These errors together account for well over $4 billion of the annual costs Crain and Crain attribute to environmental rules for the ten-year period from 1999 through 2008.

Crain and Crain also include the costs of many rules that no longer exist. Some of these rules were never put into effect because EPA chose to reconsider them. These include air toxics rules on boilers[110] and plywood,[111] a New Source Performance Standard for petroleum refineries,[112] and the

105. OMB 2001 REPORT, *supra* note 42, at 22–28 tbl.4 (reporting costs of rules issued between April 1, 1999 and March 31, 2000, some annualized and some single-year).

106. *See id.* (providing the costs of storm water discharges (phase II), handheld engines, and section 126 petitions for purposes of reducing interstate ozone transport). All of our subsequent estimates of the effect, in dollars, of double counting and other errors on Crain and Crain's total estimates are stated in 2009 dollars.

107. *See id.* (noting the Tier 2/new motor vehicle emissions standards at a cost estimate of $5.3 billion per year (1997 dollars) in 2030 and the regional haze rule at a high-cost estimate of $4.4 billion per year (1990 dollars) in 2015).

108. Crain and Crain report a high-cost estimate of just over $4 billion for this period. CRAIN & CRAIN, *supra* note 6, at 26 tbl.3. This is the same as OMB's estimate for the costs of all federal regulations for this same period. OFFICE OF MGMT. AND BUDGET, VALIDATING REGULATORY ANALYSIS: 2005 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 12 tbl.1-3 (2005) [hereinafter OMB 2005 REPORT].

109. $862 million in 2001 dollars.

110. *See* National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters, 69 Fed. Reg. 55,218 (Sept. 13, 2004) (to be codified at 40 C.F.R. pt. 63); OMB 2005 REPORT, *supra* note 108, at 13 tbl.1–4 (noting a high-end cost estimate of $876 million in 2001 dollars).

111. *See* National Emission Standards for Hazardous Air Pollutants: Plywood and Composite Wood Products; List of Hazardous Air Pollutants, Lesser Quantity Designations, Source Category List; Reconsideration, 70 Fed. Reg. 43,820 (July 29, 2005) (to be codified at 40 C.F.R. pt. 63); OMB 2005 REPORT, *supra* note 108, at 13 tbl.1–4 (noting a high-end cost estimate of $291 million in 2001 dollars).

112. *See* Standards of Performance for Petroleum Refineries, 73 Fed. Reg. 55,751 (Sept. 26, 2008) (granting reconsideration and stay of the effective date); OFFICE OF MGMT. AND

National Ambient Air Quality Standard (NAAQS) for ozone set in 2008.[113] In including rules that the agency itself has pulled, Crain and Crain overstate actual regulatory costs for the relevant period by almost $11 billion.

Similarly, Crain and Crain also include rules that no longer exist because the courts have overturned them. Rules invalidated by the courts, yet embraced within Crain and Crain's estimates of today's regulatory costs, include the Bush administration's Clean Air Act rule governing mercury from power plants,[114] its Clean Water Act rules on concentrated animal feeding operations,[115] and rules on cooling water intake structures at power plants and other facilities.[116] The cost of including these rules in Crain and Crain's cost estimates is almost $6 billion. It is also worth noting that two of the rules most cited in industry complaints about the aggressiveness of the Obama EPA are do-overs of these two invalidated rules—the proposed new rules on air toxics from power plants and on cooling water intake structures.[117] Crain and Crain use defunct cost estimates associated with past, invalidated incarnations of these rules, and many observers have then taken Crain and Crain's flawed cost estimates as a reason to caution against the new rules in this administration—which include new versions of these very same rules.[118] If ever there was double counting, this surely is it.

Crain and Crain also double count by including rules that together aim at the same regulatory end point. They include the 2006 NAAQS for

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BUDGET, 2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 16 tbl.1–4 (2010) [hereinafter OMB 2009 REPORT] (noting a cost estimate of $7 million in 2001 dollars).

113. *See* OMB 2009 REPORT, *supra* note 112, at 16 tbl.1–4 (noting a high-end cost estimate of $7.73 billion in 2001 dollars).

114. *See* OFFICE OF MGMT. & BUDGET, 2006 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL AND TRIBAL ENTITIES 9 tbl.1–4 (2007) [hereinafter OMB 2006 REPORT] (noting a high-end cost estimate of $500 million).

115. *See* OFFICE OF MGMT. & BUDGET, PROGRESS IN REGULATORY REFORM: 2004 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL AND TRIBAL ENTITIES 18 tbl.4 (2004) (noting a cost estimate of $360 million).

116. *See* Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486 (2d Cir. 2009) (vacating rule); National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41,576 (July 9, 2004) (to be codified at 40 C.F.R. pts. 9, 122-125); OMB 2005 REPORT, *supra* note 108, at 13 tbl.1–4 (noting a high-end cost estimate of $383 million).

117. *See, e.g.*, AM. LEGISLATIVE EXCH. COUNCIL, EPA'S REGULATORY TRAIN WRECK: STRATEGIES FOR STATE LEGISLATORS 12-13, 15 (2011), *available at* http://timeopinions.files.wordpress.com/2011/10/epa-train-wreck-2011-final-full-printres.pdf.

118. *See supra* text accompanying notes 7–9.

particulate matter[119] and the implementation plans for meeting these standards,[120] while at the same time including other rules that also target the same emissions of particulate matter.[121] Likewise, Crain and Crain include both the estimated costs of the 1997 ozone NAAQS[122] and rules designed to meet those very standards.[123] OMB, for its part, eschews this kind of double counting.[124] The cost of Crain and Crain's double counting here is well over $10 billion.

All told, these mistakes add up to over $30 billion out of the $48 billion Crain and Crain report for the costs of environmental regulation from 1999 to 2008.[125] And this only accounts for Crain and Crain's double counting and their inclusion of nonexistent rules, not for the likely overestimation of regulatory costs in RIAs[126] or for any other contestable part of their analysis. No one, we hope, would argue that it is acceptable to count the costs of the same rule more than once in estimating actual regulatory costs. Nor, we hope, would anyone argue that the costs of nonexistent rules should figure in estimates of actual regulatory costs. Taking out these phantom costs cuts Crain and Crain's estimate of the costs of environmental regulation post-2000 by two-thirds.

We have not toted up every single possible instance of double counting or of counting the costs of rules that are not in force. Once we discovered the magnitude of the errors in Crain and Crain's analysis, it seemed like

119. *See* National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,144 (Oct. 17, 2006) (to be codified at 40 C.F.R. pt. 50); OFFICE OF MGMT. & BUDGET, 2007 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 9 tbl.1-4 (2008) [hereinafter OMB 2007 REPORT] (noting a high-end cost estimate of $2.83 billion in 2001 dollars, equivalent to $3.42 billion in 2009 dollars).

120. *See* OFFICE OF MGMT. & BUDGET, 2008 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 11 tbl.1-4 (2009) (noting a high-end cost estimate of $7.32 billion in 2001 dollars).

121. Rules on regional haze, boilers, petroleum refineries, automobile emissions, and more: all share particulate matter emissions as one of their regulatory targets.

122. *See* OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS 79 tbl.15 (1998) (noting a cost estimate of $4.5 billion in 1996 dollars, equivalent to over $6.1 billion in 2009 dollars).

123. *See* OMB 2006 REPORT, *supra* note 114, at 8 tbl.1-4 (noting a cost estimate of $1.89 billion in 2001 dollars for the Clean Air Interstate Rule Formerly Titled: Interstate Air Quality Rule); OMB 2000 REPORT, *supra* note 42, at 38, 39 (noting a cost estimate of $1.7 billion in 1990 dollars for the NOx SIP Call).

124. *See* OMB 2007 REPORT, *supra* note 119, at 36.

125. The figures are converted from CRAIN & CRAIN, *supra* note 6, at 26 tbl.3, which were reported in 2001 dollars, to 2009 dollars based on the figures reported in CRAIN & CRAIN, *supra* note 6, at 31 tbl.6, which were reported in 2009 dollars.

126. *See supra* text accompanying notes 94–100.

overdoing it to chase after more double counted or miscounted millions when we had found so many double counted and miscounted billions.

But be assured: there are more millions, and even billions, to be found, and excised from Crain and Crain's estimates. For example: OMB's 1998 report estimates an annual cost of $17 billion in 1996 dollars for the 1997 particulate matter NAAQS ($23.28 billion in 2009 dollars). This estimate is carried over into Crain and Crain's estimates through their use of OMB's 2001 report. Yet Crain and Crain also include the costs of many rules that reduce particulate matter and are aimed in large part at attaining that 1997 standard. If the 1997 NAAQS rule is removed from Crain and Crain's aggregate cost estimate, that estimate declines by over $23 billion. And another example of many millions left on our cutting room floor: Crain and Crain's estimates surely include the costs of EPA's 1989 ban on asbestos—overturned in court almost twenty years ago.[127]

C. *Workplace Safety and Health*

Crain and Crain estimate costs of $64.3 billion for occupational safety and health regulations issued prior to 2001, and $471 million for such regulations issued between 2001 and 2008.[128] For the costs of rules issued before 2001, Crain and Crain rely on a book chapter published in 2005 by Joseph M. Johnson.[129] As Sidney Shapiro and his co-authors from the Center for Progressive Reform have tellingly observed, Johnson's figure has an exceptionally dubious provenance: Johnson aggregates cost estimates for occupational safety and health rules through 2001, then multiplies them by 5.55 based on a 1996 study[130] which itself relied on a 1974—*yes, 1974*—estimate of compliance costs ("unpublished and otherwise unavailable," Shapiro et al. point out) by the National Association of Manufacturers.[131] Despite these awkward origins, Crain and Crain apparently think so highly of the Johnson estimate that they report they used the Johnson calculations

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127. These costs are included in OMB's 2001 report (incorporated by Crain and Crain) through use of estimates compiled in 1996 for major rules issued between 1987 and 1994. The asbestos ban was issued in 1989, Asbestos Ban and Phaseout Rule, 40 C.F.R. § 763 (1989), and estimated (on the high end, which is what Crain and Crain used) to cost approximately $62 million per year. If Crain and Crain's analysis is to be believed, we are still paying over $100 million a year (based on adjusting the $62 million figure for inflation, as Crain and Crain do) for this ban, which was overturned by the courts in 1991. *See* Corrosion Proof Fittings v. Envtl. Prot. Agency, 947 F.2d 1201 (5th Cir. 1991). For the anti-regulatory crowd, this defunct ban is certainly the gift that keeps on giving. *See Five Hundred Life-Saving Interventions*, *supra* note 23, at 156 (criticizing the invalidated asbestos ban in one-third of the environmental measures discussed).

128. CRAIN & CRAIN, *supra* note 6, at 30 tbl.5 (reporting cost in 2009 dollars).

129. *Id.* (citing Johnson, *supra* note 18).

130. JAMES, *supra* note 18.

131. SHAPIRO ET AL., *supra* note 12, at 9.

"where possible, that is, until 2001."[132] Apart from showing a strange preference for calculations of dubious quality, Crain and Crain's suggestion that it was not possible to use the Johnson estimate for rules after 2001 betrays a lack of understanding of how that estimate was derived. All Crain and Crain had to do, if they really believed in the Johnson estimate as much as they appeared to, was to multiply the cost estimates for rules issued after 2001 by 5.55![133]

One of us has previously criticized this multiplier, which comes from a study by Harvey James:[134]

> Harvey James estimates the costs of compliance with 25 OSHA regulations as of 1993. But he also observes that the cost per firm was 5.5 times higher in a 1974 study of OSHA compliance costs done by the National Association of Manufacturers. James then simply asserts that the costs per firm could not be lower today than in 1974. On that basis, he multiplies his 1993 numbers by 5.5—thereby eliminating all empirical content in his study of 1993 costs, and simply recycling a 1974 estimate by an anti-regulatory industry group.[135]

It is worth noting that James himself had more modest claims for his own study, cautioning that his cost calculations were "estimates only . . . and not measures of actual expenditures."[136] He emphasized that the rules he studied had been issued in "different time periods" and that "estimates of the compliance costs of OSHA do not take into account new rules, changes in existing regulations, or old rules no longer aggressively enforced by the agency."[137] None of these cautions reappears in Crain and Crain's wholesale adoption of James's estimates.[138]

Crain and Crain's estimate for the costs of rules on workplace safety and health regulation issued from 2001 to 2008 has the same basic flaw as many of their estimates of environmental regulatory costs: the estimate

132. CRAIN & CRAIN, *supra* note 6, at 31.

133. Crain and Crain also are mistaken to say that the figure they report for OMB's estimates of the costs of OSHA rules run from 2001 to 2008. CRAIN & CRAIN, *supra* note 6, at 30 tbl.5. Actually, the OMB source they cite covers rules from 1998 to 2008. OMB 2009 REPORT, *supra* note 112, at 10-11 tbl.1–2.

134. JAMES, *supra* note 18.

135. Ackerman, *supra* note 87, at 1085-86; *see also* SHAPIRO ET AL., *supra* note 12, at 9.

136. JAMES, *supra* note 18, at 10.

137. *Id.* at 5.

138. Nonexistent rules make an appearance here, too: Johnson (based on James) includes over $1 billion (in 2009 dollars) in costs for OSHA's air contaminants rule. Johnson, *supra* note 18, at 34 tbl.10. The rule was overturned almost twenty years ago in *AFL-CIO v. Occupational Safety & Health Admin.*, 965 F.2d 962 (11th Cir. 1992).

includes costs that do not exist.[139] To take one example, a good portion—$327 million out of $470 million—of the costs Crain and Crain report for workplace rules from 2001 to 2008 comes from just one rule: OSHA's rule setting limits for hexavalent chromium.[140] After this rule was issued, the parties challenging the rule agreed to significant changes in the rule to make it more flexible and less costly.[141] But Crain and Crain use the previous version of the rule in their analysis.[142] Here, too, Crain and Crain report the costs of a rule that does not exist in the form they assume.

CONCLUSION

If statistical analysis required a driver's license, Crain and Crain could have theirs revoked for reckless and dangerous driving. On economic regulation, their one-equation calculation, worth $1.24 trillion in their fantasy of regulatory costs, rests on misunderstanding the definition of their data, flunking an elementary question on the normal distribution, padding the analysis with seven years of near-identical data, and failing to recognize the difference between correlation and causation. Their methods could just as easily be read as claiming that economic benefits would result from cutbacks in education as from cutbacks in regulation—yet, no one has argued that is a credible position.

On environmental regulation, Crain and Crain wheel out decades-old studies of decades-old rules. The bulk of their estimate rests on the idea that *voluntary* unemployment is the real culprit in today's regulatory environment. The remainder of it is filled to the brim with nonexistent rules and other phantoms—as is their flawed estimate of the costs of workplace safety and health rules.

139. Crain and Crain also repeat here the error of double counting the costs of some years' regulatory output. Crain and Crain report that their estimates from OMB's annual reports cover the years 2001 to 2008. CRAIN & CRAIN, *supra* note 6, at 30 tbl.5. In fact, those reports cover the years 1998 to 2008 and thus overlap for three years with the period covered in the James study. OMB 2009 REPORT, *supra* note 112, at 10 tbl.1–2.

140. *See* OMB 2007 REPORT, *supra* note 119, at 9 tbl.1–4 (reporting a high-end cost estimate of $271 million in 2001 dollars for this rule, which works out to approximately $327 million after adjusting for inflation).

141. *See* Settlement Agreement, Surface Finishing Indus. Council v. Occupational Safety & Health Admin., No. 06-2272 and Pub. Citizen Health Research Grp. v. Occupational Safety & Health Admin., No. 06-1818 (3d Cir. Oct. 25, 2006), *available at* http://www.osha.gov/SLTC/hexavalentchromium/elect_sign_steelworkers.html.

142. Crain and Crain rely on OMB's 2007 estimate of the cost of this rule, which itself used OSHA's estimate of the cost of the original rule and not the rule as changed after settlement. *See* Occupational Exposure to Hexavalent Chromium, 71 Fed. Reg. 10,100, 10,263 (Feb. 28, 2006) (reporting a cost estimate of $288 million per year in 2003 dollars, which works out to OMB's cost of $271 million when 2001 dollars are used); OMB 2007 REPORT, *supra* note 119, at 9 tbl.1-4 (reporting a cost estimate of $271 million).

It would be bad enough if this were a private study, undertaken with private funds, lacking any official imprimatur. Even then, the viral spread of the utterly unfounded $1.75 trillion estimate through the public sphere would be worrying enough. But this is a study requested, funded, reviewed, and edited by a government agency, the SBA's Office of Advocacy.[143] Taxpayers shelled out almost $100,000 for this nonsense.[144] More fundamentally, the Office of Advocacy's sponsorship and official embrace of the study—running all the way from initially conceiving the study, funding it, reviewing it, and editing it, to officially defending the study in testimony before Congress even after it had been severely criticized[145]—embroils this public agency in an unwholesome blend of ineptitude and bias. Before funding any more anti-regulatory research that threatens to repeat the same sad story,[146] the Office of Advocacy should officially, emphatically, and loudly disown the methodology and findings of Crain and Crain's problematic report. "Advocacy" is not an excuse for phony numbers.

143. CRAIN & CRAIN, *supra* note 6, at cover page (stating that report was "reviewed and edited by officials of the Office of Advocacy," though hedging as to whether the "final conclusions" of the report reflected the views of that office).

144. $99,500, to be exact. *See, e.g.*, Contract between U.S. Small Bus. Administration, Office of Procurement & Grants Mgmt., & Mark Crain for the *Impact of Regulatory Costs on Small Firms* (Sept. 24, 2008), http://www.progressivereform.org/articles/Crain%20and%20Crain_20Contract.pdf.

145. *See Assessing The Impact Of Greenhouse Gas Regulations On Small Business (Part 2 of 2)* (House Oversight Committee broadcast Apr. 6, 2011, 1:03:33), *available at* http://www.archive.org/details/gov.house.ogr.ra.20110406.2 (oral testimony by Claudia R. Rodgers, Deputy Chief Counsel for Advocacy, SBA Office of Advocacy). Rodgers defends the Office of Advocacy's failure to ask Crain and Crain to report on benefits of regulation, stating that the Office of Advocacy is "not required to ask for [the underlying] data" when it sponsors studies, defends the peer review process for the study, and defends the study as having the "exact same methodologies" as previous studies sponsored by the Office of Advocacy. *Id.*

146. James Goodwin, *On Heels of Debunked Report, SBA's Office of Advocacy Solicits More Anti-Regulatory Research*, CPRBLOG (Aug. 16, 2011), http://www.progressivereform.org/CPRBlog.cfm?idBlog=CF8517C8-C94D-590E-C7AD9962D431FB0A.

Mr. SMITH. Thank you, Professor Heinzerling.
Mr. Luddy.

TESTIMONY OF ROBERT L. LUDDY, FOUNDER AND PRESIDENT, CAPTIVEAIRE, INC., RALEIGH, NC

Mr. LUDDY. Thank you, Chairman Smith, and Ranking Member Conyers, and distinguished Members of the Committee for the opportunity to be here today.

I founded CaptiveAire Systems in 1976 with an investment of $1,300. Over the last 35 years, we have become the leading producer of commercial kitchens ventilation in North America. We have 80 U.S. sales offices, 5 manufacturing facilities in North Carolina, Iowa, Oklahoma, California, and Pennsylvania, and we employ over 700 people. That feat would be hard to repeat today based on modern regulation.

I am also a member of the Jobs Creators Alliance, a group formed by entrepreneurs to give small business a growth, America's primary growth creators, job creators.

Regulations disproportionately and adversely impact small businesses. Over the last several decades, the number and scope of Federal regulations has expanded exponentially, stunning job creation, economic growth, and placing an undue burden on entrepreneurial America.

The commercial kitchen ventilation industry has a myriad of current regulations for performance, safety, and energy savings. Beginning with the industry group, ASHRAE, which develops energy and design standards, which are the best in the world, and adopted into the codes. Mechanical codes, such as IMC, UMC, NFPA 96, et cetera, are the national codes, but these codes are further modified by virtually every State, and then further modified by cities and counties and local authorities having jurisdiction.

Also within our industry, we have groups, such as UL, ASTN, and AMCA, which develops testing standards and have made the American product the best in the entire world. Those were also eventually adopted into the codes over time.

As regulation increases, more cost and development time has to be shifted to deal with this regulation as opposed to working in innovative products, which is really what drives business. If you look at government intervention in the kitchen ventilation business, it goes back to 1950, and essentially what happened is they mandated very high exhaust flow rates in restaurants, which is the bane of energy efficiency.

Beginning in 1970, with the help of UL, new standards were developed, eventually approved by the code, which reduced exhaust flow rates and saved energy. But we still have areas, like the City of Chicago that has not adopted modern codes, and, therefore, energy savings are not possible there.

Now we have the U.S. Department of Energy that wants to regulate exhaust fans and blowers. Fans and blowers in a commercial restaurant comprise less than 2 percent of the energy used. And fans are very efficient because we have a fiercely competitive industry. They are in the range of 50 to 70 percent efficiency versus a nuclear power plant that is about 36 percent efficient. So we are in a very good industry.

Private sector innovation to save energy is making dramatic progress in our industries. I will give you a few examples. Demand ventilation, which allows us to modulate fans up, down, and off when they are not needed is now becoming commonplace in the market. Electronically-controlled motors are 80 percent efficient, and as the cost is driven down, become more prevalent in the market. And the real opportunity for savings are solid state controls.

Next year, we will introduce control systems that report to the web and have the opportunity to save up to 20 percent of all HVAC energy within a restaurant. They will also report on a real-time basis data to owners and users so that they can better manage a restaurant and design restaurants better in the future.

The best way to empower entrepreneurs and encourage small business owners is to establish a moratorium on new regulation. The pros of any regulation impacts industry in many ways. It really stifles initiative within the industry, it creates barriers for entry, and potentially causes the loss of U.S. jobs because small manufacturers will not be able to meet these regulations.

The creative genius of free market entrepreneurs cannot be stifled, but it can be slowed down by regulation, and that is exactly what happens. Products that we have introduced into the market have streamlined the cost and production of kitchen hoods that are much energy efficient. Control systems for indirect fired heaters, and we have introduced a revolutionary new fire protection product, which eventually we think will be the standard of the world.

Further regulation by government will hurt small business, impede innovation, stunt growth, reduce exports, reduce job creation, and essentially trample on entrepreneurial America.

Thank you very much for the opportunity to testify, and I look forward to your questions.

[The prepared statement of Mr. Luddy follows:]

Job Creators Alliance *Business Leaders for Job Growth in America*

TESTIMONY OF

ROBERT L. LUDDY

PRESIDENT

CAPTIVEAIRE SYSTEMS, INC.

RALEIGH, NORTH CAROLINA

"Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery"
Committee on the Judiciary
U.S. House of Representatives

10:00 AM
September 20, 2012
Room 2141
Rayburn House Office Building

Introduction

Chairman Smith, Ranking Member Conyers and distinguished Members of the Committee, thank you for extending to me the opportunity to testify before you today.

My name is Robert L. Luddy and I am the Founder, President and CEO of CaptiveAire Systems, the nation's leading manufacturer of commercial kitchen ventilation systems, based in Raleigh, North Carolina. CaptiveAire's integrated kitchen ventilation packages include hoods, exhaust fans, electrical controls, direct-fired heaters, UL listed grease duct systems, fire suppression systems, grease filters and utility distribution systems. We provide commercial cooking ventilation to independent operators and national restaurant chains, as well as other public and private institutions. I founded CaptiveAire as a one-room facility with just $1300 in 1976. Today, CaptiveAire maintains a network of over 80 sales offices in the United States and Canada as well as five manufacturing plants in North Carolina, Iowa, Oklahoma, California and Pennsylvania. We now employ 700 employees and are projected to grow to more than 1000 employees by 2016. We are consistently recognized as "best-in-class" in our industry, and we are one of the largest and fastest-growing private companies in North Carolina.

I am also a Job Creators Alliance (JCA) member. JCA was formed by entrepreneurs to give voice to small business – the engine of American job creation. We offer practical solutions for job creation rooted in real-world experience rather than political ideology. We want to promote and shape policies that will encourage investment, stop the migration of jobs overseas, empower small businesses to hire and facilitate the upward mobility of our middle class.

The pace of regulations and policies coming out of Washington is stunting job creation and economic growth. The undue burden being placed on businesses is stifling Entrepreneurial America. My hope and aim today is to illuminate the real issues that regulation can cause for job creators like myself, and how, with the right kind of reforms, we could help grow the economy and usher in another era of American prosperity and job creation.

Job Creators Alliance Position on Regulations

Over the last several decades, the number, scope and burden of Federal regulations have expanded exponentially. Multiple studies have shown that America's regulatory infrastructure costs the U.S. economy anywhere from hundreds of billions of dollars to over $1 trillion.

Federal regulators issued nearly 25,000 pages of final rules in 2010.[1] To put that into perspective, it would take more than 50 days of reading around the clock to keep up with the 3,573 final rules issued. Churning out this steady flow of regulations will require an estimated 291,676 full-time federal workers this year alone, doubling the number of federal regulators employed in 1980.

On top of that, we have seen hundreds of new significant rules and major regulations issued by this Administration in 2011 and 2012 – an unprecedented onslaught of regulations from Washington.

In 2008, the World Economic Forum ranked the U.S. as the world's most competitive economy. Since that point, for four years in a row, the position of the United States has declined – it is now the world's seventh most competitive economy and falling. Four years later, the United States is ranked 47th (out of 144) in the number of procedures to start a business, 68th in the extent and effect of taxation and 76th in both wastefulness of government spending and burden of government regulation.[2] This is a scary slide – especially for the entrepreneurs in this country who are relied upon for job creation. If America is to remain competitive, addressing the

1 Crewes, Clyde Wayne. 10,000 Commandments 2011. Competitive Enterprise Institute, 2010, http://cei.org/issue-analysis/ten-thousand-commandments-2011.
2 World Economic Forum, The Global Competitiveness Report 2012-2013: http://reports.weforum.org/global-competitiveness-report-2012-2013/

regulatory burden the U.S. government places on businesses – especially small businesses, which create two-thirds of all news jobs in this nation – is an urgent priority.

Greater attention must be drawn to the burden that regulation is placing on economic growth and job creation. Policymakers should better weigh the potential benefits of new regulatory initiatives against their costs.

Over the years, Presidents, Congress and this Committee have issued executive orders, enacted laws and passed legislation in an attempt to reduce the burden of regulations on businesses. These include the Regulatory Flexibility Improvements Act of 2011, the REINS Act, the Red Tape Reduction Act and the Small Business Jobs Act, just to name a few. While these efforts led by the U.S. House of Representatives have yielded some progress, the regulatory burden for small businesses continues to grow.[3] The speed and complexity with which new rules are handed down have had a chilling effect in the private sector, as businesses are unable to adequately plan for the future; they simply do not know what these regulations will cost them in time, money and energy. This Committee demonstrated leadership when it called for a moratorium on substantial

[3] SBA Office of Advocacy, "2010 Regulatory Flexibility Act Report," February 2011.

Job Creators Alliance

regulations until the economy had recovered to an unemployment rate of 6.0% or below. This was, and is still, a good idea.

As this Committee has recognized, we need better cost accounting when it comes to passing and enacting new regulations. Before laws are passed, greater emphasis should be placed on analyzing the potential costs of regulatory initiatives. The Congressional Budget Office estimates the budget impact of all legislation. A similar process for scoring the economic costs of regulations should be established as well. Better disclosure will hold lawmakers responsible for the burdens new regulations place on job creators.

As new rules are added, old regulations are often left on the books and forgotten. Various provisions intended to reduce regulatory burdens often overlap, wasting valuable resources on unnecessary paperwork and creating confusion. Congress should place a sunset date on most regulations, after which the agency must justify the continuation of the regulation and re-open the rule for comment. This Committee, again, has led on these efforts, but more needs to be done.

Underlying this entire discussion, and the reason for JCA's existence, is the reality that regulations have a disproportionately adverse impact on small businesses than large ones. As this Committee has accurately pointed out, small businesses pay 36% more regulatory costs per employee than large businesses and Federal regulations that impact small businesses have risen 14% since 2009. Large companies with big accounting, legal and compliance departments have the resources to deal with new regulations – small businesses do not. This gives a significant advantage to large, mature firms, who are creating few, if any, jobs against small, entrepreneurial firms that generate the vast majority of new jobs. This is why small business owners routinely name regulations, and the uncertainty surrounding them, as the biggest problem facing them today. A highly-regulated state makes it difficult to innovate, to invest and to grow a business.

Impact of Regulations on CaptiveAire Systems, Inc.

Current regulations for the Commercial Kitchen Ventilation industry are vast and cover all aspects of the product. ASHRAE (American Society of Heating, Refrigerating and Air-conditioning Engineers) develops standards to define acceptable performance. Five widely applied to our industry are as follows:

Standard 154 – Ventilation for Commercial Cooking Operations

Standard 90 – Energy Standard for Buildings except Low-Rise Residential

Standard 189 – Standard for the Design of High Performance Green Buildings

Standard 62.1 – Ventilation and Acceptable Indoor Air Quality

Standard 62.2 – Ventilation and Acceptable Indoor Air Quality in Low-Rise Residential Buildings

Mechanical Codes and Commercial Kitchen Ventilation Standards that apply to our industry include the following listed below. State and local jurisdictions can adopt their own mechanical codes, which can add another layer of regulations.

International Mechanical Code (IMC)

Uniform Mechanical Code (UMC)

National Fire Protection Association Bulletin 96 (NFPA96-2008) - Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations

Life Safety Code

International Fuel and Gas Code (IFGC)

International Energy Conservation Code (IECC)

Each product we sell is listed to and evaluated according to the applicable UL Standard. Testing is done through a certified testing agency and visits to our manufacturing sites are required semi-annually or annually to evaluate the manufacturing process to ensure conformity. See examples below of applicable safety standards for a portion of our products:

Underwriters Laboratories, UL Standard 710 – Exhaust Hoods for Commercial Cooking Equipment

Underwriters Laboratories, UL Standard 1046 – Grease Filters for Exhaust Ducts

Underwriters Laboratories, UL Standard 705 – Power Ventilators

Underwriters Laboratories, UL Standard 762 – Power Roof Ventilators for Restaurant Exhaust Appliances

Performance Standards for some products are also documented via American Society of Testing and Materials (ASTM). The products are then tested to the applicable performance standard. See examples below:

ASTM-F2519-05 (2011) – Standard Test Methods for Grease Particle Capture Efficiency of Commercial Kitchen Filters and Extractors

ASTM-F1704-09 – Standard Test Methods for Capture and Containment Performance of Commercial Kitchen Exhaust Ventilation Systems

ASTM-F2474-09 – Standard Test Method for Heat Gain to Space Performance of Commercial Kitchen Ventilation/Appliance Systems

Our fan line must also be evaluated to standards and testing developed by Air Movement and Control Association International, Inc. (AMCA). See some examples below:

AMCA 205 – Energy Efficiency Classification

AMCA 211 – Certified Ratings Program - Product Rating Manual for Fan Air Performance

AMCA 311 – Certified Ratings Program - Product Rating Manual for Fan Sound Performance

In 2010, the Energy Independence and Security Act (EISA) mandated a standard for Premium Efficiency Motors. EISA and its related regulations provide specific definitions for "electric motors" and apply to two subtypes of motors. Each subtype is subject to different energy efficiency standards, but affect 1-500 horsepower range of motors. The mandated move to Premium Efficiency motors included a 20-25% increase in price for the manufacturer, which was in turn passed on to the consumer.

Now, the Department of Energy is looking to regulate commercial and industrial fans and blowers. First, it must be said that the fans comprise a small fraction of the energy consumed in commercial and industrial buildings. The fan construction is a small part of system performance. The size, installation, operation and how the fan is controlled all play a large role in fan efficiency. Controlling these influences would have better efficiency gains than the marginal impact of increasing the fan alone. If a ventilation manufacturer spends development time on meeting the new fan regulation, then less time will be spent on new technologies and finding opportunities to save energy.

Private Sector innovation for Kitchen Ventilation Industry, in regards to energy savings, has increased. Three examples of this innovation can be seen in Demand Ventilation, the use of Electronically Commutated (ECM) Motors and the increase of solid state controls.

Demand ventilation is an older, but quickly growing concept, where variable frequency drives (VFD) are used to decrease or increase fan speed based on actual cooking conditions. The use of variable speed fans to reduce off-peak energy loads has increased within our company. By reducing fan speeds by 20%, a savings of up to 48% of fan energy can be saved. Our consumers understand this technology and our sales of demand ventilation have increased by 20% each year for the last 5 years (2007-2012).

The use of ECM (Electronically Commutated) motors is also increasing in the industry and being specified more frequently. Standard fraction horsepower motors are 65-75% efficient, whereas ECM motors are 80% plus efficient.

Solid state controls focus on overall building monitoring; individual pieces of equipment can be monitored and controlled, as well as points like temperature and humidity are recorded. Data is reported via a browser capable device such as an iPhone or personal computer. By viewing the overall building and analyzing data, this will allow greater reduction in energy consumption.

Given that the cost of fan energy is relatively small and given that manufacturers are using known technologies to gain efficiency – is this really an area that the Federal Government should regulate? We are on the cusp of major innovations and increased regulations will stunt this progress. This is just one example of how, too often, the Federal Government inserts itself into areas where the industry is already busy innovating. Innovation means better execution, satisfied customers and ultimately a more robust economy.

Conclusion

The best way to empower entrepreneurs and encourage small business owners is to establish a moratorium on new regulation. Ultimately, it is my belief that the American Dream -- a Dream that I have been fortunate to live -- is predicated on the free enterprise system.

Codes and regulations in the Commercial Kitchen Ventilation Industry have impeded energy saving technologies. Many manufacturers compete on the basis of performance, energy savings and lower cost. Some areas of the country, such as the City of Chicago, refuse to modernize by reducing exhaust flow for commercial hoods; a concept of listed hoods and lower airflows is now accepted by most code authorities.

The creative genius of free market entrepreneurs and their hard working employees has solved enormous challenges over the past 150 years and is the greatest single force for innovation, which produces safe, energy efficient technologies. This process bolsters America's competitiveness in the world, increases exports, our GDP and creates the jobs of the future. Thank you, and I look forward to your questions.

Testimony of Bob Luddy

Founder and President

CaptiveAire Systems, Inc.

Raleigh, North Carolina

U.S. House of Representatives
Committee on the Judiciary
Subject: *Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery*
Date: Thursday, September 20, 2011
Location: Room 2141, Rayburn House Office Building

CaptiveAire Systems, Inc.

Manufacturer of Commercial Kitchen Ventilation Systems

- 1976 - Bob Luddy founded with $1,300
- 1984 - Changed focus to Kitchen Ventilation System (KVS), 51 employees
- 2000 - Largest manufacturer of Kitchen Ventilation in US, 400 employees
- 2012 - Five plants in the US, Major investment in new technologies and energy reduction, 700 employees
- 2016 - Projection of 8 plants total and 1000+ employees, Estimate 10% of sales for export

Proposed Fan Regulations

- DOE pending regulation of commercial, industrial fans and blowers
- Fan Efficiency:
  - Small fraction of the energy consumed in commercial and industrial buildings
  - Size, Installation, Operation and How the Fan is Controlled - greater influences than the attempt to increase the efficiency of the fan alone

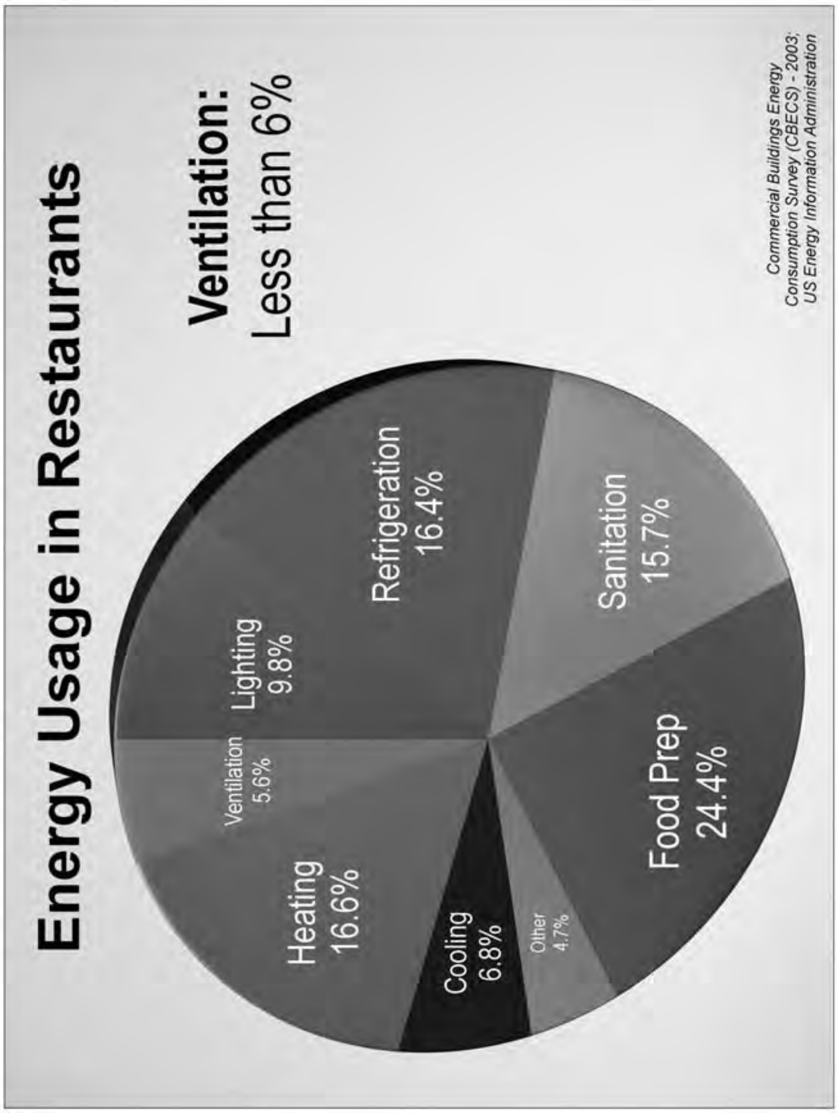
Existing Regulations

- Premium Efficiency Motors:
  - Energy Policy Act (EPAct) 1992 released, updated in 2005
  - Energy Independence and Security Act (EISA) passed in 2007 - move to Premium Efficiency mandated by 2010
  - Premium Motors are 20-25% higher in price, passed on to the customer with upgrade
- Small AC Motor Efficiency Regulation - DOE ruled in 2010 to regulate general purpose small motors, will go into effect 2015
- Most motors are imported

Current Code Requirements

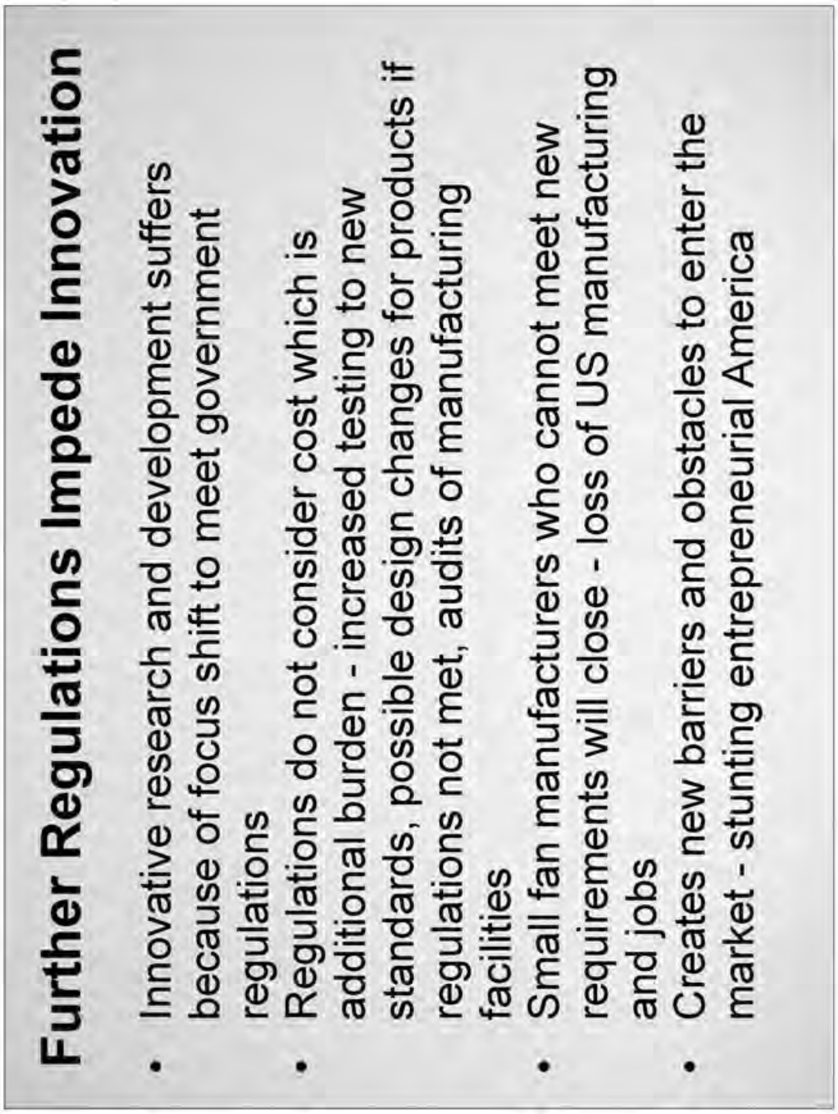
- *ASHRAE Energy and Design Standards*:
  - Standard 154, 90.1, 189, 62.1 and 62.2
- *Mechanical Codes:*
  - International Mechanical (IMC), Uniform Mechanical (UMC), NFPA 96, International Energy Conservation (IECC), International Gas & Fuel (IGFC), Individual State and Local Codes
- *Product Safety Standards:*
  - Standard UL 1995, 507, 705 and 762
- *Air Movement & Control Association (AMCA):*
  - AMCA 205, 210, 211, 260, 300 and 311

Significant Amount of Codes to Meet Currently


Energy Usage in Restaurants
Ventilation:
Less than 6%
Refrigeration
16.4%
Sanitation
15.7%
Food Prep
24.4%
Other
4.7%
Cooling
6.8%
Heating
16.6%
Ventilation
5.6%
Lighting
9.8%
Commercial Buildings Energy
Consumption Survey (CBECS) - 2003;
US Energy Information Administration

Private Sector Innovation

- **Demand Ventilation:**
  - Use of variable speed fans to reduce off-peak energy loads
  - Older concept but emerging quickly: 20% increase per year from 2007-2012 in sales for our company
  - Save up to 48% of fan energy by reducing fan speed by 20%
- **ECM (Electronically Commutated) Motors:**
  - Standard fraction horsepower motors are 65-75% efficient, whereas ECM motors are 80%+
- **Solid State Controls:**
  - Data reporting via browser capable device (iPhone, Droid, personal computer)
  - Overall building monitoring - allows reduction in energy consumption



Mr. SMITH. Thank you, Mr. Luddy.

I will recognize myself to ask questions. But first I want to put into the record, without objection, a study that was just released yesterday.

[The information referred to follows:]

AMERICAN ACTION FORUM

President Obama's $488 Billion Regulatory Burden

Wed, 2012-09-19 04:26 | Regulation | Sam Batkins [1]
[2]

The Administration has created $70 Billion in Regulations in 2012 Alone

As the mountain of regulations has grown so has the focus on the regulatory state, its impact on employment [3], investment [4], and "uncertainty [5]." President Obama and his former regulatory advisor, Cass Sunstein, have of course defended the Administration's record. The President has even authored four executive orders on regulatory reform and retrospective review. After nearly four years in office, the President's record on regulations is up for review.

Based on data from the Government Accountability Office (GAO) and regulations published in the *Federal Register*, the Administration has published more than $488 billion in regulatory costs since January 20, 2009 – $70 billion in 2012 alone.

Ignoring all non-"major" rules with costs in 2009, the regulatory tally still surpassed $61 billion. In 2010, counting only "major" rules, the regulatory bill rose to $160 billion in lifetime costs.

AAF began tracking every proposed and final rule in 2011. That year alone the Administration published more than $231 billion [6] in regulatory costs. AAF reviewed 6,705 regulations in 2011 and has tracked more than 4,700 regulations to date in 2012.

For each entry, AAF determined if a proposal contained a private-sector cost, a burden on state or local governments, or paperwork reporting requirements. Generally, *Federal Register* entries contain annualized or one-time compliance costs. For larger regulatory overhauls, however, where compliance takes several years, AAF recorded the total programmatic costs, if the agency provided those figures.

For example, the Regulatory Impact Analysis for EPA's model year 2017 to 2025 fuel efficiency standards stated that the lifetime costs of the regulation would eclipse $156 billion.

The White House routinely responds to charges of "overregulation" by touting its efforts to reduce regulatory burdens and produce net benefits. There are 59 executive-level and independent agencies that submit regulatory plans to the White House. Many of the costs and benefits are never quantified – in other words, the full impact of the Administration's regulatory burden is not yet fully appreciated.

For example, the Consumer Financial Protection Bureau's (CFPB) first rule established new requirements under Dodd-Frank for remittance transfers. CFPB estimated that the rule would impose more than 7.6 million paperwork burden hours, affecting banks large and small. The stated costs for these burdens: $0. As an independent agency, CFPB is not legally required to monetize all possible burdens on private entities and states, but it is safe to say that there will be a cost greater than $0.

These paperwork burdens are real, often ignored, and continue to grow. According to White House data, there were 8.8 billion hours of federal paperwork in FY 2010. The implementation of Dodd-Frank and the Affordable Care Act has driven this figure to 10.38 billion [7], an increase of 1.5 billion hours. To put this increase in perspective, assuming a 2,000-hour work year it, would take 771,999 full-time equivalent employees simply to fill out red tape. Or, during the same amount of time, workers could construct 220 Empire State Buildings [8].

This quantifiable spike in regulatory burdens is likely one reason that the White House has issued four executive orders on regulatory reform. In 2012, agencies followed through on the orders and rescinded $2.4 billion in regulatory costs.

Unfortunately new policy initiatives have largely erased these savings. The Affordable Care Act has already imposed $27.9 billion [9] in lifetime burdens, and the law won't be fully implemented until 2014. Dodd-Frank has imposed more than $14.2 billion [9] in costs, with countless regulations evading quantified cost-benefit analyses.

Conclusion

The estimated $488 billion is not a ceiling, but a floor of the Administration's regulatory record. Independent cost estimates routinely report higher figures [3] than initial government estimates. All of these numbers are from the government's own estimates and the 2009 and 2010 numbers exclude non-"major" rules. As a cost floor, $488 billion is still a tremendous burden on private entities and local governments. It is more than U.S. GDP growth from the past three quarters ($442 billion).

Based on this data, the current regulatory burden is undoubtedly higher than it was in 2009. If this were untrue, there would be little need for executive orders and countless informal memos begging agencies to cut burdens. The Administration admits reform is needed, but after $488 billion in new costs, the results have been entirely illusory.

Top 5 2012 Regulations By Costs	
Final EPA Utility MACT Regulations	$10 Billion
Final DOJ Prison Reform Standards	$6.9 Billion

Final CMS Community First Choice Option Implementation	$5.7 Billion
Proposed Department of Energy Distribution Transformer Standards	$5.2 Billion
Final SEC Conflict Minerals Rule	$4.7 Billion

Top 5 2012 Regulations By Paperwork Burden	
Final CMS Medicaid Expansion Under PPACA Implementation	21.3 Million Hours
Final FCC Lifeline and Link Up Implementation	21.1 Million Hours
Final CFTC Swap Data Recordkeeping/Reporting Requirements	19.4 Million Hours
Final OSHA Hazard Communication Standards	11.3 Million Hours
Final CFPB Electronic Transfer Fund Regulations	7.7 Million Hours

Top 5 Agencies By Costs in 2012	
Health and Human Services	$16.7 Billion
Environmental Protection Agency	$12.1 Billion
Department of Energy	$10.6 Billion
Department of Justice	$6.9 Billion

Securities and Exchange Commission	$6.2 Billion

Methodology

AAF derived these figures from GAO "Major Rule Reports" and the *Federal Register*. Under the Congressional Review Act, all departments, including independent agencies, must submit reports to GAO and Congress if a rule is "major," defined as a regulation likely to result in: "an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers ... or significant adverse effects on competition, employment, investment, productivity, [or] innovation."

Source URL: http://americanactionforum.org/topic/president-obama%E2%80%99s-488-billion-regulatory-burden

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[6] http://americanactionforum.org/topic/2011-year-regulation-executive-summary
[7] http://www.reginfo.gov/public/do/PRAReport?operation=11
[8] http://www.history.com/this-day-in-history/herbert-hoover-dedicates-empire-state-building
[9] http://americanactionforum.org/rodeo-database

Mr. SMITH. And this was a study that was done by a former CBO director, and let me read a sentence out for all of us. "Based on data from the Government Accountability Office, GAO, and regulations published in the Federal Register, the Administration has published more than $488 billion in regulatory costs since January 20, 2009, $70 billion in 2012 alone," which of course has not yet ended. That just confirms of course what many of us have been saying. And again, this is a former CBO director relying upon data from the Government Accountability Office.

Professor Taylor, let me direct my first question toward you, but you have actually done a good job of answering my question. I was going to ask you what the impact of the record number of regulations and the atmosphere of uncertainty they have created for business has been on the economy. You gave a lot of statistics I think pointing that out.

Is there anything you want to add more generally about the impact on the economy, or how the economy might have performed if we had not have had these stifling regulations imposed on businesses?

Mr. TAYLOR. I think I could add one——

Mr. SMITH. Turn on your mic, if you will.

Mr. TAYLOR. Other recent study by some researchers at the Federal Reserve Bank of San Francisco that tried to quantify the policy uncertainty as well that corroborates some of the research I referred to.

It is always difficult to judge what would have been had there not been what I consider this expansion of regulatory activity in the last few years. And to me, the best thing you can do is look at history, and I think Mr. Gray and I both referred to the expansion in the early 1980's. And this is '83, '84, '85. And it was a good expansion. Growth, 5.7 percent on average during that period compared to 2.2 percent now.

And if you look at the regulatory part of that, it is quite striking. That was a period where it was a reaction to the excesses in the 70's. This should not be partisan. It began to be addressed at the end of the Carter administration, and regulations were adjusted, and the number of Federal workers came down involved in this activity. And the number of pages in the Federal Register came down.

And that was part of the reason—not the whole reason that was part of the reason why that expansion was so strong I think. And more recently you have the opposite, and this expansion is slow. And it is not just the regulatory activity of government. I think it is other aspects of government as well. I would mention the uncertainty about the tax policy, the fiscal cliff, the uncertainty about these stimulus packages—Cash for Clunkers. It all adds up, I think, to be quite remarkable when you look at history. And I think it is a big factor.

Mr. SMITH. Okay. Thank you, Professor Taylor.

Ambassador Gray, you mentioned in your testimony the various pieces of legislation that this Committee has approved that have also passed the House floor. Had those bills been enacted, what impact do you think they would have had on the regulatory atmosphere or the uncertainty that businesses face in regard to regulations?

Mr. GRAY. I think they would have had a very beneficial impact on what we now see. It is again difficult to quantify, but we do have these examples from the Reagan period, from Europe, fairly recently in Germany. We have the now unified west by the European business community to work out arrangements that would codify much of what you have already or this House and this Committee in this House has already adopted in terms of providing clear guidance to regulators to eliminate their unbridled discretion, to make sure that benefits exceed costs.

It is not to eliminate regulation, but it is to make it something that a businessman, an investor, small or medium or large, can predict in trying to determine how to create jobs.

Mr. SMITH. Okay. Thank you, Ambassador Gray.

Mr. Luddy, thank you for the practical experience you bring to the table today. I am tempted to call Mr. Entrepreneur. You and your colleagues or other business owners, and operators, and founders have been the mainstay of our economy ever since the founding of our country.

My question for you is basically, how much more difficult have the implemented regulations and the proposed regulations made it for individual entrepreneurs to start a business in America today compared to before these regulations went into effect?

Mr. LUDDY. Substantially more difficult and very frustrating because, first of all, it is hard to determine what the regulation means on the ground, because in terms of code authorities, you have the written code, you have approval of the code, and then you have a local authority having jurisdiction making a final decision at inspection.

So what happens is everybody focuses on trying to please these people rather than saying how can we produce the best possible system in the world. It takes away from the innovative focus. For smaller companies to meet these requirements without a substantial amount of money and expertise, it just really cannot be done.

Mr. SMITH. Okay. Thank you, Mr. Luddy. That concludes my time. And the gentleman from Michigan, Mr. Conyers, is recognized for his questioning.

Mr. CONYERS. Thank you, Chairman Smith. Professor Heinzerling, could you help Mr. Luddy, who we praise for his inventiveness and ingenuity, feel a little better about the regulatory process and how he thinks it has curtailed the inventive spirit here in this country?

Ms. HEINZERLING. I hope so.

Mr. CONYERS. Give it a try.

Ms. HEINZERLING. I think that one piece of advice I would have in that spirit would be as I said at the outset, to focus on the good things that regulation does. Regulation is aimed at, in large part, economic problems and problems that even though not, strictly speaking, are economic. They are aimed at cleaner air, cleaner water, things that I think entrepreneurs even find satisfactory and good. And so it seems to me that there is not a necessary inconsistency between that kind of spirit and the spirit of regulation.

I will also say that having spent 2 years at EPA, I will say that there is an entrepreneurial spirit there as overregulation well. And it often gets overlooked in these debates, but what I saw every day were people trying to make regulations as creative, as flexible as they could. And that those two things combined—the regulatory benefits, the aims of regulations, and I think the spirit among the agencies of trying to help unleash flexibility, but within the constraints of protecting people against harm—seem to me may be a little hopeful.

Mr. CONYERS. Thank you so much. I wanted to compliment Mr. Gray, who very specifically said that this is not a hearing against all regulations per se. It is a matter of reasonableness in regulations, and that some regulations are necessary and important. And I thought that that was a good way to frame the basis of your remarks.

Now could I ask you, Professor, another question about what triggered the depression of '29 and the current great recession? And was there any role of a regulation or non-regulation involved in these two great disasters in American economic history?

Ms. HEINZERLING. I will say I am a law professor. I am not an economist. But what I understand is that some de-regulation preceded both economic crises, or at least a lack of regulation preceded both. And what we saw in the period following the '29 crash and the following depression is a wave of regulatory activity that was we called a New Deal, that was intended to correct for the economic problems that had occurred, and so that it would not be surprising at all to see what we are seeing today, which is an effort to correct for the lack of oversight and a lack of regulation that helped, in part at least, get us where we are today.

And it always surprising to me to hear testimony that sounds like it is suggesting that the way to get out of our current crisis is to return to the conditions that immediately preceded it.

Mr. CONYERS. Thank you. I want to ask this question and invite any of our distinguished witnesses to respond, even more than one if they care to. And it concerns the former Federal Reserve chairman Alan Greenspan's remarks. He opposed regulation of the practices that allowed subprime mortgages to be bundled into larger securities and sold to investors.

He later testified, "I made a mistake in presuming that the self-interests of organizations, specifically banks, and others were such as that they were best capable of protecting their own shareholders and their equity in the firms."

Do any of you concur with Chairman Greenspan's change of heart in the aftermath of the great economic downturn that we recently experienced?

Mr. LUDDY. All industries make mistakes, sometimes terrible mistakes. But they correct for those mistakes. If the government passes a new law every time we make a mistake, and eventually we will not make any more mistakes because we cannot do anything.

Mr. CONYERS. Anyone else have a response? Yes, sir, Mr. Taylor.

Mr. TAYLOR. In my testimony, I refer quite extensively to Mr. Greenspan's views of the recent regulatory changes in the financial area. And I think that is important to add to what you say. He is very concerned that there are so many rules that have to be written now by the regulatory agencies that it is really a major interference in the financial system. And he speaks from experience. When he was chairman, he would have to write 3 or 4 rules a year.

And now they have 200 or more to write. So it is a massive undertaking.

And I think the problem here is, of course we should regulate. Of course we should regulate. But we have gotten to the point where we so much micromanaging in the regulation that we are interfering with how businesses operate. So there are alternatives to do this. And with respect to financial institutions, more capital requirements and adequacy rather than so many rules being written.

So I think that is important to add, sir.

Mr. CONYERS. Thank you. Mr. Gray?

Mr. GRAY. I am not sure that Mr. Greenspan really was taking the full picture into account. The fact of the matter is that Fannie Mae and Freddie Mac and some of the U.S. policies were so welcoming to these subprime mortgage package deals—Countrywide was a favorite partner of Fannie Mae and Freddie Mac—could not have done what they did without the encouragement and partnership of Fannie Mae and Freddie Mac, which was, of course, a government supported entity.

And they invited the banks in, and I am not sure I really blame the banks for taking the invitation to this government largesse, complicated by the fact that the rating agencies, another government monopoly, without competition, were rating these packages as triple A when they were clearly not.

I think that Dodd-Frank would have been much more responsive had it dealt directly with the Fannie Mae problem and not dealt with a lot of other issues that had nothing to do with the crisis itself.

Mr. CONYERS. Thank you, Mr. Gray. The last word goes to Professor Heinzerling, if you would like to comment, ma'am.

Ms. HEINZERLING. I think that kind of turnabout and change of heart is worth paying attention to.

Mr. CONYERS. Thank you very much. Thank you, Mr. Chairman.

Mr. COBLE. [Presiding.] Thank you, Mr. Conyers. I apologize for my belated arrival. I had 2 other hearings to go to. I would remiss if I did not especially welcome the entire panel, but particularly 2 North Carolinians. Good to have you both here. Good to have all 4 of you here.

I will delay my questioning until later, and will recognize the distinguished gentleman from Arizona for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman. Thank all of you for being here.

Mr. Luddy, my first question is first to you. I was very impressed with your record as a small businessperson and the jobs you have created, the way that you done things. I happen to have come from the same kind of background. I did not create quite as many jobs as you did, but it was something that gives me a sense of the challenges that you faced.

And I know what it is like to be up against a Federal Government that is mostly comprised of folks who have not had to walk in your shoes. They have not had to be accountable to regulators or even to employees. They have not had to make payroll. The existing head of state I do not think has ever had to make payroll in his life before entering the White House.

The regulators seem to consider regulation sometimes in a vacuum and with no consideration for the uncertainty that regulations create. And while regulators are generally required to consider the cost of their regulations, it is the cost that are obvious and quantifiable. The larger costs to people like you or me or the American worker may be intangible, unquantified costs of uncertainty.

Where there is uncertainty, a small businessman or woman cannot plan for the future, as you know. It is impossible really to know if you can afford to expand operations or hire employees or if you simply do not.

So my question is, have you found this to be true? What is the impact of this uncertainty in your line of business or among small businesses across the country, this uncertainty factor? How much do you emphasize that, and how does regulation bring that about, and how much does it affect you in your small business?

Mr. LUDDY. Well, it is absolutely huge when you think about when we design jobs all over North America. Almost down to the zip code, we have to determine what that code official is going to expect for a particular job. So if you, an engineer, are designing for national chains, he has got to be up to speed on every one of those, and he is not going to be right all the time. So it is a formidable challenge.

To give you an example on environmental permits to build a simple building, which used to cost about $10,000 in engineering now costs between $100 and $150,000. I think the engineering community loves it because obviously they are taking in a huge amount of revenue. But for a building owner, a lot of buildings are stocked in the tracks right there because a small businessperson does not have that kind of money. That promulgates to HR, building codes, et cetera.

So the challenge are formidable. And you have to also remember that the challenges of running a business without all the regulation are formidable to begin with. As you lop on more and more regulation, for the average person it becomes very hard to build a large business.

Mr. FRANKS. Yeah. Well, I wish more people had your perspective and could understand the challenges you face, and that you are the core building block of this economy. And I certainly appreciate your testimony today.

I will shift my questions to Professor Taylor. You wrote in a recent Wall Street Journal op-ed that the solutions to our economic problems are, to use your quote, "blindingly obvious." I happen to agree with you. But do those solutions in your mind include the regulatory reform legislation that this Committee has passed? Could that be part of that?

Mr. TAYLOR. Yes, sir. I think looking through the actions, as I mentioned in my testimony. They are focused on accountability, transparency, emphasizing what good economics is, cost benefit analysis. And, in addition, calling for the best data possible. So it seems to me that is really, in terms of the regulatory area, what we need.

And of course when we say "cost benefit," we emphasize the benefits, too. But the point here is when there is so little accountability or there is not emphasis on this, we are leading, I think, to the excesses that are a big factor in the slow recovery we have.

Mr. FRANKS. Well, let me follow up a little more on that. You know, President Clinton claimed that no President could have repaired all the damage of the recession in his 4 years. But my memory says that Ronald Reagan repaired similarly severe damage in much less time. And was regulatory reform not a big part of how President Reagan was able to repair that damage? And could regulatory reform like this Committee has passed not be a big part of repairing the damage in this economy?

Mr. TAYLOR. Yes, I believe so. I think the regulatory reform should be viewed as another way to have a stronger economy and create more jobs. And if you look at the period you are referring to, the recovery from a very deep, serious recession in the early 80's, part of that was a period of reducing the regulatory excesses in the 70's where they grew dramatically. And so it was an offset to that.

And there is data that show what happened in terms of regulatory activity. It is remarkable. And we had a strong recovery. We cannot prove that is the reason. I think it is a big factor. There are other factors, too. And now we have a weak recovery, and we are, if you like, re-regulating. All the measures we have show a greater degree of regulation, and I think that should be a real concern.

And so in my testimony, when I mentioned efforts to block regulatory reform, to me, to be candid, are efforts to block job creation bills. And I think that is the way it should be examined.

Mr. FRANKS. Well, thank you. And thank you, Mr. Chairman. Thank you all for being here.

Mr. COBLE. I thank the gentleman. Professor Taylor, I am told you that you have a flight to catch, so I would ask Members if we could to confine our questioning to 5 minutes if that can be done to get you in the air in a timely way.

The distinguished gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Professor Heinzerling, what would be the consequences to public health and safety if one or more of the regulatory bills mentioned by your fellow witnesses were actually to be enacted?

Ms. HEINZERLING. I think they would be bad the consequences for public health and safety. These bills, if you read them end to end, they are incredible in their imposition of further analytical requirements on agencies. As I said, agencies are already overburdened with their requirements.

Each of these bills or many of them favor cost benefit analysis, which is uniquely equipped to make the benefits of environmental regulation look small and make costs look larger than they are. And I have written about this in a book called Priceless. But it is skewed against regulation.

To the extent that you further entrench that methodology in judging regulation, I think that the consequences for health and safety regulation will be dire.

Mr. SCOTT. And what is the problem with letting the private marketplace protect our health and safety?

Ms. HEINZERLING. I think that you can look all around you and see the consequences of that in unsafe products, in food safety scares, real problems. You can see that in the pollution that we endure. You can see that every time we are told that we should not go outside because the pollution is too bad in the summer.

There are many different ways in which these problems exists and cry out for an answer. And almost by definition, the market will not take care of them because the market does not encourage entities that are responsible for the problems to take into account those kinds of social consequences.

Mr. SCOTT. How does the present regulatory process differentiate good, cost-effective regulations that protect health and safety from unnecessary regulations that destroy jobs and do nothing to protect health and safety?

Ms. HEINZERLING. There are many, many safeguards built into the current system. Again, I think there are more safeguards than there need to be. If you look at the number of different analyses that are necessary for any rule to come out, it is a wonder that anything gets done.

But the safeguards that are built in are analytical requirements. This White House, I am happy to hear about the benefits of the Reagan regulatory reform plan because that is essentially what the Obama administration has done with respect to regulation is to impose a cost benefit framework on regulation. And so that to me, the current system has many safeguards in place against unnecessary regulation, against ineffective regulation. It has many encouragements of more cost effective regulation as well.

Mr. SCOTT. What would happen if we allowed, as some of the bills would do, any private party "affected by potential regulatory action" intervene in a lawsuit?

Ms. HEINZERLING. You know, that is a striking proposition to me. If you just step back and think about what these lawsuits are, they are aimed at agencies that have deadlines, deadlines set by Congress. Congress has set those deadlines.

And when the agency decides to settle one of those lawsuits, what it basically is thinking is we do not really have a good defense to delay action forever. And so they try to come up with a schedule for regulating. If you allow intervention, you just complicate the process.

One of the things that is striking to me is if you talk about uncertainty, in many cases that is really just a byword or a substitute for de-regulation. The kind of uncertainty that is talked about here really cuts only in one direction. We like it when it leads to less regulation and not when it leads to more.

Mr. SCOTT. Thank you, Mr. Chairman. I yield back.

Mr. COBLE. I thank the gentleman from Virginia.

The distinguished gentleman from Iowa. Did you hear what I said about Professor Taylor, Steve? He has a flight to catch, so we will try to move it along.

Mr. KING. Okay. Thank you, Mr. Chairman, and I will do my best to do that.

I would first point out that as I have watched the——

Mr. COBLE. If I can suspend for a moment, we will keep the record open for 5 days in any event, but proceed.

Mr. KING. Thank you, Mr. Chairman. I have watched this regulation grow and the burden of regulation grow. I started a business in 1975. I found out some years later that there were 43 different government agencies regulating my trade. It was impossible for me to know all of those regulations.

I would point out that there is probably not a single company in the United States of America that has a little banner on their website that says “Notice we are in compliance with all Federal regulations.” The reason for that is because if they did so, Federal regulators would go in and prove them wrong. It is not a very good cost benefit and return to do such a thing.

And so we have brought some things that incrementally addressed the regulation and the overregulation of the Federal Government. But I sometimes like to take a look at what would be the optimum that we can do? How would you get this to perfection, and then how do you move in that direction so that we have got a target?

And it looks to me like this, that Congress has handed over the rulemaking to the agencies because they did not want to deal with all of the components of that. It was too burdensome. And so we have regulations that go on in perpetuity that are not challenged again, and the only way you really do that is to mount a national movement to try to get the votes here on the floor to nullify a rule. I actually have brought one of those nullifying pieces on capping the calories of our kids in school just here within the last few weeks.

But what is optimum? And I want to pose this and ask the witnesses down on the panel for your reaction, and that is my legislation, which is the Sunset Act does this: it sunsets incrementally all Federal regulations over a period of 10 years, asking the agencies directing them to offer up 10 percent of their rules per year for a period of 10 years where Congress could reauthorize them, all on en bloc, or a Member can separate a rule out and have a separate vote on that rule, or amend that rule.

I think it does 2 things: it gets a lot of the overregulation out of the books, and it makes the bureaucrats then listen to the people who are affected by those rules before they write them, because they know that those people that are the subject of the rules can then come back to a Member of Congress and ask them to bring that rule out and pull it out separately for a separate vote.

I mean, that is a big concept to toss out here, and I know that I have not made it available to any of you. But I would like to start, if I could, on my left, Professor Taylor, and if I could ask the witnesses to comment on such a concept to try to clean this up so the voice of the people is better heard within our regulators.

Mr. TAYLOR. Well, from what you said, it seems to me it is making a good effort to deal with this real difficult problem of the Congress stating in broad terms what should be done and delegating to the agencies the details. And that is always a problem.

I think in the case of the recent financial legislation, it is just so obvious that too much has been delegated, if you like. Hundreds of rules have been asked to be written very quickly.

So I think a suggestion like that makes sense. I would have to look at the details before us, but it really gives the Congress back the responsibility to considering the rules in a kind of a regular, sensible basis.

Mr. KING. Thank you, Professor. Mr. Gray.

Mr. GRAY. I agree with that answer. I would add that reviewing old regulations, whether it is at the agency or Congress, may be better to have the regulation come up in here in Congress. It would be very salutary. Regulations attract, like a ship does barnacles, certain special interests, and they favor special interests over small businesses who want to get into the business. And rules really should be reviewed by Congress on a periodic basis.

Mr. KING. Thank you, Mr. Gray. Professor Heinzerling?

Ms. HEINZERLING. I would like to say 2 things. One is that the——

Mr. COBLE. Professor, pull your mic a little closer. Professor?

Ms. HEINZERLING. Yes?

Mr. COBLE. If you would, pull the mic a little closer to you.

Ms. HEINZERLING. I cannot. It is stuck.

Mr. COBLE. Oh, I am so sorry. Okay.

Ms. HEINZERLING. But now it is on.

Mr. KING. That helps. I can hear you.

Ms. HEINZERLING. The power rests with you. You do not need a new statute in order to take back the authority that you have. You have that authority. And so with any regulation that you do not like, you always can overturn it. That is within your power. I think Congress should act more. We should have more of a debate about exactly what regulations should do and what it should not do rather than this debate.

The first thing is without that statute, you have that power. The second thing, if you are worried about uncertainty, I would think that you would be worried about a statute like that that will take effect with unpredictable consequences on existing regulation, that people have already spent money getting up to speed on. And so you will have some people up to speed, some people not. People who are up to speed may feel unfairly treated if it is pulled back.

It just seems if uncertainty is the concern, I am not sure it is the best fit.

Mr. KING. Thank you. Mr. Luddy?

Mr. LUDDY. The pace of innovation is so quick today that I agree with your idea. Ten years to me is a long time because innovation is so rapid. If you look at the case I cited, City Chicago has 1950 ventilation rules. We are 60 yeas down line from then, so a 10-year statute might have corrected that problem.

We lobby with these groups to update their codes, but it is not an easy thing to do for any small business, or even a big business.

Mr. KING. Thank you, Mr. Luddy. And, Mr. Chairman, that is H.R. 6333, the Sunset Act. I thank the witnesses and you, and yield back the balance of my time.

Mr. COBLE. Thank the gentleman from Iowa.

The distinguished lady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much. I thank the Chairman and the Ranking Member for this hearing, and I thank all the witnesses for their presentation today, and express always an interest in creating opportunities, Mr. Luddy, for small businesses. I imagine that most Members would consider themselves champions of small businesses. In fact, for the record, I consider them the economic engine of this country, and the potential job creators going into the 21st century.

I think at that point we may have a difference of opinion in terms of framework. I truly believe that the concerns of small businesspersons as the regulatory scheme is structured should be responded to and it should be monitored.

And I would just ask you this brief question: would it be responsive that as the huge Federal Government regulates and passes regulations, and as the comment period that goes along with the regulatory structure, would it also be of help to have a more rapid response to the concerns of small businesses when they note that the regulatory structure in place intended for good may have a negative impact? Do you also see the issue of response time that could be improved?

Mr. LUDDY. Certainly it could. But keep in mind that a small businessperson, it is almost impossible for them to deal with the Federal Government. It is too vast. They do not have the resources. They do not have the time. They are literally just hoping to survive another day, another week, and another month. So to have them part of that process is extraordinarily challenging. Yes, improved response would be very helpful.

Ms. JACKSON LEE. My point would be, and I think every time I have seen a small business issue, most times I have seen large associations, which they can be a member of. Certainly the individual in their house with a computer and a desk might be a little challenging. But what I am suggesting is that most times, for example, if you see a McDonald's, you know that they are part of a franchise, though that may be an individually-owned McDonald's. You know that McDonald's speaks for those owners here in Washington. So I do think there are lines of communication.

And the point I am just making is that if there is anything that I think would be important out of this hearing would be the fact that a listening ear to the issues being raised after there is the recognition that there is a negative impact.

I do not agree with the premise of this hearing that the regulatory scheme hinders, if you will, the economic opportunities of Americans. And I raise as the point of contention is whether or not we could look at the landscape of Spain and Greece and Italy and suggest that their economy has been totally related to the lack of the over excessive regulatory scheme. Or in the alternative, you could look at developing Nations who are attempting to establish OSHA rules, i.e., safety rules as I have traveled internationally and seen clean water rules, regulations for food, to make them more of a developed Nation.

So the regulatory structure from my perspective is valuable. So let me just add for the record, if I could put into the record "Regulatory Nonsense." Mr. Chairman, I ask unanimous consent to put this article into the record. Can I put this into the record?

Mr. COBLE. Without objection, it will be entered into the record.

[The information referred to follows:]

Center for American Progress

Regulatory Nonsense

Seven Must-Read Articles Debunking Conservatives' Antiregulatory Agenda

SOURCE: AP/Charles Dharapak

President Barack Obama speaks about tougher regulations on banks that would limit the size and complexity of large financial institutions. Conservatives are currently pushing an antiregulatory agenda that is intellectually bankrupt, economically nonsensical, and utterly without basis.

By Kristina Costa **and** Michael Linden **| November 18, 2011**

Conservatives are working around the clock to convince Americans that government regulation is at fault for the slow pace of domestic job creation. They've set up this straw man to distract attention from the fact that they don't have a credible plan to actually boost employment, and that they oppose the American Jobs Act, which independent economists say will create as many as 1.9 million jobs.

But the more conservatives push this line, the more scrutiny it's getting. The results aren't pretty. Over the past several weeks, numerous reports expose this antiregulatory agenda for exactly what it is—intellectually bankrupt, economically nonsensical, and utterly without basis.

These reports come from a wide range of sources, including official government agencies, nonpartisan think tanks, and even national media outlets. So what's the truth about conservatives' regulatory bogeyman? Here's your required reading list.

- Bloomberg: Fewer new regulations under Obama than under Bush
- *The Washington Post*: Economists say regulation doesn't cause job losses, even in high-polluting industries
- U.S. Department of Treasury: Exposing the uncertainty canard
- Economic Policy Institute: Regulation is a red herring. The real problem is demand
- *The New York Times* Economix Blog: "Republicans have a problem," says Bruce Bartlett
- Bureau of Labor Statistics: Employers say regulation does not cause job losses
- Slate Magazine: Smart regulations matter to communities across America

Here's a quick analysis and most telling quotes from each of these reports.

Bloomberg: Fewer new regulations under Obama than under Bush

Republicans and conservative interest groups complain about a supposed uptick in the number of regulations approved in the Obama administration, but President Barack Obama has approved 5 percent fewer regulations than George W. Bush had by the same date in his presidency, according to an October analysis by Bloomberg. Moreover, the cumulative costs of regulations approved by the Obama administration are still below the fiscal year 1992 peak achieved by George H. W. Bush. Even if the highest cost estimates of Obama-era regulations are correct, the total is at most three one-hundredths of 1 percent of the economy.

Key quotes

"Obama's White House has approved fewer regulations than his predecessor George W. Bush at this same point in their tenures, and the estimated costs of those rules haven't reached the annual peak set in fiscal year 1992 under Bush's father, according to government data reviewed by Bloomberg News."

"The Department of Interior...says that new controls on deep-water oil drilling will cost the industry $180 million; one well blowout could cost $16.3 billion."

***The Washington Post*: Economists say regulation doesn't cause job losses, even at high-polluting industries**

In a long article investigating the evidence that regulations cause job losses, reporter

Jia Lynn Yang concludes that economists who actually study this say that regulation has no discernible net effect on big-picture employment in a given industry. The reporter cites Richard Morgenstern, for example, who worked in the Environmental Protection Agency during the Reagan administration, as one author of a major study analyzing the effect of regulations on four industries that produce high levels of pollution. Morgenstern and his co-authors found that increases in industry spending in order to comply with environmental regulatory standards did not cause "significant changes" in industry employment.

In the same *Washington Post* article, AEP, one of the nation's biggest coal-fired utility companies, says it has been retrofitting some power plants, closing others, and opening new, cleaner natural-gas plants, all to comply with clean air regulations. "We have to hire plumbers, electricians, painters, folks who do that kind of work when you retrofit a plant," says AEP CEO Mike Morris. In Conesville, Ohio, a coal-fired AEP power plant hired more than a thousand temporary workers to build a "scrubber" to meet emissions standards and then hired 40 permanent employees to monitor and maintain the new equipment.

Key quotes

"Economists who have studied the matter say that there is little evidence that regulations cause massive job loss in the economy, and that rolling them back would not lead to a boom in job creation."

"[R]egulatory experts say that viewing a rule solely through the lens of whether it will cost jobs misses the point."

U.S. Department of Treasury: Exposing the uncertainty canard

So maybe the number of regulations hasn't spiked under the Obama administration, and maybe some industry leaders are adapting to stricter standards—but surely the oft-cited "cloud of uncertainty," that ominous blot on our nation's economic future, has swelled because of new regulations. Not so, says Dr. Jan Eberly, assistant secretary for economic policy at the Treasury Department.

Eberly points out that if regulations were really "destroying jobs" or stopping businesses from hiring, there would be evidence of negative changes in "one or more of the following: business profits; trends in the workforce, capacity utilization, and business investment; differences between industries undergoing significant regulatory changes and those that are not; differences between the United States and other countries that are not undergoing the same changes; or surveys of business owners and economists."

That's a lot of possible places to find indications of regulatory uncertainty. But not a single one reveals any indication that regulations are holding the country back. Corporate profits have almost reached their pre-recession share of gross domestic product, the broadest measure of total economic activity. Businesses aren't increasing work hours for existing employees, but they are increasing investment in equipment and software, both of which are inconsistent with concerns about future regulations. And independent surveys of business owners and economists point to weak demand, not regulation, as the biggest impediment to hiring more workers.

Key quotes

"If regulation was a significant drag on business today, we would expect to see profits constrained after recent regulatory reforms were passed into law. However, corporate profits as a share of gross domestic income have about recovered their pre-recession peak, and earnings per share in industries most affected by recent regulatory changes, such as energy and health care, have among the highest earnings per share of those in the S&P 500."

"If regulatory uncertainty were having a significant impact on business performance, we would expect this to be reflected in capital markets. However, financial indicators do not provide any evidence in favor of this hypothesis."

Economic Policy Institute: Regulation is a red herring. The real problem is demand

The nonpartisan Economic Policy Institute released a major report and a pithy blog post on September 27 calling regulatory uncertainty a "phony explanation" for high unemployment. Like Dr. Eberly, EPI president Lawrence Mishel points to private-sector business investment and work hours, among other indicators, to show that the economy is suffering mightily from diminished demand.

Mishel further cites surveys of business owners and economists, which consistently rate lack of customers and low demand as the biggest problems facing the economy. "What the heavily politicized trade associations in Washington...are saying does not correspond to the real challenges facing both large and small businesses," Mishel writes.

Key quotes

"Instead of uncertainty about regulations, there is strong evidence that the absence of job creation reflects the continued unwinding of the financial collapse and the corresponding lack of demand. ... The optimal response to shrunken demand when interest rates are as low as they can go and households and firms are still not spending is for government to step in to augment demand."

***The New York Times* Economix Blog: "Republicans have a problem"**

You know your argument is on shaky ground when one of your own says so. Bruce Bartlett is an economist who held senior policy positions in the administrations of Ronald Reagan and George H.W. Bush. In an October column for *The New York Times* Economix blog, Bartlett writes that the conservative claim that deregulation will lead to job growth is "a simple case of political opportunism, not a serious effort to deal with high unemployment."

Key quotes

"Republicans have a problem. People are increasingly concerned about unemployment, but Republicans have nothing to offer them. The G.O.P. opposes additional government spending for jobs programs and, in fact, favors big cuts in spending that would be likely to lead to further layoffs at all levels of government."

"In my opinion, regulatory uncertainty is a canard invented by Republicans that allows them to use current economic problems to pursue an agenda supported by the business community year in and year out."

Bureau of Labor Statistics: Employers say regulation does not cause job losses

Before you run around town calling something a "job-killer," it would probably be a good idea to look at some data. Fortunately, the Bureau of Labor Statistics specifically asks companies that lay off workers in a given quarter to explain why they have done so. In all of 2010, just 0.3 percent of layoffs were the result of "government regulations/intervention." On the flip side, a full 47 percent of workers who lost their jobs in the most recent quarter were shown the door because of diminished demand.

Key quotes

"Business demand factors accounted for 47 percent of the [mass layoff] events and related separations in the private nonfarm sector during the third quarter of 2011."

Of course, this is what many noted economists have been saying for months.

Slate Magazine: Smart regulations matter to communities across America

According to Fox News chief Roger Ailes, there are legions of government employees who "sit in the basement and draw up regulations to try to ruin your life." A more fair and balanced description would be that smart regulations protect the health and safety of families all across the country—and a lack of such regulation can be hazardous.

Take the Galemores of Chanute, Kansas, a family of self-described conservative Republicans. According to this powerful article in Slate, they are on a mission to find out if the nearby Ash Grove cement plant is poisoning their town of 9,000. The plant in question isn't being scrutinized for violating the Clean Air Act because of an exemption for cement kilns that burn hazardous waste as fuel.

Key quotes

"The law allows [the cement plant] to emit greater amounts of some toxic chemicals into the air than the hazardous-waste incinerators specially designed to burn the very same chemicals—including industrial solvents, aluminum-plant waste, and other toxic leftovers from the production of chemicals, pharmaceuticals, and oil."

The real questions to ask about regulations

The conservative case for regulations as job-killers was always weak. But now there should be no confusion. Everyone from independent experts to major media outlets, government agencies to former Reagan officials have come to the same conclusion: Regulations aren't to blame for our economic challenges.

Conservatives are right about one thing, as illustrated by the Chanute case: Regulation is a complicated business. Some complexity, of course, is an understandable and good thing. We live in a large country with advanced technology and diverse industries. But all too often, regulatory complexity is an artificial side effect of determined campaigns by lobbyists for corporate special interests.

"There are businesses that can afford to make the regulatory system more complex to their own benefit," *The Washington Post*'s Suzy Khimm points out. That's a problem—but it's not one that across-the-board deregulation is going to solve. Or as Roger Noll, a Stanford University economics professor, notes, "Whether a regulation is a good or bad idea is not a function of employment in the industry being regulated. The right question is: On balance, does our society benefit?"

One thing is certain: There are 13.9 million unemployed Americans who aren't benefiting from conservatives' rhetorical sleight-of-hand on the role of regulations in our economy.

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Ms. JACKSON LEE. Thank you so very much. So let me proceed with my questions. I do want to thank Mr. Gray. I have seen him often. Thank him for his service to the Nation and others.

There was a quote made that "Companies went through bankruptcy. Now they are back on their feet. That was the right course. It was the course that I fought for." Do you know who made that comment, Mr. Gray? That was the presidential candidate, Mr. Mitt Romney. I think it is the gentleman who offers that he does not represent 47 percent.

And the reason why I have raised that is because these are kinds of, I think, destructive comments that play into, if you will, the not seeing as an even playing field, that regulations have their role. And what I believe we should be addressing is that whenever we pass legislation, a bipartisan Congress should respond to Mr. Luddy. It should respond to smaller community banks under the Dodd-Frank bill that argues about the regulatory impact on their ability to have a greater role in giving access to credit. I am willing to listen to that, but I cannot tolerate any idea to suggest that regulations are the main factor in undermining our economy.

So I am going to go first to Professor Heinzerling and just say, what would we be—right now we are fighting the West Nile epidemic. We just fought E.coli. Where would we be without a strong regulatory structure of oversight to enhance the quality of life of Americans?

Ms. HEINZERLING. Well, I think that we would be in trouble. That what we would see are more polluted waters, more polluted air, more unsafe products, less safe food, less safe drugs, along the whole range of human activity and market activity. I think that we would see what we have seen in any period that precedes a regulatory intervention, which is harm—harm to humans, harms to the environment, harm to the economy from those things.

And so I think that you see when you have unconstrained behavior by humans, what you will end up seeing is harm.

Ms. JACKSON LEE. And harm to children.

Ms. HEINZERLING. Yes.

Ms. JACKSON LEE. Right. Do you see any impact on small businesses in terms of if you are weighing, is it so drastic that it is not something that could be fixed within the regulatory scheme?

Ms. HEINZERLING. No, I think it can be fixed. I think a lot of the, for example, the report that I cited earlier on that talks about the cost of regulation per year, uses those same flawed statistics I mentioned to try to derive an estimate of the cost of regulation per firm, and from that then per small business. And from that says, well, these burdens are very great.

But you cannot pile nonsense on nonsense and get a sensible result. And so the statistics that, again, try to show that these costs are excessive are not credible.

Ms. JACKSON LEE. I yield back, Mr. Chairman. Thank you for your courtesy.

Mr. COBLE. I thank the gentlelady.

The distinguished gentleman from Pennsylvania.

Mr. MARINO. Thank you, Mr. Chairman. Good morning to folks. It is a pleasure to be here with you.

Professor, I tried to take down some notes, and I want to make sure what I think you said you said. And I would like you to respond to my question on that, please.

I think it was a few minutes ago you said that, and I am just taking hand notes here, some of the regulatory reform bills that we have passed in the House would be bad for agencies because they impose, and I think the important term here is “new requirements and burdens on the agencies.” And I find it a bit ironic that on one hand you say that we should not burden the agencies with requirements, but agencies are burdening small business with excessive regulation that has not seemed to be reviewed. I mean, how do you think the people in my district in eastern Pennsylvania, which is mostly farmers and small business, respond to that? Let us let unfettered rulemaking take place in the agencies, and not respond to what negative effects it has on the small business owner and the farmer? Do you want to clarify that a little bit, please?

Ms. HEINZERLING. Absolutely. I think I would explain the apparent tension that you see in these two things by saying that the agencies are there actually for the same people you are discussing. That it is not because I am worried about agencies being burdened that I worry about these bills. It is that I am worried about agencies not being able to do work for the American people. That is what they are there for. That is what you all have put them there for.

Mr. MARINO. Well, that is what they are supposed to be there for, but I can give you some primary examples. For example, the roofing industry in my area has come to see me on numerous occasions. There has been vast changes concerning harnesses and restraints concerning roofers, anywhere from 6 to 8 to 10 to 12 feet. I have had several roofers in my district who have been fined over $50,000 because of apparatus that they are supposed to have now, which proves to be, at least from the people in my district, even more hazardous because there are more ropes and more lines crossing one another where those roofers are tripping over those ropes and lines, even though it is only 8 feet off the ground on a flat roof.

So do you not think the agencies have a responsibility to come back and review that legislation and rules and regulations to actually talk to—I mean, I have been out on the sites with my people. I have been on the roofs, and I have been at the farms. And I see what regulation does. I live out in the country, and I love to see the bear and the deer come through my yard. I am on a well, and I want clean water, and I do not want anybody messing with it. But I think we should think in terms of once something is implemented, then we have to see what the results, are they efficient and effective. And you can respond to my comment if you would like to.

Ms. HEINZERLING. Yes, I would like to. You have the power. You have the power to undo any rule you want to undo.

Mr. MARINO. And as a freshman, I am taking advantage of that.

Ms. HEINZERLING. And you can step in right now. It is not the agencies. The agencies exist because Congress has given them the power and has given them certain missions. Any time you want you can take that away.

Mr. MARINO. I understand that, and I know the process by which we can take that away. But other comments have been made to people in my district when questioning the OSHA inspector that comes by, or the EPA individual, and trying to ask them questions as to, okay, what do you see here that I should be doing that I do not know that I should be doing, the individual says, well, I cannot answer that question. I am just told to find as many, as much as possible.

Ms. HEINZERLING. I would not be surprised, maybe not in your district, but in other districts in the country, I would not be surprised if there are other stories to be told about businesses where there were no inspectors, and people were hurt or killed on the job, and they wish that actually somebody had been there to prevent.

Mr. MARINO. Oh, I am sure you can come up with those as well. But I think there are far less than what regulatory agencies have done to this country. And one of my colleagues who just left wanted to find it appropriate to throw in a quote from Governor Romney, but I will throw you a quote out from Mr. Obama that I just read. And I usually verify these, but I will go back and do that. He was questioned that I have coal mines and coal producing electric companies in my district. And the President was asked about such regulation on coal mining and the use of coal. And his comment was what appeared to be in a somewhat arrogant way, I am not trying to shut down the coal industry. They can create as many mines and as many electrical plants that run on coal as they want. But they are going to go bankrupt doing it because of regulation. So with that, I hear——

Mr. COBLE. The gentleman's time has expired.

Mr. MARINO. I yield back.

Mr. COBLE. Thank the gentleman. The gentlelady from California is recognized for 5 minutes.

Ms. CHU. Thank you, Mr. Chair. Well, before I begin, I would like to take a moment to express my disappointment with today's hearing. We are using our full last full Judiciary Committee hearing before long recess to discuss the Obama administration's regulations when we have had already 16 hearings in this Committee to discuss regulations. And here again we are wasting time and money rehashing on these partisan issues that have already been discussed at great length. I think we should be using our time more wisely tackling the issues that are very key and critical to our constituents.

Well, I would like to talk first about one area and ask Ms. Heinzerling a question. I am a strong supporter of the Clean Air Act of 1970, and the benefits of this Act have far exceeded the costs associated with it by a factor of 30 to 1. Not only has this Act been proven to have resulted in a 1.5 percent increase in GDP in 2010, but it has also resulted in preventing 9,000 premature deaths every year, generating more productive workers, and creating a better environment.

Ms. Heinzerling, as an expert on environmental administrative law, can you explain to me how such an act, how environmental regulations could save lives?

Ms. HEINZERLING. Well, without the regulation, one would have likely uncontrolled pollution. The more we know about pollution, it seems like the more harmful it becomes in our eyes. And so that without that, we would have uncontrolled pollution.

As you just cited, a number of statistics from the EPA about both the monetary benefits and the benefits in terms of lives saved from the Clean Air Act. And without it, I think that we would have the reverse would be true; that is, we would have many more people sick, many people die earlier, many more economic harms than we have with the presence of that statute.

Ms. CHU. Thank you. And on small business, I know that in the small community—I am Member of the House Small Business Committee—that the issue of regulations is always debated. But I note that there is one regulation that helps small businesses greatly, and that is the set aside of 23 percent for Federal contracts to be put there for small business.

You know, we have a substantial amount of dollars in Federal contracts—$535 billion. So the fact that small business can get 23 percent gives it a fair shake. And, in fact, I am part of a bipartisan bill that has increased the regulation to go from 23 to 25 percent so that they can even get a greater fair shake.

Can you explain how such regulations actually could help small businesses?

Mr. LUDDY. In my opinion, it is always challenging to deal with any governmental entity. And it is especially challenging for small businesses. So for those businesses that choose to specialize in governmental contracts that very well may help them, in terms of the general business, the amount of time required, we think it is generally not worth it.

Mr. CHU. So you would actually not have any set asides for small business.

Mr. LUDDY. I would not.

Ms. CHU. That is really a shocking statement. Five hundred and thirty-five billion dollars, and you would not give small business a fair shake.

Mr. LUDDY. I am a free market——

Ms. CHU. I am going to move on to another question, which is how different regulations can help consumers save money. The rules issued in the last 20 years by the Department of Energy set efficiency standards for household appliances, and it would save consumers over $100 billion by 2030.

Ms. Heinzerling, can you speak about one efficiency standard of the Department of Energy which would save consumers millions of dollars, and what would happen if the standard was not in place?

Ms. HEINZERLING. Yeah, and if I may, I would even expand the category to include things like the fuel efficiency standards that the Obama administration has put in place. These kinds of standards—the Department of Energy efficiency standards, the fuel efficiency standards set by EPA and the Department of Transportation—all save consumers money by either eliminating or limiting the amount of electricity they use or eliminating the amount of fuel that they use.

And so it really puts money in the pockets of consumers rather than takes money out as we have been hearing about on the other side this morning.

Ms. CHU. Well, let us go the opposite way. Can you give an example of when consumers have lost money in the absence of a regulation?

Ms. HEINZERLING. Well, in a way you would have—there are 2 examples—one, your example about efficiency. To the extent that consumers do not know about the benefits of efficiency, have short time frames that they think over, then the regulation helps them save money. They would lose money in the absence of a nudge from government to save them money.

Other things are a little bit more direct. There are a lot of regulations that are aimed at fraud and misrepresentation by various entities that save consumers money because they prevent those kinds of activities and behaviors.

Ms. CHU. Thank you. I yield back.

Mr. COBLE. Thank the gentlelady. Without objection, I want to introduce my opening statement and letters from trade associations into the record. And so moved.

[The prepared statement of Mr. Coble follows:]

HONORABLE HOWARD COBLE
STATEMENT
COMMITTEE ON THE JUDICIARY
LEGISLATIVE HEARING ON REGULATION NATION: THE OBAMA ADMINISTRATION'S REGULATORY EXPANSION VS. JOBS AND ECONOMIC RECOVERY
SEPTEMBER 20, 2012
2141 RAYBURN
10:00 A.M.

Mr. Chairman, as you know I am not against regulations. I feel very strongly that they are critical to our health and safety, and that they can help promote our economic growth. At the same time, when regulations do not effectively balance cost with benefit or are not effective or efficient, I feel equally adamant that they are harmful and undermine the role of our government.

I am deeply concerned because while our regulatory state steadily increased prior to President Obama's election, it has since exploded in size and scope. During the President's first three years in office, his administration has promulgated 78 more major rules than were promulgated during President Bush's first three years – which includes 9/11 related security regulations. According to the Heritage foundation, the Obama administration is responsible for an additional 46 billion dollars of annual regulatory costs for American businesses. While all of this has already occurred, the Administration notified Congress last August that there are another 3,118 rules in the pipeline – several are multi-billion and another 167 are expected to exceed $100 million – which is in addition to the 1,010 regulations that have already been completed.

The subcommittee on the Courts, Commercial and Administrative Law conducted 12 hearings during the 112th Congress to review various aspects of our regulatory state and it was evident that there are a number of problems. As a result, we crafted several proposals to address these shortcomings and the House approved some additional measures to also help improve the rule making process. Regulatory reform has transcended many generations and while I'd argue our efforts in the 112th Congress have been noble, there is still much work to be done.

All this being said I would like to reiterate my support for sound and efficient regulations and for much needed improvements to our regulatory process. I know many feel adamantly that all regulations bring limitless benefits but I am afraid that the reality of our current economic situation is stark and painful example of why they are wrong.

I would like to thank Chairman Smith for conducting this important hearing and look forward to hearing the testimony of our witnesses.

I yield back the balance of my time.

Mr. COBLE. Thank you again for being here. Professor Taylor, I am determined to get you on that flight, and I think we can do it.

It is my belief, folks, that—well, strike that. Let me say it in a different way. I am not averse to regulations that are sound and efficient. We have too many that are neither sound nor efficient. I think regulatory shackles can impede the flow of commerce, particularly as far as small businesses are concerned.

Let me put this question both to Mr. Gray and to Professor Taylor. If this Committee's bills had already been introduced or enacted, would there be any need for regulations still have been able to achieve needed benefits?

Mr. GRAY. Would there be any need for?

Mr. COBLE. I did not state the question artfully. If this Committee's bills had already been enacted, would any needed regulation still have been able to achieve needed benefits?

Mr. GRAY. Well, sure. There is no question that needed regulation could have done, could do, would be able to do, what is necessary to achieve the benefits that are being sought. I will just give one example. There is no reason really in the world why the EPA could not do more with economic incentives that I think were authorized by the 1990 amendment.

Now it may be that because of court rulings there are some statutory inhibitions, but there never has really been an effort by the current Administration or by EPA that I know of to seek the statutory fix which I think Congress would be willing to provide that would allow the use of the incentives that bills that have already been adopted by this body would have encouraged.

So I think that the needed benefits could have been provided, could be provided, under every single bill that this House has adopted.

Mr. COBLE. Thank you, Mr. Gray. Mr. Taylor, I will get with you in just a second.

For those who share my view in opposing inefficient and unsound regs, oftentimes we are accused of opposing all regs. And that is indeed unfortunate because some regs are in order, but the unsound ones and inefficient ones are not in order.

Professor, do you want to add to that?

Mr. TAYLOR. Well, I understand the question is we are not talking about, and these bills are not talking about, stopping regulation or ignoring the benefits. In fact, on the contrary, they have emphasized more cost-benefits, for example, SEC, CFTC. They have emphasized transparency, so for example, the cost of the unfunded mandates would be reported.

So it seems to me it is really a straw man or straw woman to put out ideas that this is eliminating the benefits of regulation. They are basically making the regulatory process work better, more efficient, and it seems to me that is what the goal should be, especially in this environment where job growth is so abysmal.

Mr. COBLE. Again, thank you all for your participation and input today. And I am going to yield the gavel and the floor to the distinguished gentleman from Arkansas.

Mr. GRIFFIN. [Presiding.] Thank you all. Thank you, Mr. Coble. I am going to keep this short. I was told that somebody on the panel has a flight to catch.

I want to just to quickly make a few points, and then maybe ask a question or two. I have a 2-year-old and a 5-year-old, and I want them to have clean air, and I want them to have clean water. The idea that people on this side of the aisle are anti-regulations per se is just nonsense. That is a straw man drawn up for the purposes of demagoguery.

I am for reasonable regulations. I am for regulations that make sense. I am for regulations that do not crush businesses in the name of covering a hypothetical that may never happen. It is the excessive and overly burdensome regulation that we are concerned with.

I will give you an example. And let me just say this: with all due respect to all the occupations of everybody, I am glad to see that people are working regardless of what they do. And, you know, I was a lawyer and apologize for that. But when I want to know what regulations do to job creators, I ask them, like this gentleman here. They, not people who work in bureaucracies up here, are the experts on how they are impacted by regulations because they live it every single day.

And I just left a room full of 13 bankers—community bankers, small town bankers—from Arkansas that are dealing with a nightmare of Dodd-Frank. It is a disaster. They are being punished for something they never did. They were crossing the Ts and dotting the Is, no matter what was going on on Wall Street. And now they have to hire people to comply with a bunch of regulations that control almost every decision they make. It is unbelievable. And, you know, I still hear people trying to say that regulations do not have an impact on business. It is unbelievable.

I went and toured a fledgling business in Little Rock, and it is in an old industrial site. And I walked out on their loading dock, and they had a 50-foot ramp for wheelchairs. We are all for disabled folks having access to whatever building they need to access. I am for that. But it struck me as odd that a wheelchair ramp would go to a loading dock where no one ever enters the building.

Funny the people that own the business had the same concern. I said, why do you have a 50-foot wheelchair ramp going to your loading dock? Would you ever use that? Well, we were required to build that—$5,000 that they did not have. Why? Because the Federal Government wants to regulate for every contingency that might ever happen, even if it only happens once in 100 years. They want you to spend money to make it right. What a crock. It is unbelievable.

And my constituents back in Arkansas and all over this country are spending money on that type of nonsense that is promulgated up here in this city. And for people to deny that that has an impact is outrageous. Ask the job creators.

I had a conference at the Clinton Library with Democrats and Republicans. I invited business leaders—big business, small business, you name it. The number one problem they said that was serving as an obstacle to job creation was economic uncertainty created by overregulation from Washington. Period. Now that is not a question.

You know where I stand on this, but I will just tell you, I am so sick and tired of hearing people say that regulations are job creators. I understand that regulations are needed in some areas, and I am for common sense regulations. But that is not what we are talking about. We are talking about a tsunami of nonsense coming out of this city.

Let me ask you this. What is the question, the answer to which is, we need another Federal agency to regulate the financial industry? What is the question? Someone was sitting a room and said, we do not have enough bureaucracy. We do not have enough regulation. We must create another multibillion dollar entity and hire a bunch of new people, because we just cannot make the 10 other ones that already regulate them work.

It is a joke. It is an absolute joke. And I do not guess I have any questions. I appreciate you all coming to testify, and I am glad I got to Chair this hearing.

I would like to thank our witnesses for their testimonies today.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 11:44 a.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Statement of the Honorable John Conyers, Jr. for the Hearing on Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery

Thursday, September 20, 2012, at 10:00 a.m.
2141 Rayburn House Office Building

Summary of Points:

- **The assumptions underlying today's hearing title are simply false.**

- **Today's hearing is the *16th time* that the Committee has considered what is essentially the same topic: federal agencies and rulemaking. Yet the Committee during this Congress *has not held a single hearing* on numerous critical issues, such as the foreclosure crisis and the devastating impact of mandatory minimums and overcriminalization.**

- **If the Majority really cares about job creation, we should be considering legislative measures that will, in fact, create jobs.**

Today's hearing is premised on certain assumptions that are simply false.

First, the Majority makes the false assumption that regulations inhibit job creation even though there is absolutely *no* credible evidence establishing the fact that regulations have any substantive impact on job creation.

And, that is not just me saying this. Bruce Bartlett, a senior policy analyst in the Reagan and George H.W. Bush Administrations, explains:

> Republicans have a problem. People are increasingly concerned about unemployment, but Republicans have nothing to offer them. The G.O.P. opposes additional government spending for jobs programs and, in fact, favors big cuts in spending that would be likely to lead to further layoffs at all levels of government[.]

These constraints have led Republicans to embrace the idea that government regulation is the principal factor holding back employment. They assert that Barack Obama has unleashed a tidal wave of new regulations, which has created uncertainty among businesses and prevents them from investing and hiring.

No hard evidence is offered for this claim; it is simply asserted as self-evident and repeated endlessly throughout the conservative echo chamber.

The Majority's own witness clearly debunked the myth that regulations stymie job creation at a legislative hearing held last year.

Christopher DeMuth, with the American Enterprise Institute (a conservative think tank), stated in his prepared testimony that the "*focus on jobs . . . can lead to confusion in regulatory debates*" and that "*the employment effects of regulation, while important, are indeterminate.*"

Another unsubstantiated claim that the Majority makes in support of its anti-regulatory agenda is that 'regulatory uncertainty is hurting the business community.'

Once again, Bruce Bartlett, the senior economic official from the Reagan and Bush Administrations, responds:

> *[R]egulatory uncertainty is a canard* invented by Republicans that allows them to use current economic problems to pursue an agenda supported by the business community year in and year out. *In other words, it is a simple case of political opportunism, not a serious effort to deal with high unemployment.*

So make no mistake, today's hearing is yet another example of that political opportunism recognized by Mr. Bartlett.

And, perhaps the biggest canard in the Majority's arguments for so-called regulatory reform is the purported $1.75 trillion cost of regulations based on a single study.

This figure is utterly unreliable and meaningless. Again, don't take my word for this.

The nonpartisan Congressional Research Service conducted an extensive examination of the study and found much of its methodology to be flawed.

Moreover, CRS noted that the study's authors themselves acknowledged that their analysis was "*not* meant to be a decision-making tool for lawmakers or Federal regulatory agencies to use in choosing the 'right' level of regulation."

Professor Lisa Heinzerling, the Minority witness for today's hearing, has just published a well-researched academic analysis of this study which outlines the numerous methodological flaws in that study.

I hope my colleagues on both sides of the aisle will listen very closely to her testimony.

Another reason to reject this meaningless figure: it completely and blatantly ignores the overwhelming benefits of regulations.

According to the Office of Management and Budget, the net benefits of regulations through the third fiscal year of the Obama Administration exceeded $91 billion, *which is 25 times more than the net benefits during the first three years of the George W. Bush Administration.*

OMB also reports that for fiscal year 2010, federal regulations cost between $6.5 billion and $12.5 billion, but generated between $18.8 billion and $86.1 billion in benefits.

Another concern that I have about this hearing is that it is the *16th time* that the Committee has considered what is essentially the same topic: federal agencies and rulemaking.

I know regulations play a major role in ensuring the safety of the food we eat, the cars we drive, the air we breathe, and the medicine we consume.

And that the Nation's Great Recession was the result of too little, not too much regulation.

Major financial distress in American history has often been triggered by a regulatory failure of some type. The Great Depression largely resulted from the failure of severely undercapitalized banks that engaged in imprudent lending practices and other speculative activities.

The current Great Recession was largely fueled by an unregulated home mortgage industry and securitization market.

But come on now. During the 112th Congress, this Committee has *not held a single hearing on*:

- the ongoing foreclosure crisis and its crippling effect on the Nation's ability to recover its financial stability as well as that of millions of Americans in communities across the Nation;

- the nearly lifelong peonage that millions of young Americans must endure to repay private student loan debt, that even bankruptcy will not alleviate; and

- the extremely deleterious effects of mandatory minimums and the resultant overincarceration particularly has on African Americans in our Nation.

I could go on and on listing the critical issues that this Committee – over the past 20 months – has failed to consider.

Finally, if we were really serious about creating jobs, then we should be focusing on those measures that will actually result in creating jobs.

Just over a year ago, President Obama addressed a joint session of Congress at which he presented his American Jobs Act, a comprehensive bill that would have:

- cut payroll taxes for qualifying employers,

- fund a work program to provide employment opportunities for low-income youths and adults;

- fund various infrastructure construction projects, including the modernization of public schools; and

- start a program to rehabilitate and refurbishing hundreds of thousands of foreclosed homes and businesses.

Unfortunately, Congress chose to ignore this worthy initiative.

As many of you know, I have a measure – H.R. 4277, the "Humphrey-Hawkins 21st Century Full Employment and Training Act" – which aims to provide a job to any American who seeks work.

My bill would create a funding mechanism to pay for job creation and training programs.

These jobs would be located in the public sector, community not-for-profit organizations, and small businesses that provide community benefits.

But, like the President's proposal, my legislation has not received any consideration during this Congress, which is unfortunate because both of these measures would have, in fact, created jobs and helped our Nation's economic recovery.

It's time we legislate based on facts, not rhetoric. Unfortunately, I fear today's hearing will not enable us to accomplish that goal.

Material submitted by the Honorable Howard Coble, a Representative in Congress from the State of North Carolina, and Member, Committee on the Judiciary, on behalf of the Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Chairman, Committee on the Judiciary

Associated Builders and Contractors, Inc.

September 20, 2012

The Honorable Lamar Smith
Chairman
Committee on Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on Judiciary
U.S. House of Representatives
Washington, D.C.20515

Dear Chairman Smith and Ranking Member Conyers:

On behalf of Associated Builders and Contractors (ABC), a national association with 74 chapters representing 22,000 merit shop construction and construction-related firms, I am writing in regard to today's Judiciary Committee hearing titled, "Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery." The Obama administration has issued numerous regulations that impact the construction industry, which create an environment of uncertainty that has made it difficult for firms to adequately plan for the future.

For the last four years, the White House has encouraged federal regulatory agencies to assert their power through rulemaking. These agencies operate relatively unchecked and unsupervised, especially during the early stages of the regulatory process. Many rulemakings are accompanied by poor or incomplete economic cost-benefit forecasting and other data analysis that could have helped to create practical, sustainable rules and regulations. At times, even the will of Congress and the American public are disregarded in order to issue regulations.

For the construction industry, excessive regulations translate into higher costs, some of which must be passed along to the consumer. Ultimately, these costs impact our industry's recovery and our businesses' ability to expand and hire more workers. It is particularly alarming that small businesses, which comprise the vast majority of the industry, are disproportionately affected by the administration's irresponsible approach to regulation.

As builders of our communities and infrastructure, ABC members understand the value of standards and regulations based on solid evidence, with appropriate consideration paid to implementation costs and input from affected stakeholders. ABC strongly supports comprehensive regulatory reform, including across-the-board requirements for departments and agencies to appropriately evaluate risks, weigh costs and assess the benefits of all regulations. We believe several pieces of legislation that have passed the House of Representatives this Congress are especially positive steps in reforming the regulatory system to create greater accountability and transparency. If implemented, these policies would make it easier for our members to comply with regulatory requirements, allowing them more time and resources to put toward winning and performing work, and creating jobs in the process.

Regulatory Accountability Act of 2011(H.R. 3010):
In our current economic environment, steps must be taken to reform the increasingly outdated federal rulemaking process in order to improve government accountability, transparency and regulatory quality. The government should only issue regulations that are supported by adequate data and created in the most practical, well-reasoned and sustainable manner possible.

This legislation enhances public transparency and government accountability when agencies develop regulations. Earlier public outreach and access to information (including supporting data) on upcoming regulatory plans will give stakeholders a vastly improved picture of agencies' plans before regulations are fully developed. It will also include greater stakeholder input, along with mandatory public hearings on the most costly regulatory proposals.

For the first time, agencies will be required to look at potential *indirect* and *cumulative* economic impacts (including the impact on jobs and the economy). Agencies will be held accountable if the data or analyses used to write regulations are deficient or unsound. Finally, agencies will be required to adopt the least burdensome regulatory option —unless it can provide a strong reason otherwise—to ensure only the most necessary burdens are imposed on businesses and the public.

Regulatory Flexibility Improvements Act of 2011(H.R. 527):
Small businesses are the backbone of our nation's economy, and their ability to operate efficiently and free of unnecessary regulatory burdens is critical for our country's economic recovery. Proposed and existing regulations need to be thoroughly examined from cost standpoints to ensure they do not encumber our country's primary job creators.

This legislation requires federal agencies to more closely examine regulatory impacts on small businesses. It gives the Small Business Administration's (SBA) Office of Advocacy additional authority and requires the office to establish more in-depth "regulatory flexibility" analyses during the federal rulemaking process. In addition, the legislation's provisions on periodic review of rules are in line with President Obama's Executive Order 13563, which requires agencies to conduct a retrospective analysis of existing rules to identify and modify rules in need of reform.

Midnight Rule Relief Act of 2012 (H.R. 4078, Title II):
For decades, outgoing administrations from both parties have engaged in the practice of issuing so-called "midnight" regulations—rules, guidance and other policies that are often too controversial or problematic to be implemented earlier in the presidential term. Many soon-to-be proposed and final rules from a multitude of federal agencies are currently awaiting publication. Political and policy experts are in general agreement that the Obama administration is holding many of these back in order to issue them with either a new election mandate or during the "lame duck" period after an election defeat, but prior to leaving the White House.

This legislation prohibits any future lame-duck administration from issuing midnight regulations with economic impacts of $100 million or more in the transition period between Election Day and Inauguration Day. This would ensure that businesses are not slammed with a torrent of costly, burdensome regulations each time control of the Executive Branch changes.

Sunshine for Regulatory Decrees and Settlements Act of 2012 (H.R.4078, Title III):
The practice of regulation through litigation (or "sue and settle" as it is sometimes described) is used and often abused by advocacy groups in order to initiate rulemakings when they feel federal agencies are not moving quickly enough to draft and issue these policies. Organizations routinely file lawsuits against federal agencies claiming they have not satisfied particular regulatory requirements, at which point agencies can opt to settle. When settlements are agreed upon, they often mandate that rulemakings go forward and frequently establish arbitrary timeframes for completion—without stakeholder review or public comment. These settlements are agreed to behind closed doors and their details are kept confidential. Agencies release such rulemaking proposals for public comment only after the settlement has been agreed upon, which is often too late for adequate, meaningful feedback.

This legislation promotes enhanced openness and transparency in the regulatory process by requiring early disclosure of proposed consent decrees and regulatory settlements. In addition, this bill would require agencies to solicit public comment prior to entering into consent decrees with courts, which would provide affected parties proper notice of proposed regulatory settlements and make it possible for affected industries to participate in the actual settlement negotiations.

At a time when the construction industry faces an unemployment rate greater than 11 percent, the need to create jobs is imperative, and so is the need for regulatory reform. We applaud the committee for addressing these regulations and the environment of uncertainty they create for America's job builders.

Sincerely,

K Swearingen

Kristen Swearingen
Senior Director, Legislative Affairs

Business Roundtable

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September 19, 2012

The Honorable Lamar Smith
Chairman
House Committee on the Judiciary
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
House Committee on the Judiciary
Washington, DC 20515

Dear Chairman Smith and Ranking Member Conyers,

Business Roundtable, an association of chief executive officers of leading U.S. companies, is writing in regard to the hearing on September 20, 2012, entitled "Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery." We request that this letter be made part of the hearing record.

Three years after the end of one of the worst recessions in its history the U.S. economy remains mired in a fragile, uneven and uncertain recovery. Gross domestic product growth has averaged just 2.2 percent a year since the economy hit bottom, about half the normal economic growth rate following a recession. The unemployment rate remains stuck at more than 8 percent and only about half of the 8.4 million workers who lost their jobs during the recession are back at work. Simply put, America's economy is underperforming.

Amid this backdrop of unacceptably low economic growth and unacceptably high unemployment, policymakers have an obligation to identify and address factors that continue to impair U.S. economic growth and job creation. Although a variety of factors may enhance or inhibit a sustained economic recovery, business and policy leaders are increasingly concerned about the degree to which regulatory burden and uncertainty is impeding growth in the private sector.

These concerns reflect the fact that, for better or for worse, a nation's regulatory system has a significant impact on the overall business environment. On the one hand, smart regulations that clarify the "rules of the road" and align with broad societal values over multiple election cycles can provide an environment of stability, inspire business confidence and accelerate investment. On the other hand, regulations that create uncertainty and reflect shortsighted political interests can impose unproductive cost burdens on businesses and consumers, undermine confidence and delay investment. The key objective, therefore, is not to increase or decrease regulation but to ensure that regulations adopted are effective and efficient and strike an appropriate balance between costs and benefits.

The importance of achieving smarter regulation is heightened by the reality of today's hyper-competitive global economy. The rise of global supply chains and unprecedented capital mobility have greatly expanded the geographic scope of investment opportunities, allowing business to direct capital toward those jurisdictions that offer the most favorable conditions in terms of input costs and operational efficiencies. In a globalized world, even moderate increases in regulatory burden and uncertainty can be a decisive factor in a company's decision to invest in the U.S. economy.

Federal regulation of business has a profound impact on the public, on business investment and on U.S. competitiveness. Regulatory costs operate like hidden taxes: not apparent but nevertheless significant in their impact on businesses, consumers and workers. While exact estimates vary, the total costs of regulation can be measured in the hundreds of billions of dollars per year.[1]

In response to increased regulatory costs, businesses are often forced to raise prices, reduce production, eliminate jobs, cut research and development or even go out of business entirely. The resulting negative impact on economic growth and job creation can be significant. For instance, a recent study released by the Manufacturers Alliance for Productivity and Innovation (MAPI) estimates that the growing regulatory burden will reduce manufacturing output by 2 to 6 percent over the next decade and could potentially reduce manufacturing exports by up to 17 percent this year alone.[2]

Although the direct costs of regulation are typically imposed on businesses and governments, they are ultimately passed on to the American consumer through higher prices, diminished wages, reduced quality or availability of products and services and increased taxes. The same MAPI study estimates that the regulatory burden will ultimately cost each U.S. household between $1,800 and $5,000 in lost purchasing power in 2012.[3]

The current regulatory environment not only imposes direct compliance costs but also creates significant uncertainty which undermines investment, growth and job creation. If companies

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[1] Greenstone, Michael (2011). "Improving Regulatory Performance: Lessons from the United Kingdom." Testimony before the Senate Budget Committee Task Force on Government Performance. November 16, 2011.

[2] NERA Consulting (2012). "Macroeconomic Impacts of Federal Regulation of the Manufacturing Sector." Prepared for Manufacturers Alliance for Productivity and Innovation.

[3] *Ibid.*

cannot anticipate the regulations they will face, they are understandably reluctant to undertake costly investment. As explained in a 2010 statement by Richard W. Fisher, President of the Federal Reserve Bank of Dallas, uncertainty regarding the "rules of the game" can have significant negative impact on investment spending, payrolls, and the economy at large:

> *Operating a business under conditions of excessive uncertainty is like playing a game when you don't know the rules. Without rules, it is impossible to develop a strategy or playbook. Business leaders are forced to call a time-out: They remove their players from the field and anxiously wait on the sidelines until they have a better idea how to play the game. Too much uncertainty can create economic stasis as more and more decisions get delayed, retarding commitments to expansion of payrolls and capital expenditures and slowing the entire economy.*[4]

The notion that regulatory uncertainty has a negative impact on business investment is not theoretical — recent studies have confirmed the effect on firms' behavior. For example, a 2011 study by Randall Billingsley and Carl Ullrich examined the impact of electricity market deregulation on corporate investment behavior in the 1990s and early 2000s. The authors concluded that uncertainty surrounding plans for industry deregulation caused firms to reduce or delay their capital investment decisions and that this effect was even stronger for green technologies.[5] Similarly, a 2012 study by Kira Fabrizio focused on the pattern of renewable generation assets in the electricity industry following states' adoption of Renewable Portfolio Standards (RPS). The author found that firms invested less in new renewable generation assets in states in which the perception of regulatory instability was greater.[6]

Nevertheless, there is still significant political debate regarding the extent to which regulations affect the economy. As both a theoretical and empirical matter, however, the direction of this impact seems clear — regulatory burden and uncertainty harm economic growth and job creation. Even if one believes that the ultimate impact is likely to be relatively small, prudence dictates that policymakers should proceed cautiously when promulgating new regulations during periods of economic weakness and widespread joblessness. Equally as important, measures that reduce regulatory burden and uncertainty can have a positive effect on the economy — unlocking new domestic investment, accelerating innovation and enhancing productivity.

Government regulation can and must be improved. Although some regulations have been beneficial, there is a great need—and much room—for a smarter, more cost-effective approach

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[4] Fisher, Richard W. (2010). Remarks before the Greater San Antonio Chamber of Commerce. July 29, 2010.

[5] Billingsley, Randall S. and Carl J. Ullrich (2011). "Regulatory Uncertainty, Corporate Expectations, and the Postponement of Investment: The Case of Electricity Market Deregulation." SSRN No. 1944217.

[6] Fabrizio, Kira R. (2012). "The Effect of Regulatory Uncertainty on Investment: Evidence from Renewable Energy Generation." *Journal of Law, Economics, and Organization.*

to regulation. Accordingly, Business Roundtable supports legislative efforts to advance smarter regulation (for example, the Regulatory Accountability Act (H.R. 3010)). Ultimately, Business Roundtable believes that through smarter regulation the nation can sustain our commitments to public health, safety and environmental quality without compromising our ability to grow the economy and put Americans back to work.

Sincerely,

John Engler

JE/lg

1912-2012

U.S. Chamber of Commerce

WILLIAM L. KOVACS
SENIOR VICE PRESIDENT
ENVIRONMENT, TECHNOLOGY &
REGULATORY AFFAIRS

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September 19, 2012

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Re: "Regulation Nation: Administration's Regulatory Expansion vs. Jobs and Economic Recovery"

Dear Chairman Smith:

The U.S. Chamber of Commerce is pleased that you are holding this hearing that addresses the impact of regulations on jobs. As you know the Chamber has a great interest in the subject. Last year we published our study "Project No Project" which describes 351 projects that were unable to begin construction due to a cumbersome and complex regulatory process. If built they would have added $ 1.1 trillion to our economy and 1.9 million jobs annually. As presently administered the regulatory process:

1. Imposes significant compliance costs which divert resources away from other pressing needs;
2. Reduces the growth of and at times even eliminates individual industries; and
3. Imposes such complexity that it discourages business expansion and job creation.

Since the subject matter of your hearing is of such great concern to the Chamber, we are submitting the attached statement for the record which discusses how the regulatory process impacts jobs and economic recovery.

Sincerely,

William L. Kovacs

Attachment

100 Years Standing Up for American Enterprise

U.S. CHAMBER OF COMMERCE

Statement of the U.S. Chamber of Commerce

ON: REGULATION NATION: THE OBAMA ADMINISTRATION'S REGULATORY EXPANSION VS. JOBS AND ECONOMIC RECOVERY

TO: HOUSE COMMITTEE ON THE JUDICIARY

BY: WILLIAM L. KOVACS,
SENIOR VICE PRESIDENT, ENVIRONMENT,
TECHNOLOGY & REGULATORY AFFAIRS

DATE: SEPTEMBER 20, 2012

The Chamber's mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

BEFORE THE COMMITTEE ON THE JUDICIARY OF THE U.S. HOUSE OF REPRESENTATIVES

"Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery"

Testimony of William L. Kovacs
Senior Vice President, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce

September 20, 2012

Chairman Smith, Ranking Member Conyers and distinguished Members of the Committee, my name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. This statement describes the Chamber's perspective on the question of how regulations can affect people's ability to get and keep jobs, and the resulting impact on the quality of their lives. I want to emphasize at the outset that the Chamber recognizes that regulations are an essential part of a complex society such as ours. Over the decades, well-designed regulations have clearly made Americans and American workers healthier and safer. Yet the scope and pace of federal rulemakings have increased dramatically in the past few years. Hastily-written regulations issued in the health care, environmental, labor and employment and financial arenas have been written with little apparent regard for the dramatic effect they have on employers and employees and on the ability of businesses to grow and to hire more employees.

According to a study conducted for the Small Business Administration's Office of Advocacy, the total annual cost to comply with federal regulations was **$1.75 trillion** in 2008.[1] Regulations finalized since 2008 further increase these compliance costs. While the Crain and Crain study has generated some criticism because it did not examine the detailed costs of each individual regulation, it remains the **only** comprehensive estimate of the impact of federal rules on the U.S. economy. Moreover, since 2008, the number of new rules each year that impose compliance costs of a billion dollars or more has increased.[2] The combined effect of the already-large existing regulatory footprint and the

[1] Crain, Nicole V. and Crain, W. Mark, *The Impact of Regulatory Costs to Small Firms*, Office of Advocacy, U.S. Small Business Administration (Sept. 2010) available at http://archive.sba.gov/advo/research/rs371tot.pdf.
[2] In 2011 alone, federal agencies developed seven rules that would each impose over a billion dollars in new compliance costs. *See* Letter from President Barack Obama to Speaker John Boehner, August 30, 2011.

quickening pace of major new rulemakings are hobbling the economy and inhibiting job creation.

Regulations impact jobs in three ways: they impose significant compliance costs that divert resources away from other needs; they can cripple or even destroy industries; and they can impose such complexity that they discourage business expansion and job creation. To bring manufacturing back to this country, we must understand the impacts of excessive regulations. Even before the creation of the Environmental Protection Agency (EPA), Congress recognized that environmental regulations will impose costs and at times make industries uncompetitive but that the nation needed to address its environmental problems. Congress, however, was also very conscious of the impacts on industry, communities and the people impacted and demanded that the agencies charged with cleaning up the environment, primarily EPA, undertake a continuing evaluation of the potential losses and shifts in employment. The agencies charged forward with over 45,000 pages of regulations, but to this day EPA ignored the corresponding mandate to keep Congress apprised of the costs, potential job loss or shifts in employment due to regulation.

A. Regulations Impact Job Creation

1. **Regulations Impose Significant Compliance Costs, Diverting Resources Away From Other Needs.**

When resources are expended to comply with new regulatory requirements, those resources often have to be diverted from other competing needs. Even larger companies often must secure financing to pay for technology and equipment that is required by regulations. The cost of regulatory compliance can have a dramatic impact on a company's bottom line—and its ability to grow and hire.

For example, the Clean Air Act Maximum Achievable Control Technology (MACT) Rule[3] for cement plants issued by this Administration, imposes extremely stringent new emission standards for air emissions from U.S. cement plants. This rule requires cement companies to install very costly new control equipment. As written, the cement MACT rule was expected to cost more than **$3 billion** to implement and result in the closure of at least 18 of the 100 cement plants across the U.S.[4] As a result, domestic cement production is expected to fall and the price of cement will rise. The cement

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[3] National Emissions Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, 75 Fed. Reg. 54,970 (September 9, 2010) (Final Rule).

[4] Portland Cement Association, 2011 estimate.

MACT rule, together with other recent EPA rules, could add as much as **\$20 to \$36** to the cost of every ton of cement that small concrete Ready-Mix companies must purchase.[5] This represents as much as a 33 percent price increase for these small concrete companies' most critical manufacturing components. When you consider that a difference of as little as \$1 per ton of concrete can determine whether a company wins or loses its bid for a particular project, a cost increase of this magnitude can be disastrous, especially for small businesses. Companies hit with these kinds of costs will have to struggle harder simply to survive, and will not be in a position to hire new employees or upgrade their equipment.

At a minimum, virtually all new regulations directly impose some degree of new costs on regulated businesses, as well as indirect costs on supply chains and customers. For many businesses, confronting a new regulatory cost usually means choosing what competing need or project will not be funded so that the regulatory cost can be paid.

2. Regulations Can Cripple—or Even Destroy—Individual Industries.

In some cases, entire industries have been harmed—and even destroyed—by an overreaching regulation or combination of regulations.

Forestry in Washington and Oregon In the wake of the 1994 Northwest Forest Plan, which was designed to preserve spotted owl habitat, logging activities in the federal timberlands of Oregon and Washington came to a virtual halt. The regulatory requirements of the Plan made it nearly impossible to harvest timber from the formerly highly-productive federally-owned lands in the western portions of those states. As a result, employment in the forestry sector, traditionally a major driver of the regional economy, plummeted in the Pacific Northwest from 1995 onward. The number of forestry and logging jobs in Oregon and Washington fell from 27,656 in 1990 to 16,298 in 2009, a 41 percent decline (compared to a 14.6 percent decline in the rest of the U.S.).[6] Together with other impacted industries in the region (e.g., fishing), the downturn in the forestry industry caused Oregon and Washington to lead the nation in unemployment by 2002. Ironically, the spotted owl has continued to have difficulties, not because of lost habitat but because of a rival owl species that competes more successfully.

Forest Products The fate of the Pacific Northwest forestry industry has been shared by other industries in recent years. The forest products industry has been heavily

[5] Portland Cement Association, 2011 estimate.
[6] U.S. Department of Commerce, Bureau of Economic Analysis, "Annual State Personal Income and Employment."

impacted nationwide by high regulatory costs that have impacted its ability to operate pulp and paper plants, sawmills, and manufactured wood products facilities. A variety of requirements affecting the operation of boilers, the use of solvents and adhesives in building products, and biomass fuels have resulted in the loss of over 100,000 jobs in the industry in 2010 alone.[7]

Furniture Manufacturers Furniture manufacturers in many states have been hit hard by increasing regulatory costs, at the same time they must contend with intense foreign competition and rising labor costs. Regulations such as boiler MACT, the Non-Hazardous Solid Waste definition rule, restrictions on formaldehyde, and Lacey Act requirements have caused furniture makers to scale down their operations or shut down. According to Bureau of Labor Statistics data, total employment in the U.S. furniture industry declined from over 600,000 in 2002 to 350,000 in 2011.[8] North Carolina alone lost 1/3 of its workers in the industry from 1996 to 2006, and more have been lost in recent years.

Coal All segments of the coal industry have recently been hit with crippling new regulations: a combination of final and proposed rules affect coal mining methods, the combustion of coal in industrial and utility boilers, the disposal of coal ash, and potentially, the shipment of coal overseas. Clean Air Act rules such as the Utility MACT rule and the proposed New Source Performance Standards for greenhouse gases from utility boilers would make future coal-fired power plants infeasible, if not impossible. According to the U.S. Energy Information Administration, the percentage of coal providing electricity to the U.S. has fallen over the past four years from nearly 50 percent of all fuels to about 40 percent. The federal effort to curtail coal use has taken a toll on jobs in the coal mining industry, as well as on jobs that depend on coal combustion. In West Virginia, for example, about 2,000 coal mining jobs were lost in May-June 2012.[9] Alpha Natural Resources, which is the biggest coal producer in Appalachia, is planning on cutting about nine percent of its workforce. While Alpha acknowledged a combination of factors for the layoffs, it noted the regulatory effort to curtail coal, "And we're also dealing with a regulatory regime that is determined to constrain the production and use of coal."[10]

Many other industries have not been wiped out by regulation, but they have been hurt and forced to scale back. These industries include medical device manufacturers,

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[7] Estimate from the American Forest & Paper Association (2011).
[8] Bureau of Labor Statistics, http://data.bls.gov/timeseries/CES3133700001?data_tool=XGtable.
[9] West Virginia Coal Association estimate (June 2012).
[10] *See* Kris Maher, "Alpha Natural to shut coal mines, shed 9.2% of jobs," The Wall Street Journal, September 18, 2012 and Steven Mufson, "Alpha Natural Resources closing eight mines, cutting hundreds of jobs," The Washington Post, September 18, 2012.

who have largely left the U.S. because of restrictions on the use of halogenated solvents used for cleaning/sterilizing the devices after they are made. Other heavily affected industries include iron and steel manufacturing, smelting, foundries, brick manufacturing, paint and coatings, dry cleaning, and metals mining. In total, these industries—and others—have lost hundreds of thousands of workers over the past 15 years, in part because of wave after wave of new federal regulations.

3. Regulations Impose Complexity That Discourages Business Expansion.

A study by the Swedish Agency for Growth Policy Analysis compared the regulatory burdens across nations and the effects of regulations on economic growth and vitality. The study found that higher regulatory burdens not only raised the costs of business operations, but also made capital financing more expensive and harder to obtain. The study also found that increased regulations acted as a barrier to entry for new firms, resulting in less competition and less ability to innovate and to adapt to new economic conditions or new technologies. Countries with relatively more regulations were found to be less entrepreneurial and to experience significantly slower growth of per capita income. In sum, too much regulation results in a stagnant, ossified economy and an overall standard of living that is lower than that found in countries with similar resources but less burdensome regulations.[11]

Besides raising costs and harming individual industries, regulations also increase the complexity of the business environment, which can discourage investment and business expansion. This complexity often arises in the context of uncertainty about obtaining necessary permits or authorizations to undertake expansion or new projects. The large cumulative number of regulatory requirements can make it much more difficult to obtain project approvals in a timely manner, and project sponsors often walk away after years of costly delays. In 2009, the Chamber unveiled *Project No Project*, an initiative that assesses the broad range of energy projects that are being stalled, stopped, or outright killed nationwide due to a broken permitting process and a system that allows nearly limitless opportunities for opponents of development to raise challenge after challenge. Results of the study are compiled onto the *Project No Project* website http://www.projectnoproject.com. The purpose of the *Project No Project* study was to understand potential impacts of serious project impediments on our nation's economic development prospects, and it was the first-ever attempt to catalogue the wide array of energy projects being delayed nationwide.

[11] Swedish Agency for Growth Policy Analysis, "The Economic Effects of the Regulatory Burden." Report 2010:14. www.growthanalysis.se.

Through *Project No Project*, the Chamber found consistent and usable information for 333 distinct projects. These included 22 nuclear projects, 1 nuclear disposal site, 21 transmission projects, 38 gas and platform projects, 111 coal projects and 140 renewable energy projects—notably 89 wind, 4 wave, 10 solar, 7 hydropower, 29 ethanol/biomass and 1 geothermal project. Since some of the electric transmission projects were multi-state investments and, as such, necessitate approval from more than one state, these investments were apportioned among the states, resulting in 351 state-level projects attributed to 49 states.

In total, the 351 projects identified in the *Project No Project* inventory could have produced a $1.1 trillion boost to the economy and created 1.9 million jobs *annually* during the projected seven years of construction. Moreover, these facilities, once constructed, would have continued to generate jobs, because they would have operated for years or even decades. The Chamber recognizes that moving forward on all the projects is highly unlikely. There simply would not be enough materials or skilled labor to construct all 351 projects at the same time, and to do so in a cost-effective manner. However, even a subset of the projects would yield major value. The construction of only the largest energy project in each state would generate $449 billion in economic value and 572,000 annual jobs.

B. Congress Mandated Continuing Evaluation of Potential Loss or Shifts in Employment to Determine Impacts of Regulations

Congress has debated whether regulations cause adverse impacts on industry, communities and job loss for at least 45 years. The earliest direct discussion of this debate is found in the 95th Congress (1977 – 1978) during debate over the Air Quality Act. As part of the debate Congress mandated that the Secretary of Health, Education and Welfare undertake a comprehensive study of the economic impacts of air quality standards on the nation's industries and communities. Prior to the discussion, several studies were released by Senator Jennings Randolph in 1969.[12]

In the 1977 debates over the Clean Air Act Amendments of 1977, Congress even more directly confronted the issue of the impact of regulations on jobs when it enacted a provision which provided that the Secretary of Labor, in consultation with the Administrator, conduct a study of potential dislocation of employees due to implementation of the laws administered by the Administrator and that the Secretary

[12] Senate Resolution 267, October 16, 1969 and Senate Resolution 369, April 27, 1970.

submit to Congress the results of the study not more than one year after August 7, 1977.[13] This provision was codified as section 321(a) of the Clean Air Act and now reads:

> **(a) Continuous evaluation of potential loss of shifts of employment**
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> The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans, including where appropriate, investigating threatened plant closures, or reductions in employment allegedly resulting from such administration or enforcement."[14]

In the 95th Congress the debate over the employment impacts of regulation was clear, direct and extensive. The Committee noted:

> Among the issues which have arisen frequently since the enactment of the 1970 Amendments is the extent to which the Clean Air Act or other factors are responsible for plant shutdowns, decisions not to build new plants, and consequent losses of employment opportunities.
>
> On one side of this dispute, it has been argued that many employer statements that plants will have to shut down if certain pollution control measures become effective constitute "environmental blackmail." Thus, Representative George Brown testified in 1975 that "[t]here have already been major instances in which plant closings due to non-environmental factors have been blamed on environmental legislation. The effect of such "blackmail" would be to generate public pressure for the weakening of environmental standards, and to force labor unions into opposing enforcement of environmental laws."
>
> On the other hand, it has been argued that environmental laws have in fact been responsible for significant numbers of plant closings and job losses.
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> In any particular case in which a substantial job loss is threatened, in which a plant closing is blamed on Clean Air Act requirements, or possible new construction is alleged to have been postponed or prevented by such requirements, the committee recognized the need to determine the truth of these allegations. For

[13] Section 403(e) of Public Law 95–95; West, Federal Environmental Laws 2012, Historical and Statutory Notes, p. 1404.
[14] Section 321(A) of the Clean Air Act; 42 U.S.C. § 7621; This section became law as part of the 1977 Amendments to the Clean Air Act.

> this reason, the committee agreed to section 304 of the bill, which establishes a mechanism for determining the accuracy of any such allegation.[15]

The Committee went on to state:

> Section 304 of the committee bill is based on a nearly identical provision in the Federal Water Pollution Control Act. The bill establishes a new section 319 of the act. Under this provision, the Administrator is mandated to undertake an ongoing evaluation of job losses and employment shifts due to requirements of the act. This evaluation is to include investigations of threatened plant closures or reductions in employment allegedly due to requirements of the act or any actual closures or reductions which are alleged to have occurred because of such requirements.[16]

In conference, the Senate concurred with the House employment effects provision that addressed the EPA Administrator's evaluations and investigations of loss of employment and plant closure.[17]

Over the years EPA has simply ignored the Congressional mandate to conduct a continuous evaluation of loss or shifts in employment from the implementation of environmental statutes. But the debate over the impacts on jobs due to regulations continued without the information Congress mandated. In *Whitman v. American Trucking Association*, Justice Scalia writing for a near unanimous court, settled the debate, writing:

> In particular, the economic cost of implementing a very stringent standard might produce health losses sufficient to offset the health gains achieved in cleaning the air – for example, by closing down whole industries and thereby impoverishing the workers and consumers dependent upon those industries. That is unquestionably true, and Congress was unquestionably aware of it. Thus, Congress had commissioned in the Air Quality Act of 1967 (1967 Act) 'a detailed estimate of the cost of carrying out the provisions of this Act; a comprehensive study of the economic impact of air quality standards on the Nation's industries, communities and other contributing sources of pollution.' Sec.2, 81 Stat. 505. The 1970 Congress, armed with the results of this study, see The Cost of Clean

[15] 95 Cong. House Report 294; CAA77 Leg. Hist. 26 at 227.
[16] *Id.*
[17] 95 Cong. Conf. Bill H.R. 6161; CAA77 Leg. Hist. 24.

Air, S. Doc. No. 91 – 40 (1969) not only anticipated compliance costs could injure the public health, but provided for that precise exigency.[18]

Justice Scalia then proceeds to discuss how the EPA can ameliorate the adverse impacts of stringent Clean Air Act regulations.

Then in 2009 when a large number of regulations were being issued by EPA six U.S. Senators wrote to EPA requesting the results of its continuing Section 321(a) evaluation of potential loss or shifts of employment which may result from the suite of regulations EPA had proposed or finalized.[19] On October 26, 2009, EPA responded to the six Senators stating "EPA has not interpreted CAA section 321 to require EPA to conduct employment investigations in taking regulatory actions."

Therefore, a debate that started 45 years ago when Congress directly mandated a study of the employment effects of regulations so as to determine the truth of conflicting allegations about whether regulations adversely impact jobs is still unresolved due to the refusal of the agency charged with doing the continuous evaluation of potential loss or shifts in employment due to regulations to conduct such evaluation. As the next section will illustrate, job loss caused by regulations, no matter how beneficial they may be, still can be very harmful to the industry, community and person impacted. Avoiding knowledge of the harmful effects is not an appropriate way in which to conduct public policy.

C. Job Losses: The Human Dimension

As Congress recognized for decades there are huge benefits to a cleaner environment but many times they come at a cost to industry, communities and people. Moreover, many of these human costs are imposed on those least able to bear them. Congress has mandated that agencies study and report back on these costs, but the agencies refuse. Agencies, as required by law, need to start providing accurate accounting for the shifts in employment and related economic costs imposed on citizens by existing and proposed regulations so that Congress has the needed information to make sound public policy decisions.

The table below shows the employment decline in a few of the industries significantly affected by EPA rulemaking since 1990. Furniture, steel, sawmills/wood preservation and underground coal mining have been particularly hard-hit, each losing

[18] Whitman v. American Trucking Association, 531 U.S. 457 (2001) at 466.
[19] Letter from Senators Vitter, Riech, Johanns, Inhofe, Ensign and Hatch to EPA Administrator Lisa Jackson, October 13, 2009.

over 40 percent of the jobs that existed in 1990. The six industries shown accounted for over one million jobs in 1990 and by 2011, job losses totaled 472,300. This is not an exhaustive list. It is merely a list of a few selected industries that have been affected by EPA regulations.

While these job losses were not necessarily solely the result of environmental regulations, even in cases where industries were also declining for other reasons, it is reasonable to argue that regulatory burdens made matters worse. The important point is that EPA has not done the work that Congress repeatedly called for it to do with respect to investigating and tracking industries impacted by its regulations (past and proposed) to determine the extent to which worker displacement is the result of environmental regulations and to consider what steps could be taken by the government to ameliorate the burdens of job displacement that government policy decisions impose on working families.

Exhibit A
Employment Losses Selected Industries 1990 to 2011

	Employment (thousands)	Percent Change
Bituminous coal and lignite surface mining	17.1	30.6%
Bituminous coal underground mining and anthracite mining	32.8	40.8%
Sawmills and wood preservation	64.0	43.2%
Lime, gypsum, and other nonmetallic mineral products	16.3	16.7%
Iron and steel mills and ferroalloy production	93.2	49.9%
Furniture and related products	248.9	41.4%
Total	472.3	40.4%

Source: Bureau of Labor Statistics, Current Employment Statistics series

Even if job growth was spurred in other industries, the reality is that 472,000 workers and their families were burdened with the economic costs of job loss and the necessity to search for and retrain for replacement jobs. In many cases they have faced many months of unemployment before finding new jobs. In today's economy, according to Bureau of Labor Statistics data, the average job seeker has been looking for work for

39 weeks – over nine months. For workers who have been in their jobs for a long time, regulatory-induced job losses are particularly difficult to handle. Long-tenured workers have built up skills specific to an industry, and when regulations destroy job opportunities in their industry, they are at a disadvantage because their industry-specific skills may not be readily transferable to other industries.

The most recent Bureau of Labor Statistics' survey of displaced workers, for example, found that nearly half of the workers who lost jobs over the last three years were long-tenured workers, i.e., those with three or more years experience with the employer.[20] At the time of the survey (January 2012) 43 percent were still unemployed or had dropped out of the labor market, some having been jobless for up to three years after their job losses. Of those who had been lucky enough to find replacement jobs within the three years, over half (54 percent) had taken a cut in pay compared to their prior jobs.

The effect of job displacement is particularly hard on older workers, reflecting the difficulty of transferring established skills to new jobs. Among long-tenured displaced workers age 55 to 64, over half (53 percent) of workers who lost jobs over the three years 2009-2011 were still without a job in January 2012. Many older workers have been forced into early retirement, placing additional strains on the Social Security system and prematurely draining their own retirement savings. In the BLS survey, 49 percent of those age 65 or older had dropped out of the labor force.

Not all displaced workers have lost their jobs because of regulations, but for those that have, the economic (and other) burdens placed on them as the direct result of government policy choices must be recognized. EPA and other rulemaking agencies have an obligation under these circumstances at least to recognize these impacts and to consider how these impacts might be mitigated. EPA routinely points to the benefits that society gets from a cleaner environment. Congress requires that EPA continuously evaluate job displacement caused by regulation.

In evaluating the larger impact to the economy of the "sue and settle" approach to regulation, much more is at stake than the immediate cost of each new rule an agency agrees to issue or the net number of jobs that will be affected by each new rule. The immediate reality is that these new regulations will deter investment that creates new jobs and dislocate workers from the jobs that they now have. Whatever the future benefits may be, EPA's rush to regulate means that today more workers are losing jobs, families are losing income, and those least able to afford it are saddled with the burden of job

[20] Bureau of Labor Statistics, Worker Displacement 2009-2011, News Release USDL 12-1719, August 24, 2012. http://www.bls.gov/news.release/pdf/disp.pdf. Data was collected January 2012.

search, relocation, and retraining. The claim that some new jobs may be created does not lessen the burden and loss that workers who are displaced from their existing jobs experience.

The workers who lose their jobs today because regulation forces the plants where they have invested their working lives to shut down typically do not have the skills needed to take the new jobs that EPA promises will materialize, and typically new jobs when they materialize are in different places than the jobs destroyed. For example, the basic idea that a job lost today at a power plant in Ohio that shuts down will be replaced within a year or two by a new job at an electric vehicle plant in Michigan is little comfort for workers who need to feed their families and to make their mortgage payments in Ohio today.

The BLS data clearly show that EPA cannot justify ignoring employment displacement impacts by assuming that displaced workers quickly find new employment at the same wage rate. In short, EPA does not now count the loss of a job as a cost, but the government's own survey evidence shows that destroying jobs has long-lasting adverse impacts on workers. These are real, human costs that should not be ignored. When an agency of the federal government proposes a policy that it knows will result in employment dislocation for some citizens, at the very least the costs of job displacement should be recognized in the cost benefit analysis that justifies the regulation, and a decent respect for the families whose livelihoods are affected should require that the agency actively address how the burden of job dislocation will be mitigated.

Environmental regulations that force the shutdown of coal fueled power plants have reverberations down the supply chain, reducing the demand for American coal and ultimately eliminating jobs for American coal miners and those who transport coal. While these changes may also create new job opportunities in natural gas fields or alternative industries, the reality is that new jobs are not here and not now. They are generally not in the communities where coal mining jobs are destroyed and they are not jobs that former coal miners are generally prepared to fill. This means that our national policy decision to change the way we generate electricity imposes direct economic adjustment burdens on coal miners and others in the coal supply chain, their families and their communities.

From 1990 through 2011, employment in the coal mining industry has fallen by over 49,000 – a 36 percent decline. In recent weeks we have heard reports that suggest that the loss of jobs for American coal miners is accelerating. In West Virginia and eastern Kentucky, according to reports by both the mine workers' union and the coal producers' association, 2,000 mining production jobs were lost in just two months – May and June this year.[21] Regulation impact was cited as a major contributor to these job losses. Mining job losses at this rate of 1,000 per month could wipe out the entire U.S. coal mining industry (2011 employment: 136,000) in a little over 10 years.

Regardless of potential future job losses, let us look at the potential economic losses faced by only those 2,000 Appalachian coal miners who we know lost their jobs in May and June this year. Based on average experience reported in the most recent BLS survey of displaced workers, 860 of those 2,000 workers can expect to still be jobless (either looking for work or given up looking) three years from now. Based on the average hourly pay of production workers in the coal mining industry,[22] those 860 workers and their families can expect each to lose over $151,000 in income from three years of joblessness. That amounts to a total economic loss of $126 million for those 840 families over three years and more losses as more years of joblessness accumulate.

Income losses of this magnitude translate into real hardship -- decline of families from middle class to poverty status, mortgage foreclosures, stresses that tear at the fabric of families, stresses that destroy individual health, and children who do not go to college or who drop out of high school to work. It is bad enough when families are faced with such burdens because of natural disasters, business cycles, or foreign competition, but when such burdens are inflicted on them by the conscious decisions of their own government it is intolerable.

What of the other workers, the ones who are lucky enough to find new jobs within three years? Based on the averages from current average duration of unemployment published by BLS, even they will face 39 weeks of unemployment and an income loss of $38,313 each during their job search (totaling $36.7 million for those 1,140 workers and their families.) The displaced worker survey data also suggests that 615 of them will have to take a significant cut in pay when they do find new work, adding further to the burden that they carry from their job displacement.

The loss of coal mining jobs in West Virginia and eastern Kentucky is of particular concern because these are typically among the best paying jobs in the affected communities. These jobs anchor the middle class families in their towns and rural counties, and loss of these jobs has community-wide economic repercussions.

[21] See "WV Dems announce training funds for displaced miners" at http://www.statejournal.com/story/19012590/wv-dems-announce-training and http://wowk.membercenter.worldnow.com/story/18917094/hard-times-for.

[22] $24.31 per hour according to Bureau of Labor Statistics Occupational Employment and Earnings Survey data for May 2011. Weekly and annual earnings do are based on 40 hours per week and do not include overtime pay that many miners receive.

One of the 2,000 laid off Appalachian coal miners was interviewed for a September 17, 2012, news story.[23] Allen Black was laid off on April 29 after working as a coal miner for over twenty years. His $70,000 annual income enabled his family to send a son to major in pre-med at a university, but now Mr. Black's income has been reduced to $350 per week in unemployment benefits, and with no new job in sight he has begun liquidating his retirement savings to keep his son in college and to pay for food and housing for his family. Said Black in the Human Events interview, "There was a massive migration out of Appalachia going north to build cars in the 1960s because there were not jobs here. Coal is the only industry [left] and when it fails, we all fail…this time we have nowhere to migrate to."

Three new EPA regulations are expected to close 175 coal-fired electric generating plants (according to a Senate report quoted by Human Events), but the effects of these rules and the inflexible schedule adopted for their implementation extend far beyond the directly affected plants and into the homes and communities of coal mining workers across the nation.

Significantly, EPA did not include any of these real, human cost burdens imposed on coal mining families in their calculations of the *$13 billion* in costs for the three new rules. They should have to, and be required to, propose ways to mitigate these costs when they propose new regulations.

Recent studies discuss the startling human disaster impacts of unemployment. For example, the prospects of re-employment of older workers deteriorate sharply the longer they are unemployed. A 50 – 61 year old worker unemployed for 17 months has only a nine percent chance of securing a job in the next three months and workers over 62 have only a six percent chance of finding a new job.[24] Another study finds mid-career workers who lose long-held jobs and experience long term unemployment can expect to live one and one – half years less than a continuously employed worker.[25] According to Sullivan and von Wachter:

> These results suggest that events in the labor market shaping workers' careers also have long-run effects on health outcomes. The losses in life expectancy implied by our estimates shows these effects can be large. A worker displaced in mid-career can expect to live about one and half years

[23] "The War on Coal," Human Events, Sept. 17, 2012, p. 16.
[24] Dean Baker and Kevin Hassett, "The Human Disaster of Unemployment," New York Times, May 12, 2012, http://www.nytimes.com/2012/05/13/opinion/sunday/the-human-disaster-of-unemployment.html?pagewanted=all.
[25] Daniel Sullivan and Till von Wachter, "Job Displacement and Mortality: An Analysis Using Administrative Data: Quarterly Journal of Economics, Vol. 124 (2009), number 3 (Aug), pp. 1265-1306 at http://qje.oxfordjournals.org/content/124/3/1265.short.

> less than a non-displaced counterpart. The reduction in life expectancy is smaller for older workers who experience lower lifetime earnings losses and are exposed to increased mortality for a shorter period of time. Our results do not speak to the role of non-economic factors such as stress, selfworth, and happiness. Yet, they suggest an important avenue for future research would be to examine whether the negative health consequences of mass layoffs can be prevented by providing assistance that stabilizes the level and variance of earnings."[26]

Moreover, the rate of suicides for unemployed workers also increased by up to ten percent.[27] These are real people, and not EPA's computer modeled people.

EPA needs to consider more than the supposed net impacts of its regulations. While EPA's regulations have both benefits and costs, the reality is that the winners and the losers are not the same people and usually not even in the same communities. EPA's regulatory decisions create massive shifts in the structure of the economy, benefiting some workers, some communities and some industries and imposing costs or complete destruction on others. Even if EPA's redistributive mandates yield a net benefit for society as a whole over time, the rapidity of change that EPA mandates and the nationwide scope of change is a tremendous shock to the economic system. EPA needs to consider how it can lessen the burdens it is placing on the workers, families and communities that it targets for losses.

EPA could reduce the economic shocks of its mandates by adopting more gradual approaches that phase in new standards over longer periods of time and that apply new standards only to new facilities, allowing existing facilities and the communities that depend on them to live out their natural lives. New technologies yield net benefits to society, but their efficiency gains also come with costs as jobs and industries dependent on old technology are replaced. But in the case of technological change, the typical experience is gradual adjustment that cushions the shocks of economic change. EPA should endeavor to make its program of environmental change resemble more closely the successful experience of adoption of technological change. In addition to gradual schedules for adoption of new standards, EPA might also feature greater reliance on voluntary compliance, demonstrations, and incentive programs. A more gradual approach to regulation implementation would yield the added benefit of facilitating empirical study of effects to ensure that policies really are effective and on the right track.

[26] Sullivan and von Wachter, p.1290.
[27] *Supra*, note 49. *See also* Annie Lowery, "Death and Joblessness," Washington Independent, August 17, 2010 at http://washingtonindependent.com/94925/death-and-joblessness.

Thank you for the opportunity to submit this testimony. I look forward to answering any questions you may have.

NFIB
The Voice of Small Business.

September 19, 2012

The Honorable Lamar Smith
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The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Smith and Ranking Member Conyers:

The National Federation of Independent Business (NFIB) appreciates the opportunity to submit this letter for the record to the Committee on the Judiciary for the hearing entitled "Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery." NFIB is the nation's leading small business advocacy organization representing over 350,000 small business owners across the country, and we appreciate the opportunity to provide our perspective on how regulations affect small businesses.

Excessive and complex regulatory burdens continue to be a hardship for many small business owners across America. In NFIB's most recent *Small Business Economic Trends*, released on September 11, "government requirements and red tape" ranked as the second-most frequent answer when NFIB members were asked to identify the single-biggest problem facing their small business. More than one in five respondents cited regulation as the biggest issue[1]. Regulation ranked just behind taxes and ahead of poor sales – the latter of which many have claimed as the primary reason why the economy has been slow to recover.

Furthermore, a U.S. Small Business Administration's Office of Advocacy study found in 2010 that regulatory compliance costs small businesses 36 percent more per employee per year than their larger counterparts.[2]

Small businesses operate on thin margins. Mandating that a small business install an expensive piece of equipment or take on a burdensome process that makes their company less efficient affects a business's ability to either retain or grow jobs. Regulation is indeed necessary, but its impacts need to be studied carefully.

Small businesses frequently find that regulation is too often "one-size-fits-all," and fails to consider the unique challenges that these companies face. Many times, options exist that would provide greater compliance flexibility for small businesses that still allow the agency to meet its regulatory goal. Accordingly, regulatory agencies need to take small business flexibility seriously, even when it is not legally required.

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[1] http://www.nfib.com/Portals/0/PDF/sbet/sbet201209.pdf. pp. 18.
[2] http://www.sba.gov/advo/research/rs371tot.pdf

Small businesses often find that when they go through the required steps and processes to comply with a rule, the total cost of compliance is significantly higher than what the agency estimated in its economic impact analysis. Agencies need to incorporate realistic costs into their analyses, including foreseeable indirect costs on industries. As an example, a recent Environmental Protection Agency (EPA) rule on mercury emissions from power plants failed to take into account how increased costs of energy for small businesses and consumers would affect the economy. These types of estimates are critical in order to paint a full and clear picture of a rule's impact.

In an effort to inform the public about the problems excessive regulations can have on small businesses and the economy, NFIB formed Small Businesses for Sensible Regulations in 2011. This coalition of small businesses has coalesced around five core principles that we believe should guide reform of the regulatory process. These principles are:

1. Small businesses deserve a greater voice in the federal regulatory process.
2. The Administration's first focus should be on providing assistance to small businesses before assessing penalties.
3. Every major regulation should undergo rigorous benefit-cost analysis.
4. Regulations should be based on objective data and hard science.
5. The regulatory process requires more transparency and accountability.

Last year, Chairman Smith introduced – and the House of Representatives ultimately passed – the Regulatory Flexibility Improvements Act (H.R. 527). This important legislation addresses many of the principles listed above, and its enactment remains NFIB's top regulatory reform priority.

Specifically, H.R. 527 would strengthen the regulatory process by requiring agencies to thoroughly analyze the economic impact their rules have on small businesses. In particular, the legislation would expand the Small Business Advocacy Review Panel process, whereby agencies can learn how their regulations will practically affect small entities. It would also give the Office of Advocacy the authority it needs to establish standards for "regulatory flexibility analysis."

The legislation would also improve the accuracy of benefit-cost analysis by requiring agencies to consider the indirect impact of regulations on small business. Finally, the legislation's provisions on periodic review of rules are in line with President Obama's Executive Order 13563, which requires agencies to conduct a retrospective analysis of existing rules to identify and modify rules in need of reform.

NFIB appreciates the opportunity to share the views of our members regarding excessive red tape and looks forward to working with the Committee to improve the regulatory environment for small business owners.

Sincerely,

Susan Eckerly

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