# HOW THE ADMINISTRATION'S REGULATORY ONSLAUGHT IS AFFECTING WORKERS AND JOB CREATORS

## HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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# C O N T E N T S

# HOW THE ADMINISTRATION'S REGULATORY ONSLAUGHT IS AFFECTING WORKERS AND JOB CREATORS

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**Wednesday, December 9, 2015**
**House of Representatives**
**Committee on Education and the Workforce,**
**Subcommittee on Workforce Protections**
**Washington, D.C.**

The subcommittee met, pursuant to call, at 10:03 a.m., in Room 2175, Rayburn House Office Building. Hon. Tim Walberg [Chairman of the subcommittee] presiding.

Present: Representatives Walberg, Thompson, Rokita, Brat, Stefanik, Wilson, Pocan, Clark, and DeSaulnier.

Also Present: Representative Kline, Representative Courtney and Representative Takano.

Staff Present: Andrew Banducci, Workforce Policy Counsel; Ed Gilroy, Director of Workforce Policy; Jessica Goodman, Legislative Assistant; Callie Harman, Legislative Assistant; Tyler Hernandez, Press Secretary; Nancy Locke, Chief Clerk; John Martin, Professional Staff Member; Dominique McKay, Deputy Press Secretary, Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Olivia Voslow, Staff Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Christine Godinez, Minority Staff Assistant; Carolyn Hughes, Minority Senior Labor Policy Advisor; Brian Kennedy, Minority General Counsel; Richard Miller, Minority Senior Labor Policy Advisor; Amy Peake, Minority Labor Policy Advisor; Saloni Sharma, Minority Press Assistant, and Elizabeth Watson, Minority Director of Labor Policy.

Chairman WALBERG. Good morning. It is sure quiet in the room. After running up two flights of stairs, let me get my wind back here.

A quorum being present, the subcommittee will come to order. Good morning. I would like to thank you all for joining us today, and thank our witnesses for being here with us to share their experiences and perspectives.

The end of the year is an important time to reflect on what has been accomplished and what work remains to be done. As members of the Education and the Workforce Committee, this is especially important as we consider the significant challenges many workers continue to face.

Recent months have shown signs of economic improvement and signs of continued concern, both. Roughly 8 million Americans are still unemployed and searching for work, and an additional 6 million are working part-time hours when they really need and want full-time jobs. That does not include the millions of individuals who are so discouraged by meager job prospects that they have simply dropped out of the workforce entirely.

Meanwhile, those with jobs are facing fewer opportunities to advance and earn higher wages. Some will say the problems facing workers and job creators can be solved with more spending, more Government mandates, and more regulation. Perhaps we will hear some of those claims today, but that is the same failed approach that the Obama administration has pursued over the last seven years.

The results have been an anemic economy, sluggish job growth, and most importantly, less opportunity and prosperity for millions of hard working men and women.

Time and again, we have called on the administration, including those at OSHA and the Department of Labor more broadly, to pursue a different, more responsible course, and time and again, our calls have been rebuffed.

The most recent example was the release of the administration's regulatory agenda, which doubles down on the same extreme regulatory approach that has made the problems plaguing the country worse at the expense of those struggling the most.

Let me be clear. Federal policies do play an important role in ensuring safe and healthy workplaces and protecting the basic rights of hard working men and women. That is not what we are here to discuss today.

The question is not whether there should be rules of the road for workers and employers to follow. The question is how we ensure those rules are implemented fairly, responsibly, and in a way that promotes the best interests of both workers and their employers.

Unfortunately, more often than not, what we have seen from this administration is an overly punitive and unnecessarily burdensome approach. Adding insult to injury, often these rules and regulations are being developed and changed without any public input. This regulatory approach is holding us back, and that is the focus of today's hearing.

We know there are areas where we can make meaningful change without creating costly consequences and unintended harm. For example, Chairman Kline and I have said we are open to modernizing current overtime rules to strengthen protections for workers and help employers fulfill their legal responsibilities.

Instead, we have had to confront a proposal that will limit workplace flexibility, make it harder for workers to advance up the economic ladder, and impose a significant burden on small businesses.

Earlier this year, Nicole Berberich, director of human resources at the Cincinnati Animal Referral and Emergency Center, testified in front of this subcommittee about the challenges employers are already facing because of complicated federal wage and hour regulations. She also explained that small businesses like the one she works for are likely to experience the burdens of these regulations disproportionately. She added that those burdens will continue to worsen with the expected overtime changes.

At a separate hearing before this same subcommittee, Eric Williams, who worked his way up from crew member at a fast food restaurant to become a franchise and chief operating officer at CKE Restaurants, shared his fears that the administration's overtime proposal, and I quote, "will severely limit hard working, talented Americans from realizing their dreams," as he dreamed and realized. He worries that because of the proposal, some employees, and I quote, "may never reach their full potential." That is a shame.

The overtime proposal is just one example of this administration's misguided approach to regulating. At another hearing, Drew Greenblatt, a steel wire manufacturer from Baltimore, spoke to us about how Government policies are hindering growth and how he and others in his industry find themselves stuck between a rock and a hard place.

He explained the situation as between, and I quote, "A rock of harsh and unforgiving global economic competition and a hard place of inflexible and ever proliferating regulations."

It should be clear to anyone who is listening that the current regulatory onslaught is making life harder for working families and small business owners, not better.

According to a study commissioned by the National Association of Manufacturers, federal regulations cost more than $2 trillion in lost economic growth annually, and the American Action Forum estimates that the administration imposed more than $181 billion in new regulatory costs during 2014 alone. These are staggering statistics that in many ways represent lost wages and fewer jobs for American workers.

Today, we will hear from our witnesses how this unprecedented regulatory approach has created troubling concerns for workers and small businesses during the past year. My hope is that by demanding more responsible regulatory policies we can ensure a prosperous 21st century workplace.

With that, I will now recognize my Ranking Member, Ms. Wilson, for her opening remarks.

[The information follows:]

**Prepared Statement of Hon. Tim Walberg, Subcommittee on Workforce Protections**

Good morning. I'd like to thank you all for joining us today and thank our witnesses for being here to share their experiences and perspectives.

The end of the year is an important time to reflect on what has been accomplished and what work remains to be done. As members of the Education and the Workforce Committee, this is especially important as we consider the significant challenges many workers continue to face.

Recent months have shown signs of economic improvement and signs of continued concern. Roughly eight million Americans are still unemployed and searching for work, and an additional six million are working part-time hours when they really need and want full-time jobs. And that doesn't include the millions of individuals who are so discouraged by meager job prospects that they have dropped out of the workforce entirely. Meanwhile, those with jobs are facing fewer opportunities to advance and earn higher wages.

Some will say the problems facing workers and job creators can be solved with more spending, more government mandates, and more regulation. Perhaps we will hear some of those claims today, but that's the same failed approach the Obama administration has pursued over the last seven years. The results have been an anemic economy, sluggish job growth, and most importantly, less opportunity and prosperity for millions of hardworking men and women.

Time and again we have called on the administration – including those at OSHA and the Department of Labor more broadly – to pursue a different, more responsible course, and time and again our calls have been rebuffed. The most recent example was the release of the administration's regulatory agenda, which doubles-down on the same extreme regulatory approach that has made the problems plaguing the country worse at the expense of those struggling the most.

Let me be clear: Federal policies do play an important role in ensuring safe and healthy workplaces and protecting the basic rights of hardworking men and women. That's not what we are here to discuss today. The question isn't whether there should be rules of the road for workers and employers to follow. The question is how we ensure those rules are implemented fairly, responsibly, and in a way that promotes the best interests of both workers and their employers.

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We know there are areas where we can make meaningful change without creating costly consequences and unintended harm. For example, Chairman Kline and I have said we are open to modernizing current overtime rules to strengthen protections for workers and help employers fulfill their legal responsibilities. Instead, we have to confront a proposal that will limit workplace flexibility, make it harder for workers to advance up the economic ladder, and impose a significant burden on small businesses.

Earlier this year, Nicole Berberich, director of Human Resources at the Cincinnati Animal Referral and Emergency Center, testified about the challenges employers are already facing because of complicated federal wage and hour regulations. She also explained that small businesses like the one she works for are likely to experience the burdens of these regulations disproportionately. And she added that those burdens will continue to worsen with the expected overtime changes.

At a separate hearing, Eric Williams – who worked his way up from a crew member at a fast-food restaurant to become a franchisee and chief operating officer of CKE Restaurants – shared his fears that the administration's overtime proposal "will severely limit hardworking, talented Americans from realizing their dreams." He worries that, because of the proposal, some employees "may never reach their potential."

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Today we will hear from our witnesses how this unprecedented regulatory approach has created troubling concerns for workers and small businesses during the past year. My hope is that by demanding more responsible regulatory policies, we can ensure a prosperous 21st century workforce.

With that, I will now recognize Ranking Member Wilson for her opening remarks.

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Ms. WILSON. Mr. Chairman, I want to thank you for holding this hearing and giving us an opportunity to discuss the Department of Labor's work to ensure more American workers have the protections they need to build a better life for themselves and their families.

The legislation establishing the Department of Labor memorialized the agency's honored purpose, to foster, promote, and develop the welfare of working people, to improve their working conditions, and to advance their opportunities for profitable employment.

Since its inception in 1913 and throughout America's ever changing economic and social landscape, DOL has held steadfast to this original purpose. Using its court affirmed statutory authority, the department has proposed rules to promote fair wages, safe workplaces, and equal employment opportunities.

For instance, I was pleased to hear that DOL released the persuader rule for OMB review this week, and will soon finalize the rule. Four years in the making, this rule will level the playing field for workers wishing to organize by strengthening disclosure requirements for employers that hire pricey outside consultants to bust union organizing efforts.

It is my hope that our subcommittee, also tasked with promoting the welfare of working people, will join DOL in its efforts by passing legislation that supports working families. Instead, it seems we are stuck in a perpetual state of inaction or flat out obstruction. Efforts to derail DOL's regulations do not help workers struggling to get by, create safer workplaces, or promote equal opportunity in employment.

The men and women teetering on the brink of poverty, people making $23,660 a year, who are asked to work 50, 60, or 70 hours a week with no promise of extra pay, are not helped by efforts to block DOL's rule to extend overtime protection to 5 million working Americans.

The nearly 2.1 million workers exposed to silica and at risk of contracting potentially lethal silicosis are not made safer by efforts to block full implementation of DOL's crystalline silica dust rule.

Expectant mothers who want nothing more than the ability to work and save for their new additions are not comforted by efforts to impede EEOC's work to address pregnancy discrimination in the workplace.

Americans are no longer persuaded by some of the offered justifications for attempts to block regulations designed to protect workers. It is hard to argue the Department of Labor's regulatory agenda is causing historic job loss when we are in fact in the midst of the longest streak of job growth on record. Our economy has added over 13.7 million jobs over 69 straight months, and we are seeing the lowest unemployment rate since April 2008.

These questionable arguments for blocking DOL's rules must make us question the purpose of our pursuits.

If there is genuine concern for workers, as well as businesses, then support a working families agenda that boosts wages, so more Americans are economically secure and have the increased spending power that supports job creating consumer demand. Take up a vote on a working families agenda that promotes the strong work/family balance needed for productive workers. Pass a working families agenda that promotes the equal employment opportunity that is linked to increased profitability and ensures all workers have a fair shot at success.

I must remind my colleagues that the department's purpose as well as our own is singular and clearly defined, the welfare of working people. It is this purpose that we must look to when judging DOL's actions as well as our own. We are the Workforce Protections Subcommittee. We must protect the workforce.

I look forward to hearing from the witnesses and what we can do to support DOL's efforts to promote the welfare of working people.

To the witnesses, I have read your statements. I want to work with you and do what we can to support DOL's efforts to promote the welfare of working people.

Very shortly, in Emancipation Hall at 11:00 a.m., members of the Congressional Black Caucus and House and Senate leadership will commemorate the 150th anniversary of the ratification of the 13th Amendment to the United States Constitution, which abolished slavery in the United States. The very slaves who built the United States Capitol.

Thousands fell to their death trying to erect the dome. They slept outside in the snow while laying the marble floors and columns. The ultimate workforce on whose shoulders we stand. They never had or received any protection. There was no Department of Labor, no Workforce Protections Subcommittee.

We cannot turn back. We have made so much progress. Let us vow to protect our present workers. After all, we are the Workforce Protections Committee, and I want to be proud of our work as we protect our workers.

I want to thank Representative Pocan for substituting for me. I have to attend the ceremony, and I yield back my time.

[The information follows:]

Committee on
Education and the Workforce
subcommittees
Health, Employment, Labor, and Pensions
Workforce Protections - Ranking Member

Frederica S. Wilson
Congress of the United States
24th District, Florida

**Opening Statement of Ranking Member Frederica S. Wilson**
**Workforce Protections Subcommittee Hearing**
*"How the Administration's Regulatory Onslaught is Affecting Workers and Job Creators"*
Wednesday, December 9, 2015

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Thank you.

Chairman WALBERG. I thank the gentlelady and I thank you for reminding us of this celebration today and the 13th Amendment and the impact.

Pursuant to Committee Rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record, and without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce today's witnesses. Mr. Sam Batkins is director of regulatory policy at the American Action Forum here in Washington, D.C.

Prior to joining AAF, Mr. Batkins worked at the U.S. Chamber of Commerce, Institute for Legal Reform, and the National Taxpayers Union. His work has focused on lawsuit abuse, tort reform, federal regulation, and state and federal spending.

Mr. Ralph Beebe is president of Highland Engineering, Inc. in Howell, Michigan. It is good to see a Michiganian here. That is just kind of a personal side line between us, right?

He is testifying on behalf of the National Federation of Independent Business. Highland Engineering manufactures troop support equipment and contracts with all branches of the Department of Defense, as well as the Federal Emergency Management Agency, and foreign militaries.

In addition to its DOD work, HEI works with commercial customers in automation and water treatment areas.

Ms. Christine Owens is executive director of the National Employment Law Project in Washington, D.C. Prior to working with the National Employment Law Project, she worked at the AFL–CIO as a senior policy analyst specializing in workplace equity issues. Much of her work has focused on minimum wage and living wage hikes, pay equity, and state unemployment insurance coverage expansions.

Mr. Bradford Hammock is a shareholder and co-leader of the Workplace Safety and Health Practice Group for Jackson Lewis in Reston, Virginia. Prior to this, Mr. Hammock served as an attorney at OSHA, working on regulatory initiatives, compliance assistance, and enforcement policies.

I welcome you all, and as is the policy in this Committee, we would ask you now to rise and raise your right hand.

[Witnesses sworn.]

Chairman WALBERG. Thank you. You may take your seats. Let the record reflect the witnesses answered in the affirmative.

Before I recognize you to provide your testimony, let me briefly explain the lighting system, which is probably not unfamiliar to most of you. It is like traffic lights. Green, keep on going, you have five minutes for your testimony. Yellow hits, you have a final minute to wrap up. When red hits, you do not have to screech to a stop but come to a conclusion. You will have an opportunity to answer further questions during our questioning. The same will be true for the members of this subcommittee.

Now, let me recognize for five minutes of testimony, Mr. Batkins. Welcome.

**TESTIMONY OF SAM BATKINS, DIRECTOR OF REGULATORY POLICY, AMERICAN ACTION FORUM, WASHINGTON, D.C.**

Mr. BATKINS. Thank you, Chairman Walberg, members of the Committee. Thank you for the opportunity to appear today.

In this testimony, I wish to highlight the following points: first, by virtually any metric, regulatory activity has increased across the federal government, from the 100 major rules issues in 2010 to the more than $100 billion in new annual regulatory costs. These new measures will affect employment.

Second, there is a general consensus that regulations have statistically significant but small effects on industry employment. The American Action Forum's work has found that $1 billion in new annual regulatory costs could cut industry employment by 3.6 percent, and third, even federal agencies routinely acknowledge the impact of regulations on employment.

From 2012 to present, 22 rules have conceded they could negatively impact employment, resulting in nearly 86,000 lost jobs.

Regulatory activity has undoubtedly increased in recent years. The paperwork burden, the number of major rules, and monetized regulatory costs, have all trended upward. What does this mean for employment?

We know there are more regulatory compliance officers now than ever before, approximately 246,000. As the regulatory burden grows, so, too, does demand on businesses, to shift employees from profit making endeavors to compliance.

A 2013 Minneapolis Fed study emphasized paperwork burdens and what being forced to hire additional compliance staff means for small banks. The study found that hiring two additional compliance officers reduced profitability by roughly half a percent, and that one-third of the banks studied would become unprofitable if forced to hire additional compliance officers.

For regulatory costs, EPA and the Department of Energy alone have added $39 billion in new annual burdens since 2009. For employees in fossil fuel power plants, these costs are one leading factor to a 28 percent decline in industry employment since 2008.

There are other factors in play but regulation has definitely made its mark. According to the most recent literature, regulation has a modest but significant impact on industry employment.

In one seminal study, Professor Michael Greenstone examined how employment in pollution intensive industries in non-attainment ozone counties differed from attainment counties. The results were dramatic. Non-attainment counties, those with more stringent EPA controls, lost 590,000 jobs, $37 billion in capital, and $75 billion in output.

Dr. Richard Morgenstern, whose work is often cited in regulatory impact analyses, summarizes the intersection of regulation and employment writing, "there is only limited evidence that environmental regulation leads to significant job loss." Note, he did not say there is evidence environmental regulation leads to major job gains.

The American Action Forum's work found that for every $1 billion increase in regulations, industry employment declines by 3.6 percent.

More important than a top line number, however, is the human element to regulation. Even if a rule leads to a net zero impact on aggregate employment but results in thousands of job transfers, there still might be individual job losses and stagnant wages.

For instance, research has found job displacement can lead to a 15 to 20 percent increase in death rates in the 20 years following displacement. This should not be discounted by regulators or policymakers.

Finally, regulatory agencies need to perform more employment impact analyses. Rutgers University Professor Stuart Shapiro examined a regulatory impact analysis of 56 major rules and found that just 11 quantified the rules' impact on employment. On rules since 2012 that had discussed the impact on employment, the American Action Forum found 22 admitted some job losses were possible, including 11 to date in 2015.

As the Department of Energy once conceded, "it is possible small manufacturers will choose to leave the industry or choose to be purchased by or merged with larger market players."

Likewise, a Department of Labor rule admitted its implications would result in a dead weight loss and dis-employ roughly 1,000 workers annually. The combined employment loss from the 22 rules, according to agency estimates, could top 85,000 workers.

Based on the research from Professors Eric Posner and Jonathan Masur, the cost of an individual job displacement is $100,000. If we take this 85,000 jobs figure at face value, it means $8.5 billion in costs, human costs, a human toll from regulation.

The proposed overtime expansions, the fiduciary rulemaking, and redefining the joint employer rule could add to these significant totals.

In conclusion, the general consensus is regulation does have an effect on employment, at least at the industry level. More research is needed in this field, and agencies, OIRA, and independent parties should work to perform more rigorous analysis on the intersection of regulation and employment.

Thank you for your time, and I look forward to answering your questions.

[The statement of Mr. Batkins follows:]

# "How the Administration's Regulatory Onslaught is Affecting Workers and Job Creators"

United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections

Sam Batkins, Director of Regulatory Policy*
American Action Forum

December 9, 2015

*The views expressed here are my own and not those of the American Action Forum.

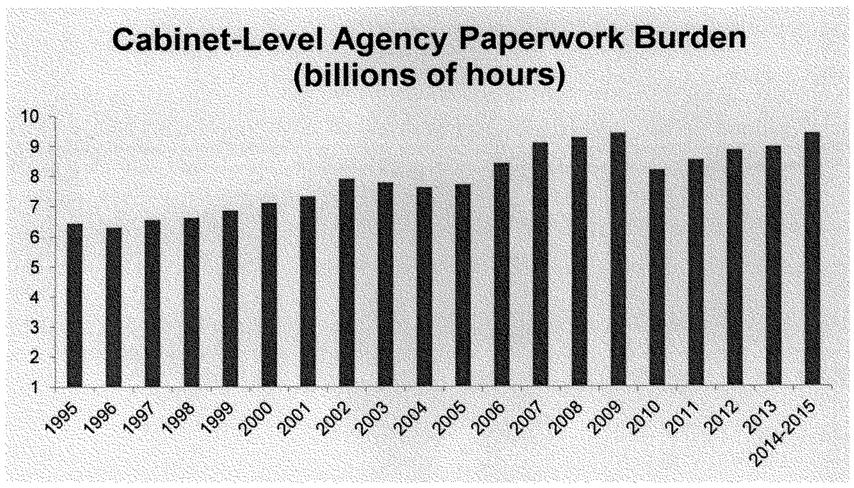
Chairman Walberg, Ranking Member Wilson, and Members of the Committee, thank you for the opportunity to appear today. In this testimony, I wish to highlight the following points:

- By virtually any metric, regulatory activity has increased during the past few years. For example, in 2010 the federal government set a modern record by issuing 100 major rules. Over time, as agencies issue an average of 75 major rules annually, regulations will have an impact on employment: either gains, losses, or transfers. Since 2008, regulators have added more than $100 billion in annual regulatory costs. These regulatory costs affect employment, consumers, and the broader economy.
- The general consensus suggests that regulation can have a statistically significant and directionally negative effect on employment. For example, Richard Morgenstern, a leading regulatory economist has stated, "There is only limited evidence that environmental regulation leads to significant job loss." Conclusions about other employment areas are mixed and more research is needed.
- The American Action Forum's (AAF) own work has found statistically significant, but small effects from regulation on employment. In one study examining the effect of 148 regulations on 44 industries over time, AAF found that for every $1 billion in new regulatory costs, industry employment declined by 3.6 percent.
- In addition to what outside research suggests, even federal agencies routinely acknowledge new rules can have negative impacts on employment. Based on an AAF review of rules since 2012, 22 regulations have conceded they could negatively affect employment, including eleven from this year.

**Regulatory Overview**

Even though there might not be a general consensus that regulatory activity has increased recently, a variety of metrics from both non-profit and government sources reveal that activity (measured by paperwork, major rules, overall regulatory costs, and regulatory restrictions) has increased substantially.

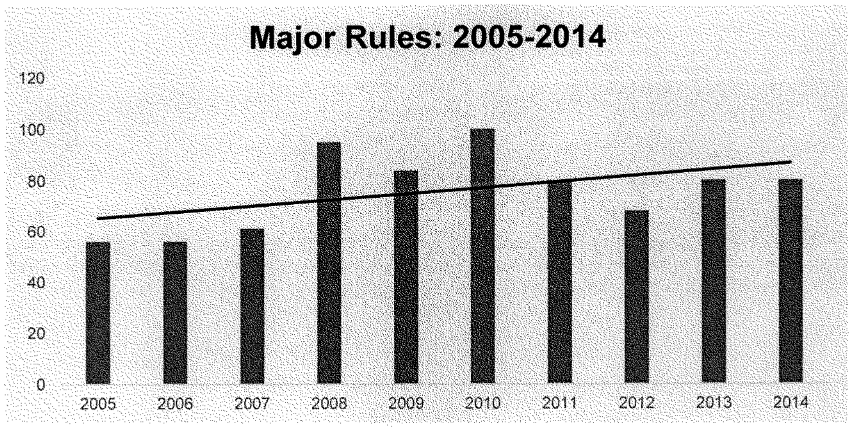
The first chart below tracks the cabinet-level paperwork burden from 1995 to 2015, years for which the federal government has available data. As shown below, paperwork at the cabinet level has accelerated from 6.4 billion hours in 1995 to roughly nine billion hours today, an increase of approximately 40 percent.



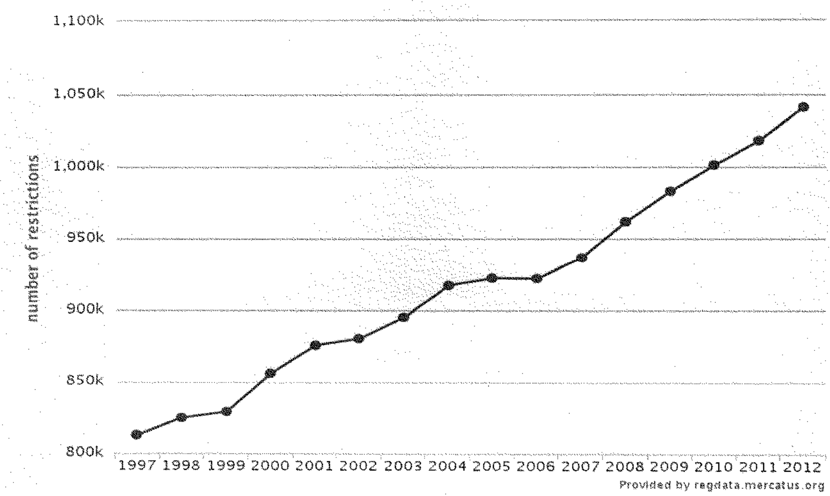

Paperwork is an important metric for measuring regulation because it is the most obvious way for most Americans to encounter the effects of federal rules. Virtually all Americans have completed an I-9 form or complied with the hundreds of tax forms generated by the IRS. This paperwork also has an effect on business. According to the Bureau of Labor Statistics, there are more than 246,000 employees devoted solely to compliance, either regulatory or legal. Annually they are paid approximately $16.7 billion.

As the regulatory burden grows, so does the demand on businesses to shift employees from profit-making tasks to compliance. A 2013 Minneapolis Fed study emphasized paperwork burdens and what being forced to hire compliance staff means for small banks. The study found that hiring two additional compliance officers reduced profitability by 45 basis points (roughly half-a-percent) and that one-third of the small banks studied would become unprofitable if forced to hire additional compliance officers. Rising paperwork doesn't just exist in the abstract. As regulatory demands increase, so do demands on firms, and ultimately their profitability.

The second chart below tracks the number of "major" regulations during the last ten years. These are rules with an economic impact of $100 million or more. As the chart shows, there has been a notable increase in the number of "major" regulations. For example, in 2010, the federal government published 100 major regulations, a modern record. Those major rules imposed an aggregate cost of $165 billion.



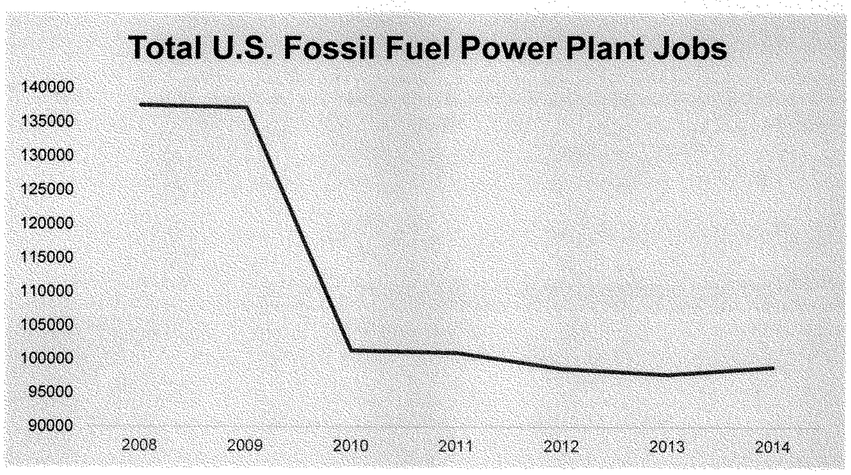

The Mercatus Center has another innovative way to track regulatory growth. By examining the number of "restrictions" (words such as "must" and "shall") contained in the Code of Federal Regulations, Mercatus can determine how regulation increases or decreases over time. Their chart below demonstrates the significant increase in regulation from 1997 to 2012.




According to Mercatus, the number of federal regulatory restrictions increased 28 percent from 1997 to 2012. Passage of the Affordable Care Act and Dodd-Frank presages even more growth.

Finally, AAF has data on every federal regulation that has monetized costs, benefits, or paperwork burden hours from 2006 to present. From 2008 to 2015, regulators have added about $100 billion in new annual regulatory costs. EPA and the Department of Energy (DOE) are particularly aggressive, adding $39.7 billion in new annual costs since just 2009, including measures that reduce regulatory burdens.

Few would argue these new rules won't have an effect on employment. Some rules might generate new jobs in the short-run as firms must hire compliance officers or install new equipment to comply with environmental rules. Some regulations might lead to transfers among states, but others might lead to the closure of power plants or mining operations. The chart below tracks fossil fuel power plant employment from 2008 to 2014.




Despite the slight uptick in 2014, employment has nevertheless declined by 27.8 percent and it remains at its lowest level since at least 2001. There are other factors at work, namely the rise in renewable energy and the Great Recession, but even EPA Administrator Gina McCarthy has conceded that regulations are a factor in declining industry employment. The intersection between regulation and employment is far more complicated than "increase" or "decrease," but the preponderance of academic evidence indicates that regulation can negatively affect economic growth and employment.

**Literature on Regulation and Employment**

As with any public policy debate, there are studies on both sides that support or oppose a position. Indeed, there are studies showing that regulation can increase employment in certain industries, decrease employment, or lead to statistically insignificant results. The macroeconomic effect of regulation is more difficult to discern. For example, even a $10 billion regulation will likely have insignificant effects on nationwide employment and output.

Recent work, however, by Professors John Dawson and John Seater suggests the aggregate impact of regulation over time is profound.[1] In their analysis of regulation from 1949 to 2005, they find regulation has reduced annual output by roughly 28 percent. To put that in context, they write, "In 2011, nominal GDP was $15.1 trillion. Had regulation remained at its 1949 level, current GDP would have been about $53.9 trillion, an increase of $38.8 trillion."[2] Few would argue that the 1949 level of regulation is appropriate today, and indeed, the authors share that sentiment. They note, "Consequently, we emphasize that our results offer no conclusion on whether regulation is a net social benefit."

If the results of Dawson and Seater seem implausible, consider a 2005 World Bank study that found that as a country's index of regulation increases by one standard deviation (roughly 34 percent), its annual GDP per capita declines by 0.4 percent.[3] Dawson and Seater write, "By comparison, our time-series of the US indicates that an increase in total regulation of 600% reduces growth by just 2 percentage points."[4] Yet, those two percentage points have significant consequences for growth and employment.

In a recent compendium ("Does Regulation Kill Jobs"), editors Cary Coglianese, Adam Finkel, and Christopher Carrigan find the real picture of regulation and employment decidedly mixed, with a call for more research on the topic. On one hand, the authors lament claims that all regulations kill jobs. On the other, there are claims from former EPA Administrator Carol Browner, "[T]he EPA creates opportunities and creates jobs." However, if it were that easy, one way to increase labor force participation would be through increased EPA regulation. Yet, few argue that regulations should be the sole vehicle for boosting employment.

Someone must bear the costs of regulation. Generally, everyone enjoys the benefits of federal rules, but someone must pay: either owners of a firm, employees of the firm, or consumers in the form of higher prices. Sometimes, all parties bear the costs of increased regulation. In a seminal study, Professor Michael Greenstone examined how employment in "pollution intensive industries" in non-attainment ozone counties differed from attainment counties. The results were dramatic: non-attainment counties, those with stringent EPA controls, lost 590,000 jobs, $37 billion in capital, and $75 billion in output.

However, as Richard Morgenstern's review of this study reveals, the jobs total may be shocking, but the study's results did not preclude the possibility that these jobs could have simply been transferred from non-attainment counties to attainment counties. Based on Morgenstern's review, he finds, "There is only limited evidence that environmental regulation leads to significant job loss." He did not say that there is evidence environmental regulation leads to major job gains.

Beyond these topline figures, recent research has highlighted the human component to regulation and employment. Even if a regulation results in a net of zero jobs gained or lost, but it still

[1] Journal of Economic Growth, "Federal Regulation and Aggregate Economic Growth," available at http://bit.ly/1O65AqA.
[2] Id.
[3] World Bank, "The Impact of Regulation on Growth and Informality," available at http://bit.ly/1QUsXcL.
[4] Id.

results in transfers where some workers are temporarily unemployed, what is the result? Increased morbidity and mortality for some. Research has found job displacement can lead to a 15 to 20 percent increase in death rates in the 20 years following displacement.[5]

The University of Chicago's Jonathan Masur and Eric Posner examined the human element more closely. They attempted to monetize the cost of one displaced worker. Using an estimate of $100,000 per worker, they then determined whether regulatory agencies monetized the impact of lost employment.[6] Frequently, even though agencies might quantify the number of lost jobs, they do not monetize the per-employee amount. Masur and Posner next examined an EPA regulation that would generate $159 million in net benefits, but also result in 5,711 fewer jobs. This job loss wasn't directly a factor in the net benefits calculation, but when Masur and Posner monetized each job lost at $100,000, net benefits turned to net costs of $411 million.

Much of the debate over regulation and employment is more than abstract figures. There is a decidedly human component. Even if a regulation has insignificant effects on national employment, the temporary dislocation for some workers should be understood by regulators and policymakers. Few major rules even contemplate or quantify the effect of the rule on employment. In the future, all major rules should at least contain a discussion, and an attempt to quantify, if not monetize, the effect of regulation on employment.

**Recent Work on Regulation and Employment**

AAF has conducted several studies examining the impact of regulation on industry employment. Some have revealed statistically insignificant results, but others have shown that as regulation increases, affected industry employment declines.

In AAF's largest study, my co-author, Ben Gitis, and I examined the effect of 148 regulations on 44 industries, from 2001 to 2012.[7] Each of these regulations stated it would affect one or more of the affected industries in our sample. We found that for every $1 billion in new regulatory costs, employment in the affected industry declined 3.6 percent. In our sample, the average industry employed 222,035 workers. If in the following years, the average industry faced $1 billion in new regulatory costs, it would lose 8,101 jobs.

This might appear striking, but there are only a handful of billion-dollar regulations annually. The Office of Information and Regulatory Affairs (OIRA) reported that there was just one billion-dollar rule issued by cabinet agencies in FY 2014,[8] but during the course of a decade, several multi-million-dollar rules could impose burdens on an industry, reducing employment. The loss of 8,101 jobs in an economy with 142 million employees might seem trivial, but

[5] National Bureau of Economic Research, "Mortality, Mass-Layoffs, and Career Outcomes," available at http://www.nber.org/papers/w13626.
[6] University of Chicago Working Paper No. 571, "Regulation, Unemployment, and Cost-Benefit Analysis," available at http://bit.ly/1OJKAZz.
[7] American Action Forum, "The Cumulative Impact of Regulatory Cost Burdens on Employment," available at http://bit.ly/1mH105M.
[8] Office of Information and Regulatory Affairs, "2015 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," available at http://1.usa.gov/1lct4n7.

consider the human element behind each lost job.[9] At $100,000 per worker, the cost to a single industry could be $810 million.

Beyond, the emotional toll of employment disruptions, there are also distributional impacts. There is strong evidence that regulation affects start-ups and small businesses disproportionately. Here, two recent studies provide some perspective. In "Regulatory Impact on Small Business Establishments," Ben Gitis and I found that a 10 percent increase in cumulative regulatory costs reduces the number of businesses with fewer than 20 workers by five to six percent.[10] Meanwhile, large businesses can actually prosper from some types of regulation. Our study found a two to three percent increase in firms with more than 500 workers after an increase in regulation.

Another study by James Bailey and Diana Thomas for the Mercatus Center found similar results.[11] Using RegData, they analyzed the impact of rising regulatory burdens on small firm creation. Their results suggest a ten percent increase in regulation results in a 0.5 percent decrease in "overall firm births."[12] They also noted that the effects of regulation were more acute for small firms and some large businesses might actually prosper from new rules. Bailey and Thomas write, "In fact, there is some evidence that deaths among large firms actually decrease: a 10 percent increase in regulation is associated with a 0.9 decrease in the deaths of large firms."[13]

In sum, the recent work on regulation and employment has shown small, but statistically significant results for industry employment. Undoubtedly, some industries are more regulated than others, and generally, increased compliance costs can stifle small business growth.

**Regulatory Impact Analyses and Employment**

Typically, agencies omit or fail to quantify the impact of major regulation on employment. For example, Rutgers University Professor Stuart Shapiro examined the Regulatory Impact Analyses (RIA) of 56 major rules and found that just 11 quantified the impact of the rule on employment.[14] Professor Shapiro recommends a new federal office to study the effects of rules. Ideally, this office could study regulations both prospectively and retrospectively.

For the RIAs that do at least discuss the intersection of regulation and employment, many do concede some employment declines. AAF studied the RIAs of rules from 2012 to present and found 22 that either mentioned or quantified a loss of employment. In 2015, so far 11 rules from four different agencies have acknowledged a negative impact on employment. The combined employment loss from the 22 rules, according to agency estimates, could reach 85,981 workers.

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[9] Bureau of Labor Statistics, "Employees on Nonfarm Payrolls," available at http://1.usa.gov/1NJXmtX.
[10] American Action Forum, "Regulatory Impact on Small Business Establishments," available at http://bit.ly/1zUJXYp.
[11] Mercatus Center, "The Effect of Regulation on Entrepreneurship and Employment," available at http://bit.ly/1Rqhz7B.
[12] Id.
[13] Id.
[14] Does Regulation Kill Jobs, "Reforming the Regulatory Process to Consider Employment and Other Macroeconomic Factors," p. 224.

Proposed overtime expansions, the fiduciary rulemaking, and redefining the joint employer rule will likely add to these significant totals.

For example, in 2013 the Department of Labor issued a rule, "Application of the Fair Labor Standards Act to Domestic Service."[15] The measure imposed minimal costs, just $15 million annually, but it did admit to a deadweight loss. That is, "Deadweight loss from a regulation results from a wedge driven between the price consumers pay for a product or service, and the price received by the suppliers of those services."[16] With the domestic service rule, transfers from employers to employees could reduce the willingness for firms to provide services and the availability of those services. As a result, the DOL rule could "disemploy" approximately 1,000 workers annually during the first ten years of the regulation. Thus, a rule designed to help domestic service employees could notably reduce their employment as well.

The most active regulators, EPA and DOE, are also the most willing to admit their rules could cause employment disruptions. From the list of 22 regulations, DOE and EPA issued 15 admitting employment could decline. DOE might operate under-the-radar, at least compared to EPA, but its regulations will have a profound impact on employment. In one recent air conditioning rulemaking, the administration wrote, "It is possible the small manufacturers will choose to leave the industry or choose to be purchased by or merged with larger market players."[17] Finally, in an efficiency standards rule for hearth products, DOE predicted industry employment could drop by 51 to 908 employees. This might seem insignificant, but consider that overall employment in the hearth industry is projected to be 1,565 employees by 2021.[18]

With just 22 regulations admitting some decline in employment, there are certainly other rules with employment impacts that regulators never analyze. For example, not one independent agency has forecasted a decline in employment from a rule in recent years, despite dozens of major Dodd-Frank rulemakings. Expanding the use of employment analyses, and RIAs at independent agencies, will at least aid in our understanding of regulation and employment.

**Conclusion**

The general consensus is regulation does have an effect on employment, at least at the industry level. Generally, statistically significant results show small impacts on employment, but these figures can hide a real human component behind the cost of losing one's job. More research is needed in this field and agencies, OIRA, and independent parties should work to perform more rigorous analysis on the intersection of regulation and employment.

Thank you. I look forward to answering your questions.

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[15] 78 Fed. Reg. 60,453, available at https://federalregister.gov/a/2013-22799.
[16] 78 Fed. Reg. 60,537, available at http://www.federalregister.gov/a/2013-22799/p-783.
[17] American Action Forum, "The Department of Energy: Under-the-Radar, Overly Burdensome," available at http://bit.ly/1hQOIL9.
[18] Id.

Chairman WALBERG. Thank you. Now, I recognize Mr. Beebe, and thank you for being here, taking time away from your business to join us and give us your experience.

**TESTIMONY OF RALPH BEEBE, PRESIDENT, HIGHLAND ENGINEERING, INC., HOWELL, MI, TESTIFYING ON BEHALF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS**

Mr. BEEBE. My pleasure. Good morning, Chairman Walberg, Ranking Member Pocan, and members of the Committee. I am pleased to be here on behalf of the National Federation of Independent Business. I am one of the owners of Highland Engineering, and have been a member of NFIB since 1993. I also currently serve on the NFIB Michigan Leadership Council.

Thank you for holding today's hearing on how the administration's regulatory onslaught is affecting workers and job creators.

The current regulatory framework negatively impacts small and closely held businesses in several important ways, so I appreciate the invitation to be here today to discuss these important issues.

The NFIB is the nation's leading small business advocacy organization. As part of representing small business owners, NFIB frequently conducts surveys of both the NFIB membership and the small business population as a whole.

Government regulation consistently ranks as one of the greatest concerns. In fact, since January 2009, government requirements and red tape have been a top three problem for small business owners on NFIB's monthly small business surveys.

In the administration's fall 2015 regulatory agenda released on November 18, there are 3,297 federal regulations in the pipeline waiting to be proposed, finalized, or implemented. About 10 new regulations are finalized every day, according to data on Regulations.gov, adding to the volumes of rules with which small business owners must comply. This constant onslaught of government regulation makes it incredibly difficult for me to operate my day-to-day business.

I would like to spend the rest of my time telling you about my personal experience dealing with government regulations. Highland Engineering was founded in 1986 and we moved to Howell in 1987. We specialize primarily in troop support equipment for the U.S. Department of Defense, as well as some other agencies. With 45 full-time employees, we are a contractor for all branches of the DOD, FEMA, and foreign militaries.

In addition to our government work, we also serve commercial customers in the automation and water treatment areas.

Through our company's nearly 30 year history, I have seen the impact of the direct costs of excessive regulations, particularly in the past four years. For example, the number of clauses in our contracts have increased nearly 50 percent since 2011. Additionally, reporting requirements have increased to the point that they have become overbearing.

Keeping up with these ever changing regulations is such a task that I have had to hire a professional compliance officer, who also happens to be my wife, Sally, to work 10 to 20 hours per week solely to make sure we are abiding by complex, uncertain, and ever changing regulations.

Each time a new regulation comes out, she has to research it, decide if it pertains to us, and if it does pertain to us, figure out what we need to do about it.

The pace of changes in regulations is astounding. In October of 2011, the Federal Acquisition Regulation or FAR, was on Revision 44. By October 2015, it is now on Revision 84. With this current pace of excessive regulation by the administration, more and more small businesses will either have to divert their monies to hiring compliance personnel, as we did, or will simply decide the burden is too great and get away from the over regulation by dissolving their businesses.

Further, the companies still doing business with the government are passing on these increased costs to the taxpayers instead of being able to use this money to invest in the company's development or to hire new employees. We have had to focus on understanding and complying with new regulations.

Further, in my experience with the Department of Labor, I have found the agency to be more interested in trying to find what we did wrong instead of providing assistance and education in understanding new rules.

My company set up an employee stock ownership plan as a way to take care of our employees and provide for their retirements. We hired lawyers to make sure we understood the process and that we did it right. After the plan was filed with DOL, DOL determined that they needed to audit us. After 17 months of what we thought was nothing more than a phishing expedition, they determined that we did everything 100 percent correct. Those 17 months cost us a lot of time and money.

Highland Engineering's business is primarily with government agencies, and we have seen firsthand the detrimental effects of ever changing and excessive regulations, especially as a small business with limited resources, resources that we could be using to more fully support our core mission, which is supporting the warfighters.

The current state of government regulation has become a confusing and unpredictable challenge for the vast majority of small business owners. Government regulations should not hinder the ability of small business owners to create or expand their business. The current pace of new regulations combined with the existing regulatory burden can dictate the business decisions an owner must make, whether it means using a compliance officer, attempting to expand its business, or hiring new employees.

As Congress examines the current regulatory burden faced by small business owners, I would encourage you to keep the following goals in mind: number one, agencies should take into account a proposed regulation's indirect economic impact on small business. Two, agencies should increase compliance assistance so small businesses acting in good faith can continue to operate without fear of undue penalties, and three, DOL and all agencies should be required to conduct SBIR panels when considering any new regulation.

Working toward these goals would create a more stable pro-growth environment for small businesses.

Thanks again for having me today, and I will be happy to answer any questions.

[The statement of Mr. Beebe follows:]

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

# NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB
The Voice of Small Business®.

Testimony of Ralph Beebe,
House Committee on Education and the Workforce
Subcommittee on Workforce Protections
December 9, 2015
*How the Administration's Regulatory Onslaught is Affecting Workers and Job Creators*

Good morning, Chairman Walberg, Ranking Member Wilson, and members of the Committee. I am pleased to be here on behalf of the National Federation of Independent Business (NFIB). I am one of the owners of Highland Engineering, Inc. and have been a member of NFIB since 1993. I also currently serve on the NFIB-Michigan Leadership Council. Thank you for holding today's hearing, "*How the Administration's Regulatory Onslaught is Affecting Workers and Job Creators.*" The current regulatory framework negatively impacts small and closely-held businesses in several important ways, so I appreciate the invitation to be here today to discuss these important issues from the perspective of a small business owner.

The NFIB is the nation's leading small business advocacy organization. All of NFIB's members are independently owned, which is to say that none are publicly traded corporations. As part of representing small business owners, NFIB frequently conducts surveys of both the NFIB membership and the small business population as a whole, and government regulation consistently ranks as one of their greatest concerns. A few consistent concerns are raised regardless of the trade or industry in which the small business is engaged. In fact, since January 2009, "government requirements and red tape" has been a top-three problem for small business owners, per NFIB's monthly *Small Business Economic Trends* survey.[1] Further, according to a 2014 study commissioned by the National Association of Manufacturers, federal regulations cost businesses with 50 employees or fewer about $12,000 per employee per year. That's 30 percent more than the largest businesses.[2]

In the administration's fall 2015 regulatory agenda,[3] released on November 18, there are 3,297 federal regulations in the pipeline waiting to be proposed, finalized, or implemented. About 10 new regulations are finalized every day, according to data on regulations.gov, adding to the volumes of rules small business owners must comply with. This constant onslaught of government regulation makes it incredibly difficult for me to operate my day to day business. Further, there is little currently done by the Department of Labor to ensure that any new regulations adequately consider the impact on small businesses.

The Regulatory Flexibility Act only requires agencies to consider those small entities that are directly impacted by a new regulation. Consequently, regulators may ignore foreseeable indirect impacts a new

[1] nfib.com/sbet
[2] http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Executive-Summary.pdf
[3] http://www.reginfo.gov/public/do/eAgendaMain

regulation may have on a small business. Regulatory agencies often proclaim indirect benefits for regulatory proposals, but fail to analyze and make publicly available the indirect costs to consumers, such as higher energy costs, lost jobs and higher prices. Agencies should be required to make public and take into account for procedural purposes a reasonable estimate of indirect impact. Congress should do a better job of holding agencies accountable for providing a balanced statement of costs and benefits in public regulatory proposals.

Another problem facing most small businesses is the startling lack of compliance assistance and support from agencies when dealing with any new regulations. Approximately 82 percent of small businesses find out about regulatory requirements in the course of normal business activities.[4] What this figure shows is that companies that want to abide by the law, that want to do the right thing, often times are caught unaware of any change in circumstances. Instead of agencies educating these small businesses about new regulatory requirements, often times they are more concerned about regulatory enforcement and collecting fines. By focusing more on the carrot of compliance assistance as opposed to the stick of enforcement, agencies would make small businesses more aware and put them in a better position to protect workers.

Additionally, an important safeguard against new regulations for small businesses, Small Business Advocacy Review (SBAR) panels are currently only required at the U.S. Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau. SBAR panels represent an important check on proposed regulations that will impact small businesses, by allowing a panel of small business owners and stakeholders to propose recommendations for regulatory alternatives. SBAR panels should be expanded to cover all agencies issuing rules that affect small businesses, and in particular the entire Department of Labor, as a means to require these agencies to evaluate the burdens their rules place on small employers.

I would like to spend the rest of my time telling you about my personal experience dealing with government regulations. Highland Engineering, Inc. was founded in 1986 and moved to Howell, MI in 1987. We specialize primarily in Troop Support Equipment (Water Purification, Field Feeding and Hygiene Systems) for the U.S. Department of Defense. With 45 full time employees, we are a contractor for all branches of the Department of Defense as well as the Federal Emergency Management Agency

[4] http://411sbfacts.com/sbpoll.php?POLLID=0038

and Foreign Militaries. In addition to our government work, we also serve commercial customers in the automation and water treatment industries.

Throughout our company's nearly 30 year history, I have seen the impact of indirect costs of excessive regulation, particularly in the past four years. For example, the numbers of clauses in our contracts have increased nearly 50 percent since 2011. Additionally, reporting requirements have increased to the point that they have become duplicative and overbearing. Keeping up with these ever changing regulations is such a task that I've had to hire a professional compliance officer (who also happens to be my wife Sally) to work ten to twenty hours per week, solely to make sure we're abiding by complex, uncertain, and ever changing regulations. Each time a new regulation comes out she has to research it, decide if it pertains to us, if it does pertain to us figure out what to do, and then ensure we comply.

The pace of changes in regulations is astounding. In October of 2011 the Federal Acquisition Regulation or FAR was on revision 44, by October of 2015 it is now on revision 84. With this current pace of excessive regulation by the Administration, more and more small businesses will either have to divert our monies to hiring compliance personnel as we did, or will simply decide that the burden is too great and get away from the over regulation by dissolving the business. Further, the companies still doing business with the government are passing on those increased costs to the taxpayers. Instead of being able to use this money to invest in the company's development, or hire new employees, instead we have had to focus on understanding and complying with new regulations.

Further, in my experience with the Department of Labor (DOL), I have found the agency to be more interested in trying to find what we did "wrong" instead of providing assistance and education in understanding new rules. My company set up an Employee Stock Ownership Plan (ESOP), as a way to take care of our employees and provide for their retirement. We hired lawyers to make sure we understood the process and did it "right." After the plan was filed with the DOL and underway the DOL determined that they needed to "audit" us. After 17 months of what we felt was nothing more than a fishing expedition, they determined that we did everything 100% correct. Those 17 months cost us a lot of money and time. The annual reporting requirements for our ESOP continue to change as well, making it difficult and time consuming for our company to keep up with the new changes to avoid fines.

Highland Engineering's business is primarily with government agencies, and we have seen first-hand the detrimental effects of ever changing and excessive regulations, especially as a small business with limited resources. Resources that could be used better to more fully support our warfighters, which is our core mission. Federal agencies should more fully take into account the regulatory burdens faced by small business and be required to conduct SBAR panels. Expanding SBAR panels to all agencies, including the DOL, will go a long way to ensure that any new regulations do not have unintended negative consequences on small businesses, including their growth.

As Congress examines the current regulatory burden faced by small business owners, I would encourage you to keep the following goals in mind. Working towards these goals will create a more stable, pro-growth environment for small businesses to thrive: 1) agencies should take into account a proposed regulation's indirect economic impact on small businesses, 2) agencies should increase compliance assistance so small businesses acting in good faith can continue to operate without fear of undue penalties, and 3) the DOL (and all agencies) should be required to conduct SBAR panels when considering any new regulation.

Small businesses truly are the engine of economic growth. This isn't just a slogan, as small businesses created two-thirds of the net new jobs over the last decade. Small business owners are risk takers and entrepreneurs. They are the last businesses to lay off employees when business declines and slow to rehire when business picks up. The owner works as many hours as necessary. When a small business hires an employee, it is their intent to keep them on for the long run.

The current state of government regulation has become a confusing and unpredictable challenge for the vast majority of small business owners. Government regulation should not hinder the ability of small business owners to create or expand their businesses. The current pace of new regulation, combined with the existing regulatory burden, can dictate the business decisions an owner must make, whether it means utilizing a regulatory compliance officer, attempting to expand its business operations, or hiring new, full-time employees for the businesses primary function.

Making regulations more accountable to the indirect economic impact on small businesses, increasing compliance assistance, and expanding SBAR panels to the Department of labor should be priorities of Congress in order to spur job growth and promote business creation. I appreciate Congress taking a look at the current regulatory regime and urge you to keep in mind the unique challenges that face small businesses.

Thank you again for having me here today and I'm happy to answer any questions you may have.

Chairman WALBERG. Thank you. Ms. Owens, we welcome you, thank you for being here. We now recognize you for five minutes.

**TESTIMONY OF CHRISTINE OWENS, EXECUTIVE DIRECTOR, NATIONAL EMPLOYMENT LAW PROJECT, WASHINGTON, D.C.**

Ms. OWENS. Thank you very much, Chairman Walberg, Mr. Pocan, and members of the subcommittee. I appreciate the opportunity to testify today on behalf of my organization, the National Employment Law Project, which engages in a number of activities designed to promote the interests and rights of low wage and unemployed workers.

The Obama administration has proposed or taken several executive regulatory and other agency actions essential to workers' ability to earn decent wages, meet responsibilities on the job and at home, and work in safe, healthy, and non-discriminatory workplaces. These actions have been thoughtful, informed, fair and balanced, and consistent with legal authority and legal responsibilities to further underlying workforce policy goals.

Far from causing harm, they make it more likely that we will rebuild the economy on a foundation of good jobs and safe and healthy workplaces.

Regulatory and related action by the Obama administration is extremely important. Wages for most workers have fallen over most of the last four decades, even as worker productivity grew, and the average age and education of the workforce rose. The Great Recession exacerbated these trends, particularly for low wage workers.

During the period of limited congressional action on workforce policy, administration action is a vital response to the wage crisis. It also better aligns workforce policy with today's economy and its evolving business and employment practices and family needs.

Several actions update old standards that because they have not been adjusted regularly neither meet the needs of today's workers nor serve employers effectively.

Contrary to arguments that workforce regulations are burdensome and costly job killers, analyses of regulations over a multiyear period find their benefits vastly exceed costs, while cost estimates typically fail to consider mitigating savings, and actual costs often turn out to be significantly lower than estimated.

Less than three-tenths of 1 percent of employers initiating mass layoffs in 2012 said government regulation was their layoff reason, affecting only five of every 2,000 laid-off employees.

A 2014 analysis of 10 proposed or final public health and safety rules, including OSHA's proposed silica rule, concluded they would save 10,000 lives, prevent 300,000 cases of occupational illness or injury, and yield a net overall benefit of as much as $122 billion. Frankly, 69 months of record uninterrupted job growth along with cutting the unemployment rate in half is wholly inconsistent with the notion that a regulatory onslaught has damaged the economy or cost us jobs.

In the face of extreme inequality, stagnant and declining wages, and inadequate labor markets, the Obama administration has acted judiciously and lawfully to help ensure that Americans who work for a living will make a decent living from work in safe, healthy, and non-discriminatory workplaces.

I will now briefly describe a couple of these initiatives. The Labor Department moved to revitalize the *Fair Labor Standards Act* and strengthen the middle class this July, when after a period of substantial outreach and sustained deliberation it proposed a rule updating the so-called "white collar exemption" to the overtime pay requirement.

Recognizing that the existing poverty level threshold of $23,660 is far too low, the Department proposed to lift it to a far more realistic level of $50,440. This change will benefit as many as 11 million workers and restore overtime protections to 44 percent of the white collar workforce. This is still below the historic standard, but definitely an improvement.

The Department also acted importantly and appropriately in 2013 when 16 years after first listing revision of the silica standard on its regulatory agenda, OSHA proposed a new protective regulation.

Disease and deaths from silica exposure are preventable, yet more workers died from silicosis and silica related diseases in 2013 than from explosions or from being caught in or crushed by collapsing materials, running equipment, or machinery.

These as well as other regulations and actions we discussed in our written testimony, including extension of minimum wage and overtime protections to the home care workforce, are important actions within the constitutional and statutory authorities of the President, the Labor Department, and the EEOC, in response to some of today's workforce challenges and crises.

By improving wages and working conditions for tens of millions of workers, the administration's actions will strengthen American working families and help achieve a healthier and more robust economy in which all who contribute to its success have a shot at sharing fairly in its prosperity.

Thank you. I would welcome any questions.

[The statement of Ms. Owens follows:]

**NELP** National Employment Law Project

Testimony of
Christine L. Owens
National Employment Law Project

Hearing Before the
United States Congress

Workforce Protections Subcommittee
House of Representatives Education and Workforce Committee

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Chairman Walberg, Ranking Member Wilson, and members of the subcommittee on Workforce Protections: My name is Christine Owens. I am the Executive Director of the National Employment Law Project (NELP) and testify today on NELP's behalf. We appreciate the opportunity to address the Subcommittee.

NELP is a national non-profit organization that for over 45 years has combined research and advocacy, public education, technical assistance and direct services to advance the rights and interests of low-income and unemployed workers, a disproportionate share of whom are women, people of color and immigrants. Our goal is to ensure that work is an anchor of economic security and a ladder of economic opportunity for all of America's working families. Working together with national, state, and local partners, we promote policies and programs to create good jobs, strengthen upward mobility, enforce hard-won worker rights, and help unemployed workers regain their economic footing.

Over the past seven years, the Obama administration has issued several crucial regulations (and in the case of the Equal Employment Opportunity Commission, sub-regulatory guidance) on issues within this Subcommittee's jurisdiction, and we expect a few more will be finalized before the end of the President's second term. Though opponents of these actions castigate them as "job-killers," the reality is quite different: The regulations and sub-regulatory guidance, along with the President's labor-related executive orders, do not deter economic growth or cost us jobs. Instead, they are essential to our nation's workforce – to workers' ability to earn pay commensurate with the work they do and the time they spending doing it, to balance their personal and professional obligations, to labor free of insidious discrimination, and to work in environments that do not put their health, well-being and very lives in danger. Mischaracterizing these actions as bad for employers, bad for workers and bad for the economy ignores the crucial role that thoughtful, tailored regulatory action plays in building a robust economy on the foundation of safe and healthy workplaces, where workers earn living wages and have fair opportunities to advance. It also unfairly demeans regulators for striking a balance between sometimes competing interests that our labor and employment statutory framework requires.

**The Ongoing Wage Crisis amid a Recovering Economy**

By now, we all know that when President Obama took office, the U.S. economy was descending into the worst economic crisis since the Great Depression. Over a formal recession of 18 months followed by a jobless recovery that persisted into early 2010, the economy shed more than eight million jobs, the unemployment rate peaked at 10 percent, and long-term unemployment reached unprecedented levels. A series of aggressive measures, including multiple extensions of federal unemployment benefits for the long-term unemployed and critical investments in job-creation and job-stabilizing programs, helped to mitigate the severity and duration of the downtown, and put the economy on course to turn the corner. We are now in the midst of the longest period of sustained monthly job growth on record, with the economy adding more than 13 million new jobs since its low point and unemployment having shrunk to a much-improved (though still too high) five percent.

Notwithstanding these improvements, there is no real dispute that for most of America's workers, wages have declined for most of the past 35 years, and that our economy is marked by wage stagnation and near-unprecedented income inequality. These are destructive trends for the economy and our nation. Even Speaker Ryan, when first addressing the House of Representatives after taking the gavel, noted that:

> [The American people are] working hard. They're paying a lot. They are trying to do right by their families. And they are going nowhere fast. They never get a raise. They never get a break. But the bills keep piling up—and the taxes and the debt. They are working harder than ever to get ahead. Yet they are falling further behind.[1]

Data amply support the Speaker's assessment. A recent review by the Bureau of Labor Statistics considered wage and compensation trends from the years 2007-2014 and found that when looking at either wages alone or total compensation (wages plus benefits), the overwhelming majority of workers have experienced stagnant or declining pay.[2] Taking only

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[1] Speaker Ryan's Remarks to the House of Representatives, http://www.speaker.gov/press-release/speaker-ryans-remarks-house-representatives.

[2] "Compensation inequality: evidence from the National Compensation Survey," http://www.bls.gov/opub/mlr/2015/article/compensation-inequality-evidence-from-the-national-compensation-survey.htm.

wages into account, four out of five workers (the bottom 80 percent) have experienced stagnant or declining pay; and when looking at total compensation, the share of workers experiencing stagnation or decline increases to 88 percent. Not surprisingly, the higher-paid workers saw increasing compensation, particularly their benefits, during the same time period, with the disparity being "more pronounced in 2014 than it was in 2007."[3]

NELP's review of occupational wage changes by quintile between 2009 and 2014 confirms the BLS observations of declining wages. Our analysis divided 785 occupations into quintiles by median pay, with each quintile representing roughly one-fifth of total employment in 2014. We found that averaged across all occupations, real median hourly wages fell by four percent over the five-year period, with quintiles at the bottom of the wage distribution experiencing the greatest declines. Specifically, in the bottom two quintiles, real average hourly wages declined by 5.7 percent and 4.7 percent, respectively. Real average wages declined in the top two quintiles as well, but the declines were smaller.[4]

Wages have remained stagnant or decreased for the vast majority of workers even as they have become more productive[5] and attained more education.[6] Between 1973 and 2014, net productivity of the American worker grew by 72.2 percent. Yet hourly compensation, adjusted for inflation, rose by just 8.7 percent, or 0.2 percent annually.[7] Notably, nearly all wage growth was concentrated in the years between 1995 and 2002.

Though not the only driver of wage stagnation, Congress's inattention to the federal minimum wage and failure to raise it regularly accounts for a significant part of this stagnation – as much as two-thirds of the wage gap between low and middle income workers, according to

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[3] Id.

[4] "Occupational Wage Declines Since the Great Depression," September 2015, http://www.nelp.org/content/uploads/Occupational-Wage-Declines-Since-the-Great-Recession.pdf.

[5] Josh Bivens and Lawrence Mishel, Understanding The Historic Divergence Between Productivity and a Typical Worker's Pay: Why it Matters and Why It's Real, September 2, 2015, http://www.epi.org/files/2015/understanding-productivity-pay-divergence-final.pdf.

[6] "It's Time to Raise the Minimum Wage, http://www.nelp.org/content/uploads/Its-Time-to-Raise-the-Minimum-Wage.pdf.

[7] See footnote 5, http://www.epi.org/files/2015/understanding-productivity-pay-divergence-final.pdf.

analysis by the Economic Policy Institute (EPI).[8] This failure has had real consequences for working families. Contrary to stereotypes often promoted by minimum wage opponents, the minimum wage is far from a "starting wage" for young workers. Increasingly, older workers are the backbone of the low-wage economy. An EPI analysis of increasing the federal minimum wage to $12 per hour finds that 89 percent of beneficiaries are over the age of 20 (nearly two-thirds of those are 25 years or older, and nearly half over 40 years old[9]) and almost half have some college education under their belts.[10] Nearly one in three workers who starts in a minimum wage job is still earning that wage a year later, and there's a stark rise in the number of people who stay in minimum wage jobs for three years or more.[11] The "lucky" two-thirds who do get raises were still earning within 10 percent of the minimum wage after a year, and two-fifths of 2008's minimum wage workers were still in near-minimum wage jobs a full five years later.[12] Hence, inaction on the federal minimum wage is consigning more and more adult workers to lifetimes of working harder but falling farther behind.

While some pundits and policymakers proffer education as the cause for the aging of the minimum wage workforce, the reality is that a "cruel game of musical chairs"[13] is underway in the United States labor market, with many college-educated workers of all ages now forced to settle for jobs that are much lower-paying than those held by similarly educated workers in past decades. This phenomenon, in turn, pushes less educated and trained workers into even lower-paying jobs or out of the labor market altogether. [14]

As the Washington Center for Equitable Growth has extensively documented,

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[8] Lawrence Mishel, Causes of Wage Stagnation," January 6, 2015, http://www.epi.org/publication/causes-of-wage-stagnation/.

[9] "Data Tables: Raising the Minimum Wage to $12 by 2020 would lift Wages for 35 Million Workers," http://www.epi.org/publication/data-tables-raising-the-minimum-wage-to-12-by-2020-would-lift-wages-for-35-million-workers/.

[10] See footnote 6; David Cooper and Dan Essrow, "Minimum Wage Workers are Older Than You Think," April 27, 2015, http://www.epi.org/publication/low-wage-workers-are-older-than-you-think/.

[11] Ben Casselman, "It's Getting Harder to Move Beyond a Minimum-Wage Job," October 8, 2015, http://fivethirtyeight.com/features/its-getting-harder-to-move-beyond-a-minimum-wage-job/.

[12] Id.

[13] Marshall Steinbaum and Austin Clemens, "What happened to the job ladder in the 21st Century?" October 2, 2015, http://equitablegrowth.org/cruel-game-musical-chairs-u-s-labor-market/; http://equitablegrowth.org/what-happened-to-the-job-ladder-in-the-21st-century/.

[14] Id.

> [t]he dire experience of these workers with college degrees displacing workers with less formal education stands in strong contrast to the widely–held view in economic and policymaking circles that the main problem facing the U.S. economy is a shortage of highly-educated workers. If college-educated workers were in short supply, then we would expect their wages to rise as employers attempted to lure them away from their competitors. Yet the inflation-adjusted value of the wages of college-educated workers has barely increased in the 21st century.
>
> What's more, between 2000 and 2014 (the last year for which complete data are available), the employment of college-educated workers has increased much more rapidly in low-earning industries than in high-earnings ones. If there weren't enough college graduates to go around, then the opposite should be happening because high-earnings industries would presumably be out-competing low-earnings industries to hire college-educated workers. Our new analysis of the data from the U.S. Census Bureau's Quarterly Workforce Indicators strongly suggests that college-educated workers are more likely to "filter down" the job ladder than to climb it.[15]

Wages are not all that have stagnated for America's workers. The failure of labor standards to keep up with workers' needs even as profits have soared and CEO compensation has skyrocketed is another reason economic security from work has declined for the vast majority of working families.

The United States guarantees lower wage and benefits floors than any similarly situated Western economy, existing standards have not kept pace with inflation and other economic realities, and chronic underfunding of enforcement agencies has diluted the effectiveness of legal protections for millions of workers.[16] The implications of deficient and weakly enforced labor standards are graver for workers of color and women,[17]who are both more likely to experience workplace violations than higher-paid employees and less equipped--financially or otherwise--to vindicate their rights. A frequently-cited and highly-regarded 2009 survey by NELP and partner organizations of more than 4000 low-wage workers in Chicago, Los Angeles and New York found that more than two-thirds had experienced at least one wage violation in the week preceding the survey; 26 percent had not been paid the applicable (federal or state)

[15] Marhsall Steinbaum and Austin Clemens, "The cruel game of musical chairs in the U.S. labor market," September 2, 2105, http://equitablegrowth.org/cruel-game-musical-chairs-u-s-labor-market/.
[16] Joseph E. Stiglitz, Rewriting the Rules of the American Economy, An Agenda for Growth and Shared Prosperity, https://www.gsb.columbia.edu/faculty/jstiglitz/download/papers/2015%20Rewriting%20the%20Rules.pdf.
[17] Id.

minimum wage; and of those who had worked overtime hours, 76 percent were not paid the legally-mandated overtime wages.[18] Among those workers experiencing a serious injury on the job, only eight percent filed for workers' compensation benefits; and half of the workers who told their employers about their injuries were subjected to retaliation, including discharge.[19]

There are simple and common-sense policy solutions to wage and other workplace problems and challenges workers face. These include raising the minimum wage, guaranteeing paid sick leave and fair schedules for workers, improving overtime pay protections, and strengthening our rules that guard against workplace illness, injury and death. Numerous states have implemented these or other family-supporting reforms with none of the prophecies of doom materializing.

Opponents of family-supporting policies argue they do more harm than good--burdening employers and killing jobs--and that cutting taxes and gutting regulations are the most effective job-creation strategies. This contention, however, ignores the lived experience: Even with massive tax cuts, a comparatively milder recession than the most recent, and curtailment of regulation during the Bush 43 Administration, net job growth then was less robust than over the past seven years (since the beginning of 2009), when the economy endured much greater loss and turbulence. Between the final full month before President Obama took office (December 2008) and the most recent reported monthly data (November 2015), the economy has added a net 8.1 million new jobs. Over the comparable period in the Bush 43 Administration, the economy added only 5.5 million new jobs (net). Moreover, the Kansas experiment, with Governor Brownback leading the legislature through a process of slashing taxes, yielded near-catastrophe for the state financially and far-below-national-average job growth.[20]

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[18] Annette Bernhardt, et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1.
[19] Id.
[20] Yael T. Abouhalkah, "New, disastrous Kansas job loss exposes pure folly of Gov. Sam Brownback's tax cuts," September 18, 2015, http://www.kansascity.com/opinion/opn-columns-blogs/yael-t-abouhalkah/article35684450.html.

Nor do regulations cause significant job loss or impose unsustainable costs outweighing the benefits they confer. According to the Bureau of Labor Statistics report on extended mass layoffs (involving more than 50 employees per event) and resulting job separations in 2012 (most recent data), employers cited "government regulation/intervention" as the reason for mass layoffs in less than three-tenths of one percent (0.27 percent) of events, affecting only around five of every 2000 workers separated from work due to mass layoffs that year.[21] An extremely comprehensive 2011 analysis by researchers for the Economic Policy Institute, surveying and summarizing extensive research, concluded that (1) over the ten-year-period between 2000 and 2010, benefits of regulations vastly exceeded their costs; (2) assessments of regulation costs typically fail to consider a variety of factors that not only mitigate costs, but may generate unanticipated benefits (such as new job creation); and (3) estimates of regulations' potential costs both by government and by industry opponents typically overstate the costs, sometimes significantly.[22] A 2014 report by the Center for Effective Government analyzed ten rules (or proposed rules) focused on public health and safety, including OSHA's proposed rule on Occupational Exposure to Respirable Crystalline Silica, and concluded that when fully implemented, the rules would save 10,000 lives, prevent 300,000 cases of occupational injury or illness, and produce a net overall benefit to society of as much as $122 billion.[23] It also bears noting that throughout the recovery, the foremost reason and concern businesses have cited with regard to their hiring is consumer demand, a concern reinforced by the latest reports showing sluggish consumer spending in September and October.[24]

[21] BLS Reports, "Extended Mass Layoffs in 2012," http://www.bls.gov/mls/mlsreport1043.pdf (Table 4, "reason for layoff").

[22] Isaac Shapiro and John Irons, Regulation, Employment, and the Economy: Fears of job loss are overblown," April 12, 2011, http://www.epi.org/files/2011/BriefingPaper305.pdf A number of the regulations discussed in this analysis were environmental regulations but the author also included analyses of OSHA regulations, and their conclusions overall are generally applicable to labor market regulation.

[23] July Tran, Ronald White, et al., The Benefits of Public Protections: Ten Rules that Save Lives and Protect the Environment," http://www.foreffectivegov.org/files/regs/benefits-public-protections-2014.pdf.

[24] Phil Izzo, "Dearth of Demand Seen Behind Weak Hiring," July 18, 2011, http://www.wsj.com/articles/SB10001424052702303661904576452181063763332; Joseph Lazarro, "What's Really Ailing Employment: Lack of Demand," February 2, 2011, http://www.dailyfinance.com/2011/02/04/americas-high-unemployment-rate-lack-of-skills-or-jobs/; Frank James, "Economists: Low Hiring Due to Consumer Weakness, Not Policy Doubts," July 18, 2011, http://www.npr.org/sections/itsallpolitics/2011/07/18/138467531/economists-lack-of-hiring-due-to-low-

Against a backdrop of egregious income inequality, stagnant and declining wages, inadequate labor market policies, and Congressional failure to act in response to needed labor market reform, the Obama Administration has acted judiciously and lawfully in exercising its authority to regulate and guide, where feasible, to help ensure that working Americans can support themselves and their families through jobs that provide living wages in safe and healthy environments, free from discrimination. Labor market policy has no more important purpose than protecting and advancing the rights and interests of all of America's workers, particularly those most vulnerable to workplace exploitation and abuse. In pursuing this objective, the Administration has struck the right balance between the interests of all stakeholders--employers, workers, consumers and the public overall--and among the various tools--education and outreach, enforcement and regulation--it has to achieve the underlying goals of our nation's labor and employment laws.

**OSHA: A Case Study in the Role and Importance of Labor Market Regulation**

Before turning to a broader discussion of some of the Administration's recent labor market initiatives, and as an exemplar of why regulation matters, this section examines the Occupational Safety and Health Administration's (OSHA) standard-setting in support of its mission to protect workers from death, illness and injury on the job. Any discussion of the 45-year history of OSHA must start with the simple and compelling fact that its standards have saved lives, prevented serious injuries and illnesses and, not inconsequentially, also saved money for employers.

Since 1970, when OSHA was created, though the workforce has nearly doubled, workplace deaths have dropped by 66 percent and reported serious workplace injuries have decreased by 67 percent.[25] Indeed, study after study confirms that OSHA's regulations have been successful in reducing workplace injuries, illnesses and deaths. For example, OSHA's blood-borne pathogens standard virtually eliminated hepatitis B fatalities that killed 120

consumer-demand-not-policy-doubts; Jeffrey Sparshott, "Slow U.S. Consumer Spending Signals Caution," November 25, 2015, http://www.wsj.com/articles/u-s-consumer-spending-up-0-1-in-october-1448458450.
[25] "Healthier Workers, Safe Workplaces. A Stronger America." https://www.osha.gov/osha40/; https://www.osha.gov/oshstats/commonstats.html;

workers every year;[26] OSHA's basic "lock out/tag out" safety standard reduced fatalities by over 50 percent in its first seven years alone;[27] and OSHA's Grain Handling Standard led to a 70 percent decrease in fatalities from grain explosions.[28]

While this represents great progress, the Bureau of Labor Statistics just reported that 13 workers still die on the job every day in this country and almost three million workers in the private sector suffered a serious job related injury or illness.[29] Clearly more work remains to be done.

In reality, very few OSHA regulations have been promulgated since the beginning of the agency because OSHA's standard-setting process is extremely lengthy. A 2012 report by the U.S. Government Accountability Office found that it could take OSHA up to 19 years to promulgate a standard, with the average taking seven years,[30] because the number of procedural requirements governing the standard-setting process at OSHA is greater than at other agencies. And, OSHA's process also allows for more substantial opportunities for public involvement than other federal agencies.

Since the beginning of the Obama Administration, OSHA has issued only four major standards. The first rule, which was issued in 2010, covered the safety of cranes and derricks.[31] This rule was started in 2003 and finally published in 2010. The promulgation of the final rule was delayed by procedural and analytical requirements that, according to OSHA's risk analysis, resulted in 132 unnecessary deaths and 1,050 preventable injuries.[32]

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[26] Kent A. Sepkowitz and Leon Eisenberg, Occupational Deaths Among Healthcare Workers, July, 2005, http://wwwnc.cdc.gov/eid/article/11/7/pdfs/04-1038.pdf. See also http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3021207

[27] OSHA: The Control of Hazardous Energy (Lockout/Tagout): Notice of the Availability of a Lookback Review Pursuant to the Regulatory Flexibility Act and Executive Order 12866.

[28] OSHA: Regulatory Review of OSHA's Grain Handling Facilities Standard; February 2003 http://www.bls.gov/iif/.

[30] C WORKPLACE SAFETY AND HEALTH: Multiple Challenges Lengthen OSHA's Standard Setting; GAO-12-330: Publicly Released: Apr 19, 2012, http://www.gao.gov/assets/590/589825.pdf.

[31] Cranes and Derricks in Construction: Final Rule, https://www.osha.gov/FedReg_osha_pdf/FED20100809.pdf.

[32] Id. The other three standards OSHA has issued during this administration are Electric Power Generation, Globally Harmonized System (updated Hazard Communication) and Confined Space in Construction.

**OSHA rules do not kill jobs, they prevent jobs from killing workers.** The evidence does not support the notion that any occupational safety and health regulation issued by OSHA has had overall negative job impacts. Yet with every new OSHA regulation, industry claims the costs will run into the billions, and job losses will be massive. Industry's hollow cries of billion-dollar rules started in the 1970's, during one of the first OSHA rulemaking proceedings, after a number of workers in a Kentucky plant were diagnosed with a rare liver cancer caused by exposure to vinyl chloride, a chemical used to make plastic found in hundreds of products. OSHA subsequently proposed a regulation to reduce worker exposure to vinyl chloride.

As soon as OSHA issued the new proposal, manufacturers predicted that it would destroy the industry and cost millions of jobs. In fact, on June 26, 1974, The New York Times quoted industry spokesmen saying that "the proposed standard was medically unnecessary, technologically unfeasible, and would lead to the loss of as many as 2.2 million jobs." Yet, after the new vinyl chloride regulation went into effect in 1975, the magazine Chemical Week described an industry rushing to "improve existing operations and build new units" to meet increased market demand. The Sept. 15, 1976, issue reported that producers "have installed the equipment needed to meet the worker-exposure requirements set by [OSHA], but without inflating production costs to the point where PVCs growth might be stunted." Notably, the vinyl chloride industry spent only a quarter of the amount OSHA originally estimated it would cost to comply with the standard, and new technologies designed to meet the standard actually increased productivity.[33]

Much more recent, and similarly compelling, evidence shows the positive effect of OSHA standards. In 2012, the Harvard University and University of California at Berkeley Business Schools found that following OSHA inspections that enforce safety standards, worker injuries were reduced with no detectable job losses.[34] They found that following an OSHA inspection, workers compensation claims fell by 9.6 percent and employers saved an average of 26 percent

[33] http://ota.fas.org/reports/9531.pdf
[34] Michael Blanding, OSHA Inspections: Protecting Employees or Killing Jobs?, May 12, 2012, http://hbswk.hbs.edu/item/osha-inspections-protecting-employees-or-killing-jobs.

on workers compensation costs.[35] Thus, complying with OSHA standards not only prevented injuries, it also saved money for the employer.

The sad fact is that far from over-regulating, OSHA has published very few new regulations since its early years. The vast majority of OSHA's current regulations were adopted in 1971, roughly 45 years ago. They came from industry consensus standards that were based on science developed in the 1950's and 1960's. Most of these standards are very old and out of date and do not adequately protect workers. Yet, given the current length of the standard-setting process, it would take hundreds of years for OSHA to update these regulations. Far from a "regulatory onslaught," the real crisis is a "regulatory draught" when it comes to workplace safety and health.

**Snapshot of Selected Regulations and Agency Actions**

In the discussion that follows, I will not go into detail on each regulatory or executive action taken by the Obama Administration on behalf of workers, but will highlight a few of those most important to working families. These carefully-tailored, thoughtfully-constructed, and common-sense reforms are long-overdue and go to the heart of very serious issues facing working people today. As appropriate and necessary, NELP intends to submit a supplemental statement for the record, to address matters that arise in the hearing.

Before discussing specific regulations, it is important to stress that the federal labor and employment agencies possess and use a variety of approaches to achieve compliance with our nation's basic worker protection laws and further their objectives. These include extensive outreach and education for stakeholder communities (prominently including employers), targeted enforcement to maximize the potential for addressing the most egregious legal violations in a manner that will spur greater compliance across-the-board, informal guidance and interpretations, and regulation developed and implemented through a deliberative process that allows full opportunity for input from affected stakeholders, as well as comprehensive

[35] Id.

review of various factors, including the benefits and costs associated with proposed regulatory action.

With respect to regulation (and as described in the preceding discussion of OSHA), it is not uncommon for regulatory development to consume multiple years at the agency stage alone. Requirements imposed on agencies by various executive orders, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the Regulatory Flexibility Act, along with review of and appropriate response to public comments that, for a major proposed rule, can run into the thousands of pages, as well as comprehensive review by the Office of Management and Budget at both the proposed and final stages, make rulemaking a long and exacting process. Subsequent challenges in Congress and the courts can further delay the process and postpone final implementation of a rule. Given the complexity, rigor and duration of the regulatory process, agencies do not undertake to craft or amend rules cavalierly or without regard to their impact on all those affected by them. Agencies are entitled to a presumption that they have acted reasonably, within their statutory authority, and in pursuit of the goals they are required to pursue.

We turn now to a discussion of specific regulations and other administration actions in the area of workers' rights and protections.

1. Updating the Executive, Administrative and Professional Exemptions for Overtime Pay Eligibility

For decades, America's workers have been putting in more hours for less income, but DOL's proposed regulation governing the so-called "white collar" exemptions to overtime coverage could ensure heightened overtime pay protection for at least 11 million more workers.[36] This reform has been years in the making. When the Fair Labor Standards Act (FLSA) was enacted in 1938, one of its most important provisions was "time-and-a-half pay" for workers who put in more than 40 hours per week. This rule provided a financial incentive for

[36] Defining and Delimiting the Exemptions for Executive, Administrative and Professional, Outside Sales and Computer Employees: Proposed Rule, http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf.

employers not to overwork their employees, encouraged employers to hire more people, and rewarded workers with higher pay when they clocked extra time.

These overtime pay protections are as vital to workers today as they were 77 years ago. But, decades of regulatory neglect have pulled the teeth from these important protections. Currently, only eight (8) percent of salaried white collar workers have guaranteed overtime protection, a huge decline from 1979, when more than 60 percent of the salaried workforce got overtime pay, according to the Economic Policy Institute.[37]

The "Executive, Administrative and Professional" exemptions to the requirement of premium pay for overtime hours were intended to respond to the realities of certain high-level white collar positions. Specifically, in exchange for higher pay, more flexibility in how they spend their work hours, and greater autonomy in performing their jobs, white-collar employees are expected to spend the time required to get the work done, and to do so without any additional compensation at all for overtime hours. But the Labor Department's failure to regularly review and update the tests governing the exemption, and employers' exploitation of regulatory loopholes, have led to more workers being called "managers" and denied overtime pay, even when they spend the majority of their time performing work routinely done by hourly workers.

A gateway problem with the current rule is its outdated salary threshold. In order to be classified as overtime-exempt, an employee must be paid a salary of at least $455 a week, or $23,660 a year. If that sounds low, it's because it is: Full-time, full-year earnings of only $455 per week fall below the poverty line for a family of four and would render many families of such workers eligible for public benefits like Medicaid, SNAP and other forms of public aid. The salary threshold was last adjusted a decade ago, and before that, had last been revised in the mid-1970s. When the Bush 43 Administration's Labor Department set the current threshold, the level it chose was far too low, just barely above the poverty-line for a family of four. At the

[37] Ross Eisenbrey, "The Number of Salaried Workers Guaranteed Overtime has Plummeted Since 1979," July 11, 2105, http://www.epi.org/publication/the-number-of-salaried-workers-guaranteed-overtime-pay-has-plummeted-since-1979/.

same time, the Department eliminated the distinction between the so-called "short duties test" and "long duties test" to determine exempt status of a white collar employee. As a result, considerable confusion exists among workers and employers alike regarding whether individuals are even eligible to be considered for exemption; and because the salary threshold is so low, many exempt white collar individuals who put in excessive overtime hours end up earning less than the non-exempt employees they supervise and manage. No one would voluntarily opt to be classified as exempt, only to earn poverty level wages notwithstanding excessive hours of work.

The Labor Department proposes to address confusion around proper application of the white collar example and to remedy the erosion of overtime pay with a much more realistic weekly salary threshold of $970, or $50,440 annually for a full-time worker. According to EPI, this level will ensure that at least 44 percent of all white collar workers are automatically covered by the FLSA's overtime protections, a share smaller than the percentage of white collar workers who have historically been guaranteed overtime pay but nevertheless much more representative than under the current threshold of the percentage of workers who, because they likely do not enjoy the economic power required to ensure that their hours are not abusively high or their compensation shamefully low, should be guaranteed overtime pay protections.[38]

Wanda Womack from Alabama is one such worker, and one of several profiled in the NELP report, "The Case for Reforming Federal Overtime Rules: Stories from America's Middle Class."[39] While working as a store manager at Dollar General for 11 years, Ms. Womack spent the majority of her workdays ringing up sales, checking inventory, and unloading freight, tasks indistinguishable from those of employees she supervised and managed. She regularly worked 50 to 70 hours per week but earned only $37,000 a year, resulting in an hourly wage that

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[38] Will Kimball and Lawrence Mishel, "Estimating the Number of Workers Directly Benefiting from the Proposed Increase in the Overtime Salary Threshold," August 3, 2015, http://www.epi.org/publication/overtime-estimates-technical-memo/; see also, Ross Eisenbrey and Lawrence Mishel, "Raising the Overtime Threshold Would Directly Benefit 13/5 Million Workers," August 3, 2015, http://www.epi.org/publication/breakdownovertimebeneficiaries/.
[39] http://www.nelp.org/publication/the-case-for-reforming-federal-overtime-rules-stories-from-americas-middle-class/.

averaged less than that of her employees.[40] Sadly, all the extra hours of work and the hard manual labor that should have been overtime-eligible took quite a toll on Ms. Womack. She suffered from a herniated disc and needed three surgeries to repair her rotator cuff. Unable to lift over 25 pounds any longer, she could not perform her "managerial" duties at Dollar General and was forced to leave her job.[41]

In proposing a reasonable new salary threshold that will be indexed to grow annually, the Labor Department has taken a crucial step to strengthen middle class wages and give overtime regulations their intended scope--and to ensure that exemption from overtime is consistent with the stringent limitations contemplated by the FLSA. Workers in sectors as diverse as retail, food service, accounting, mortgage and finance, banking, and oil and gas inspection will all benefit from the updated rule. Indeed, even the National Retail Federation, one of the chief opponents of updating the outdated overtime rules, acknowledges that these new regulations will not result in job loss, but will create tens of thousands of new jobs in the retail sector alone.[42]

The Labor Department's proposal of a stronger salary threshold that is consistent with the purposes and intended scope of the FLSA and that aligns the threshold more closely with its historic standard is long-overdue. After decades of declining wages and failure to adequately update the white collar exemption rules, the Labor Department should be applauded for acting to restore wages and protections to where they should be for America's workforce.

2. Protecting Workers from Harmful Exposure to Silica Dust

Exposure to silica dust is a significant occupational health hazard where current worker protections are woefully inadequate. Silica causes cancer and silicosis, an incurable, progressive, and too-often fatal lung disease. Knowledge of the dangers of silica dust exposure is not new. As far back as 1937, Secretary of Labor Frances Perkins declared war on silicosis.

[40] Id.
[41] Id.
[42] Rethinking Overtime, page 26, https://nrf.com/sites/default/files/Documents/Rethinking_Overtime.pdf

In 1997, OSHA added updating its silica standard to its regulatory agenda because its current silica standard was more than 40 years old, was based on science that is even older and endangered workers lives and health. In 2013, a full 16 years after it first appeared on the regulatory agenda, OSHA finally proposed new protective measures for workers exposed to silica. The proposal would save nearly 700 lives and prevent 1,600 cases of silicosis annually.

The proposed rule contains common sense, flexible measures that employers can use to reduce silica exposure. After the standard was proposed, OSHA provided a full year for the public to provide comments on the proposal to the agency. An initial approximate six-month written-comment period was followed by three weeks of public hearings, and thereafter, by an additional 130-plus days to submit final comments. OSHA is now preparing the final rule, after this exhaustive recent process that builds on decades of study and intensive analysis.

The simple fact is that disease and death from silica dust exposure can be prevented. Common dust control methods such as applying water to control the dust, or adding ventilation can substantially reduce the amount of dust. Allan White, a foundry worker from upstate New York, was diagnosed six years ago with silicosis. He had never smoked and was a healthy guy. Now, however, he has trouble completing simple things, like talking on a cell phone while walking or trying to walk the simple mile home from his job. As he told OSHA, "[t]he progression of silicosis reduces my physical endurance over time and is very difficult to experience."[43]

In 2013, more workers died from silicosis and silica-related diseases than from explosions, being caught in or crushed by collapsing materials such as a trench collapse, or being caught in running equipment or machinery. Workers should not have to sacrifice their health and, ultimately, their lives for a paycheck. We have waited long enough to update this important standard and save 700 lives per year. OSHA should issue this crucial revised standard as soon as possible.

3. Executive Orders Pertaining to Federal Contract Workers

[43] Statement of Mr. Alan White, August 23, 2013, https://www.osha.gov/silica/AlanWhite.pdf.

It should be axiomatic that our tax dollars must not subsidize poverty jobs or jobs with substandard working conditions. Jobs paid for with taxpayers' dollars should lift up workers, not consign them to conditions of poverty. As a first step toward achieving this objective, President Obama issued Executive Order 13658 mandating that as of January 1, 2015, all new federal contract jobs must pay a minimum wage of $10.10 an hour.[44] This is a good first step, but no more than that, for as the Economic Policy Institute's Family Budget Calculator demonstrates, even a wage of $10.10 per hour isn't enough to support a family anywhere in the United States.[45]

Further acting to ensure that public dollars support only good jobs, President Obama also issued Executive Order 13673, "Fair Pay and Safe Workplaces." Companies with significant, repeated and un-remedied violations of labor and employment laws should not be rewarded with federal tax dollars in the form of government contracts. Yet federal contracts are awarded to such companies with shocking frequency.[46] Executive Order 13673 will better ensure that our tax dollars only go to "responsible" companies that have a satisfactory record of performance, integrity, and business ethics, a requirement already in federal law, but not adequately enforced.

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[44] Executive Order – Minimum Wage for Contractors, https://www.whitehouse.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors.

[45] Elise Gould, et al. ,"What Families Need to Get By," August 26, 2015, http://www.epi.org/publication/what-families-need-to-get-by-epis-2015-family-budget-calculator/.

[46] As the Senate HELP Committee and the Government Accountability Office have extensively documented, there is a long and unfortunate history of federal agencies continuing to grant contracts to unscrupulous employers who flout federal labor law. Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk, December 11, 2013, http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf; Federal Contractors and Violations of Labor Laws,. http://www.gao.gov/assets/230/221816.pdf; Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors, http://www.gao.gov/assets/310/309785.pdf. And not surprisingly, those that can't be bothered to adequately comply with labor laws also are also more likely to have other performance problems. The Center for American Progress found that of the companies that committed the worst workplace violations over a five-year period and later received federal contracts, one in four had significant performance problems including fraudulent billing, cost overruns, performance problems, and schedule delays costing taxpayers billions of dollars. Karla Walter and David Madland, At Our Expense: Federal Contractors that Harm Workers Also Shortchange Taxpayers, December 2013, https://cdn.americanprogress.org/wp-content/uploads/2013/12/BadFedContractors-3.pdf.

At the outset, it's worth noting that this EO will apply only to the scant five percent of federal contracts with an estimated value exceeding $500,000.[47] And at the point of a contractor's initial application, there is nothing new – the potential contractor simply has to check a box to certify compliance with applicable labor laws. Next, if the prospective bidder reaches the "responsibility" determination in the procurement process, the company must then disclose whether there have been any administrative merits determinations, civil judgments, or arbitration awards rendered against it within the preceding three-year period for labor law violations. Realistically, companies bidding on contracts of this magnitude should be well-aware of any such determinations made against them, and requiring that they disclose this information in the bid process is far from burdensome.

Finally, after a contract has been awarded, contractors must semi-annually update the information provided about their own labor law violations and obtain the same information for covered subcontracts. If they are scrupulous about their actions, and subcontract to similarly scrupulous contractors, the semi-annual compliance process will be quite simple.

Far from "blacklisting" any companies from federal contracts, the EO and proposed implementing Federal Acquisition Regulation System regulations are intended to further the simple goal of ensuring that in its role as steward of taxpayer funds, the government is not underwriting law-breaking. Holding contractors that seek federal contracts to the modest standard that they obey the law and correct legal violations is not a burden -- it is the bare minimum that taxpayers have a right to expect.

It is also important to note that mere allegations of violations will not bar a company from receiving a contract, nor will the existence of violations per se act as a bar. For example, the EO explicitly states that "...in most cases a single violation of law may not necessarily give rise to a determination of lack of responsibility....," and the proposed DOL Guidance likewise recognizes that labor law violations that "could be characterized as inadvertent or minimally impactful" are purposely excluded from consideration.

[47] "FACTSHEET: Fair Pay and Safe Workplaces Executive Order," https://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order

Consistent with these directives, affected bidders will be able to submit evidence of mitigating circumstances to procurement officials, including whether they are contesting the citation, appealing the determination, or whether they have already corrected the issue. Indeed, because of the extensive and appropriate reliance on mitigating circumstances, perhaps the most important impact of the EO will be giving prospective and current contractors the tools and incentive they need to come into compliance with federal labor and employment laws.

Most recently, the President has issued an executive order that will require federal contractors to give the employees on those contracts paid sick leave. It will mean 300,000 workers who service federal contracts but cannot earn paid sick days now will soon be able to earn the paid sick time they need to recover from illness, seek preventive care, or care for sick children or other relatives.[48] As a result of this executive order, fewer workers will have to make choices no one should have to make -- between their jobs and their health, or their family's health. Twenty-five jurisdictions – including four states and some of our largest cities – have adopted paid sick days standards[49] and this executive order, too, will make a tremendous difference.

4. The EEOC's Regulatory and Enforcement Agenda

The Equal Employment Opportunity Commission (EEOC) is charged with enforcing many of our nation's anti-discrimination laws with respect to employment, both for the private sector, the federal government, and state and local agencies.[50] Notably, however, many of the laws pertaining to the private sector do not apply to the smallest businesses, for example, those with under fifteen employees.[51] In order to enforce those laws, and give both workers and employers instruction on what actions constitute violations of the anti-discrimination laws, the

[48] "FACTSHEET: Helping Middle-Class Families Get Ahead by Expanding Paid Sick Leave," https://www.whitehouse.gov/the-press-office/2015/09/07/fact-sheet-helping-middle-class-families-get-ahead-expanding-paid-sick

[49] "Current Paid Sick Days Laws," November 4, 2015, http://www.nationalpartnership.org/research-library/work-family/psd/current-paid-sick-days-laws.pdf.

[50] Laws Enforced by the EEOC, http://www.eeoc.gov/laws/statutes/index.cfm.

[51] See, e.g., Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/statutes/titlevii.cfm

EEOC issues both regulations and guidance, depending on the statute it is enforcing and the vehicle it determines to be both authorized and effective.

Within the last two years, the EEOC has issued notices of proposed rulemaking with respect to employee wellness programs and requirements under the Americans with Disabilities Act (ADA)[52] and the Genetic Information and Nondiscrimination Act (GINA).[53] The Notice of Proposed Rulemaking for the ADA was issued on April 20 of this year, with the period for public comments closing on June 19, 2015; 313 comments were filed.[54] The proposed GINA regulations were published on October 30, 2015, and the public comment period is now scheduled to run until January 28, 2016.[55]

There are important interests to be balanced in finalizing the regulations under ADA and GINA. Businesses and workers have obvious interests in wellness programs to enhance workforce health and productivity. At the same time, workers and their families have the right to be confident that these programs are not subterfuges for any form of illegal discrimination, or end-runs around the prohibitions of ADA, GINA and other health privacy laws. And all workers are entitled to assurance that employee wellness programs do not discriminate in any other manner within EEOC jurisdiction. There has already been extensive documentation and debate of these issues, and the final complement of comments submitted on the proposed regulation will likely reflect the fullness of the debate. There is no reason to feel that the EEOC will not properly and lawfully weigh those comments or that its final regulation will do anything other than strike the proper balance between the competing interests.

Enforcement Guidances are likewise crucial documents for both employers and employees. They flesh out the limited outlines provided by legislation, in the process describing in detail the rights and responsibilities of all parties to the employment relationship and

[52] https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act
[53] https://www.federalregister.gov/articles/2015/10/30/2015-27734/genetic-information-nondiscrimination-act-of-2008
[54] https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act.
[55] http://www.gpo.gov/fdsys/pkg/FR-2015-12-07/pdf/2015-30807.pdf

providing examples to guide employer compliance and employee examination of employment practices that raise legal questions.

During the Obama Administration, the EEOC has issued guidance related to two issues, criminal records and pregnancy discrimination. The first guidance, issued in April 2012, updated earlier guidance on using arrest and conviction records for screening and hiring employees; this guidance was originally issued by the EEOC when Justice Clarence Thomas was its Chairman. The revised guidance, approved of on a bi-partisan basis with four of the five EEOC Commissioners voting for its adoption, reiterated the long-standing doctrine that improper use of arrest and conviction records in employment decisions may violate Title VII's prohibition of actions that have a disparate impact based on race. The guidance also provided suggested steps employers could take to ensure proper consideration of criminal records in the employment process, so as to insulate themselves from liability.[56] Revised guidance was appropriate and necessary, given the proliferation of background checks as part of the employee selection process, the explosive growth of the background checking industry, the disproportionate engagement communities of color have with the criminal justice system, and the continued imperative, first adopted by the Supreme Court in 1971, in a unanimous opinion written by Chief Justice Burger,[57] and subsequently affirmed repeatedly by Congress and the Courts, to ensure that facially neutral practices that have a disparate impact on groups protected under Title VII are job-related and promote a business necessity. Many criminal background checks fail that test, in the process unfairly and unlawfully excluding many otherwise qualified applicants from employment. The EEOC acted within its statutory authority and performed an important public service in updating and clarifying guidance in this area of such growing importance.

The guidance on pregnancy discrimination was originally issued on July 14, 2014, and updated on June 25, 2015. The updated guidance addressed when failure to accommodate a reasonable accommodation request from a pregnant worker violates Title VII. This revision

[56] "Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964," http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.
[57] https://www.law.cornell.edu/supremecourt/text/401/424 (Griggs v. Duke Power Company,

aligns the Commission's guidance with the Supreme Court's decision in Young v. United Parcel Serv., Inc., 135 S.Ct. 1338 (2015).[58]

Far from an "onslaught" by the EEOC, its regulatory agenda and guidances during the Obama Administration have been few and painstakingly considered.

5. Extending Federal Minimum Wage and Overtime Pay Protections to Home Care Workers

After four decades of exclusion from the federal minimum wage and overtime protections of the Fair Labor Standards Act, our nation's two-million-plus home care workers are now finally covered by these laws as the result of a Labor Department regulation, issued in September 2013, that extends these basic wage rights to this critical workforce.[59] Long considered a controversial and questionable interpretation of the FLSA's "companionship" -- casual babysitter -- exemption, the prior regulation excluding home care workers was a byproduct of Jim Crow America and came about at a time when home care was a fledgling industry. As the population aged and the home care industry grew (particularly with the introduction of many third-party-providers, including many for-profit agencies), home-based care gained currency as an alternative preferable to institutional care for the elderly and people with disabilities. Home-based care is not only less expensive, but it also improves the quality of life for its recipients. Today, home care work represents one of the fastest-growing occupations in the nation, expected to add among the largest number of new jobs by 2022.

Home care workers are skilled professionals who help their clients meet a range of needs of daily living. If they worked in a nursing home or related institution, these workers would long have been entitled to federal wage protections. In revising and updating its companionship rule, the Labor Department has not simply acknowledged the growth and changing nature of the home care profession; it has ended the anomaly of extending wage protections to workers who labor in institutions, while denying those same protections to

[58] "Enforcement Guidance: Pregnancy Discrimination and Related Issues," http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.
[59] Application of the Fair Labor Standards Act to Domestic Service, Final Rule., https://www.dol.gov/whd/homecare/final_rule.pdf.

workers who provide the same level of care and support, albeit more economically and in a more nurturing environment, in the home.

Correcting a decades-old injustice that has fueled poverty wages and destabilized an increasingly vital workforce, the Department of Labor's regulations entitle home care workers to the federally-protected right to time-and-a-half of their regular hourly wage when they work over 40 hours in a week; compensation for time spent traveling between consumers' homes; and compensation when they wake to care for clients on overnight shifts, among other things. The Court of Appeals for the D.C. Circuit unanimously upheld this regulation as a legitimate exercise of the Labor Department's authority, and the Department is proceeding with implementation and enforcement of the rule.[60]

These regulations recognize that, in particular for the home care industry, quality jobs are essential for quality care. Low pay leads to burnout and high turnover rates that compromise care, which in turn creates economic strains on the home care system. Raising the standards for this industry by creating a floor of federal protections is not only the right thing to do by workers, it is imperative if we are to meet the demands of an aging America and a preference for in-home services and supports.

Conclusion

The Obama Administration, the Labor Department and the Equal Employment Opportunity Commission have acted within their constitutional and legislative authorities in taking a limited number of actions designed to address the challenges and crises workers contend with every day. These actions reflect careful and balanced consideration of varying interests, input from key stakeholders, and solutions tailored to solving longstanding workforce problems. By improving wages and working conditions for tens of millions of workers, these actions will strengthen America's working families, help rebuild the middle class, reduce income

[60] "Federal Minimum Wage and Overtime Protections for Home Care Workers," September 2015, http://www.nelp.org/content/uploads/NELP-Fact-Sheet-Companionship-Rules-Reform.pdf.

inequality, and lead to a healthier and more robust economy in which all who contribute to its success can share more fully in its prosperity.

We are all better off as a result of these actions. Rather than question or undermine them, Congress should support DOL and the EEOC, and where appropriate, as in the case of executive orders, codify these actions into legislation.

Chairman WALBERG. Thank you. Mr. Hammock, welcome, and we recognize you now for your five minutes of testimony.

**TESTIMONY OF BRADFORD HAMMOCK, SHAREHOLDER AND CO–LEADER OF THE WORKPLACE SAFETY AND HEALTH PRACTICE GROUP, JACKSON LEWIS P.C., RESTON, VA**

Mr. HAMMOCK. Thank you, Mr. Chairman, Congressman Pocan, members of the subcommittee. Good morning. I am Brad Hammock. I manage the Workplace Safety and Health Practice Group at the law firm of Jackson Lewis.

Before joining Jackson Lewis, I spent 10 years at the Department of Labor working on various matters on behalf of OSHA. I worked specifically on OSHA's regulatory program, including serving as counsel for safety standards for the last few years of my tenure there. I am very familiar with OSHA's regulatory program having been and worked there and lived there.

Since leaving the Department, I have had the privilege of working with countless employers in a variety of industries in a compliance assistance capacity, as well as helping them navigate OSHA enforcement actions.

I am pleased to offer my perspective on regulatory burdens on employers from my experience of working for OSHA as well as representing employers across the country.

Many employers I work with are feeling the full weight of OSHA and fear several new regulatory initiatives set to become final rules in 2016. In addition, now more than ever employers are facing compliance challenges resulting from the ambiguous OSHA guidance in such areas as ergonomics, workplace violence, and process safety management.

The combination of new regulatory requirements and aggressive enforcement places significant pressure on employers. That is why it is critical that agencies be mindful of the cumulative impact of regulations on employers and be judicious with promulgating new rules.

From a regulatory perspective, OSHA is extremely active. One of the regulatory actions that my clients raise with me with great concern is OSHA's proposed electronic recordkeeping rule. As proposed, this rule would amend the agency's recordkeeping regulations to add new electronic reporting obligations.

OSHA would require employers with over 250 employees per establishment to submit their OSHA 300 Logs to the agency on a quarterly basis, and OSHA would in turn post those OSHA 300 Logs on its website to make the information publicly available.

There are several problems with this rule, starting with the fact that OSHA has not justified any safety and health benefits from the proposal. OSHA seems to believe that benefits will flow once injury and illness information is made public, and customers, employees, and others can make determinations about how safe a particular worksite is. This in turn would lead employers to make improvements in workplace safety.

This is wrong at several levels. OSHA should know that the occurrence of an injury in and of itself is not a complete or fair indication of an employer's safety and health program and its effectiveness. To suggest that individuals, whether it be researchers, workers, other employers, customers, or unions should make conclusions about the safety and health of a workplace based on just the public report of an OSHA 300 Log, a lagging as opposed to a leading indicator, is misguided.

As you can imagine, employers are very concerned with this proposal, that may unfairly tarnish a worksite as unsafe, having a negative impact on the employer of the site, regardless of the true effectiveness of the employer's safety and health program.

Another significant regulatory initiative that will have major impacts on many employers is OSHA's proposed rule regulating crystalline silica. OSHA has been working on a respirable crystalline silica rule for decades.

To be clear, crystalline silica at certain exposure levels has been shown to cause silicosis, a potentially fatal lung disease. Over the course of the last several decades, however, the incidences of silicosis have been steadily and rapidly declining, according to the Centers for Disease Control.

It is with this backdrop that OSHA's proposal was issued. For many employers, particularly small employers, the rule will be highly burdensome. Take the construction industry, for example. Not only is OSHA proposing to significantly reduce the permissible exposure limit for silica in construction, it is proposing other extensive requirements, including prohibitions in certain instances on work practices such as the use of compressed air, dry sweeping, and dry brushing.

Some stakeholders have estimated that the cost of the rule for construction alone will be approximately $4.9 billion a year.

There are other rules as well in the most recent regulatory agenda, over 30 regulatory initiatives are proposed by OSHA. This comprises almost 45 percent of the regulatory burden of the Department of Labor.

Aside from the new regulatory requirements discussed, in the last several years many employers have been challenged by OSHA enforcement initiatives in areas where the agency has provided little compliance clarity.

I just want to highlight one here today, ergonomics. Over the last few years, OSHA has been active in attempting to utilize the general duty clause to cite employers for failing to take certain actions to protect employees from musculoskeletal disorders.

The problem with this for many employers is that OSHA has provided little guidance on what its expectations are for compliance with respect to ergonomics. Thus, many employers are following OSHA's own ergonomics guidelines for a particular industry, but they still get cited because OSHA wants them to actually do more undefined with respect to ergonomics.

In conclusion, I want to leave one final thought with the Committee. All these burdens placed on employers may actually take resources away from workplace safety and health. While compliance is important to employers, so is the day to day job of working to prevent injuries.

When OSHA proposes a rule or embarks on an enforcement initiative, it must truly analyze how necessary the rule is, the benefits of the rule, and the adverse consequences of it.

Thank you, Mr. Chairman.

[The statement of Mr. Hammock follows:]

**COMMITTEE ON EDUCATION AND THE WORKFORCE**
**SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

**HOW THE ADMINISTRATION'S REGULATORY ONSLAUGHT IS AFFECTING WORKERS AND JOB CREATION**

**Testimony of Brad Hammock**

Good morning, I am Brad Hammock and I manage the Workplace Safety and Health Practice Group at the law firm of Jackson Lewis. Founded in 1958, Jackson Lewis is one of the largest law firms dedicated to representing management exclusively in workplace law.

Before joining Jackson Lewis in 2008, I spent 10 years at the Department of Labor in the Office of the Solicitor's Occupational Safety and Health Division, working on various matters on behalf of OSHA. I worked specifically on OSHA's regulatory program, including serving as Counsel for Safety Standards for the last few years of my tenure there.

When I originally joined the Department during the administration of President Clinton, I spent most of my first few years working with OSHA to promulgate its Ergonomics Program Management standard. During my career, I also assisted OSHA in finalizing major regulatory initiatives such as the Employer Payment for Personal Protective Equipment standard, OSHA's update to its electrical utilization standard, and others. Many of my former colleagues at the Department still work there. They are dedicated to worker safety and I hold them in high regard.

Since leaving the Department, I have had the privilege of working with countless employers across the country and safety and health professionals in a variety of industries in a compliance assistance capacity, as well as helping them navigate OSHA enforcement actions. I have been impressed with the dedication of these employers in ensuring the safety and health of their employees. Ensuring a safe worksite takes a collective effort from OSHA, employers, safety professionals, and employees.

I am pleased to offer my perspective on regulatory burdens on employers from my experience working for OSHA, as well as representing employers across the country. Many employers I work with are feeling the full weight of OSHA and fear the onset of new burdens, based upon OSHA's recent announcements in the Regulatory Agenda of its intent to finalize several new rules. I discuss just a few of these regulatory initiatives below.

In addition, now more than ever, employers are facing compliance challenges, resulting from ambiguous OSHA guidance in such areas as ergonomics, workplace violence, and process safety management ("PSM"), causing employers to spend significant resources simply discerning OSHA's expectations in these areas. Unfortunately, despite employers' best efforts at compliance, many employers find themselves on the wrong end of an OSHA citation when they only find out at the time of the inspection the requirements to which they are being held. In these closing months of this administration, OSHA is increasingly looking to expand the use of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 ("OSH Act"), also known as the General Duty Clause, to create *de facto* regulations – effectively issuing new regulations through enforcement actions.

The combination of new regulatory requirements and aggressive enforcement places significant pressure on employers. And employers must at the same time deal with the vast array of regulatory burdens from other federal and state agencies. That is why it is critical that agencies be mindful of the cumulative impact of regulations on employers and be judicious with promulgating new regulations and limit issuing civil penalties for alleged violations which are not defined at all in standards or regulations.

**OSHA Regulatory Activity**

From a regulatory perspective, OSHA is extremely active and, if the Department of Labor's latest Regulatory Agenda is correct, 2016 will bring significant new and burdensome regulations on employers. OSHA has the statutory authority and obligation to promulgate standards and regulations that are reasonably necessary and appropriate to protect the safety and health of employees. I do not question this and was a part of the regulatory process during my tenure at the Department of Labor. However, we are seeing OSHA now put forth several regulatory initiatives that have questionable benefits for employees or lack statutory authority altogether, and at the same time place significant burdens on businesses, both large and small.

**1. Improve Tracking of Workplace Injuries and Illnesses**

One of the regulatory actions that my clients raise with me – with great concern – is OSHA's Proposed Rule to "Improve Tracking of Workplace Injuries and Illnesses." 78 Fed Reg. 67254 (Nov. 8, 2013). This rule is currently under review at the Office of Management and Budget and is projected to be issued as a final rule in March 2016.

As proposed, this rule would amend the Agency's recordkeeping regulations to add new electronic reporting obligations. OSHA would require employers with over 250 employees (per establishment) to submit their OSHA 300 Logs to the Agency on a quarterly basis and OSHA would, in turn, post those OSHA 300 Logs on its website to make the information publicly available.

There are several problems with this rule. First and foremost, OSHA has inadequate data or evidence to justify any safety and health benefits from the proposal.

OSHA "anticipates that establishments' electronic submission of establishment-specific injury/illness data will improve OSHA's ability to identify, target, and remove safety and health hazards, thereby preventing workplace injuries, illnesses, and deaths." 78 Fed. Reg. at 67276. OSHA believes – based on what appears to be simple speculation – that making a company's recordkeeping logs public will increase worker safety. For example, in the preamble to the proposal, OSHA states:

> Using data collected under the proposed rule, potential employees could examine the injury and illness records of establishments where they are interested in

> working, to help them make a more informed decision about a future place of employment. This would also encourage employers with more hazardous workplaces in a given industry to improve workplace safety and health, since potential employees, especially the ones whose skills are most in demand, might be reluctant to work at more hazardous establishments. 78 Fed Reg. at 67259.

This shows how misguided the proposed rule is and, frankly, offensive to many safety and health professionals that work tirelessly to protect workers. OSHA should know that the occurrence of an injury, in and of itself (and its subsequent recording) is not a complete or fair indication of an employer's safety and health program and its effectiveness. To suggest that individuals (whether it be researchers, workers, unions, or other employers) should make these types of conclusions about a workplace based on just the public report of an OSHA 300 Log is insulting.

In fact, in many instances an effective safety and health management system will initially result in an increase in injury reporting, which can be reflected in an OSHA 300 Log. Having more injuries and illnesses reported for a certain amount of time is not an indication – necessarily – that a worksite is unsafe. It may mean the exact opposite.

And yet, OSHA would have the public draw negative inferences on an employer's safety and health program based on this one lagging indicator that it has decided to make publicly available. This is particularly wrongheaded, given OSHA's rhetorical emphasis on employers stressing leading indicators to promote safety in the workplace. OSHA wants employers to implement and track leading indicators, but then asks the public to draw conclusions about worksite safety based on one lagging indicator.

Take the following hypothetical employer. This employer has fully implemented a robust safety and health management system in its worksite, based upon OSHA's guidelines regarding effective safety and health programs. The employer incentivizes leading indicators of safety. Employees are financially rewarded for identifying hazards in the worksite and suggesting controls to address those hazards. Employees are financially incentivized to report near misses. Employees are rewarded for participating in monthly safety committee meetings. The employer has embraced the concept of continuous improvement in safety, performing regular evaluations of its safety and health management system with full employee participation. Yet, this employer does not go injury free for a calendar year and the injuries that do occur are published on OSHA's website so that OSHA, potential and current employees, researchers, unions, and the surrounding community (as well as people around the globe) can determine that, in fact, despite all of the efforts of this employer to proactively approach safety and health, this employer is a "bad" employer that potential employees should avoid. This, of course, is wrong.

Aside from the policy perspective, OSHA lacks the statutory authority to publish the injury and illness information as it intends to do. While the OSH Act gives OSHA authority to collect and compile data regarding workplace safety and health, the statute says nothing about making that information open to the public across the globe. Had Congress empowered OSHA to take such action, it would have explicitly provided the Agency the authority to do so. It did not.

As you can imagine, employers are very concerned with this proposal. It will force them away from leading indicators. It may unfairly tarnish a worksite as unsafe, having a negative impact on the employer of the site, regardless of the true effectiveness of the employer's safety and health program. And, above all, OSHA cannot credibly claim that this will produce any improvement in workplace health and safety. Yet, if this rule goes forward, potentially starting in 2016, employers will be faced with this prospect.

These and other concerns were raised with OSHA during the comment period for this rulemaking. Despite the intense opposition to the proposal, OSHA seems intent on proceeding with this rulemaking. In fact, as a follow-on to the initial proposal, OSHA issued a supplemental notice of proposed rulemaking (79 Fed. Reg. 47605 (August 14, 2014)) seeking comment on whether the electronic reporting rule would encourage employers to under-record their injuries and illnesses and suggesting that it would prohibit in a final rule employer practices that it determines discourage injury and illness reporting.

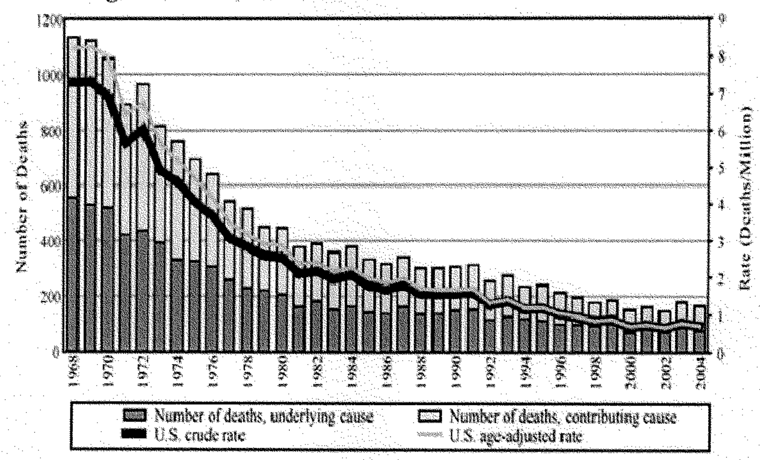
The supplemental proposal suffers from the same problem as the initial proposal: it provides no data or evidence to support the information presented. In addition, it provides no real notice of what OSHA intends to prohibit in a final rule. There is no actual regulatory text proposed. Instead, the supplemental is just a series of questions dealing generally with disincentives to reporting. It would not further workplace safety and health for OSHA to prohibit certain workplace policies and programs without really doing its homework on the effect of those policies and programs in various worksites across the country. It appears, though, that OSHA intends to do precisely that.

## 2. Occupational Exposure to Crystalline Silica

Another significant regulatory initiative that will have major impacts on many employers is OSHA's proposed rule regulating crystalline silica. OSHA is proposing to reduce the permissible exposure limit ("PEL") for respirable crystalline silica down from its current levels to 50 $\mu g/m^3$. The Agency has also proposed an action level ("AL") of 25 $\mu g/m^3$, which triggers certain aspects of the proposed rule. The impact of this rule cannot be overstated.

OSHA has been working on a respirable crystalline silica rule for decades. To be clear, crystalline silica at certain exposure levels has been shown to cause silicosis, a potentially fatal lung disease. Over the course of the last several decades, however, the incidences of silicosis have been steadily and rapidly declining, according to the Centers for Disease Control.

**Figure 3-1. Silicosis: Number of deaths, crude and age-adjusted death rates, U.S. residents age 15 and over, 1968–2004**




NOTE: See selected limitations for general cautions regarding inferences based on small numbers of deaths, and see appendices for source description, methods, and ICD codes.
SOURCE: National Center for Health Statistics multiple cause-of-death data. Population estimates from U.S. Census Bureau.

It is with this backdrop that OSHA's proposal was issued. For many employers, particularly small employers, the rule will be highly burdensome. Take the construction industry for example. OSHA is proposing to reduce the PEL for respirable crystalline silica from its current level of 250 $\mu g/m^3$ to the 50 $\mu g/m^3$ level, discussed above. It is proposing other extensive requirements, including requirements for regulated areas or written access control plans; prohibitions on work practices on construction sites such as compressed air, dry sweeping, and dry brushing; medical surveillance; respiratory protection; training and hazard communication; and recordkeeping.

Even OSHA's attempt to make compliance easier for construction employers under the proposed rule was a failure. OSHA proposed as an alternative to the rule's exposure monitoring provisions compliance with a "Table 1." Table 1 set forth specific job activities, engineering and work practice controls, and respiratory protection that if followed, would exempt employers from compliance with the standard's exposure monitoring requirements. OSHA's intent with Table 1 was to devise a simple compliance option for construction employers with respect to implementation of engineering controls and respiratory protection. Unfortunately, OSHA failed to do so. Table 1 required practices so burdensome – such as performing a task using wet methods without producing any visible dust – that no construction employer would ever be able to comply.

The burdens of this rule are reflected in OSHA's own estimate of the costs of compliance. Using the construction industry as an example again, OSHA has estimated that the cost of compliance with the rule will be approximately $511 million annually. This is significant in its own right. However, other stakeholders have done separate analyses of the costs for construction and estimate that it will be approximately $4.9 billion a year, an amount nearly ten times larger than OSHA's estimate.

I raise the crystalline silica rule not to suggest that silica is not hazardous or that it should not be regulated, which it already is. But, OSHA's approach to the standard, given the ongoing decline in silicosis cases, is not justified and will be highly burdensome to many employers, both large and small.

## 3. *Volks* Rule

Finally, employers expect to be facing yet another new rule related to recordkeeping in 2016. The proposal, "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness," 80 Fed. Reg. 45116 (July 29, 2015), is an attempt by OSHA to overturn a decision by the U.S. Court of Appeals for the D.C. Circuit, *AKM LLC d/b/a Volks Constructors v. Sec'y of Labor* ("Volks"), 675 F.3d 752 (D.C. Cir. 2012). In *Volks*, the D.C. Circuit held that the six-month statute of limitations for issuing citations and penalties set forth in the OSH Act is applicable to recordkeeping violations and OSHA cannot cite employers for alleged violations for recordkeeping beyond the six-month time period.

Employers are highly concerned with this proposal and see it as an attempt to circumvent the D.C. Circuit's decision – and the statute – through rulemaking. The proposal is about OSHA's enforcement authority and capabilities, something that Congress established in the OSH Act. While employers agree with OSHA that it is important to maintain accurate records, many fundamentally disagree that the Agency should be able – through rulemaking – to overturn a Court of Appeals decision that held OSHA does not have the authority to issue recordkeeping citations beyond the OSH Act's statute of limitations, because *Congress* did not allow for it in the OSH Act. Unfortunately, that is precisely what OSHA is attempting to do here.

The regulatory actions I have highlighted above are just a few of the potential rules facing employers from OSHA in the coming months. There are others. For example, OSHA issued a Request for Information ("RFI") regarding how to more quickly update regulations for chemical health hazards in the worksite. As a possible follow-on to that RFI, OSHA just announced a new regulatory initiative to delete from its standards outdated PELs for certain chemicals. By doing so, OSHA would be able to enforce lower PELs through the General Duty Clause – regulation through enforcement, rather than rulemaking. In the most recent Regulatory Agenda, over 30 regulatory initiatives are proposed by OSHA. This comprises almost 45% of the regulatory burden of the Department of Labor. The next closest DOL agencies from a regulatory perspective are the Employee Benefits Security Administration and the Mine Safety and Health Administration, each with eight (8) regulatory initiatives a piece.

**OSHA Enforcement**

Aside from the new regulatory requirements discussed above, for the last several years many employers have been challenged by OSHA enforcement initiatives in areas where the Agency has provided little to no guidance. This puts employers in a difficult position of having to try to discern OSHA's positions on how to address certain hazards, often in the context of an ongoing OSHA inspection. Three examples of this are in ergonomics, workplace violence, and process safety management.

Over the last few years, OSHA has been active in attempting to utilize the General Duty Clause to cite employers for failing to take certain actions to protect employees from musculoskeletal disorders ("MSDs"). We have seen this most recently in OSHA's National Emphasis Program for the nursing home industry.

The problem with this for many employers, and particularly small employers, is that OSHA has provided little guidance on what its expectations are for compliance with respect to ergonomics. OSHA has issued some guidance documents related to ergonomics, but in my experience, often it views its own guidance as outdated. Thus, employers that are following OSHA's own ergonomics guidelines for a particular industry, may be cited because OSHA believes that they need to be doing something "more" in the worksite, even though there is no clear guidance as to what that "more" should be. Unfortunately, employers are frequently told of that expectation in the midst of an inspection or even after an ergonomics citation is issued.

Having worked with OSHA on its Ergonomics Program Management standard and on several ergonomics guidance documents while with the Agency, I can tell you that effective ergonomics is anything but simple. Employers need access to compliance assistance material and they cannot be expected to just "guess" about OSHA's compliance expectations.

The same is true in the area of workplace violence, where OSHA also does not have a standard setting forth employer obligations to address this hazard. Workplace violence can surface in many ways in a worksite, but there is often not one approach for managing the hazard, and indeed, too often the causes of workplace violence are outside of the workplace and beyond the reach of the employer. OSHA, however, seems to be vigorously pursuing General Duty Clause enforcement against employers for workplace violence trying to create a *de facto* standard where none exists.

Finally, process safety management is another area where employers are often forced to guess as to their compliance obligations. OSHA's PSM standard is a performance-oriented rule, designed to allow employers to analyze risks from processes involving highly hazardous chemicals. The nature of the rule itself does not allow for a one-size-fits-all approach to assessing and mitigating risk.

The difficulty for employers, however, is that the rule forces covered worksites to engage in a seemingly endless pursuit of industry and national consensus standards that might be relevant to a covered process and potentially change their process and equipment in accord with these non-OSHA standards. OSHA recently published a memorandum to Regional Administrators and State Plan Designees detailing how they should interpret and enforce the PSM standard. It discusses these industry and national consensus standards as representing recognized and generally accepted good engineering practices ("RAGAGEP"), which employers must follow under the rule, thereby endorsing and effectively adopting them. The memorandum was not put out for notice and comment, but will be a key part of future OSHA PSM enforcement.

The memorandum highlights the difficulties for OSHA and employers in characterizing and complying with RAGAGEP. The memorandum describes the vast array of "consensus" and "non-consensus" documents employers may need to consult to meet the requirements that their covered processes conform to RAGAGEP, an alphabet soup of non-OSHA produced material from organizations such as the NFPA, ANSI, ASME, IIAR, and CCPS. Generally, these standards are not free and are updated frequently. Employers covered by OSHA's process safety management standard must continually monitor these outside standards' organizations and ensure that their processes and equipment either comply with the standards or are otherwise documented as safe, considering updates to the published standards. This is incredibly resource-intensive and places significant burdens – financially and technically – on covered employers.

* * * * *

I want to leave one final thought with the Committee. All of these burdens placed on employers may actually take resources away from workplace safety and health. Certainly in the case of the proposed "electronic recordkeeping" rule, employers will be forced to divert resources and time to lagging indicators, rather than leading indicators. While OSHA compliance is important to employers, so is the day-to-day job of working to prevent injuries. When OSHA proposes a rule or embarks on an enforcement initiative, it must truly analyze how necessary the rule is, the benefits of the rule, and the adverse consequences of it.

Employers are faced with mounting challenges economically and from a regulatory perspective. It is incumbent upon all agencies to only issue regulations necessary to fulfill their agency obligations, to only do so when there is adequate data and science to support these actions, and to not use the enforcement process as a substitute for rulemaking.

I appreciate the opportunity to share my thoughts with the Committee.

Chairman WALBERG. Thank you. Appreciate the testimony of the witnesses. Now, we turn to the panel for questions. I recognize the gentleman from Pennsylvania, Mr. Thompson.

Mr. THOMPSON. Mr. Chairman, thank you so much. Thank you to the witnesses for being here, lending your experience and expertise to a very important issue.

Mr. Batkins, I work hard every day to try to boost earnings of low income workers as co-chair of the Career and Technical Education Caucus. I believe that is the best way, most effective way to truly do that, through the provisions of opportunities for job training to get the skills/competencies.

This Committee, this whole Committee, Education and the Workforce Committee, has done an outstanding job with legislation. We have one that has crossed the finish line a year ago or so, the *Workforce Innovation Opportunity Act*, which is about job training. I think within the days to come, the ESSA, which really clears for the secondary levels a pathway for career and technical education training to have a better role within our schools.

The administration, on the other hand, has kind of a different opinion. As you know, in March 2014, the President issued an Executive Order directing Secretary of Labor Perez to update the so-called "white collar regulations" that establish overtime requirements for executive, administrative, and professional employees.

This proposed rule seeks to extend overtime pay in a broad fashion, and according to the administration, will boost the wages of millions of workers that are exempt from current regulations.

The Department of Labor estimates that average annualized direct employer costs will total up to $253 million per year, depending on the updating methodology.

Is this an effective tool to boost the earnings of low income workers? In other words, will this regulation have its intended effect?

Mr. BATKINS. Well, again, the effect of regulation on employment is complicated, but one thing it will definitely do, and this is something Mr. Beebe mentioned, is it will impose millions of dollars in costs, and hundreds of thousands of paperwork hours.

Now, someone, whether it is someone's wife or compliance officer, has to eventually comply with those regulatory compliance. Those hours mean something. They translate into compliance officer's time from profit making tasks devoted instead to regulatory compliance.

The overtime rule in conjunction with some other Department of Labor rules, I think if you add up the regulatory agenda, would be something close to $7 billion in aggregate costs.

It is difficult to say that kind of imposition will not have at least some effect on employment. It might take the form of lower labor force participation rates or it may take the form of lower wages. I certainly think you will see some impact.

Mr. THOMPSON. Thank you. Mr. Beebe, I spent a lot of time visiting small businesses, the backbone of our economy, and talking with them. I have had numerous instances where I have gone and visited them at their request because of regulation concerns they have had, specifically where they have had an anonymous complaint placed by OSHA. They come in, they clear the complaint, but once they are in the door, they just nitpick and tear things apart.

That was not the disturbing part for me. It was the intimidation that OSHA did. These are businesses—one specific example, the employer said okay, what suggestion do you have, how do I correct this, so I can appeal it, and was told by OSHA, or the OSHA individual, well, you do not want to do that because if you do, the consequences could be greater.

It really was intimidation or fear of retribution.

A recent survey from the National Association of Manufacturers notes, "small manufacturers pay more than three times as much as the average U.S. business." Can you explain how small business employment is negatively affected by regulation, and how do regulations impact larger companies differently?

Mr. BEEBE. Well, I think it all comes down to when you talk about impacts, it is the percentage. If I only have 40 people and I have to hire a compliance officer, that is obviously a large percentage of my wages versus a company that has 5,000 employees and two compliance officers.

I think the burden on small businesses by definition is much more impactful than on the large businesses.

Mr. THOMPSON. Very good. Thank you, Mr. Chairman. Let me just say in those situations where I found that, I found it helpful to call the local OSHA office and ask for a face to face meeting with somebody from that department to explain their actions. That has been somewhat effective, providing some good oversight, but it is unfortunate those actions are necessary where these businesses, small businesses in particular, feel intimidated and fear retribution.

Chairman WALBERG. I thank the gentleman. The gentleman's time has expired. I recognize the Ranking Member instead, I guess I would say, at this point in time, Mr. Pocan.

Mr. POCAN. Thank you, Mr. Chairman. I know everyone says it is a new day here in Congress. Sometimes I feel like it is Groundhog Day. I feel like every month we have one of these hearings or sometimes two of these hearings. I was in line at the White House for a holiday party behind someone from the Department of Labor, I am like hey, I have not seen you in about a month.

It is good to be back because I think it allows us to offer maybe some of the facts that are out there. I think, Ms. Owens, you mentioned specifically, according to the Bureau of Labor Statistics, a study on the percent of layoffs from regulation is something like 0.1 to 0.4 percent over about a seven year period. It is extremely low. Yet, the percentage of jobs lost due to lack of demand is really the significant barrier.

I am a small business person for 28 years. I know this from practical experience as well. That is the reality. That is the facts that are out there.

I know we talk about the costs that are involved. Again, as much as I think sometimes we inflate the costs, when I read some of these reports about what something is going to cost. When you actually look back at it, according to the Office of Management and Budget, they said in fiscal year 2014, for example, executive agency major rules delivered the benefits of $22.8 billion annually while the costs were 3 to $4 billion annually. The benefit is definitely exceeding any costs.

In fact, I would argue it is kind of like that credit card commercial, the cost of this, the cost of this, the cost of coming home to your child at the end of the day without an injury, priceless.

Again, your statistics showed that is what happens with these regulations. Since this is the Education and Workforce Protections Committee as opposed to Chamber protections, let me ask you a question, Ms. Owens, specifically regarding something I just did.

I recently followed a worker who works as a caregiver. They have been doing this for 23 years, and are making now $11.50 a hour, after 23 years of working as a caregiver. We helped physically move the body of someone, we did cooking and cleaning, we did all this stuff, non-stop busy, taking care of the pills very precisely, cutting what the person has to have.

Look at the work involved, and all too often we find these folks are not getting the proper pay, the proper overtime, especially when they do overnight shifts, et cetera.

Can you just talk a little bit about that, just one rule, for example, since I just did that Thanksgiving week, it is fresh in my mind. This is someone who is fighting for $15 minimum wage in an union. Can you just talk about that?

Ms. OWENS. Sure. I have had a similar experience, although I seem too old for this to be true, the reality is I am one of the sandwich generation, and I had a child I was raising. At the same time, my mother had advanced dementia. We had home care workers. She always wanted to be in the home, and we wanted her to be, so we had home care workers.

We paid good wages, and we reported their earnings and complied with the law. I would never have done anything differently for my mother. I have to say caring for my mother was much harder than caring for my daughter, because my daughter grew up, and my mother just got worse.

The reality is this is a vital job. None of us, I dare say, could do it very well. It requires patience. It requires compassion. It requires a certain level of skill. It requires a certain level of strength. It is a job that has changed dramatically since the 1970s when the Labor Department first exempted the job from minimum wage and overtime protections.

It now is a profession. It is one of the fastest growing jobs in our economy, and one of the two jobs that will add the most net jobs over the next 10 jobs.

Here is an irony. If these people, most of whom are women and women of color and many are immigrant women, if these women were working in nursing homes or public institutions, they would get minimum wage and overtime pay. Because they have worked in the home, which actually is better care and less costly care, and what all of us want for our loved ones, they have not been entitled to minimum wage and overtime pay. That is just wrong.

The Labor Department's extension of these protections, which the D.C. Circuit has upheld, is not only fully consistent with the Department's statutory authority, it is good public policy that we all ought to applaud.

Mr. POCAN. It is interesting. One of the things a person mentioned is, you know, people who make $174,000 a year trying to tell them they are making too much at $11.50 an hour after 23 years of being in that profession.

I think the only thing I would say in closing, Mr. Chairman, is I know as a small business owner I often get private sector businesses I deal with that make me jump through hoops to do various things, and if I want to do business with that company, I do that.

To say that somehow if you have the privilege of being able to do business with the Federal Government but you do not want to follow any of the regulations, I did the exact thing with private sector businesses, it is part of what is called doing business, and if people do not like that, there are other businesses out there, but I love the business that I have been in for 28 years, and that is something I try to comply with.

Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentleman. I recognize now the gentlelady from New York, Ms. Stefanik.

Ms. STEFANIK. Thank you, Mr. Chairman. I wanted to start off with a broad question to Mr. Batkins. Do you believe there is a connection between the $100 billion in additional annual regulatory costs imposed by this administration and the stagnation facing this nation's wages?

Mr. BATKINS. There certainly is a connection. Again, I think when you look at sort of the aggregates, regulations are often hidden. They are not on our tax bill like FICA, we do not see that in terms of sales tax.

There is a lot of evidence looking at the impact of regulation on employment. There was a study done looking at the *Clean Air Act*. It found sort of marginal impacts on employment, but close to $9 billion in foregone wage earnings as a result of the regulations. A lot of that was through a lower labor force participation rate and lower wages down the line.

I do not think you can see $100 billion and say that will not have an impact somewhere down the line. I think a lot of this sort of operates under a false premise. We say well, the unemployment rate is low, regulations cannot possibly be having an effect.

No one has ever said that a single regulation would cause the unemployment rate to go up to 10 percent. These are mostly industry specific examples. If you look at certain heavily regulated industries, there certainly are impacts on employment and wages.

To discount it and say the unemployment rate is low is sort of disingenuous.

Ms. STEFANIK. My follow up question is last month I chaired a hearing hosted by the Republican Policy Committee on Millennials in the Workforce. I am chairing the Millennial Task Force.

One of the themes is the importance of this empowerment economy, so companies like Uber, Lyft, Airbnb, that provide greater flexibility.

When I visit college campuses in my district, one of the professions that I hear most often from students is they want to be entrepreneurs, but witness after witness at these millennial hearings raised the challenges of regulatory overreach as to starting their business or growing their careers.

Can you identify certain pending DOL regulations that you believe pose the greatest threat to this empowerment economy?

Mr. BATKINS. Some of the regulations that I have mentioned just from DOL specifically, the joint employer rule is one, the overtime rule, fiduciary rule. Those are sort of the big DOL regulations coming down the road.

I think when you look at regulatory costs generally, especially with small start up's, these costs fall disproportionately on small firms.

If you are just one or two people starting up a business and you have sort of these fixed regulatory costs, as they tend to be, you have to spread those regulatory costs over a much smaller pool of assets, and in some cases, just your own money, and you do not have a team of compliance officers or a team of lawyers that larger competitors might have.

If you are just starting out in this new economy and you sort of have a fixed base of regulatory costs, it is going to be tremendously difficult without a lot of capital to get things moving.

Ms. STEFANIK. Thank you. Mr. Beebe, I grew up in my family's small business, which is a plywood wholesale company. We have less than 20 employees. One of our greatest challenges is dealing with regulations.

Since you are a small business owner yourself, I wanted to ask you if there are specific instances where regulations have either forced you to delay important projects or have not allowed you to hire additional employees.

Mr. BEEBE. A number of times. The regulatory burden, it has directly affected our supplier base. That is one key issue to us. For most of our regulations, we are required as a federal contractor to slow those down.

A business like yours, plywood supplier, all of a sudden is faced with all these DOL regulations, and lots of times they will say I am not going to supply you with plywood, it is not worth it. That is a direct and obvious thing.

The wages for my wife. I would much rather hire a welder. That is just the costs we have to face.

Ms. STEFANIK. Thank you very much. I yield back.

Chairman WALBERG. I thank the gentlelady. Now, I recognize the gentleman from California, Mr. DeSaulnier.

Mr. DESAULNIER. Thank you, Mr. Chairman. I want to thank all the witnesses, and like Mr. Pocan, I think sometimes as somebody who opened my first business—I am going to date myself—in the 1970s, and I did it with my wife, Mr. Beebe. Although we are still very good friends and we are former's, I am not sure I would ever suggest that I would prefer a welder or another cook as opposed to having her on the payroll, but there were moments.

I wanted to direct a question to you because you brought something up which I often think as a former small business person is an appropriate approach. You mentioned a small business acting in good faith should have some consideration for that.

The opposite of that always bothered me as well, where I knew I was competing against companies that were not complying with OSHA requirements or were not paying their employees what they were supposed to pay or wage theft.

I wonder if you have some comment on that. I understand we all want the right kind of regulatory oversight to allow you to thrive, but on the other hand, in the absence of it in my estimation, being effective, you get frustrated when you do comply that you are competing against companies that flout those rules mostly because, in my experience, there were not enough resources for government agencies actually to enforce the regulations, or your competitor just did not have a very ethical business model.

Mr. BEEBE. I guess I cannot speak for my competitors. I can speak for the business—

Mr. DESAULNIER. I asked you speaking for yourself.

Mr. BEEBE. I personally feel that most small business owners are very ethical and try their best to do it. I guess I do not agree that I have competition from others that are not following the rules. That is not an issue.

Mr. DESAULNIER. Maybe it was more frequent in the restaurant business. I do not disagree with you. Most of them are, but the problem is the ones that do not comply—I am showing my age—seem to be growing. Their inability for whatever reason always bothered me.

Ms. Owens, in an environment, and we have talked a little bit about this, where 66 percent of the American workforce lives paycheck to paycheck, and while I think it is important we talk about unemployment rates, to have the ability to actually live a life where you can afford to pay your housing costs and actually have disposable income.

In that context, two questions. I wonder if you will just respond in terms of regulatory, and also in the same spirit as I mentioned to Mr. Beebe, the cost/benefit of the lack of regulations, do we analyze that when we do have sort of a drive to the bottom in some instances.

Those two things, sort of the macro, in this environment, of all things, you would think you would be working to make sure that workers are protected and their wages are actually increased given that they—of all the benefits in the last 30 years, in the economy, including recovery, most of that has gone to people who are heavily invested as opposed to people who are living on wages.

Ms. OWENS. I think that is absolutely right. I guess I would like to start by also picking up on Ms. Stefanik's question. The reality is wages have been declining for the last 40 years. There was some exacerbation of that during the recession and recovery particularly for workers at the bottom, but that was not because of regulation, it was because it was the worse economy we have had since the 1930s.

Even employers that were doing well were taking advantage of that economy to bargain hard for concessions from their employees in unionized places. We had many more college students who could only get jobs that were low wage jobs.

There really was a race to the bottom in terms of driving down wages. Certainly, our experience is that in the low wage sector, the phenomenon you referenced is very real, that companies and contractors put wages in competition, and the way they compete for contracts is by driving down the wages of their workers.

These are not workers who have much bargaining power, they are not usually Union members. The only protection they have is from law or regulation. That is precisely why in this environment it is so important that the administration has acted appropriately with respect to regulation because frankly, nothing else was cutting it for workers, and they needed administrative action to raise their wages, to be able to step out of the working class into the middle class, and for middle class families to feel secure that through their work, they would have economic security and economic opportunity.

Mr. DESAULNIER. I appreciate it. We have an environment where American workers are more productive than ever, particularly because of the entrance of women in the workforce, like Mr. Beebe's wife, but at the same time they have not shared in the wealth created by that productivity.

Ms. OWENS. That is absolutely right.

Mr. DESAULNIER. Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentleman. I recognize myself now for my five minutes of questioning.

Mr. Beebe, the President's "Fair Pay and Safe Workplaces" Executive Order 13673 creates a new costly paperwork burden on the existing federal procurement system by placing extensive new reporting requirements on Federal contractors.

More appropriately, this Executive Order is referred to as "blacklisting," an administrative compliance nightmare that this will potentially put in place. It will place thousands of federal contracts in jeopardy, drastically reduce the number of small businesses competing for federal contracts, like yours, and make procurement of goods and services more expensive for the government and the taxpayer.

In her statement, Ms. Owens stated that the Executive Order would only apply to, and I quote, "to a scant 5 percent of federal contracts," and "The semi-annual compliance process will be quite simple."

Can you explain from your experience and your perspective the flaw behind that logic?

Mr. BEEBE. Yes. Currently, under our defense contracts, we are required to certify that we are not suspended or debarred or have tax liens. There is a current shopping list of about eight or 10 items we have to certify that we are not on to even be eligible to bid for jobs.

The way I understand it, the blacklist drastically expands that, and again, more than doubles the number of things that are looked at.

Chairman WALBERG. I would assume it would be very burdensome and cumbersome in the process, especially if you are working with any subcontractors as well?

Mr. BEEBE. Very much so.

Chairman WALBERG. Would you agree that this regulation protects all American workers?

Mr. BEEBE. No, I would not agree with that. I believe that it would just do nothing more than expand the reporting requirements and actually hurt in the end because like you were pointing out, a number of businesses would just not be eligible all of a sudden.

Chairman WALBERG. Who are trying to be honest and upstanding.

Mr. BEEBE. Yes.

Chairman WALBERG. Thank you. Mr. Hammock, OSHA's economic estimate for a silica standard is dramatically different, to say the least, than the estimates of almost every industry providing economic data to the regulations docket.

Is there any way in your mind to explain how the agency arrived at such different cost estimates?

Mr. HAMMOCK. Thank you, Mr. Chairman. It is hard to say specifically why the estimates are so different except I think on a number of different levels, OSHA has not considered all the different inputs that go into what a business has to do to comply with a rule.

OSHA in good faith, and I know the people do their best, try to quantify how much a regulation is going to cost, but in the end, they have to make certain assumptions. Ultimately, I think they do not quite understand how a business, a small business, large business, actually internalizes it and has to comply with a particular regulation.

As a result, when you look at all the different assumptions that OSHA makes in coming up with an economic analysis, each of those assumptions are on the conservative side, and when they actually get implemented, you do find that the costs are significantly higher when you consult with people like Mr. Beebe who have to ultimately implement a particular regulation.

Chairman WALBERG. I appreciate that. Mr. Batkins, in my 47 seconds remaining here, some statements have been made specifically in reference to the regulations dealing with home care workers. Talk to us about the impact of these regulations.

Michigan has requirements that labor is attempting to put in. We are losing home care workers because of it. Talk to us why.

Mr. BATKINS. Well, the Department of Labor—actually, this is one of the few instances where they did forecast potential job losses as a result of the regulation, and it is one of the few regulations we have come across, and we have come across thousands since 2006, where they admitted there would be a dead weight loss as a result of the regulation, and over the course of roughly 10 years could dis-employ 1,000 workers annually.

There are very few regulations that admit that impact. It would be interesting to go back five to 10 years from now and actually see the retrospective impact of the rule, but up front, if you are projecting 1,000 workers annually being dis-employed, that is sort of the other side of the coin when we compare it to higher wages.

Chairman WALBERG. Thank you. I know that was our impact with care for my mother, similar, Ms. Owens. It is a challenge. I applaud you for doing what you did. It is the right thing to do, but a difficult process. To find the caregivers that were consistent, because of what Michigan has in place with the overtime rules, made it difficult for mom to have someone she recognized to some degree every day.

I now recognize for five minutes of questioning, Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman. I appreciate getting waived in today, and it is good to be back on the subcommittee. Thank you to the witnesses for your testimony.

Mr. Batkins, you sort of raised this sort of morbidity issue of the effect of unemployment caused by regulations that result in people's early life passing away. It is an interesting concept.

Normally, in this Committee, we have talked about morbidity in terms of the lack of regulation. Again, as someone who is in year nine - Upper Branch, where 29 coal miners lost their lives. We obviously just had a jury verdict in West Virginia holding the employer responsible. There is no question in my mind that the failure of Congress to update MSHA's regulations could have prevented that horrendous tragedy.

Deepwater Horizon, where 11 workers lost their lives because of just incredibly shoddy oversight and regulation of the deep water drilling.

I represent New London, Connecticut, home of the Coast Guard Academy, seeing the assets of the Coast Guard having to get pulled out of Homeland Security and repositioned down at the Gulf of Mexico to deal with the mess that was created there by poor regulation.

In Middletown, Connecticut, we had a power plant explosion where again the failure to update our regulations in terms of cleaning the piping at the plant there, which even private sector folks like Siemens had already said was woefully out of date. We had seven workers who lost their lives, one of them was a very good friend of mine. I still talk to his widow on a frequent basis.

There is no question that we live in a democracy and it is important to raise any issue here, but frankly there needs to be a balance.

If we are going to talk about morbidity and the effect of regulations, we have to recognize that workplace fatalities is a reality of life, and we are not doing a very good job right now in terms of bolstering really common sense updates that even in the private sector we have been warned is going to cause problems.

Ms. Owens, I do not know if you want to comment on that.

Ms. OWENS. I would. Thank you very much. You know, it is pretty stunning that still today 13 American workers are killed on the job every single day. That is amazing. I thought the jury verdict in the Massey case was great, but the maximum penalty he will get is one year in prison, if he gets that.

There is no way to replace the lives lost through dirty, dangerous, unsafe working conditions. My written testimony cites a study that was done by researchers at Berkeley and Harvard that actually looked at what the injury rate was and what employer costs were following OSHA inspections that found that employers were following standards, and that study found that injury rates were lower, employer costs were lower when employers were following standards.

There is no question that there is a beneficial impact in terms of lives saved. The silica rule is estimated, if it is finalized in its proposed form, to save 700 lives a year. We cannot put a price tag on that. That is of incomparable value, and that is why we need to update these regulations.

Mr. COURTNEY. Thank you. Mr. Beebe, again, I represent Eastern Connecticut, which is the home of Electric Boat. We build the Virginia-class submarines there and deal with thousands of suppliers all across the country. Thank you for the work you do to protect the warfighters who are out there.

Again, when we talk about that critical work, protecting lives is also part of it. A supplier who sent elbow piping to the Virginia-class program did bad welds, so right now the Navy is in the process of pulling out piping, which delays deployment of attack subs that we need, particularly in South China Sea right now.

We are talking about vessels that operate in an environment that does not sustain human life. There is no margin for error for sailors out there in terms of doing that.

Frankly, it is important for our military branches to really screen and watch what is coming into the depots, what is coming into the shipyards, what is coming into the airfields, because as I said, there is no margin for error.

Cyber is the other burgeoning area for small suppliers. It is a very difficult problem, I think you would acknowledge that, because we have the bad guys out there that are not just looking at the prime contractors, they are going down deeper into the supply chain to try to penetrate our national defense by trying to probe weaknesses with the small guys, who again are doing everything right.

We need new regulations, frankly, in terms of creating hardening defenses for our national defense on all these platforms that we depend on for our national defense.

I think people really have to get balanced here in terms of the discussion, both in terms of workplace fatalities but also the fact that there is a real public interest in terms of making sure the stuff that the government is buying from people is actually of high quality.

With that, I will yield back. Thank you, Mr. Chairman.

Chairman WALBERG. Thank you, Mr. Courtney. I now recognize the gentleman from California, Mr. Takano.

Mr. TAKANO. Thank you, Mr. Chairman. I am glad to join the subcommittee this morning as we review the Department of Labor's regulatory agenda to promote shared prosperity and help hard working Americans.

It is past time for the Department to update the *Fair Labor Standards Act's* exemption for overtime pay. When enacted, the intent of the white collar exemption was to exempt those with sufficient power in the labor market who are able to advocate for better wages and hours for themselves. That is clearly not the case today.

In 1975, more than 60 percent of salaried workers were eligible for overtime. Now, only 8 percent of workers are eligible.

The $23,000 threshold is outdated and below the poverty level for a family of four. Americans are working longer hours and are more productive, yet their wages are largely flat. Updating the overtime exemption will help millions of workers make ends meet and give an added boost to our economy.

My first question is for Ms. Owens. Ms. Owens, there has been a lot of discussion about the proposed overtime regulation's impact on job creation. I have been able to come and hear some of that from your fellow panelists.

The Department has updated the salary level seven times since the *Fair Labor Standards Act* became law in 1938. Can you talk generally about how industry has complied with these adjustments? Is there a history of significant job loss attendant to these regulations?

You mentioned a National Retail Federation report—I will stop there. Go ahead.

Ms. OWENS. Thank you, Mr. Takano. I have been doing work in this field for 30 some odd years, and the reality is every single time a piece of legislation is introduced or a regulation is proposed, the response from industry is that it is going to kill jobs, it is going to lead to exorbitant costs, it is going to depress wages. That was the response in 1964 when—I was not around then—when the Civil Rights Act employment protections were extended to women and people of color. The 1963 *Equal Pay Act*. The *Pregnancy Discrimination Act of 1978*.

The reality is these doomsday prophecies just have not come true. It is true that when other things are going on in the economy that are depressing consumption, that has an impact on jobs, and that is what happened during the great recession and the slow recovery.

The reality is we have not seen significant job loss associated with updating basic standards like the overtime standards. I am glad you pointed out how infrequently that has happened over the past 70 some odd years. It is one of the reasons that overtime protections used to cover more than 60 percent of the white collar workforce, and today, only cover 8 percent. That just makes no sense at all.

Mr. TAKANO. You mentioned a National Retail Federation report about job creation in your written testimony. Can you just elaborate on that a little?

Ms. OWENS. Sure. They did a report that was certainly not supportive of the overtime regulations, but I do not remember the specific data right now, they analyzed what they thought some of the impacts would be. Some of the impacts—they said it is not true that everyone will get higher wages because the overtime threshold is increased.

That means a lot of people who are being forced to work overtime hours for less than $24,000 a year will no longer be required to work unpaid overtime. They will have more time with their families, more time to take a second job if that is what they want, more time to go back to school, whatever.

It is not the case that everybody affected will necessarily get a pay increase, but fewer people will be working longer hours for no pay at all, and one of the things the National Retail Federation estimated is that something north of 100,000 jobs are likely to be created because employers will find that it is more cost effective to hire some additional workers than to pay overtime to existing workers. That is also okay.

That is the purpose of the overtime law, one of the fundamental purposes, to spread work around. If it works that way, that is what it is supposed to do.

Mr. TAKANO. It is really a matter of fairness to the worker who is earning a low income who may be classified to the advantage of the employer as a manager, a manager who is earning a relatively low salary, and because of that classification, they are having to work extra hours.

They now have more time with their family, but that employer has to make a decision, a fair decision, the right decision, to hire a second person, give the original employee time with their family, and in fact, the regulation can have the effect of creating jobs.

Ms. OWENS. Exactly.

Chairman WALBERG. I thank the gentleman. His time has expired. I want to thank the panel for your testimony as well as your responses to our Committee and the questions we have asked. I now recognize the Ranking Member for his closing statement.

Mr. POCAN. Thank you, Mr. Chairman, and thank you to our witnesses. I think our conversation today has been interesting. That said, I think we have had a very Washington conversation aimed at a very Washington audience.

For the vast majority of our constituents who may be watching, this hearing has reinforced some of their bad feelings perhaps about Congress, and no one here today has told our constituents what this hearing is likely really about.

The congressional leadership strategy is simple, although it is not necessarily obvious if you are not paying close attention, shut down the appropriations process, bog down Congress, and stuff an end of the year package with gifts for special interests. That is probably more of what the hearing is about today.

Referring to rules and regulations as an "onslaught," as many of our witnesses and colleagues on the other side of the aisle did today, is part and parcel of the rhetoric that the other side deems as necessary to accomplish the broader goal of filling the omnibus appropriations bill with Christmas gifts from big businesses' wish lists.

They say they are worried that this onslaught will hamper job growth and lead to mass unemployment. We have already seen today less than three-tenths of 1 percent of workers who lost their jobs in mass layoffs during the early years of the Obama administration was due to government regulations or intervention. This rate is unchanged from the Bush administration, according to data from the Bureau of Labor Statistics.

All these rules and regulations referenced today have one thing in common, they help hard working middle class Americans by ensuring workers are afforded the dignity under the law that they unquestionably deserve.

There is no doubt that ensuring worker safety, paying a living wage, strengthening the average American's voice in the workplace, and ensuring the Federal Government contracts with responsible players come at a cost. We can debate that cost. I tend to think the other side exaggerates it and I think the data backs me up. I also tend to think that maintaining safe workplaces and protecting workers' voices are worth that cost.

Earlier I referenced big businesses' wish list. We talked about the things on their list today. Middle class Americans are not sitting around saying you know, the income threshold for overtime as proposed by the Obama administration is far too high.

They are not doing so because middle class families are focused on finding affordable day care for their children and finding good, safe public schools for those who are over that age. They are focused on other things that are important to them.

One thing they are not doing is saying that Americans do not deserve a raise, as some are saying on the other side of the aisle, as they criticize the proposed overtime rule and attempt to block it in the omnibus.

The raise came as a result of the Department of Labor updating a regulation that in the past has been routinely updated by both Democratic and Republican administrations instead of an act of Congress.

I want to reiterate that I have owned my own small business for 28 years. I understand the challenges small business owners face. I say this because it is often interpreted that the Chamber of Commerce and other groups speak for all businesses. This could not be further from the truth. Most of the things on their wish lists do not affect the majority of small businesses that operate in this country.

As is often the case, we have been given a false choice. If you are for an onslaught of regulations, or what I would call strong workers' rights and sensible workers' protections, then you are against economic growth. If you are for economic growth, then you cannot be for increasing worker protections under the law.

Nowhere do we mention "shared growth." Nowhere do we mention how workers are the only ones who have not been paid for increased productivity over the last 30 years.

When we hold a hearing to debate big businesses' Christmas list for the omnibus, we need to make sure that we are being very clear exactly what this Christmas wish list is.

Before I came to Congress, people around here used to refer to special interest projects requested by lawmakers as "earmarks." These limitations or riders big business has requested of the 114th Congress are "earmarks."

As we sit here and debate the Chamber's wish list, let's call it what it is, a list of earmarks, and let's talk about who gets what. In the old days, an earmark might be used to pay for a handicap access ramp at a local library in a member's district. Today's earmarks go to constituencies with far more resources than your local library.

As we continue to debate big businesses' list, I ask all Members of Congress to have their constituents check it twice. Surely, we can come together to advance policies that can benefit the American people in the manner other than asking middle class Americans to stand outside in the rain and wait for their fair share to trickle down as they have been doing far too long.

Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentleman. My perspective is a little bit different. This hearing was meant to benefit both sides or all sides of the equation.

There is no one on either side that want to see employees hurt or wages held down. We want to see expanded living wages. We want people in jobs that are their sweet spots. We want them to go in each day excited about their work or the opportunity to expand their work future.

Just like some of those we had in front of us testifying in recent hearings, who started out on a grill, and ended up running the company, multiple companies. The resume was built. The time was there. Sure, there were decisions that were made that had sacrifices for future award, opportunities for building resumes. It was based up on the fact of reality that choices were made, and with the responsibility also came the benefit.

We certainly understand that 1938 law, the *Fair Labor Standards Act*, is not fit for the present. We need to see some change to expand the opportunity for flexibility in the workplace.

However, the Department of Labor and what they have proposed does not expand flexibility. It tightens the thumb screws down and takes away that flexibility for people to determine how they work.

We have heard in recent testimony from Uber that the choices that people are making now are not necessarily for remuneration but for the flexibility to have the opportunity for what makes them tick and the opportunity to have a time frame in place that better fits their needs.

Look at actual case experiences relative to regulations. You see the costs that CBO puts out, the cost of loss of jobs coming from the regulatory climate, from ObamaCare, the *Affordable Care Act*, which has proven not to be affordable, and not truly the care for more uninsured. That is regulation that is hurting.

If we saw the Department of Labor Wage and Hour Division looking at an expansion of wages for minimum wage that hit the targets that we have looked at in the past, that we have seen going up over $50,000, coming in under that, taking the exemption away of overtime, New York and San Francisco do not even fit in that area.

If we had realistic regulation building that took that in place, that would be one thing. We do not see that.

When I go back to the simple issue of human care, home care for people who need it, and I see the outcome of what is taking place in Michigan, home care providers, companion care providers, that provide great service to my mother and others like that over the years, in their waning years, now being frustrated as a result of those companies having an inability to care for those needs because it costs too much, so they have to make decisions on not providing that care for ones that need it until someone literally dies off and they can move someone in that place.

That is not what we are as a country. That is what we are not as a government. I respectfully disagree with the approach, and I think that is why these hearings are here in place, to see that we have a tension, and we can get over it.

We have to understand it is not us against them, them against us, but rather us working together to find regulations that are needed, yes, but done in a realistic way that promote opportunity, meet needs, and make a better society.

We will keep doing it, and I guess the debate will go on, and we will do that with a smile on our face, but hopefully an intention to come to a conclusion that benefits us all.

With no other testimony or information to come before the Committee, the Committee is adjourned.

[Additional submissions by Chairman Walberg follow:]

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ECONOMIC PERSPECTIVES

## The Unintended Consequences of Federal Regulatory Accumulation

PATRICK MCLAUGHLIN AND ROBERT GREENE
*Senior Research Fellow and Project Coordinator*

Federal regulators often have good intentions when proposing new rules, such as increasing worker safety or protecting the environment. However, policymakers typically view each regulation on its own, paying little attention to the rapid buildup of rules—many of them outdated and ineffective—and how that regulatory accumulation hurts economic growth.

The continuous accumulation of rules over the last several decades has not only slowed economic growth but has also reduced employment opportunities and disproportionately harmed low-income households. Unless Congress and agencies address this growing backlog, it will continue to stifle innovation and entrepreneurship.

### BUILDUP OF RULES HARMS THE ECONOMY

According to the Mercatus Center's RegData—a tool that uses text analysis to quantify the federal regulations targeting each industry in the United States—total regulatory restrictions have increased nearly 20 percent since 1997 to more than 1 million. Multiple studies have quantified how the growth of rules slows economic growth:

- A recent study published in the *Journal of Economic Growth* found that between 1949 and 2005 the accumulation of federal regulations slowed US economic growth by an average of 2 percent per year. Had the amount of regulation remained at its 1949 level, 2011 gross domestic product (GDP) would have been about $39 trillion—or three and a half times—higher, which translates into a loss of about $129,300 for every person in the United States.
- A 2005 World Bank study found that a 10-percentage-point increase in a country's regulatory burdens slows the annual growth rate of GDP per capita by half a percentage point.[1] Based on this finding, an increase in regulatory burdens can translate to thousands of dollars in lost GDP per capita growth in less than a decade.
- Other economists have estimated that a heavily regulated economy grows two to three percent slower than a moderately regulated one.

### IMPROVING REGULATORY SYSTEMS SPURS ECONOMIC GROWTH

Conversely, large-scale efforts to reduce regulatory burdens can result in increased investment and economic growth.

- According to a World Bank study, moving from the 25 percent most burdensome to the 25 percent least burdensome regulatory environment (as measured by the World Bank's Doing Business index) can increase a country's average annual GDP per capita growth by 2.3 percentage points.

1. Calculated by using the method of estimation set forth by Table 3B, setting the governance index at the world median (0.46), and setting overall regulation to 0.1 to represent a 10-percentage-point increase along the study's index.

- When the United States and the United Kingdom reduced regulation in the utility, communications, and transportation industries in the late 1970s and early 1980s, investment in those sectors as a percentage of capital stock more than doubled—from 3.7 percent in 1975 to 8.15 percent in 1998. During that same time, investment rates decreased by 5 percent in continental European countries that did not implement large-scale deregulatory reforms, including Italy, France, and Germany.

## HOW REGULATIONS HURT THE LABOR MARKET

The rapid growth in the number of federal rules has likely hindered the struggling labor market. An increasing regulatory burden can harm workers in various ways. As former Bureau of Labor Statistics Commissioner and Mercatus Center senior research fellow Keith Hall explains in a recent study:

- Regulation adds to costs, increasing prices for regulated goods and services and reducing the final amount bought and sold. As production declines, so does the demand for workers engaged in production.
- This shrinkage in the size of the market can decrease employment not only in these regulated industries but also in industries downstream that use the now more expensive goods and services.
- More regulation also leads to a shift of workers from production to regulatory compliance jobs, which reduces overall economic efficiency.
- Even if displaced workers eventually find new employment, they often face permanent losses in lifetime earnings, which can be as high as almost three years of the previous annual income. This is largely due to skill mismatches between the jobs lost and the new jobs created in the economy.

## REGULATIONS CAN BE REGRESSIVE

Proponents of federal regulations often use the need to protect society as a whole, particularly lower-income individuals, to justify regulation despite potential economic costs. However, numerous regulations disproportionately *burden* poor Americans, who are least able to afford them.

- Mercatus Center research finds that federal regulations often address small risks impacting a targeted group but spread costs uniformly. As a result, these rules cost up to six to eight times more as a share of income for low-income households than for high-income households.
- In 2005 the Food and Drug Administration banned the use of chlorofluorocarbons as propellants in medical inhalers, such as asthma inhalers, for environmental reasons. Shortly thereafter, the price of asthma inhalers tripled. As Mercatus Center senior research fellow Patrick McLaughlin explained in a 2013 Senate testimony, this higher price disproportionately harms lower-income persons and may lead to the choice not to buy an inhaler or leave an asthma attack untreated.
- The minimum wage acts as a regulation that prohibits the exchange of a service below a certain price. This also harms workers with the least skills and experience. A recent Mercatus Center study found that a proposed 13.8 percent increase in New Jersey's minimum wage (from $7.25 to $8.25 per hour), which voters passed into law, would not directly affect the college-educated and presumably wealthier workers. However, the wage hike could increase unemployment by as much as two percentage points for young workers without high school diplomas.

## SOLUTIONS TO REDUCE THE REGULATORY BURDEN

There are many obstacles to reducing duplicative, outdated, and harmful regulations.

- Special interests will pressure agencies and Congress to keep rules in place that result in concentrated benefits to their constituency but spread costs to the rest of the population.
- Agencies have few incentives to determine which regulations are obsolete or to eliminate their own rules.

- Agency employees are rewarded for creating new regulations and thus have little incentive to provide information that would lead to a rule's elimination.
- Removing regulation may require congressional consent, and certain statutes' authors may reject the notion that regulations from those statutes are no longer necessary.

In a 2014 Mercatus Center study, "The Consequences of Regulatory Accumulation and a Proposed Solution," scholars Patrick McLaughlin and Richard Williams found the most effective strategy to overcome the obstacles listed above would be for Congress to create an independent commission tasked with reducing unnecessary regulatory burdens. To maximize the commission's ability to curb regulatory accumulation and improve economic growth, they suggest the following:

- The commission would use a transparent method of assessment that focuses on whether and how rules lead to the outcomes desired.
- While the commission would receive input from stakeholders and agencies, it should be explicitly directed to consider how underrepresented stakeholders are affected by regulations.
- The commission would produce a report of regulations and programs to be modified, consolidated, or eliminated.
- Similar to the process used with the Base Realignment and Closure Commission, Congress would need to pass a joint resolution of disapproval to prevent the commission'srecommendations from going into effect.

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# WORKING PAPER

## REGULATORY OVERLOAD: A Behavioral Analysis of Regulatory Compliance

By Andrew Hale, David Borys, and Mark Adams

MERCATUS CENTER
George Mason University

# Regulatory Overload: A Behavioral Analysis of Regulatory Compliance[1]

*Andrew Hale,[2] David Borys,[3] and Mark Adams[4]*

We are seeking more affordable, less intrusive means to achieve the same ends—giving careful consideration to benefits and costs. This means writing rules with more input from experts, businesses, and ordinary citizens. It means using disclosure as a tool to inform consumers of their choices, rather than restricting those choices.

Barack Obama, 2011[5]

Government regulations impose an enormous burden on large and small businesses in America, discourage productivity, and contribute substantially to our current economic woes.

Ronald Reagan, 1981[6]

The first and most fundamental defect...is simply that there is too much law.

British Government Report, 1972[7]

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[1] The authors wish to acknowledge the contribution to this paper of Professors Richard Williams and Michael Baram, who made valuable critical comments on earlier drafts. They also thank the Mercatus Center at George Mason University for the support that made work on this paper possible.

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[5] Barack Obama, "Toward a 21st-Century Regulatory System," *The Wall Street Journal*, January 18, 2011 (wsj.com/article/SB10001424052748703396604576088272112103698.html).

[6] Ronald Reagan, "Remarks Announcing the Establishment of the Presidential Task Force on Regulatory Relief" (January 22, 1981), available online at The American Presidency Project (http://www.presidency.ucsb.edu/ws/index.php?pid=43635).

[7] Lord Robens, *Report of the Committee on Safety and Health at Work 1970–1972* (London: Her Majesty's Stationery Office, 1972).

## 1. Introduction

As past and present American presidents and other government leaders have recognized, regulation imposes a substantial burden on businesses. In 2011, American businesses must comply with no fewer than 165,000 pages of federal regulations. While there is agreement that there is a substantial regulatory burden, there is less agreement about why this is the case and what to do about it. In this paper, we take a behavioral and organizational perspective and examine how this regulatory burden has come into being, how the weight of the regulatory burden is influenced by whether regulators specify particular actions in detail or allow companies the freedom to decide how to reach regulatory goals, and what the consequences of so many regulations are for small and large firms. We also propose a novel way of considering the costs and benefits of regulation within the context of companies' entire regulatory burden rather considering regulations individually.

Regulations impose burdens on companies in several ways. When an agency issues a new or modified regulation, companies must spend time discovering whether the new regulations apply to them and, if so, whether there is a gap between their current practices and those now mandated by the regulator. If there is no gap, the initial costs of the regulation are limited to this discovery cost (although there may be longer-term costs if the regulation locks in current production or risk-control methods and prevents them being superseded by more effective ones). If there is a gap, companies must determine what else they must do, or do differently, to comply with the new regulations. Compliance may impose costs associated with adopting new methods of production, retraining employees, or buying new materials and equipment. However, this compliance review also gives companies the opportunity to improve their processes so as to achieve gains in productivity or in quality or pollution control, and these improvements mitigate the overall cost of compliance.

These activities consume the time and energy of managers and employees, who must devise and implement the assessments, changes, and notifications, and they divert human resources from other activities. Compliance costs fall disproportionately on small businesses, which lack the ranks of internal management for translating large and complex rules sets. Moreover, regulations are often written with a view to the complex and formal internal procedures of large companies and are ill-suited to implementation by smaller companies. This may put smaller but more flexible companies at a competitive disadvantage and discourage entry into markets by smaller companies.

There are additional ways in which regulations impose costs on companies. Compliance with detailed, prescriptive regulations may build a reactive compliance culture, which stifles innovation in developing new products, processes, and risk control measures. Regulators often respond more slowly than companies to changing market conditions, locking industry into outdated production methods. Additional costs come from the burden of record keeping and reporting to the regulator about compliance. These costs can reduce competition and increase prices for products and services.

All of these costs of regulations must be set against the benefits in terms of reduced injury or loss of life, improved environmental conditions, or other benefits. In some circumstances regulations become counter-productive: Sunstein has identified several instances of regulations having the opposite of their intended consequence. For example, car safety standards, which reduced injuries in accidents but also made cars heavier and thus made cars pollute more, have had overall adverse health effects because the health impact of reduced accident injuries is outweighed by the ill effects of pollution.[8]

Even when the regulations are not simply counter-productive, measuring whether the benefits of regulations outweigh the costs is difficult. It is hard to quantify the benefit from preserving a scenic view or to quantify the social and psychological costs of compliance or of witnessing a serious accident. It is also very difficult to establish the causal link between some regulatory requirement, such as mandating a formal safety management system, and its effect on accident rates. More importantly, efforts to quantify costs and benefits usually take a snapshot approach, looking at individual regulations in isolation rather than considering the cumulative effects of the regulatory system as a whole.[9]

In this paper, we lay the groundwork for an alternative to the usual snapshot approach: one that explains how the overall size, complexity, and style of the regulatory system can change costs and benefits. The value of this approach arises from the fact that regulations can have a different effect when the entire system is viewed as a whole rather than as a collection of isolated pieces. For example, a regulation mandating a warning label for some real but minor risk may, when viewed in isolation, provide benefits. However, that additional warning might distract consumers from more important warnings and thus, when taken as part of the whole system, increase risk.[10] Studies inside large organizations have shown that the sheer volume of rules for complex technologies, such as nuclear and railways, make those rules less effective.[11]

Our approach promises a way to impose some order and limit on the regulatory process, which has been a goal of presidents at least since Lyndon Johnson and continued under Gerald Ford and Richard Nixon. This effort was expanded during the Carter administration with the elimination of two major regulatory agencies and the creation of the Commission on Price and Wage Stability, which examined the contribution of regulations to the inflation problem. Out of that Commission the Reagan administration created the Office of Information and Regulatory Affairs to conduct economic analysis of all major regulations created by the executive agencies (but not of independent agencies).[12] Presidents Clinton and Obama have both reaffirmed the government's commitment to reducing the burden of regulation, yet despite broad bipartisan support for ensuring that the benefits of regulation justify their costs, the scale of the regulatory burden has not lessened. Instead the number of pages in the Code of Federal Regulation, and the cost imposed by regulation, has increased under every president.[13] Regulations expand because agencies issue detailed rules

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[8] Cass Sunstein, "Health–Health Tradeoffs," *University of Chicago Law Review* 63 (Fall 1996): 1533–73.
[9] See for example "EPA Asked to Consider Cumulative Effect Air Rules Will Have on Utilities, Economy," *Environment Reporter*, August 2011.
[10] Wesley A. Magat, W. Kip Viscusi, and Joel Huber, "Consumer Processing of Hazard Warning Information," *Journal of Risk and Uncertainty* 1, no. 2 (1988): 201–32.
[11] See for example Rien Elling, "Veiligheidsvoorschriften in de Industrie" [Safety rules in industry], (PhD diss., University of Twente, the Netherlands, 1991); and David Maidment, "Privatisation and Division into Competing Units as a Challenge for Safety Management," in *Safety Management: The Challenge of Change*, ed. Andrew Hale and Michael Baram (Oxford: Pergamon, 1998), 221–32.
[12] Executive Order (E.O.) 12296.
[13] E.O. 12866 and E.O. 13563. The total cost of regulation or the number of rules on the books is difficult to measure (as opposed to the total number of pages). For a recent approximation of regulatory trends since 1960, see Susan E. Dudley, Arthur G. Fraas, and Brian F. Mannix, "The Office of Management and Budget's

instructing companies to take specific actions instead of stating policy objectives and leaving companies to decide how to meet those objectives. Regulators respond to changing circumstances by issuing new regulations on top of old ones, expanding the complexity of the regulatory code, and making it harder for companies to comply or innovate. The issue of regulatory overload is not exclusively American: many European countries have also suffered from regulatory overload and in response have moved away from defining specific actions and instead define outcomes that leave firms free to decide how best to achieve regulatory goals.

Although we advocate examining the regulatory system as a whole, we do not present a choice between either continuing with the current system or eliminating it entirely. Previous studies have demonstrated that it is possible for regulators to achieve their goals at a lower cost or to improve outcomes at no additional cost.[14] Our findings suggest that there is even greater scope for improvement. We will show how the style of regulation affects the volume as well as the effectiveness and cost of regulation. We propose a framework of rule management derived from Hale and Borys' studies of the management of rules created in and for workplaces in companies, where individual and work group behavior is the target of the rules.[15] We believe this framework is helpful also at the regulatory level, particularly in understanding the views of small business and the responses of the managers who control those companies. The framework allows us to ask whether similar issues exist at the federal regulatory level and whether our perspective throws light on them.

Although the regulatory burden has shifted since the 1970s from largely economic regulation into the realm of social regulation, including environmental health, occupational safety, consumer protection, and other more general realms of safety, a preliminary search of literature on the effect of a high volume and complexity of regulation at the company level reveals only limited empirical work in the area of safety, health, and environmental regulation. We have used that literature where appropriate. There is a much more extensive qualitative literature, which we have used in an illustrative way to support or question the application of conclusions from the workplace level to the regulatory level.

In this paper, we present our account of how to measure and to mitigate the regulatory burden that has concerned presidents and other political leaders as well as businessmen and citizens. In section 2, we summarize the issues that have been raised by studies of the burden imposed on those charged with compliance by a large and complex volume of detailed social regulations. In section 3, we take a step back to consider the nature and purpose of rules and regulations, as well as the ways in which regulatory regimes typically evolve over time. In section 4, we propose a framework of rule management for analyzing and understanding these issues. Finally, in section 5, we use the framework to propose ways of addressing the issue of regulatory overload. We especially argue that a change from action rules to rules defining desired outcomes, wherever that is possible, and the

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Draft 2010 Report to Congress on the Benefits and Costs of Federal Regulations" (research brief, Regulatory Studies Center at George Washington University, June 2010), 3–5.

[14] Tammy O. Tengs and John D. Graham, "The Opportunity of Costs of Haphazard Social Investments" in *Life-Saving, in Risks, Costs, and Lives Saved*, ed. Robert W. Hahn (Oxford, UK: Oxford University Press, 1996), 167–82.

[15] Andrew Hale, David Borys, and Dennis Else, *Management of Safety Rules and Procedures*, report to the Institution of Occupational Safety & Health (Wigston, United Kingdom: HASTAM, 2011).

adoption of clear and certain rules, which would significantly reduce the regulatory burden on businesses.

## 2. The Problem of Regulatory Overload

The three main criticisms of imposing a large, detailed and complex set of rules on companies are:

1. There is a strong tendency for regulation to increase with the effect of stifling innovation. We consider the factors leading to the development and growth of sets of regulations; their formulation in either a specific, detailed form or as more flexible goals, outcome-based regulations or risk-management process rules; and how this affects small and large companies.
2. Many regulations are written so as to be unclear, vague, or inconsistent. We consider the reasons for and effects of inappropriately formulated regulations.
3. While businesses are most effective in managing risk when they feel that they "own" the problem of risk management, many regulatory regimes undermine companies' senses of ownership of risk. We consider the effect that the number and formulation of regulations has on companies' ownership of and motivation to comply with such regulations.

We examine each of these criticisms in turn.

### 2.1. Dynamics of rule generation and ossification

In general, there is a structural tendency for regulation to increase over time, creating increasing rigidity within regulated firms and increasing costs for new entrants. These factors tend to reduce innovation both in the discovery of more efficient rules and in companies' production processes.

Ideally, new regulations are produced for three main reasons: new problems emerge, or new technologies to manage old problem emerge, and new regulations are required to respond to these developments; some existing regulations are seen to fail, and new regulations are required to fill the gaps or promulgate a different approach; and practice shows that some rules are insufficiently precise, and new regulations are required to permit successful implementation and enforcement. All of these lead to a cycle of rules engendering new rules and pressure to make rules more detailed and specific.[16] As Howard laments:

> We have too easily succumbed to the siren song of regulation or rather...of comprehensive regulation. We are too easily moved by notions of rationalized completeness.[17]

[16] See Neil A. Gunningham and Richard Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (Oxford: Oxford University Press, 1999); Neil A. Gunningham and Darren Sinclair, "Designing Smart Regulation" in *Smart Regulation: Designing Environmental Policy*, ed. Neil A. Gunningham and Peter Grabosky (Oxford: Oxford University Press, 1998), 1–19; Neil A. Gunningham and Darren Sinclair, *Leaders and Laggards: Next Generation Environmental Regulation* (Sheffield, UK: Greenleaf Publishing, 2002); Svein Jentoft and Knut H. Mikalsen, "A Vicious Circle? The Dynamics of Rule-Making in Norwegian Fisheries," *Marine Policy* 28 (2004): 127–35; and Lord Robens.

[17] Philip K. Howard, *The Death of Common Sense: How Law is Suffocating America* (London: Random House, 1994).

Banks describes this as a culture of "regulate first and ask questions later."[18] Some scholars attribute this to regulatory risk-averseness, as regulators diligently seek to cover every eventuality and produce redundant rules.[19] Regulatory risk-averseness is partially a consequence of the incentives facing regulators: regulators are more likely to be blamed for a failure to prevent a new problem than for excessive means to control an old problem. Consequently, regulators are likely to be risk averse. One study found that when the Food and Drug Administration's (FDA) review process was compared to less stringent standards in Europe, the FDA's more stringent process produced more deaths from delaying the introduction of new drugs than it prevented by keeping dangerous drugs off the market.[20]

Regulators face other political incentives that contribute to the trend to ever-increasing regulation. Olson observes that the number of lobbying associations representing companies and industries tends to increase markedly over time.[21] He finds that industry groups lobby for beneficial rules and then other groups lobby for exceptions to those rules. Over time this leads to an accumulation of rules, which

> ...increases the complexity of regulation, the role of government, and the complexity of understandings, and changes the direction of social evolution.[22]

Indeed, work by Stigler and Peltzman found that a substantial majority of the economic regulation in effect in the 1970s benefited industry rather than consumers by shutting out competitors.[23] Although Stigler and Peltzman confined their analysis to economic regulation, our analysis suggests that lobbyists might also seek favor in beneficial social regulation of environmental, health, and safety standards.[24] Industry groups will lobby for regulations that reduce competition and thus allow them to charge higher prices.

All of these political factors work to increase the regulatory burden over time. This heavy burden affects all firms, but it does not affect large firms and small firms to the same extent. Large firms can absorb the cost of regulation more easily than small firms: there is a minimum amount of time needed to find, interpret, and apply a regulation no matter how small the business, and these costs cannot be spread over so much productive time in a small firm as in a large one. Furthermore, large firms already rely more on rigid internal procedures to manage production and may find it easier to apply rigid external rules imposed by an outside agency, especially when regulators look to those

[18] Gary Banks, "Reducing the Regulatory Burden: The Way Forward" (lecture, Monash Centre for Regulatory Studies, Melbourne, Australia, May 17, 2006).
[19] Ulrich Beck, *Risk Society: Towards a New Modernity* (New Delhi: Sage Publications, 1992); and Lord Young, *Common Sense, Common Safety: Report to the Prime Minister* (London: Her Majesty's Stationery Office, 2010).
[20] Dale H. Gieringer, "The Safety and Efficacy of New Drug Approval," *Cato Journal* 5, no. 1 (1985): 177–201.
[21] Mancur Olson, *The Rise and Decline of Nations* (New Haven, CT: Yale University Press, 1982). Evidence for Olson's claim may be found in data about the increasing number of registered lobbyists in Washington, D.C., which is tracked by the Center for Responsive Politics (http://www.opensecrets.org/lobby/).
[22] Olson, 73.
[23] Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law and Economics* 19, no. 2 (August 1976): 211–40; and George J. Stigler, "The Theory of Economic Regulation," *The Bell Journal of Economics and Management Science* 2, no. 1 (Spring 1971): 3–21.
[24] See for example Jessica Coomes, "Air Conditioner Makers Ask EPA to Ban Units with Ozone-depleting Substance," *Environment Reporter* 42 (August 2011): 1866.

larger companies for examples of formal rules. Empirical research finds that small firms bear a disproportionate burden of compliance costs with costs per employee that are 30–36% higher than for larger businesses.[25]

When regulations are complex to discover or interpret, there are likely to be benefits to specialization, which large firms can more easily exploit. Outcome-based regulations in the form of goals come in simpler sets of regulations than detailed, specific rules. However, if outcomes are couched in generic, rather than concrete, terms they require much interpretation to decide what concrete actions to take. Large firms have staff specialists with the time and competence to do this while small businesses often do not. Outcome-based regulations, whether generic or concrete, allow large firms in particular to derive their own set of detailed rules and controls adapted to their own circumstances. Large firms dislike detailed and very specific regulations imposed by the regulator because those regulations reduce the company's flexibility to define its own rules and impose a heavy burden of discovery. However, small businesses prefer that regulations be phrased in concrete and not generic terms so that, once the discovery cost is incurred, it is clear exactly what the company must do.[26]

Although there is no clear consensus about the total costs for complying with regulation, it is clear that companies must invest significant time and resources to find out what regulations apply to them and how to interpret those regulations. Just considering the cost of management's time, one company-level study in Australia received submissions from companies indicating that up to 25% of senior managers' time was spent on compliance.[27] For managers, the costs of discovering the relevant regulations and demonstrating compliance through reporting and recording can divert attention and resources from other management processes.[28] Instead of devising methods to reduce risk, firms focus on compliance and reacting to regulation. This is a prima facie description of a culture that values conformity over innovation.

The process of discovering the most effective rules is one of trial and error.[29] When every company is forced to adopt the same strategy in detail, it is harder to see whether another strategy would be more effective. Moreover, as each firm must comply with the same detailed rules, there is no competitive advantage for any firm that bears the cost of discovering and implementing more efficient rules. When the only way to change the rules is to lobby the regulator to impose the change at a federal or state level, the cost of changing rules becomes much higher because more

[25] These results are from Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," U.S. Small Business Administration Office of Advocacy, *Small Business Research Summary* No. 371 (September 2010). The authors acknowledge that elements of their estimates, including the estimate for the cost of economic regulation and the total estimate for regulatory costs (which included both economic regulation and tax compliance costs) are controversial. We note that, when these costs are removed, the estimate for differences between cost per employee for small businesses and large businesses is significantly higher than Crain and Crain's estimates. The estimate of difference in burden is, therefore, likely conservative.

[26] Robyn Fairman and Charlotte Yapp, "Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement," *Law & Policy* 27, no.4 (October 2005): 491–519.

[27] See Banks.

[28] William Burman and Robert Daum, "Grinding to a Halt: The Effects of the Increasing Regulatory Burden on Research and Quality Improvement Efforts," *Clinical Infectious Diseases* 49 (2009): 328–35; and Mary Olson, "Agency Rulemaking, Political Influences, Regulation and Industry Compliance," *The Journal of Law, Economics, & Organization* 15, no. 3 (October 1999): 573–601.

[29] Friedrich A. Hayek, *Law Legislation and Liberty*, vol. 1 (Chicago: University of Chicago Press, 1973).

stakeholders are involved. It is also riskier to change rules because one company cannot easily experiment with a different set of rules (bearing all the risks and rewards of such an experiment). Coupled with the high risk-averseness of regulators, these incentives reduce innovation.

Knowing that their competitors cannot switch to more efficient procedures, firms worry less about competitive pressures and more about compliance. They may replace highly skilled (and so highly paid) experts, who can assess situations as they arise and develop new approaches or exceptions to rules, with lower-paid rule-followers. The absence of such highly skilled employees makes it less likely that the firm will innovate in any of its processes or procedures.

As a result of all these pressures, the law becomes ossified as the number of regulations and exceptions increases. Companies also become ossified, relying more on rigid rules that are more effective at ensuring compliance with complex rules and less on decentralized decision-making that transfers authority to experts on the ground. In doing so, companies also become less effective at other forms of innovation. Moreover, as detailed regulations will tend to fall more heavily on small firms, it becomes more costly for them to enter markets. Industries will thus become more concentrated and dominated by larger firms that rely more heavily on rules rather than local expertise.[30]

## 2.2. Inappropriately formulated regulation

Detailed regulations are hard to understand because of their legalistic phrasing and complexity, and it is often difficult to determine whether a particular rule applies in a given situation.[31] Companies complain of inconsistencies[32] and that regulations are not structured according to companies' technical and management processes but according to the concepts, structure, and boundaries of the jurisdiction of the regulator.[33] The problem with jurisdictional boundaries is particularly salient when several agencies have overlapping authority over some areas of a company's activities, and especially when one agency's regulations conflict with another's (which happens most often when the regulations are detailed).[34] Avoiding these conflicts takes deliberate planning and action by the agencies, which may be successful[35] but is not always forthcoming. As hard as it is for companies to deal with complex overlapping regulations, it is even harder to oversee the entire regulatory system, covering every regulator and every industry, and to spot conflicts when rules are highly detailed.

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[30] Laura Jones and Stephen Graf, "Canada's Regulatory Burden: How Many Regulations? At What Cost?" The Fraser Institute, 2001; Sumit K. Majumdar and Alfred A. Marcus, "Rules Versus Discretion: The Productivity Consequences of Flexible Regulation," *Academy of Management Journal* 44, no. 1 (February 2001): 170–79; and Anthony Ogus, "Comparing Regulatory Systems: Institutions, Processes and Legal Forms in Industrialised Countries" (working paper no. 35, Centre on Regulation and Competition, University of Manchester, Manchester, United Kingdom, December 2002).
[31] Martin Loosemore and N. Andonakis, "Barriers to Implementing OHS Reforms—The Experiences of Small Subcontractors in the Australian Construction Industry," *International Journal of Project Management* 25, no. 6 (August 2007): 579–88.
[32] Burman and Daum.
[33] Johan de Gelder, "Conceptual modeling of building regulation knowledge," *Artificial Intelligence in Engineering* 11, no. 3 (July 1997): 273–84.
[34] Banks.
[35] Todd S. Aagard, "Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities," *Virginia Environmental Law Journal* 29, no. 3 (May 2011): 237–303.

Regulatory requirements are not necessarily the best way to control risks at many companies.[36] Small firms, which operate on informal communications, are saddled with bureaucratic systems and reporting requirements; regulations do not allow for less commonly occurring technical variations in regulated processes and so innovations in developing potentially beneficial technical variations are discouraged. Saji mentions that there is often a long delay in certifying new equipment in strictly regulated processes. This discourages companies from adopting innovations that depend on yet-uncertified equipment.[37] There are a number of reasons for this. Centrally formulated regulations cannot easily reflect the diversity of situations to which they apply; provisions are therefore set for the majority of applications or in the interests of the firms that lobby the hardest. This leaves firms to struggle under sub-optimal regulation and with no easy way to handle exceptions to the norm.

Firms also tend to have better information than the regulator about their own industry, certainly in respect of new technological and organizational advances.[38] This allows firms to improve safety or reduce pollution if compliance with ineffective rules does not crowd out these investments. Firms may also have more expertise in the totality of regulations that affect their specific industry when those firms deal with multiple regulators. For example, car manufacturers must balance safety against environmental concerns (heavier cars reduce harm from accidents but increase harm from air pollution) but each regulator may only be concerned with its own area, such as automobile safety or air quality standards. Firms can use their expertise better to balance competing social priorities. At the extreme, the regulations may be impossible to apply in some cases or may even create danger, because the regulator defining them has insufficient knowledge of practice. Lange's study of environmental regulation characterized this problem as a gap between regulatory rules and the practices of the regulated. This parallels the gap commonly found in workplaces between work as imagined by managers and written down in safety rules and work as it is actually performed by workers who must confront the reality of translating the safety rules into practice. Problems arise for both risk management and organizational learning when managers are unaware that workers' practices have drifted away from the written rules and that there may be good reasons this drift has occurred. The same could occur at the regulatory level.[39] All of this makes it difficult for the agencies that are charged with reducing regulatory burdens, such as the Office of Information and Regulatory Affairs, to identify regulations that are excessive or ineffective.

## 2.3. Responsibility and ownership

Studies show that imposed rules are seen as "not invented here" and to be complied with at best only in the letter and not the spirit, with the least possible commitment, if at all.[40] Detailed rules imposed from the outside discourage companies from studying their own risks and using their own

[36] Ogus; and Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1990).
[37] Genn Saji, "Safety Goals in 'Risk-informed, Performance-based' Regulation," *Reliability Engineering and System Safety* 80, no. 2 (May 2003): 163–72.
[38] See Australian Chamber of Commerce and Industry, "Holding Back the Red Tape Avalanche: A Regulatory Reform Agenda for Australia," (position paper, Australian Chamber of Commerce and Industry, Barton, Australian Capital Territory, 2005) and Lord Robens.
[39] David Borys, "The Role of Safe Work Method Statements in the Australian Construction Industry," *Safety Science* 50, no. 2 (February 2012): 210–20.
[40] See Ogus; Saji.

expertise in their technology and organization to devise effective and efficient ways to control risk.[41] Companies lose the sense that they own the problem of managing the risks inherent in their business. This sense of loss of ownership is particularly evident in small companies: small companies faced with detailed rules tend to wait until an inspector visits and then to ask him exactly what should be done and to do that. They thus fail to determine for themselves what the best means of compliance would be.[42] Brockner et al. characterize this mode of risk management as a reactive "prevention mode," which they unfavorably contrast with a creative and proactive "promotion mode."[43]

Although regulators should take into account the range of motives that would spur regulated companies to comply with regulations, regulators often are insufficiently attentive to how the size of the rule set and the way the rules are enforced affects companies' motivations to comply with regulation. Winter and May identify three motives to comply with regulation although they note that these are not mutually exclusive.[44] First, the "calculative motivation" follows from reckoning that the benefits of compliance (including escaping punishment) exceed the costs. Second, the "normative motivation" relies on managers' senses that they have a moral duty to comply with regulation. Third, the "social motivation" attends upon managers' wishes for respect from their company or industry peers for complying with or for violating regulations.

Large rule sets may decrease calculative motivation: for example, Langbein and Kerwin argue that higher standards in environmental and safety regulation may result in lower compliance and make the workplace less safe.[45] Since the cost of complying with a large rule set is greater than the cost of complying with a smaller rule set, a cost-benefit approach to the decision about what degree to comply with regulation will make compliance less likely under a larger rule set. To counteract this situation, Langbein and Kerwin suggest that regulators should take account of companies' motivations to comply and consider what social practices will achieve increased levels of compliance even under a large rule set.

Regulators' manner in enforcing rules is also critical in influencing compliance behavior. Indeed, the number of regulations may be less important than the process for translating regulations into practice.[46] For example, a study of residential homebuilders found that when regulators sought to facilitate companies' efforts to meet outcome-based goals there was a greater motivation to comply, while formalism or a deterrent style of enforcement undermined this motivation.[47] Other

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[41] See Michael Lavérie and Roger Flandrin, "Relations Between the Safety Authority and the Nuclear Power Plant Operators," *Nuclear Engineering and Design* 127 (1991): 215–18; and Lord Robens.
[42] Fairman and Yapp.
[43] Joel Brockner, E. Tory Higgins, and Murray B. Low, "Regulatory Focus Theory and the Entrepreneurial Process," *Journal of Business Venturing* 19, no. 2 (March 2004): 203–20.
[44] Søren C. Winter and Peter J. May, "Motivation for Compliance with Environmental Regulations," *Journal of Policy Analysis and Management* 20, no. 4 (September 2001): 675–98.
[45] Laura Langbein and Cornelius M. Kerwin, "Implementation, Negotiation and Compliance in Environmental and Safety Regulation," *The Journal of Politics* 47, no. 3 (1985): 854–80.
[46] Peter J. May and Robert S. Wood, "At the Regulatory Front Lines: Inspectors' Enforcement Styles and Regulatory Compliance," *Journal of Public Administration Research and Theory* 13, no. 2 (2003): 117–39.
[47] Peter J. May, "Compliance Motivations: Affirmative and Negative Bases," *Law & Society Review* 38, no. 1 (March 2004): 41–68.

studies of negotiated regulation or responsive regulation[48] have also shown an enhanced motivation to comply when this social relationship between the regulator and the regulated is emphasized.[49] A study of the social relationship between the regulator and those subject to the regulation at a wastewater treatment plant in the United Kingdom found that negotiation resulted in rule adaptations, which better reflected company practices. This reduced the gap between the rules and practices and, in some instances, resulted in more stringent rules being accepted over the formal legal rules. Negotiating rules can lead to better outcomes, but, when regulators define outcomes vaguely and rely on a process of negotiation, larger firms have an advantage because they are able to develop closer relationships with regulators than smaller firms, which may end up facing tougher requirements.

## 3. The Nature of Rules and Regulations

In this section, we consider the nature and purpose of rules and regulations and lay the groundwork for a general framework of rule development and management.[50] We will use these insights in section 4 to propose a structure of rule management that conforms to the way people naturally behave when confronted by rules. We will then return in section 5 to the lessons we believe this has for understanding and modifying regulations to assist in moderating the regulatory burden.

We will begin by considering the nature and purpose of rules very broadly. There is a broad spectrum of rules that govern behavior; on one extreme of that spectrum are norms of behavior developed to cope with daily life, on the other extreme are formal regulations. Along this spectrum, rules may arise from individual experience informed by education and training, or rules may be imposed by regulators, employers, professional groups, insurers, or other third parties. We define some general principles about how rules, broadly defined, come about, what forms they take, and how their form limits the degree of freedom of action permitted to the rule-follower. We turn first to some definitions and principles, drawn from our review of the literature on rules imposed at the workplace level.

### 3.1. Definitions and principles

Rules exist to influence behavior by specifying what the behavior should be or should achieve and applying some form of motivation to encourage it. That motivation may be complex, including some or all of the following: to do a good job, to conform to social expectations and pressures, to comply with the law, or to escape punishment. Rules about safety and health, which are our focus, may be aimed at the behavior of workers, designers, managers, clients, contractors, visitors, local residents, or the public.

Rules are procedures or routines that define regularities in behavior and are by definition simplifications of the diversity of reality. We use the word "rule" very generally, as any routine or procedure that can be devised by anybody, including the person who carries out that behavior. Thus an employee manual, a set of best practices, and the working habits of an individual worker may all

[48] Vibeke L. Nielsen, "Are Regulators Responsive?" *Law & Policy* 28, no. 3 (July 2006): 395–416; see also Bettina Lange, "Compliance Construction in the Context of Environmental Regulation," *Social & Legal Studies* 8, no. 4 (December 1999): 549–67.
[49] Nielsen.
[50] Hale, Borys, and Else.

be considered rules under this broad definition. They may or may not have formal sanctions attached to non-compliance, and there will often be rewards socially, financially, or in effort and comfort in breaking the rule. There are very few "golden rules" that have no exceptions. Dealing with those exceptions is a key issue in rule management.[51] It can contribute greatly to the size and complexity of rule sets, as rules are extended to cover the exceptions, usually after an accident or incident not covered by the rule.

Regulations form a subset of rules. They are rules imposed by the executive or independent agencies with the force of law and an explicit threat of punishment for non-compliance. Our analysis of regulations also applies to some voluntary rules issued by organizations other than governments, such as insurers as well as standards and certification authorities. Although these rules are not strictly regulations, which carry the force of law, they may be treated by companies as equally relevant. Examples include rules for safety management systems issued by bodies such as the International Standards Organization (ISO), the American National Standards Institute (ANSI), and the chemical industry's "Responsible Care" standards. These differ from regulations in that companies can opt out if they judge that the rules are not appropriate to them. Some regulations issued by traditional regulators may share some features with voluntary rules, such as regulations that create defaults with opt-outs. Even state or local laws are in some sense voluntary if companies are free to move to another jurisdiction. The essence of regulations is that they are imposed by an external authority on an organization, group, or individual that must comply and are backed by some form of institutionalized sanction for non-compliance.

The level of generality at which rules are formulated significantly affects the size of any rule book or set of regulations.[52] We divide generality into two aspects: how concrete the rules are, by which we mean how easily measurable the result is, and how restrictive is the rule to the freedom of discretion of the rule-follower on how to comply.

With regard to how restrictive the rules are on those governed by them, we distinguish three points along a continuum from least to most restrictive: regulators may set rules that are: (1) goals: (a) specific outcomes, (b) market incentives, (c) disclosure rules or (d) abstract aspirations; (2) specifications of the risk-management process to produce the rules; or (3) specific actions to be performed or concrete states to be achieved. We describe each of these in detail:

1. Goals.
   a) Outcome-based rules specify concrete measureable outcomes but not how to achieve them, for example, "this factory will release not more than 200 tons of mercury into the atmosphere each year."

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[51] Stian Antonsen, Petter Almklov, and Jorn Fenstad, "Reducing the Gap Between Procedures and Practice—Lessons from a Successful Safety Intervention," *Safety Science Monitor* 12, no. 1 (2008): article 2; Sidney W.A. Dekker, *Ten Questions about Human Error: A New View of Human Factors and System Safety* (Hillsdale, NJ: Lawrence Erlbaum Associates, 2005); and Jacques Leplat, "About Implementation of Safety Rules," *Safety Science* 16, no. 1 (1998): 189–204.

[52] Gudela Grote, "Rules Management as Source for Loose Coupling in High–risk Systems" (presentation, Second Resilience Engineering Symposium, Juan les Pins, France, November 8–10, 2006) and Andrew Hale and Paul Swuste, "Safety Rules: Procedural Freedom or Action Constraint," *Safety Science* 29, no. 3 (August 1998): 163–77.

b) Market-based rules likewise specify measureable objectives but allow firms to balance competing objectives. For example, regulators might specify a pollution cap but then modify it by also allowing firms to trade pollution allowances. Thus the regulators' objective of limiting pollution is still met but companies have increased flexibility to meet the goal for their own plants. Thus, if there are economies of scale in pollution control, then large firms can exceed the required control levels and sell permits to small firms, which may then use less costly (but less effective) pollution control methods. Some scholars have proposed introducing markets using occupational health through a strict liability system where employers must compensate employees for injuries incurred on the job.[53]

c) Disclosure rules do not specify outcomes but seek to correct market failures by making information more readily available. Rules might require a financial firm to disclose risks to consumers or an employer to disclose accident rates. These work as a corollary to market-based rules: firms face incentives to reduce risks because consumers are less willing to buy risky products and workers demand risk-pay. Indeed, empirical evidence comparing risk-pay across industries shows that workers are much better at estimating risks than regulators.[54] Requiring disclosure allows consumers and workers to choose their preferred mix of risk and pay.

d) Some goals can be very abstract, for example, "drive safely," and "workplaces shall be designed to prevent injury or ill health, so far as is reasonably practicable."

All four types of goal leave it to those governed by the rules to decide how to achieve the outcome. However, there is great variety in how easy it is to measure whether the outcome has been achieved. If the regulator has specified a concrete outcome, the measurement of success is relatively easy. In the case of the abstract rules there is an extra translation, for example in defining precisely words and phrases such as "safely" or "so far as is reasonably practicable." The translation into actual behavior is left to the discretion and competence of the person upon whom the regulation is imposed, although he may be guided by dialogue with the enforcement authority.

The translation of rules into behavior is more determined under risk-management process rules and action rules. In practice, abstract goals become action rules through the enforcement process if regulators fail to define specific outcomes at the outset.

2. Risk-management process rules. Risk-management process rules specify how to arrive at the required behavior, but not what that behavior is, for example, "conduct an effective risk assessment before starting any new work task and eliminate or control any risks found," and "submit a safety case for approval by the authority." All regulations requiring organizations to have a safety management system to control their risks fall under this heading as do safety case regimes requiring submission of a reasoned analysis of risks in a proposed activity and the means proposed to control them. There are few regulations for

[53] Richard A. Epstein, "A Theory of Strict Liability," *The Journal of Legal Studies* 2, no. 1 (January 1973): 151–204.

[54] John F. Morrall III, "A Review of the Record," *Regulation* (November–December 1986): 25–35.

management systems in the United States,[55] but there are voluntary private sector rules issued by ISO, ANSI, and others on safety management, which may be used by companies to populate this category of rule. Companies in the United States may also pay attention to the management criteria incorporated in the criminal prosecution guidelines set by the Environmental Protection Agency, the Food and Drug Administration, and the Department of Justice, because a firm found in non-compliance with a regulation is more likely to be subject to criminal prosecution if the agency determines that non-compliance arises from a deficient management system. Design standards such as the European norm for machinery safety are also of this form.[56] As with rules that take the form of goals, there must be a translation process from the risk-management process rule to the specific behavior. This relies on the competence of the regulated organization to win the approval of a regulator. However, the room for interpretation is smaller than for translating a goal.

3. Action rules. Action rules specify closely the behavior to be shown in a defined or implied situation, for example, "approved hard hats will be worn by all personnel within the bounds of the construction site," or they define the state to be achieved: "scaffolding will be close boarded and have toe-boards at least x inches high." Even here there is some leeway left for translation in terms of what is meant, in the first example, by "approved" (matching what standard, approved by whom?), "personnel" (employee, contractor, visitor?) and "construction site" (within what bounds, office as well as open site?), but this is now minimal. Action rules also have the advantage that compliance can be measured without having to wait for the eventual outcome it is designed to control: a machine guard can be seen to be in place without waiting to see if an accident occurs. This gives the regulated more immediate certainty that he is in compliance.

There are a number of postulates, which have been derived in earlier studies of this classification system[57]:

- The more that regulations are phrased as action rules, the more rules there must be to cover a given breadth of activities or risks. It is frequently regulations at this level that we hear complaints about as imposing a too-great regulatory burden. Many European countries and Australia have moved from action rules to goal-setting or risk-management process regulation, leaving the regulated to devise their own action rules, because of this concern about the proliferation rules. The United States has not followed this trend.
- The more rules are specified at the action level, the more exceptions there will be to which the rule does not, or cannot, apply. Following the rule may even be dangerous in some circumstances.
- Rules at the level of goals, outcomes, and risk-management processes are subject to fewer exceptions but give less certainty to companies of what to do or not to do and less guidance to the enforcer of what to approve and what to disallow.

[55] The OSHA Process Safety Management of Highly Hazardous Chemicals standard (29 CFR 1910.119) is an exception applying to major hazard companies.
[56] Comité Européen de Normalisation, *Safety of Machinery: Basic Concepts, General Principles for Design*, part 1: *Basic Terminology, Methodology* and part 2: *Technical Principles and Specifications*, EN292–1 and EN292–2 (Brussels: Comité Européen de Normalisation, 1992).
[57] Hale and Swuste; and Hale, Borys, and Else.

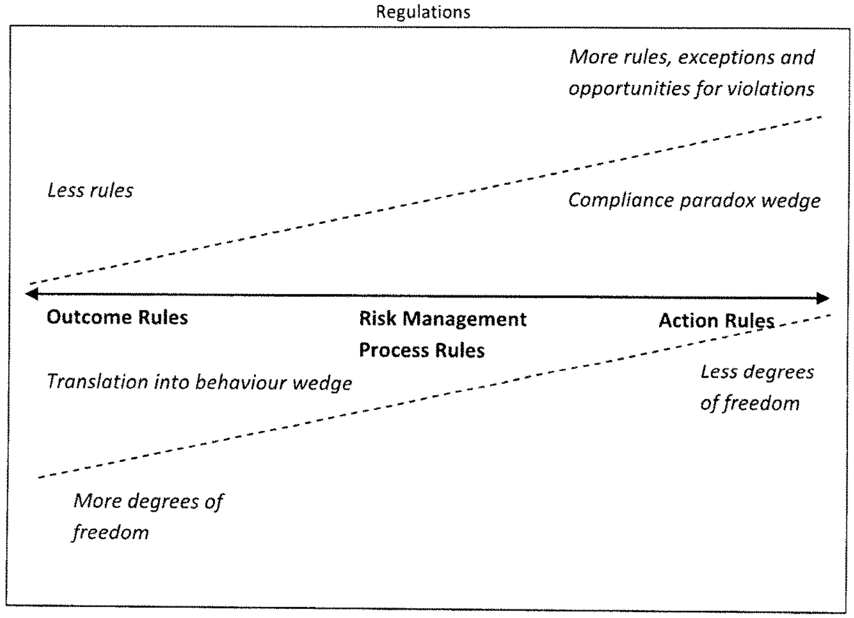
- If the formulation of an outcome rule is not concretely measurable, the regulated have two translation processes to accomplish: what the rule means in practice and how to comply with it. Concrete outcome-based rules only impose the latter.
- Serious accidents that are not the result of a breach of existing regulations are often portrayed in accident investigations as stemming from gaps or exceptions to the existing regulations or failures to interpret generic rules for the specific situation encountered. As such they tend to spawn new regulations, usually at an action-rule level, to outlaw the behavior that led to the accident. This increases the size and complexity of the rule set.
- If regulators do not impose action rules for an activity, it is up to the companies and persons carrying out that activity to translate safety goals into specific behavior. To do this, they must have time, motivation, competence, and authority.
- Unless a rule is imposed form above, the people facing the risk must formulate a rule for their own behavior at each moment. The question is not whether an action rule is needed but at what level in the hierarchy the action rule is formulated and on what levels it is imposed (i.e., how many actions become enshrined in regulations and how many stay as self-imposed rules).
- Imposing an action rule limits the freedom of choice of companies more than rules that specify goals or risk-management process rules, but this may also limit the level of competence needed to interpret the rule, provided that the action rules are appropriate to the situation the company is facing and are relatively simple to discover and understand.
- There is strong pressure to frame rules as action rules for situations in which there will be little decision time (for example, rules for emergencies). However, when workers are confronted with novel situations for which no action rules exist, or for which the rules are not applicable, on-the-ground expertise will be valuable to devise appropriate ways of behaving to match those situations.[58]
- The more concern there is for creating a level playing field where all are subject to the same rules, the more there is pressure to specify rules in concrete ways that are easy to monitor and enforce. This will entail using fewer process rules and vague goals, which must be negotiated by companies, and more concrete goals or action rules.
- The more that many people must collaborate on an activity, the more pressure there is to specify action rules so as to increase the degree of certainty that specific behavior will be predictable for all concerned. For example, rules for which side of the road to drive are essential to make other drivers' behavior predictable.
- The more extensive the set of action rules imposed, the more likely it is that the individuals and organizations will work in compliance mode and the less willing they may be to invest in experts who can respond creatively to exceptional risks and their control.
- The more that the relationship between the company and the regulatory auditor or enforcer is antagonistic and not based on trust, the more there will be debate and conflict over the interpretation of the rules, and the more pressure there will be to define them at a specific action level, thus increasing their number and complexity. This is not to say that trust should be unquestioning, a situation that leads to private interests capturing regulators for their own benefit.

[58] Karl E. Weick, "Drop Your Tools: An Allegory for Organizational Studies," *Administrative Science Quarterly* 41, no. 2 (1996): 301–13.

As we have described, there are many forces driving companies to adopt rules that define actions and become increasingly detailed and complex over time. On the other hand, competition and the pursuit of profit are countervailing forces on companies that encourage them to prefer to reduce rule sets or to make them more flexible for the sake of freedom of choice, efficiency, and innovation. We postulate that the same pressures to increase the size of rule sets apply to regulators, and we presented in section 2 some evidence that this is happening, but regulators do not make profit from adopting more efficient rules nor are they subject to competitive pressures. Regulators may face lobbying efforts by firms to avoid onerous regulations, but firms may also support regulations that are harmful to their competitors.

There is a choice as to which level of rule to use when formulating regulations, and there is a correlation in moving up or down the continuum between the discretion and freedom of choice left to the company and the competence needed to translate the regulation into practice. Moreover, as the size of the rule set increases, it is harder for the firm to identify which rules are relevant. Discretion to interpret broad goals or risk-management process rules and translate them to cope with the diverse realities implies that there must be motivation to comply. Figure 1 illustrates these choices.

Figure 1. A Conceptual Framework for Formulating Regulations




The conceptual framework for formulating regulations shown in figure 1 illustrates the menu of rules as a continuum with outcome rules on the left end and action rules on the right. Outcomes rules generally require translation into process rules and those into action rules. Drawing this as a wedge illustrates how there is a progressive loss of freedom to translate the rule into a behavior as one moves to the right of the diagram, ending with action rules that specify behavior in detailed terms. At the same time, there is a compliance paradox wedge, illustrating that with fewer degrees of freedom come more rules. The paradox is that there is evidence that the larger the action rule set, the more situations there will be in practice where the rule is felt not to apply, spawning more violations or more detailed rules to cover the exceptions. In other words, the more specific the set of rules, the less well that rule set will apply in practice. To combat this, there is a need for explicit processes for sanctioning discretion to adapt the rules under exceptional circumstances and this level of discretion requires strong mutual trust. Conversely, as there are fewer rules at the outcome-rule end of this wedge, there is ample room for rule adaptation, but commensurate with this is an increasing need for greater competence and trust in those translating the outcome rule into behavior. A further consideration is that a company's action rules demonstrate more clearly to a regulator how an organization intends to manage its risk than outcome rules.

### 3.2. Uncertainty and rules

Rules may vary in generality but also in their certainty. Regulatory uncertainty may arise in three ways:

1. Uncertainty from vague and overbroad rules. Small firms may delay compliance until the regulator or the courts provide firm definitions in the form of action rules. Evidence shows that not only will firms delay making decisions when courts make unclear rulings, but regulators will also often stick with outdated procedures until courts hand down a clear decision.[59]
2. Uncertainty from excessively complex rules sets. Just as vague rules give firms little guidance, too-large rule sets leave firms wondering about which rules apply to them.
3. Changing rules. Although it is necessary for rules to respond to changing circumstances, firms are less likely to comply if they believe that rules will change.[60]

The flexibility of the rule and the uncertainty of the rule are related. Flexible rules are more likely to be vague if the regulator fails to define specific outcomes. However, detailed rules are harder to discover and may lead to increased uncertainty over which rules apply to the firm. Furthermore, detailed rules must change more frequently to keep pace with innovation, creating additional uncertainty.

The uncertainty generated by regulatory practices has serious economic consequences. Uncertainty is associated with lower growth and lower overall output of companies.[61] Companies are less willing to invest in an uncertain business climate.[62] Technical uncertainty can lead firms to use outdated technologies because they believe that a new technology will supplant the currently available

[59] Lawrence Baum, "Implementation of Judicial Decisions," *American Politics Research* 4 no. 1 (January 1976): 86–114.
[60] Kristina Daugiradas, "Evaluating Remand without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings," *New York University Law Review* 80 (2005): 278–311.
[61] Joshua Aizenman and Nancy P. Marion, "Policy Uncertainty, Persistence and Growth," *Review of International Economics* 1, no.2 (1993): 145–63; Jun Ishii and Jingming Yan, "Investment under Regulatory Uncertainty: U.S. Electricity Generation Investment Since 1996" (working paper, Center for Study of Energy Markets, March 2004); and Robert Lensink, Hong Bo, and Elmer Sterken, "Does Uncertainty Affect Economic growth? An Empirical Analysis," *Review Of World Economics* 135, no. 3 (1999): 379–96.
[62] Ibid.

technology (like a consumer who stayed with VHS because he was unsure whether Blu-ray or HD-DVD would become the new standard). Likewise, if a firm believes that a regulator will mandate some particular technology but is still awaiting the regulator's announcement of which technology will be mandated, the firm may delay its investment. As our analysis above indicates, adoption of new procedures for managing risk involves significant training and investment in organizational capital. Uncertainty may therefore also delay this training and investment and, ultimately, the implementation of new procedures. Regulatory uncertainty is thus likely to limit improvements in risk-management strategies and innovation in general.

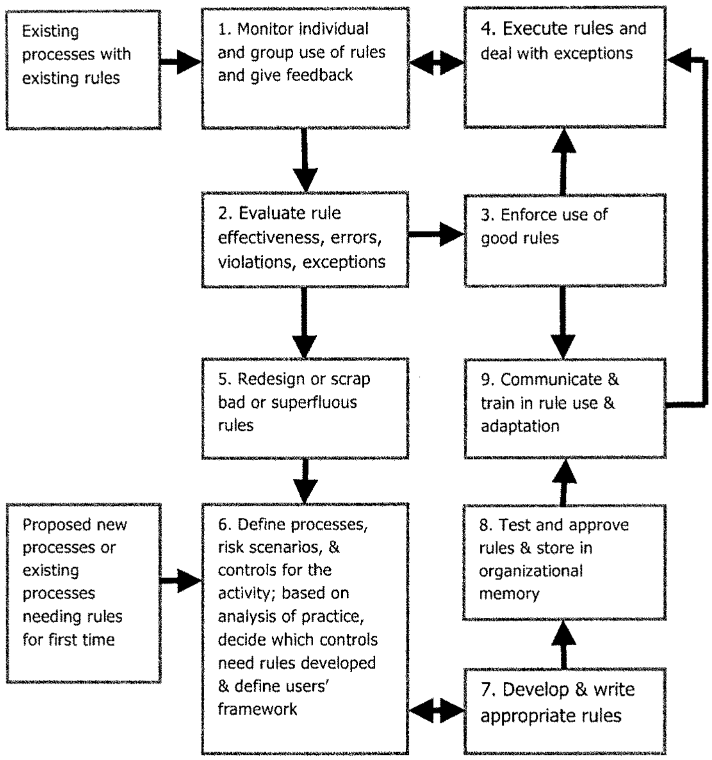
## 4. A Framework of Rule Management

In order to analyze the effect of a large, complex rule set on the behavior of managers and companies, we need a framework showing the steps in the process of rule development, use, enforcement, and revision. We set out in figure 2 the generic framework devised in our review,[63] which is based on defining rules for the workplace level but which, we believe, is also applicable for regulatory rules.

What drives good workplace rule management is an active process of monitoring rule use (boxes 1–4). Monitoring rule use demands evaluation of rule compliance, accidental violation, and deliberate violation. In cases of non-compliance, managers must assess if the reasons for non-compliance lie with the quality of the rules or the characteristics and motivation of those who should have followed the rule. Active rule monitoring also keeps the rule in the forefront of the minds of both the rule-follower and rule-maker. Depending on the result of the evaluation, the next step is either reinforcement of the rule or redesign of the rule. Box 5 starts a redesign process that may lead to a fundamental reconsideration of how the hazard will be best controlled through new formal rules as well as through redesigned work equipment, processes, work methods, or workplaces.

[63] Hale, Borys, and Else.

Figure 2. Generic Framework for Rule Management



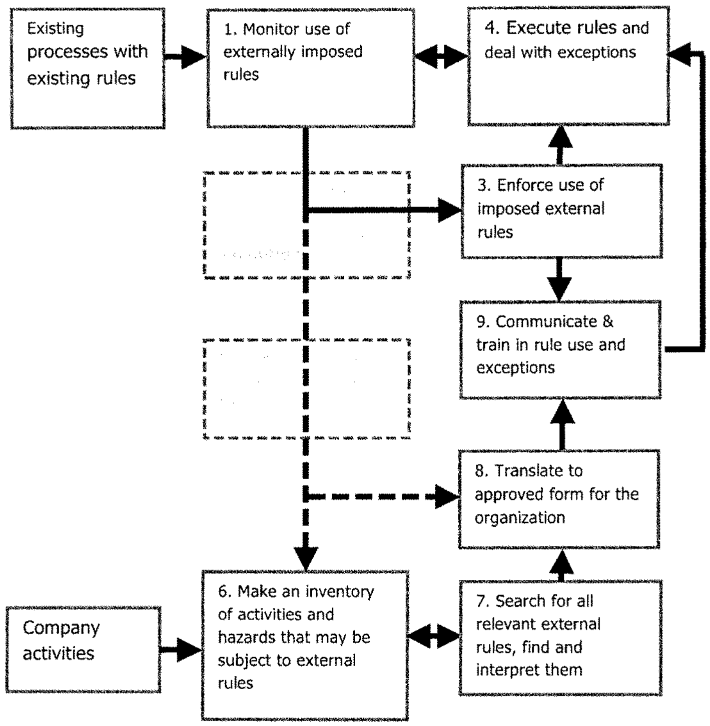

Boxes 7–9 cover the processes of rule development, testing, approval, promulgation, communication, and training.

The involvement of those who must conform to the rules is essential to good rule management, particularly in boxes 2 and 5–8. When rules are to be implement by highly educated professionals (for example, doctors in hospitals, pilots of aircraft and maintenance fitters in high technology industries), it is especially important to consult them. Professionals are accustomed to devising their own routines for coping with the range of eventualities they meet and are more resistant to having rules and regulations imposed upon them. They usually regard such imposed rules as over-simplifications, written by people with only superficial knowledge of the complexity of reality and undervaluing the professionals' long years of "apprenticeship" and experience.[64] However, outsider

[64] Gudela Grote, Johann C. Weichbrodt, Hannes Günter, Enikö Zala-Mezö, and Barbara Künzle, "Coordination in high-risk organizations: The need for flexible routines," *Cognition, Technology & Work* 11, no. 1 (February 2009): 17–27; John C. McCarthy, Peter C. Wright, Andrew F. Monk, and Leon A. Watts, "Concerns at Work: Designing Useful Procedures," *Human-Computer Interaction* 13, no. 4 (December 1998): 433–57; and Yuichi

regulators tend to underestimate the complexity and diversity of even simple tasks, so involvement of the rule-followers is needed also for those tasks.

Figure 2: Generic Framework focused on External Regulations




If we now consider what happens to this generic process when we suppose that a distant, largely non-participative regulator imposes a large set of rules that are predominantly action rules that cover a range of different activities and that impact a wide range of people in the company, we arrive at figure 2. We have kept the numbering of the boxes the same to facilitate the comparison with figure 1, but the order in which they are addressed changes, as we indicate below. We can use this framework to locate the issues set out in section 3.

The overall problem of a mass of overly complex and detailed regulations means that the rule-management process absorbs many resources and diverts them from other important activities, such as innovation and employment generation.

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Otsukaa, Ryo Misawab, Hiroshi Noguchic, and Hiroyuki Yamaguchib, "A Consideration for Using Workers' Heuristics to Improve Safety Rules Based on Relationships Between Creative Mental Sets and Rule-Violating Actions," *Safety Science* 48, no. 7 (August 2010): 878–84.

The loss of boxes 2 and 5 and the presence of only a dotted line (representing a link that may or may not be present) between the monitoring function (box 1) and the adaptation process of the external regulations (boxes 6–8) indicates that externally imposed rules weaken or even remove the central motor of rule adaptation and improvement in the rule-management process of a company. This undermines the sense of ownership of risk management and results in token compliance with the letter and not the spirit of the law. No longer can organizations themselves modify, let alone scrap and replace, an action rule that does not fit their circumstances. They are bound to follow it, however impracticable or irrelevant it may appear to them. The only recourse remaining is to find another implementation or translation (box 8) that is more appropriate and still acceptable to the enforcer. Only in the longer term can more fundamental changes be made through lobbying or on the initiative of the regulator. There will be uncertainty about when—or whether at all—such lobbying will succeed. If external rules are phrased as goals, outcomes, or risk-management process rules, the task of translation and adaptation remains inside the company and can still power the motor of rule management.

Working through figure 2, where the company begins on the rule-management process has also shifted. Instead of starting with the monitoring and optimization of rules at the "sharp end" of production, mangers begin by asking which of their company's processes and activities are covered by external regulations. This turns their eyes outward to the regulator instead of inward to what sensible rules for the company would be and what rules are working well now or need modifying. This weakens the innovative spirit of the company.

The focus for the development of rules in boxes 6 and 7 now lies outside the company with the regulator, who is not so well placed as the company to know the best risk-control methods and to keep up with new developments. The regulations are therefore inclined to be sub-optimal and not to take account of the concerns of the company for balancing risk control with the need for competitiveness and avoidance of barriers to expansion. In dealing with the remainder of its task under boxes 6 and 7, the company has to face a jungle of existing, likely sub-optimal, detailed regulations, whose complexity and wording may confuse even the inspectors from the enforcement agencies.[65] The company must learn the laws and determine which sections apply to it. This discovery process is costly, in part because the structure of the legislation is often determined by the limits of the jurisdictions of the different enforcing agencies rather than by any division into activities that the company recognizes. The more the regulations are phrased as action rules, the more they will be cluttered with articles giving exemptions or dealing with special circumstances requiring exceptions to the normal regulation. To interpret such regulations, companies often turn to inspectors and enforcers or to consultants to tell them what to do. In addition to discovery and compliance costs, companies must bear the costs of keeping records that the agencies will use in monitoring and enforcement actions (boxes 1 and 3).

One might argue that it would ease the difficulties of making the inventory of hazards, searching for regulations, and translating rules into organizational practices (boxes 6, 7, and particularly 8) if there were a good liaison between the companies and the regulators or inspectors so that practicable translations of the regulations could be agreed upon in a dialogue. This would give companies the certainty they desire that they are complying with the rules and need not fear an inspector's visit.

[65] De Gelder.

Such collaboration calls for a high level of trust and strong professional relationships between regulators and regulated. Perhaps only with large companies with professional safety staff is there a level of equality and trust necessary for a professional debate on alternatives. However, this level of trust can allow firms to capture the regulator for their own devices and may be harmful to competition: large firms will seek to win exceptions to rules instead of changing bad rules and may even prefer that onerous rules stay in place, knowing that those rules will apply to their competitors. Trust may thus be a double-edged sword. Small businesses tend to regard inspectors warily and are not inclined to ask them into their organizations for discussion of this sort at all.

The legal language and complexity of the regulations means that the consultants or employees who carry out the hazard assessment, discovery of regulations, and translation of regulations into practices (boxes 6–8) must have legal training. However, lawyers are unlikely to be familiar with the technology, work methods, and hazards of the company's processes. The regulatory analysts' starting point is the law rather than the practicable ways to control hazards. Box 8 becomes crucial as the interface between the law and lawyers on one hand and the workplace and the practitioners of technical processes on the other hand. To find practicable and effective translations of the regulations, the technologically trained managers should dominate the lawyers. However, it is the lawyers who tend to dominate the practitioners when there are extensive and complex regulations to be implemented. All of this leads to the sub-optimal solutions to controlling hazards being enshrined in regulations.

At the sharp end of rule use and enforcement (boxes 1, 3, 4, and 9), there are a number of factors relating to a mass of externally imposed regulations that discourage compliance, except as window dressing when an inspector or other enforcer is present. If those who will use the rules are not involved in deciding on, approving, and monitoring the rules and their use, it is likely that they will consider those rules "not invented here" and not adhere to them. If rules are seen as impracticable, both operators and immediate supervisors will collude in bending or even breaking rules and a company culture of non-compliance will develop. Studies show that managers are just as likely to breach rules as operators.[66]

The enforcement of regulations is based on deterrence theory, but some studies show that deterrence theory does not fully describe what determines compliance in companies.[67] Deterrence theory points to the probability of detected non-compliance, the cost of contingent punishments, and the costs and benefits of compliance or non-compliance as the key factors in determining compliance, but these factors explain only part of the tendency to comply with regulations.[68]

[66] Lynn Martin, "Bending the Rules or Fudging the Paperwork? Documenting Learning in SMEs," *Journal of Workplace Learning* 13, no. 5 (2001): 189–97.
[67] Richard Johnstone, "From Fiction to Fact—Rethinking OHS Enforcement" (Working Paper 11, National Research Centre for Occupational Health and Safety Regulation, Regulatory Institutions Network, Australian National University, Canberra, July 2003).
[68] Fairman and Yapp.

Increased inspection does seem to increase compliance.[69] However, social norms and peer pressure in the industry may be more important in determining compliance.[70]

When faced with a large and complex set of rules, managers, especially of small businesses, tend not to bother to find and learn about the rules (box 6)[71] but rather to assume that the rules will match their own common sense and expertise.[72] Managers thus rely on their own expertise as their basis for deciding how to control hazards. As a consequence, they think they are complying with the regulations,[73] which strengthens their belief that they need not seek out and study the regulations nor fear inspections. This fuels a deeply reactive response to rules, which may be called into question only when an inspector calls and points out non-compliance. What follows is a process of negotiation between inspector and company,[74] and the outcome of that negotiation is taken by the company to be the proper interpretation of the regulations (at least until another inspector calls). This reactive approach is particularly found in small businesses operating under abstractly phrased rules or under rules that are hard to discover.

The removal of boxes 2 and 5 to a position outside the regulated organization means that little or nothing can be done locally to eliminate inappropriate rules and replace them with better ones. The feedback loop for regulatory change is not within the company but runs via major industry players, industry and professional associations, lawyers, and lobbyists. All that can be done locally with bad or inconvenient rules is to ignore them, which contributes to a general lack of trust even in the good rules in the set and underlines the non-compliance culture tacitly supported by management and workforce. Yet we still see that rules proliferate, as accidents, incidents, enforcement problems, and the compensation cases create an incentive to add detail, fill the gaps of exceptions, and tackle new technologies and risk.[75] This is particularly so with complex technologies.[76]

We began our paper by noting that American businesses must now comply with 165,000 pages of federal regulations. Although the sheer number of regulations is problematic, it is the style and content of those rules that lies at the heart of the problem of regulatory overload. This determines the sense of ownership of the rules, their comprehensibility, as well as the degree of technical competence necessary to understand and implement them, and, ultimately, the likelihood that companies will accept and comply with the rules.[77] The need for clarity, explicitness, and enforceability of rules, which drives rules to become ever more action-based and restrictive, must be

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[69] Olson.

[70] Henk Elffers, Peter van der Heijden, and Merlijn Hezemans, "Explaining Regulatory Non-Compliance: A Survey Study of Rule Transgression for Two Dutch Instrumental Laws, Applying the Randomized Response Method," *Journal of Quantitative Criminology* 19, no. 4 (2003): 409–39.

[71] Olson.

[72] Fairman and Yapp.

[73] Ove Njåa and Svein Håkon Fjelltun, "Managers' Attitudes Towards Safety Measures in the Commercial Road Transport Sector," *Safety Science* 48, no. 8 (October 2010): 1073–80.

[74] Fairman and Yapp.

[75] See for example Jontoft and Mikalsen; and Michael Moran, "Understanding the Regulatory State," *British Journal of Political Science* 32, no. 2 (April 2002): 391–413.

[76] Giandomenico Majone, "The regulatory state and its legitimacy problems," *West European Politics* 22, no. 1 (1999): 1–24; and Gunther Teubner, *The Theory of Communicative Action*, vol. 2, *Lifeworld and System: The Critique of Functionalist Reason* (Cambridge, UK: Polity, 1987).

[77] Majumdar and Marcus.

balanced against the need for freedom of decision and discretion to devise optimal solutions and cope with the diversity of reality and with exceptions to rules.

## 5. Remedies

Having located the different criticisms of the regulatory burden within our framework of the rule management process, we conclude with a section in which we draw on this framework to sketch options for tackling regulatory overload. While we of course recognize that our analysis is far from comprehensive, we believe that we make important suggestions about how to begin to reduce the regulatory burden that is weighing down economic growth. We start with the place that the regulator normally begins, namely our box 6, the decision whether to regulate and if so how. This decision is often based on indications that existing regulation is not working adequately or at all.

### 5.1. Determining the need for regulations (box 6)

Some have questioned whether regulation is needed at all—whether regulation is the best and most efficient way to control risk or there are alternatives to regulation that would better control risk.[78] An answer to such questions depends on agreement on how to measure costs and benefits of regulation, no easy thing to achieve, especially with indirect costs and benefits. Moreover, there is a dearth of comparative studies of costs and benefits that look at how best to regulate and the relative costs and contributions to productivity of good and bad regulations. One of the few studies in this area examined the electrical utilities industry; this study found that well-formulated, flexible, outcome-based environmental regulations contributed positively to productivity while inflexible and action-based ones had a negative effect.[79] Although there are few comparative studies in this area, some economists and political scientists have offered checklists of qualitative questions regulators should address before deciding to embark on new regulations.[80]

### 5.2. Developing, testing, and approving appropriate regulations (boxes 7 and 8)

We now consider what the "best" type of rules for given circumstances are and how the type of regulation affects the size and complexity of the regulatory rule book.

Most literature on the regulatory burden is critical of "command and control" regulation and is particularly critical of action rules to govern the use of complex technologies. Most economists advocate "smart regulation" that takes advantage of the greater flexibility of outcome-based rules or risk-management process rules for mandated safety-management systems[81] and safety-case

[78] See for example Jones and Graf; and Moran.
[79] Majumdar and Marcus.
[80] Susan Dudley, *Primer on Regulation* (Arlington, VA: Mercatus Center at George Mason University, 2005); D. Ruimschotel, P. van Reenen, and H.M. Klaassen "De tafel van elf" [The Table of Eleven] *Beleidsanalyse* 3 (1996): 4–13; and Royal Ministry of Government Administration, *To Regulate – Or Not: Checklist for Use When Deciding on Instruments and New Regulation* (Oslo, Norway: Royal Ministry of Government Administration, 1994).
[81] Marius Aalders and Ton Wilthagen, "Moving Beyond Command and Control: Reflexivity in the Regulation of Occupational Safety and Health," *Law & Policy* 19, no. 4 (October 1997): 415–43; Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992); Neil A. Gunningham and Peter Grabosky, eds., *Smart Regulation: Designing Environmental Policy*

regimes.[82] These types of more flexible rules allow regulated companies to fill in the detail of the action rules themselves either as individual companies or collectively through their industry, trade, or professional associations.[83] This allows the government to scrap its own detailed action rules.[84]

Many commentators have noted that flexible rules are suitable to govern the use of complex technologies operated by large companies.[85] However, in the Netherlands, the implementation of more flexible rules has been carried much further and is being tried in a wide range of industries. The Dutch government is funding the development by industry and professional bodies of catalogues of good risk-control practices relating to significant hazards in that industry or activity. These catalogues are subject to inspectorate approval but, once approved, will be used as the basis for the inspectorate's enforcement actions. Extant regulations will be repealed. Outcome-based and risk-management process regulations underpin these "outsourced" action rules.[86] This does not reduce the number of detailed rules, but it does shift their origin to companies and industry groups and should increase companies' feelings of ownership of risk management. Voluntary standards, such as those issued by ANSI,[87] play a comparable role in the United States but are not sanctioned by government as in the Netherlands.

We should distinguish between types of outcome rules: those that require particular, measurable outcomes and those that require disclosure of particular kinds of information. Those formulated as concrete and measurable outcomes (for example, emission norms in environmental regulations) are easily understood, and their attainment is relatively easily measurable, albeit only in retrospect. Outcome rules have also been used for major hazard sites, requiring operators to prove that the probability of death of someone outside the site's perimeter should be lower than a specified rate. However, since serious accidents are rare in any small business (although in aggregate across many businesses they are a significant problem) but not entirely preventable, it would be nonsensical to require that an accident never occur. The outcome norms in safety are typically phrased in more proactive terms, requiring the company to achieve safety by applying state-of-the-art prevention techniques or to have safety-management systems and processes in place. There are also market-based alternatives such as disclosure rules. A rule can force employers to disclose information about

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(Oxford: Oxford University Press, 1998); Bridget M. Hutter, *A Reader in Environmental Law* (Oxford: Oxford University Press, 1998); Ogus; Teubner; and Majone.

[82] Robert Baldwin, *Rules and Government: Non-Statutory Rules and Administrative Law* (Oxford: Oxford University Press, 1995); and Michel Lavérie and Roger Flandrin, "Relations between the Safety Authority and the Nuclear Power Plant Operators," *Nuclear Engineering and Design* 127, no. 2 (June 1991): 215–18. And Saji.

[83] Francis Chittenden, Saleema Kause, and Panikkos Poutziouris, *Regulatory Burdens of Small Business: A Literature Review* (Manchester, UK: Manchester Business School, 2002) available at http://www.dti.gov.uk/files/file38324.pdf); Jones and Graf; David Laurence, "Safety Rules and Regulations on Mine Sites—The Problem and a Solution," *Journal of Safety Research* 36, no. 1 (2005): 39–50; and Lord Robens.

[84] Lord Robens.

[85] Jones and Graf; Laurence; and Majumdar and Marcus.

[86] Paul Baart and Tamara Raaijmakers "Developments in the Field of Work and Health in the Netherlands in the Period of 1990–2010" (Recommendation Paper for the Network of WHO Focal Points for Workers' Health, Amersfoort, the Netherlands, 2010); and Jan Heijink and Shirley Oomens "De werking van arbocatalogi: Evaluatie van het project arbocatalogi van de Stichting van de Arbeid" ["The working of the Working Conditions Catalogues of the Foundation for Work"] (Project no. 340000768, Group ITS, Radboud University Nijmegen, Netherlands, February, 2011).

[87] See for example the debate over prevention through design and the use of control banding, discussed in Stephen Lee, "Prevention Programs: Prevention through Design Adoption Stalled by Lack of Standard. Advocates Report," *Occupational Safety & Health Reporter* 41 (August 2011): 738.

accidents or work practices. This may be particularly effective with small firms because workers can more easily seek employment elsewhere if employers fail to take adequate precautions.

A number of studies have looked at the use of risk-management process rules, which have been called "enforced self-regulation" in Europe and "management-level regulation" in the United States.[88] These studies show almost uniformly that small businesses find such regulations difficult to understand and to implement. Thus small businesses often ignore the regulations or only implement what they consider to be "common sense" out of them.[89] The cry from small businesses is usually that they want clear and simple rules to follow, because this saves them from investing a lot of time and resources into finding, understanding, and interpreting more flexible risk-management process rules. Unfortunately for safety regulations, this has typically meant that rules are phrased as action rules, which by their nature are more voluminous and complex to navigate. The dilemma for regulation of small businesses is where to strike the compromise between specificity and flexibility, or indeed whether there is a suitable compromise to be found. The answer is likely to lie in producing only rules that solve real social problems based on good cost-benefit analysis, which may reduce the number rules considerably.

Large companies do have the resources, competence, and motivation to translate abstract goals or risk-management process rules into detailed rules. If a regulator changes the regulation from one that specifies concrete actions to one that prescribes outcomes or risk-management process systems, the regulator must also change its inspection strategy from inspecting on the basis of detailed external regulations to assessing safety-management systems and the detailed rules developed within such systems.[90] The latter may be a more difficult task for the regulator, as it cannot simply observe whether the externally prescribed procedures are being followed but must become deeply familiar with each company's unique safety protocols. Ashby and Diacon warn that vaguely defined goals and processes can breed legal loopholes and make enforcement and prosecution problematic.[91]

Determining what regulations are most appropriate seems therefore to depend crucially on the size of the company and the complexity of its technology, which are often correlated. Large firms working with complex technologies prefer, and can cope with, flexible goals, outcome-based rules, and risk-management process rules, which give them the freedom to devise their own detailed solutions on the strength of their expertise and knowledge of their technology.[92] Small businesses operating less complex technologies prefer clear, easily accessible rules, formulated in a concrete way.[93] Where outcome rules can be formulated in a concrete, measurable way, such rules may

[88] Ayres and Braithwaite; Anthony Ogus and Carolyn Abbot, "Sanctions for Pollution: Do We Have the Right Regime?" *Journal of Environmental Law* 14, no. 3 (2002): 283–98.
[89] Fariman and Yapp; Christopher A. Janicak, "Employers' Knowledge of the Hazard Communication Standard Requirements and the Perceived Barriers to Compliance," *Journal of Safety Research* 27, no. 4 (Winter 1996): 233–39; and Loosemore and Andonakis.
[90] Andrew Hale, Louis H.J. Goossens, and Ibo van der Poel, "Oil & Gas Industry Regulation: From Detailed Technical Inspection to Assessment of Management Systems," in *Changing Regulations: Controlling Risks in Society*, ed. Barry Kirwan, Andrew Hale, and Andrew Hopkins (Oxford: Pergamon, 2002), 79–108.
[91] Simon G. Ashby and Stephen R. Diacon, "Motives for Occupational Risk Management in Large UK Companies," *Safety Science* 22, nos. 1–3 (February–April 1996): 229–43.
[92] Majumdar and Marcus.
[93] Australian Consumers' Association, *Submission to Taskforce on Reducing the Regulatory Burden on Business* (Marrickville, New South Wales, Australia: Australian Consumers' Association, 2005).

provide an optimum solution for both small and large companies. The dilemma is most acute where goals cannot be sensibly formulated in concrete terms.

The strategy of reducing the number of regulations by shifting to a small number of outcome-based or risk-management process regulations seems most likely to succeed with large firms in complex industries. For small firms, who may regard regulation at best as a necessary evil to be kept to the minimum, some compromise has to struck between a few abstract but vague goals or management-process regulations and a larger number of concrete, but detailed, action rules. One option, discussed above, is disclosure rules, which make it easier for workers to determine risk and provide market incentives for firms to mitigate risk. Disclosure rules have the added benefit that workers have better information about their own risk averseness than regulators, but they do depend for their success on worker activism and power. Regulators may also use incentives (such as tax credits) to encourage voluntary compliance. This would mean fewer companies complying with the rule but those would also be the companies with the highest cost of compliance. Compliance would be lower under such a regime, but there would also be offsetting benefits in increased competition and innovation, including in risk management.

Studies show regulators usually consult only large companies when developing regulations and neglect to consult smaller companies whose particular concerns remain unclear to regulators.[94] In Europe, this focus on large companies has led regulators to shift to risk-management process regulation, which tends to leave the small companies unsatisfied and seeking help to formulate the necessary action rules. The approach through risk-management process rules has not been attempted in the United States, with the possible exception of food safety regulation.[95]

A potential compromise explored in some countries and industries is to have overarching outcome regulations underpinning risk-management process and action rules that are mandatory unless a company comes up with its own action rules and demonstrates to the regulator that its processes are at least equally effective in managing hazards. The Dutch experiment described above is a compromise along these lines but with elements outsourced to industry and professional associations rather than individual companies.

### 5.3. Communicating and training in regulations (box 9)

We have considered how the regulatory burden may be reduced by eliminating regulations that are not cost-effective or by specifying outcomes or risk-management processes. The next best way to reduce the regulatory burden is to increase the accessibility of the regulation. More effective ways of finding, understanding, and interpreting relevant regulation are needed.

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[94] See for example Keith W. Holman, "The Regulatory Flexibility Act at 25: Is the Law Achieving its Goal?" *Fordham Urban Law Journal* 33 (2005): 1119–37; Ogus; and Charles Simeons, "Health and Safety Regulations: A Key Issue for the Board," *Long Range Planning* 19, no. 3 (June 1986): 86–92.

[95] Philippa Gander, "Fatigue Management in Air Traffic Control: The New Zealand Approach," *Transportation Research Part F: Traffic Psychology and Behaviour* 4, no. 1 (March 2001): 49–62; Neil A. Gunningham, "Best Practice Rail Safety Regulation" (Working Paper 31, National Research Centre for Occupational Health and Safety Regulation, Regulatory Institutions Network, Australian National University, Canberra, 2004); Jan Hovden and Ranveig K. Tinmannsvik, "Internal Control: A Strategy for Occupational Safety and Health: Experiences from Norway," *Journal of Occupational Accidents* 12, nos. 1–3 (June 1990): 21–30; and Lord Robens.

Controlled studies have shown that training in the requirements of regulations increases compliance with regulations in small businesses and can even increase compliance with outcome-based or risk-management process regulations.[96]

A number of authors point to the potential of information technology (IT) to help in this.[97] They envision databases and expert systems that can be queried by the regulated organization to learn what applies to its processes and activities. However, we did not find examples in the literature studied of successful IT applications that solve the problem of ignorance of the law and its correct interpretation. The finding that practically no small businesses actively search for information on regulations with which they should comply suggests that simpler access to information about regulation may not improve knowledge of it. However, if such a regulation database were to be proposed, some national or industry leader must take charge of it, as developing an IT support system is not cheap and no small firm can bear its cost alone.[98] The alternatives for developing an IT support system are either that companies in industry, trade associations, or professional associations could coordinate to finance the project or that government could see it as part of its duty of informing the regulated of their obligations.

If two or more agencies regulate the same activity of the company, those regulations may overlap and even conflict.[99] Aagard shows that overlapping jurisdictions (he examines overlap between the Occupational Safety and Health Administration and the Environmental Protection Agency) need not cause problems if the overlap is explicitly managed by the two agencies. The agencies can resolve inconsistencies in regulations, systematize regulation and its implementation, and remove gaps both in rule making and in inspection practice by collaborating explicitly.[100] Aagard also argues that it is an illusion to expect that all such boundaries between jurisdictions can be removed by amalgamating agencies. Only at the level of the organization do all of these jurisdictions come together. Agencies have their natural homes in areas of authority; boundaries can only be shifted but never eliminated. An explicit mandate to manage the boundaries can reduce conflict between agencies but this is harder when there are larger numbers of rules: the regulator is as human as the regulated and will have difficulty processing large and complex sets of information about rules and regulated entities.

### 5.4. Enforcing the use of regulations (boxes 1 & 3)

We mentioned one of the main strategies adopted by small businesses in relation to compliance with a mass of regulations, namely to wait until the inspector comes and then to negotiate which regulations must be implemented.[101] This process of negotiation effectively transfers the burden of boxes 6–9 to the inspectorate. Jurisdictions in Europe differ in whether they regard this as a

[96] Fairman and Yapp; and Daniel Stokols, Shari McMahan, H.C. Clitheroe Jr., and Meredith Wells, "Enhancing Corporate Compliance with Worksite Safety and Health Legislation," *Journal of Safety Research* 32, no. 4 (December 2001): 441–63.
[97] Burman and Daum; Chittenden, Kause, and Poutziouris; de Gelder; and Andrew Hale, Frank W. Guldenmund, P.L.C.H. van Loenhout, and Johannes I. H. Oh, "Evaluating Safety Management and Culture Interventions to Improve Safety: Effective Intervention Strategies," *Safety Science* 48, no. 8 (October 2010): 1026–35.
[98] For a summary of the present conditions and challenges in advancing more easily accessible regulations, see Jerry Brito, "The Promise And Limits Of E-Rulemaking" (research brief, Mercatus Center at George Mason University, Arlington, VA, December 8, 2010, available at http://mercatus.org/sites/default/files/publication/promise-and-limits-of-e-rulemaking_1.pdf).
[99] Aagard; Burman and Daum; de Gelder; and Lord Robens.
[100] Aagard.
[101] Fairman and Yapp.

legitimate role for the inspector or view it as a hidden subsidy of expert advice that companies should pay for from consultants or occupational safety and health services.[102]

Chittenden et al. propose that companies should be allowed to put the amount of a fine for non-compliance toward making their workplaces compliant.[103] Such a provision would not differ much in principle from the British inspectorate's powers to order specific improvements in workplace safety to be made under the threat of a fine if the order is not followed. There is evidence that enforcement style influences how motivated company managers are to comply with regulation . Some studies argue that deterrent approaches, although still relevant, should not occupy center stage.[104] Rather a more collaborative style of enforcement coupled with a mix of enforcement strategies is today more appropriate.

### 5.5. Evaluating, redesigning, and scrapping regulations (boxes 2 and 5)

In our review of the management of workplace rule management, we characterized the evaluation, redesign, and replacement of regulations (boxes 2 and 5) as the motor of good rule management. At the regulatory level, these activities are placed almost entirely outside the regulated organizations and instead with the regulatory agencies. However, that does not reduce the importance of this process. One reason for the proliferation of regulations is that effective mechanisms for reviewing and streamlining them are used infrequently. Such review can be forced by having "sunset provisions" limiting regulations' lifespans unless agencies renew them,[105] or review can be compelled by Congress.[106] Agencies may also decide to review their own regulations periodically, as is currently being done by Environmental Protection Agency.[107]

Learning about and improving regulations will not occur unless some "learning agency" is designated as owner of that process.[108] The government must clearly establish a "learning agency" to enable each regulatory agency to learn about what works, and what does not work, in its formal regulations. Learning about and improving regulations must be explicitly defined as a goal and the agency responsible for attaining that goal must be properly funded.

## 6. Conclusions

We have offered an analysis of rule use and management derived from our review of safety rules at the workplace and intra-organizational level. We have extrapolated from that analysis to consider the consequences for companies of having to comply with a large set of detailed regulations, especially when regulations are scattered across many different laws or enforced by multiple

[102] David Walters, ed., *Regulating Health and Safety Management in the European Union: A Study of the Dynamics of Change* (Brussels: Peter Lang, 2002).
[103] Chittenden, Kause, and Poutziouris.
[104] Gunningham and Sinclair.
[105] Australian Chamber of Commerce and Industry; Banks.
[106] Chittenden, Kause, and Poutziouris.
[107] U.S. Environmental Protection Agency, "Improving on Regulation: Final Plan for Periodic Retrospective Reviews of Existing Regulations," August 2011 (available at http://www.epa.gov/improvingregulations/documents/eparetroreviewplan-aug2011.pdf).
[108] Floor Koornneef and Andrew Hale "Organisational feedback from accidents at work," in *After the event: from accident to organisational learning*, ed. Andrew Hale, Bernhard Wilpert, and Matthias Freitag (Oxford, UK: Pergamon, 1997).

regulatory authorities. We have focused on analyzing the problem of regulation and its burdens and we have offered some suggestions of ways to reduce regulatory burdens. We conclude that, while the whole complex of detailed regulations does of itself impose a heavy burden of search and interpretation on companies, a potentially more serious problem is the strong forces pushing regulators to formulate their regulations at an action rule level. These forces lead to a proliferation of regulations and a jungle of exceptions and exemptions. To cope with such imposed action rules, companies focus on compliance rather than on managing risks. This turns compliance into a bureaucratic, legalistic paper game rather than a creative process of optimizing risk control and is likely to inhibit innovation.

We conclude that there is a large regulatory burden, particularly on small businesses. It is true that many regulations have benefits in excess of their costs, although these regulations may still be reformed to reduce costs or increase benefits. Nevertheless, many existing regulations were produced prior to the internet revolution or are the result of industry efforts to reduce competitive pressures and are no longer useful (if they ever were) for solving social problems. In a number of cases, information and incentives now exist that make these regulations ineffective or harmful and, after a proper analysis and review process, these regulations should be eliminated. Cost-benefit analysis can offer guidance on the advisability of introducing specific regulations by looking at the burden of compliance and its transactional costs in relation to the expected benefits of compliance.

To the extent that extant regulations are cost-effective, we have argued for a much closer attention to the style and content of proposed regulations. Companies that possess the motivation, resources, and competence to devise their own detailed risk-control solutions should be permitted to do so after regulators define appropriate outcomes. If it is not possible to allow companies to devise their own risk-control solutions, regulators should consider allowing companies to devise their own risk-management process rules. These changes would considerably reduce the size and complexity of regulations formulated at such levels. Companies know their own processes much better than outsider regulators, who frequently underestimate the complexity and diversity of tasks performed by the firm. Furthermore, when firms focus on problem-solving instead of compliance they are more likely to invest in experts who can find innovative solutions to problems. A shift to outcome-based rules would suit large companies and shift the role of enforcement agencies to monitoring outcomes or, with process rules, approval of solutions and enforcement of them. Many European countries have already moved in this direction. It is high time for the United States to consider following Europe's lead in this regard.

Small businesses are organized differently to large firms, relying less on rigid procedures and more on solving problems as they arise. This can make it harder to adapt to rigid and detailed regulations and also harder to develop procedures that are observable by regulators. Outcome-based regulation suits small businesses only when the outcomes to be achieved are easily measurable and the business has the competence to decide how to meet those goals. With many safety goals, it is difficult to define concrete outcomes, and a compromise must be struck between flexibility and clear, concrete rules that specify particular actions. Disclosure rules and market-based incentives provide one way around this dilemma but rely on the effective working of that market and hence the power of its participants (workers or consumers). Action rules can provide clarity and detailed guidance for those small businesses that do not have the staff or the time to devise their own action rules, provided that the rule sets are sufficiently small and knowable. As rule sets grow it is harder for firms to identify which rules apply to them. How, and whether, improved accessibility to the complex set of detailed rules can be achieved through innovative use of IT remains a question for study. Solutions can be sought in improving search access and by consolidating them into codes that are arranged not by regulatory jurisdiction but in terms of company processes. Industry and professional bodies can play a vital role in such translation roles. There is also a role for the regulatory agencies if they were to be given a mandate to do so. This could encompass collaboration with industry and professional bodies to help to develop such IT support.

When regulations are looked at piecemeal and their costs and benefits considered individually, the analyst loses sight of the cumulative effect of the whole set of regulations that apply to the same organization. Problems must have an owner if they are to be solved, and a too-large set of rules undermines companies' sense of ownership of the risks inherent in their processes. Regulatory agencies themselves, which have a strong interest in the amount and style of regulations they develop, are also part of the problem of regulatory overload. A body such as the Office of Information and Regulatory Affairs or the General Accountability Office may be better placed to take on a critical role, questioning the need for and style of regulations as well as bringing agencies together to resolve gaps and conflicts between their regulations. The various regulatory agencies should themselves coordinate across their jurisdiction boundaries. Each agency should have an office within it charged with learning how to improve regulations and optimize their burden on the regulated. The Office of Advocacy of the Small Business Administration could also support this process by developing a small business standpoint on the style of regulation appropriate to small businesses.

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BRIDGING THE GAP BETWEEN ACADEMIC IDEAS AND REAL WORLD PROBLEMS

# DO MORE REGULATIONS EQUAL LESS SAFETY?

American business must comply with a lot of rules. There are over 165,000 pages of federal regulations, almost 20,000 of which were added in the past four years. One of the chief rationales for many regulations is safety, and, as Congress expands regulators' mandates, regulators concentrate on writing highly detailed and specific rules to cover perceived gaps in the law. For the sake of protecting the health and safety of workers and consumers, the federal government accepts the significant drag regulatory compliance puts on the U.S. economy and the burden it places on all businesses, but especially small ones.

Psychology, economics, and organizational science, however, suggest that too many regulations—particularly highly detailed regulations—may make society less, rather than more, safe. In "Regulatory Overload: A Behavioral Analysis of Regulatory Compliance," occupational psychologists and economists look at the behavioral effects of regulatory overload on businesses. They find that too many, and too detailed, regulations can reduce compliance, discourage innovation, and fuel uncertainty, ultimately making Americans less safe.

Below is a brief overview of the study's key findings. To read the paper in its entirety and learn more about its authors, please click here.

## REGULATORY OVERLOAD

Regulatory overload occurs when too many, and too detailed, regulations swamp businesses. The effects of these regulations are reduced compliance, less innovation, and increased uncertainty.

*Reduced Compliance.* Workers subjected to too many rules—some of which are overly complex, contradictory, outdated, or inapplicable to their specific jobs—often forget, cannot prioritize, or simply ignore many of them.

- Helpful rules become harmful if they obscure more important rules. For example, road signs announcing important, but relatively minor, risks can distract a driver long enough to miss the stop light.
- Regulators often try to address a wide range of industries and situations by writing very detailed "command-and-control," or prescriptive, rules.
  - The length and legalistic language of the regulations make it hard for businesses to decipher if, or how, these rules apply to them.
  - The rules that do apply directly often fail to capture the complexity of the problems businesses face.
- Even if there has been full regulatory compliance, something bad happening in an industry or a specific business often spurs even more rules and exceptions, further increasing the complexity of, and difficulty of complying with, the parts of the regulatory code applicable to each situation.

- When workers no longer see regulations as a means of promoting safety, they are less likely to comply; when they do comply, they often focus on passing inspections, rather than improving safety.
- Workers who see an increasing number of regulations as irrelevant to their jobs become less motivated to comply with any of the rules.

*Less Innovation.* When there are too many rules, particularly command-and-control rules, businesses may respond by becoming rigid and reactive. Instead of anticipating and addressing safety concerns, businesses become so preoccupied with following the rules that they fail to pursue innovative solutions to improve safety. The failure to innovate leads to more mistakes, which spurs more regulations, less innovation, less safety, more mistakes, another round of rules, and so on. In addition:

- When something unexpected happens, reactive businesses are less capable of solving problems. Instead, they simply wait for inspectors to tell them what to do.
- Financially, it often is more cost-effective for firms to invest in legal experts, to ensure regulatory compliance at the lowest possible cost, than in experts who can find the best solutions to the business' specific challenges.
- Attempting to comply with too many rules is harder for small businesses. Large businesses manage by complex internal procedures and can dedicate resources to compliance. Small businesses without internal bureaucracies must be as flexible as possible and cannot arrange their business around rigid external rules.
- When large businesses lobby to have their procedures adopted as rules, small businesses bear a disproportionate compliance cost—at least 30% higher per employee—and may be priced out of the market. This reduces competition and innovation, both in general and in the realm of safety.

*Increased Uncertainty.* Businesses face an on-going climate of uncertainty fueled by too many vague, broad, and overly complex rules. This uncertainty suppresses investment and growth across the economy, and is particularly harmful for small businesses.

- The sheer volume of rules on the books today creates uncertainty; but the situation is made much worse by the fact that no rule ever is "final." Particularly when regulators use command-and-control techniques, there will be more rules that change more often.
- Uncertainty often leads to paralysis. Businesses delay investments, even in safety improvements, so as to see what regulators will do next. For example, a nuclear power plant might not install a new safety system because regulators might later specify a different, though not necessarily better, technical standard.

**SOLUTIONS**

In the attempt to better protect workers, consumers, and the environment, regulators write ever more, and ever more prescriptive, rules. But evidence suggests that constantly expanding the regulatory code has the opposite effect: the difficulty of complying with such complex regulations makes Americans less safe.

Simplifying and clarifying the regulatory code would go a long way toward improving safety. Specifically, regulators can eliminate rules that are no longer needed and keep rule books shorter with clear compliance priorities. They also can focus on defining required *outcomes,* rather than detailing activities. This would return to businesses and workers the behavioral and financial incentives to find the best solutions for their specific, ever-evolving set of challenges—and the responsibility to do so.

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[Whereupon, at 11:29 a.m., the subcommittee was adjourned.]