THE OBAMA ADMINISTRATION'S REGULATORY WAR ON JOBS, THE ECONOMY, AND AMERICA'S GLOBAL COMPETITIVENESS

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

FEBRUARY 28, 2013

Serial No. 113–38

Printed for the use of the Committee on the Judiciary

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

U.S. GOVERNMENT PRINTING OFFICE

79–587 PDF WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
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THE OBAMA ADMINISTRATION'S REGULATORY WAR ON JOBS, THE ECONOMY, AND AMERICA'S GLOBAL COMPETITIVENESS

THURSDAY, FEBRUARY 28, 2013

HOUSE OF REPRESENTATIVES,

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

COMMITTEE ON THE JUDICIARY,

Washington, DC.

The Subcommittee met, pursuant to call, at 9:01 a.m., in room 2141, Rayburn House Office Building, the Honorable Spencer Bachus (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Goodlatte, Farenthold, Issa, Marino, Holding, Collins, Rothfus, Cohen, DelBene, Garcia, and Jeffries.

Staff Present: (Majority) Daniel Huff, Chief Counsel; Ashley Lewis, Clerk; (Minority) James Park, Minority Counsel; and Susan Jensen-Lachmann, Counsel.

Mr. BACHUS. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time. We are expecting some early votes, so we will try to get rolling. We welcome all our witnesses today and look forward to your testimony. Now we will go to opening statements, and the Chair recognizes himself for the purposes of an opening statement.

This is the first of a series of hearings that this Subcommittee will hold on the Federal regulatory structure, its impacts, and potential regulatory reform. To be clear from the start, the argument is not that we don't need any regulations at all. Reasonable rules provide clear rules of the road for businesses so they have some certainty and know what to expect, they provide safeguards for consumers and the general public, and they provide protection for the environment. But clear and reasonable rules of the road that provide certainty are not what we have gotten from this administration, and that has been a major contributing cause to the continuing underperformance of the U.S. economy.

That is something that I have experienced with the oversight of the Dodd-Frank Act, but it cuts across every Federal agency. For example, in 2011 the President ordered regulatory agencies to consider cost and benefits and choose the least burdensome path. We applauded that statement. The order continued, and I quote, "The

regulatory process must be transparent and include public participation." This sounded perfectly reasonable, and that is how it was reported.

But the devil is in the details. It is at the implementation stage where the promises have failed to pan out, and it is there that a regulatory tax is imposed on jobs, the economy, and America's global competitiveness. Only an expert would notice how the administration's cost-benefit analysis has been skewed. For example, less than 0.01 of a percent of the claimed monetary benefits from the EPA's rule to reduce mercury emissions actually come from reducing mercury. The rest arises from the so-called incidental benefit of reducing particulate matter that was not the principal target of the regulation because such particulate matter was already considered by EPA to be generally within acceptable limits.

What does this translate to? In my district in Alabama, it is the difference between a concrete plant in Leeds, Alabama, employing hundreds of people, being able to comply with the new regulations or potentially being shut down because of the cost.

Many of the new regulations fall most heavily on small businesses that are the job creators in our economy. If you are a larger company, you can probably financially afford to hire an army of compliance officers. But if you are a small business, you are already stretched thin, and every extra regulatory cost means you have less money to invest in your business and hire workers. I think that is something that I think Republicans and Democrats are in agreement on, and that is the burden on small businesses.

Factory workers, anxious about the economy, need to know about recent findings that over the next 10 years regulations could shave industrial output from between 2.3 to 6 percent at a time when we need more growth and jobs. Americans still looking for work need to be aware that agencies ignore the burden of job displacement when calculating regulatory cost. Agencies simply assume displaced workers will find a new job quickly. But a recent study shows overwhelming evidence that even temporary job displacements cause significant long lasting declines in earnings. Of workers who lost long-tenured jobs from 2009 to 2011, 44 percent were still unemployed 3 years later. Fifty-four percent of those who did find jobs earned less. Older workers were hit hardest.

Communities bear the impact, too. In Avon Lake, Ohio, a plant is shutting down because of the rising costs associated with EPA's controversial utility MACT rule. Closures like this devastate families, neighborhoods, and the local tax base that schools and city governments depend on. We often think of regulatory tradeoffs affecting only businesses, but they affect individuals as well. If a regulation increases the price of a needed product without a corresponding benefit, it takes money away from a person that could be spent elsewhere that would have a greater health or safety benefit. This especially affects low-income Americans for whom money is already tight.

This is another area which very provocative research is being done on the harmful effects of regulations on our most vulnerable citizens. During this series of hearings, we will examine the shortcomings and failures of the current regulatory system, with an eye to developing clearheaded, workable solutions. Federal agencies

need to do a better job—a much better job—of determining when regulation is needed and proposing smarter regulations when it is. And in forming regulations we actually do have to consider the consequences on jobs and the economy, because that is the foundation on which everything else rests.

Finally, I want to close with this video of a statement made by Federal Reserve Chairman Ben Bernanke at a Humphrey-Hawkins hearing earlier this week. Please turn to our video monitor. I guess we need some sound, too.

[Video shown.]

Mr. BACHUS. Okay. Thank you. At this time I recognize the Ranking Member for his opening statement.

Mr. COHEN. Thank you, Mr. Chairman. First, I would like to put that video back on and get to the part where Bernanke says the sequester could hurt the deficit more than it could help. That was coming up in just a minute, I think.

Mr. BACHUS. Let me say this. In the hearing, I stated very clearly that Congress ought to come together. And Chairman Bernanke said we ought to come together and make long-term structural changes in our entitlement programs. And I think there is agreement on that across the aisle. And I have urged the Congress and the President to get to work.

And we were all told that the sequester wasn't going to happen, and we all know that that is just another promise that didn't happen. So, you are absolutely right. That work should have started months ago. And we could actually raise the retirement age for Social Security in the future by 2 months and save more money than this sequester will save, and it will be a long-term structural change and less harmful for the economy.

He also said that fee-for-services in our medical system was driving up costs, and that addressing that, reforming our health care system and doing away with fee-for-services and having the patient invest more in their own health care would change the entire dynamics of the debt.

Mr. COHEN. Thank you. I appreciate that.

Mr. ISSA. Thank you for yielding all that time to the Chairman, too.

Mr. BACHUS. You have 5 minutes, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chairman.

Mr. BACHUS. And for Mr. Issa, I think he only has a minute left.

Mr. COHEN. Thank you.

On a typical day, and today is a typical day, I get up, brush my teeth, shower, get bagel and bacon, coffee, get dressed, go to my car parked outside, and drive into the Capitol. And then I am in the office, and I work, I come to hearings such as this, I go to the House floor, I meet with constituents, and, you know, grab a bite to eat here and there, finish the day with dinner, and that is it.

At the end of each week, when we are in session, I will fly back and forth from Memphis to Washington. And I do all this without thinking twice about whether any of these activities are going to be harmful to my health or whether there is going to be a risk of harm whatsoever. And that is because we take these activities for granted in our country because we have a strong regulatory system

that allows us to go on with our lives and not have to be at risk so many times.

We strive to protect our environment, our health, and ensure the safety of our workplaces, our public spaces, our consumer products, cars, airplanes, among other things. And we are concerned about our most vulnerable citizens who might get black lung disease if we didn't have regulations in mining, health care workers who are exposed to too much radiation, asbestos exposure to construction workers, and other of our most vulnerable citizens who are put in jobs that are often the least desired and the most at risk for health hazards. But regulations have helped over those years. Sinclair Lewis would think, I think, that regulations are good for our most vulnerable citizens, and so do most people, I think.

The regulatory debates in this Subcommittee which we have had over the last couple of years have focused almost exclusively on the costs of implementing regulations, and there are costs indeed. It is often left to those of us on this side of the aisle to defend regulations and the benefits that they have, and the benefits consistently outweigh the costs of regulations. In addition to ignoring the net benefits of regulations, those who focus exclusively on the costs tend to ignore the greater costs of regulatory failure. Mr. Glicksman of GW Law School and Mr. Weissman of Public Citizen will discuss in greater detail regulatory failure, that that regulatory failure can be more costly for the economy and society than the existence or the creation of new regulations.

Let's not forget that it was the lack of adequate regulations that caused the Deepwater Horizon oil spill, still in litigation, still affecting the Gulf Coast, or the mine disasters that we recently experienced. The mortgage foreclosure crisis was caused by the lack of adequate regulations and enforcement thereof. And the 2008 financial crisis and the great recession that followed and the sequester that we see today that does involve different issues that we have discussed.

In short, there is a far greater human and economic cost to stopping agencies from regulating than there is in allowing new regulations to take effect. I will leave the rest of our discussion to our panel of witnesses and our question time, but I would like to ask this of our good Chairman. We ought to be able to have serious, substantive, and nuanced discussion about what problems might exist in the Federal regulatory system—nothing is perfect, and indeed it isn't—and what Congress ought to do to address the problems. But to have hearings with inflammatory titles like "The Obama Administration's Regulatory War on Jobs, the Economy and America's Global Competitiveness," those such inflammatory and partisan titles take us away from discussions of issues and make us have to defend our President and make this a fight back and forth over politics and verbiage. And that is not the way to resolve regulations and good policy. It makes it difficult for all of us to have a debate in a proper atmosphere.

We will, as we did the last Congress, unfortunately, end up with a battle of talking points. So if we want to work on this, I would suggest that. I am afraid if I got on the floor and said something about war there would be an entire CNN episode about it, so we won't do that. And we know from the song, war, what is it good

for? Absolutely nothing. So I hope we can move forward and do better, and I yield back the balance of my time to Mr. Issa or whoever.

Mr. BACHUS. Thank you, Mr. Cohen.

I would now like to recognize the full Committee Chairman, Mr. Bob Goodlatte of Virginia, for his opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman. And thank you for holding this important hearing.

Since the November 2012 election, the Obama administration has moved into overdrive in its regulatory war on jobs, the economy, and America's global competitiveness. Let me be clear, Congress cannot sit silent while America's economic growth is imperiled. One of my top priorities in this Congress will be to do everything possible to reduce the regulatory burdens that our Nation's small businesses are facing, to get more Americans back to work, and to help grow our economy.

A study last summer by the Organization for Economic Cooperation and Development revealed that after measuring countries by the number of regulations they have, it is now easier to start a business in Slovenia, Estonia, and Hungary, than in America. According to former CBO Director Douglas Holtz-Eakin, countries from England to South Korea to Portugal have already undertaken regulatory reforms. England has been particularly aggressive, adopting a one-in, two-out rule for new regulations, which requires policymakers introducing a new regulation to rescind or modify an existing regulation that costs double so that the total regulatory burden is actually reduced. The governments of our international competitors are not merely paying lip service to lightening the regulatory load, they are taking meaningful actions.

We seem to be moving in the opposite direction. Last year, the total U.S. paperwork burden grew by more than 355 million hours, or 4 percent. A 2012 report by the NERA Economic Consultants on the regulations affecting the manufacturing sector found that exports in 2012 might have been as much as 17 percent lower than they would have been without the estimated regulatory burden. Such loss in output directly represents lost jobs and economic opportunities.

Instead of the regulatory burden diminishing to keep American businesses competitive and hiring, experts expect the pace of regulation to increase in President Obama's second term. Just prior to Election Day, the National Journal reported that, quote, "Federal agencies are sitting on a pile of major health, environmental, and financial regulations that lobbyists, congressional staffers, and former administration officials say are being held back to avoid providing ammunition to Mitt Romney and other Republican critics."

Now the floodgates are open. For example, the Patient Protection and Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act created a host of regulatory obligations which agencies have yet to fulfill. Similarly, the American Action Forum identified $123 billion in possible regulations in the administration's 2012 Unified Regulatory Agenda that would also add more than 13 million hours of paperwork burden. It is no wonder that the administration delayed releasing this agenda and its plans

for 128 new economically significant regulations until after the election.

What is most striking, perhaps, is this administration's insensitivity to the negative effects overregulation has on vulnerable groups. Overregulation costs American jobs. And a new study shows agencies' cost-benefit analyses fail to consider that over 75 percent of older workers who lose their jobs remain unemployed 3 years later, and those who can find work frequently must accept as much as 20 percent less in pay.

Overregulation also disproportionately burdens low-income households. Because of the law of diminishing returns, new regulations require spending increasingly more money to mitigate increasingly smaller risks. Many of these costs are passed down to consumers. New research from the Mercatus Center shows low-income households would be much better off spending this money mitigating more immediate personal risks, for example, by using money that should rightfully be theirs to afford rents in safer neighborhoods.

In light of these real trade-offs, I am deeply concerned that some pro-regulation advocates are calling for an executive order to rescind requirements that there be cost-benefit analysis of significant regulations. I hope that stories from Main Street about the negative impacts plant closures have on lives and communities will help sensitize regulators and their allies to the very real suffering that even well-meaning regulatory advocacy can impose.

However, we cannot rely on hope to turn the tide of excessive regulation. I am committed to restoring accountability and providing relief from excessive regulation to our Nation's small businesses and job creators who need it most. Last Congress, the Committee reported a number of important and far-reaching bills to reform overregulation, ease burden on jobs and the American economy, and restore America's competitiveness. The House passed them all, but the Democrat-led Senate refused to act, and President Obama threatened to veto them.

The overreach of Obama administration regulations is one of the chief reasons the economy has failed adequately to recover and produce new jobs throughout the Obama administration. Congress and the President must act to take a different direction that will allow America's jobs, economy, and competitiveness to be restored. The House will do its part, and for the sake of our economic future, I call on the Senate and the Obama administration to do theirs.

I thank the Chairman. I yield back.

Mr. BACHUS. Thank you, Chairman Goodlatte.

I would now like to recognize Mr. Doug Collins of Georgia for his opening statement.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate you convening a hearing on this important topic. I think this is one of the things that is vital to our country right now, and something we ought to look at to get us on a path to prosperity again.

It is an unfortunate misconception to paint the regulatory arena as being disconnected from the everyday lives of Americans. Regulations affect the air we breathe, the type of car we drive, and the food we feed our pets. Unfortunately, the Obama administration has created a web of regulations that are too complex, too expen-

sive, and completely ineffective. Economic growth cannot occur if job creators continue to be crushed by the fatal grip of overregulation.

In the upcoming days I plan to introduce the Sunshine and Regulatory Decree Settlement Act of 2013. This legislation ends the abuse of consent decrees and settlements to require more regulations. Regulators often use consent decrees and settlements to secretly establish new rules outside the regular rulemaking procedures without transparency and without public participation. This sue-and-settle approach has enabled agencies to impose higher costs with no accountability to those directly impacted.

One of the issues that has already been said today, and I think when we get into this there is a problem when we paint the fact that there is either one extreme or the other, that we need no regulation or we need overregulation. I think the problem we have got here is most people just want to get up, start their business or go to their workplaces, and be safe and do the things that need to be done. Government has a role, but government's role is not at the expense of business. Government's role is not at the expense of making the growth industry, as I had a constituent tell me yesterday, the only people we are hiring right now are people to do our regulatory reform, to make sure that we do the paperwork. That is not what this business was made to do. He wants to be able to expand his business in what he wants to be able to do in his field, not having to comply with overburdensome regulations that do not help his business.

I look forward to this hearing from the witnesses on this issue and many others. I thank the Chairman, and yield back the balance of my time.

Mr. BACHUS. I thank you, Mr. Collins.

I would now like to recognize the Chairman of the Government Oversight and Investigations Committee, and Member of this Subcommittee, Mr. Darrell Issa of California, for his opening statement.

Mr. ISSA. Thank you, Mr. Chairman. I would ask unanimous consent I have a full 5 minutes, in spite of my earlier outbreak.

Mr. BACHUS. All right.

Mr. ISSA. The Ranking Member, Mr. Cohen, talked about getting on an airplane without fear. Steve and I have been friends since he arrived here, and I know that when he arrived here several years ago he also got on that airplane without fear. We are not talking today about regulations in memoriam. We are not talking about decades and decades. We are not talking about reversing ones which have made our air and our water and our transportation safer.

What we are talking about here today, and what I know that the witnesses will be speaking of, is the growth of new regulations in a nanny state that is attempting to regulate every aspect without concern for the cost. Our Committee pushed hard and continues to push hard for cost-benefit.

Now, Mr. Greenblatt, I note, has a combination of stamped and probably multi-slide and every other machine it took to create that part in front of him. And on top of that, it has a plating. When I began work in my industry in Cleveland, Ohio, we still had chro-

mium and other metals that were being dumped into the Cuyahoga River, getting into Lake Erie and getting into our drinking water. Again, throughout the years of the Clean Air and Clean Water Act, we have addressed actual health hazards, manufacturers taking their leftovers and putting them on the backs of American people trying simply to drink water and breathe air.

But those days in fact have been a success. And rather than saying that it has been a success and making incremental changes closely analyzed to figure out whether or not it actually adds to life expectancy and quality of life, we on this side of the dais and those down Pennsylvania Avenue and beyond have an assumption that if they are not doing something and creating new rules and laws, they are obviously not doing their job.

The fact is that the Ranking Member, as is often does, used talking points, and he talked about lack of regulation causing Deepwater Horizon. Nothing could be further from the truth. Failure to comply with existing regulations by the Federal Government was a major factor. On the very day that the Deepwater Horizon blew up, two individuals from Mineral Management Service came aboard that facility. In violation of any form of common sense, where they were required to be two separate people conducting investigations designed to be check and balance of what they saw, it was a father-son team. They came, they drank coffee, and they left.

The truth is all of the materials and all of the information was honestly given to Mineral Management as they asked and they did not see a problem. Likewise, as the euphoria of debt far beyond that which people could pay, even in my original hometown of Cleveland, Ohio, caused people to have no possibility of paying their mortgages unless their home continued to rise in value and they could refinance, as that happened, the Federal Reserve, the treasurer, and others continued to talk about—and the President of the United States at that time, George W. Bush—continued to talk about the benefit of home ownership.

So let us not rewrite history here today and say that all government needs to do is have more regulations. All government needs to do is do what it is required to do and do it well. Then regulations on a limited basis with a cost-benefit and a degree of transparency can be considered.

In closing, I might say here today that there are three kinds of taxes. There are taxes in which we take money. And I would share with the Ranking Member a concern that we only take 60 cents for every dollar we spend, clearly unsustainable, and we need to address that. There are taxes in which we ask people to do things at their expense—actually order them do them at their expense—and then don't consider it a tax. As a matter of fact, it is only tax deductible to the extent that you didn't make a profit and therefore do not have to pay taxes on it.

Last but not least, there is the new tax in the Obama administration. That is that any time government does not provide more goods and services with somebody else's money you must be taxing people's ability to live their lives. The sequestration today is being talked about as though it is an onerous tax on every American if somehow 2.4 percent of spending were not to happen. For example, the Ranking Member, when he talks about going back and forth on

that airplane, he has been doing it since the TSA had about 15,000 employees. Today they have 68,000 employees. There is no question as to why TSA stands for thousands standing around. When you triple the amount of employees for the same amount of flying personnel, you are inevitably going to have built in inefficiencies.

So today our job is to listen to people who have dealt with these new regulations, listen to them honestly, and, Mr. Cohen, ask the question was that particular regulation necessary? Was that regulatory assertion necessary? Not should we have had the Clean Air and Clean Water Act, something that people on both sides of the dais agree with. And I yield back.

Mr. BACHUS. Thank you.

I now recognize our Ranking Member, Mr. Steve Cohen, for the purposes of introducing an opening statement.

Mr. COHEN. Thank you. Thank you, Mr. Chairman. Mr. Chairman, the Ranking Member of the full Committee, Mr. Conyers, has a statement. And while you were kind enough to allow me to read it, I won't do so.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Today's hearing title reflects the 3 principal canards of the Majority's anti-regulatory agenda and I want to address each of these in detail.

Let's first begin with the Majority's claim that regulations inhibit job creation.

It is pretty incredible that the Majority continues to make this claim in light of the fact that there is absolutely *no* credible evidence establishing the fact that regulations have any substantive impact on job creation.

And, that is not just me saying this. Bruce Bartlett, a senior policy analyst in the Reagan and George H.W. Bush Administrations, has explained:

> Republicans have a problem. People are increasingly concerned about unemployment, but Republicans have nothing to offer them. The G.O.P. opposes additional government spending for jobs programs and, in fact, favors big cuts in spending that would be likely to lead to further layoffs at all levels of government[.]
>
> These constraints have led Republicans to embrace the idea that government regulation is the principal factor holding back employment. They assert that Barack Obama has unleashed a tidal wave of new regulations, which has created uncertainty among businesses and prevents them from investing and hiring.

He then concludes:

> *No hard evidence is offered for this claim; it is simply asserted as self-evident and repeated endlessly throughout the conservative echo chamber.*

Susan Dudley, who headed the Office of Information and Regulatory Affairs during the administration of George W. Bush, has been quoted as saying that it is "hard to know what the real impacts of regulation are." She also stated that she was unaware of any "empirically sound way" to assess the impact that proposed rules have on jobs.

And, during one of the many hearings held on this issue in the last Congress, the Majority's own witness clearly debunked the myth that regulations stymie job creation.

Christopher DeMuth, with the American Enterprise Institute (a conservative think tank), stated in his prepared testimony that the "*focus on jobs . . . can lead*

to confusion in regulatory debates" and that *"the employment effects of regulation, while important, are indeterminate."*

Another unsubstantiated claim that the Majority makes in support of its anti-regulatory agenda is that "regulatory uncertainty is hurting the business community" and makes American businesses less competitive in the global marketplace.

Once again, Bruce Bartlett, the senior economic official from the Reagan and Bush Administrations, rejects this false claim:

> *[R]egulatory uncertainty is a canard* invented by Republicans that allows them to use current economic problems to pursue an agenda supported by the business community year in and year out. *In other words, it is a simple case of political opportunism, not a serious effort to deal with high unemployment.*

So make no mistake, today's hearing is yet another example of that political opportunism recognized by Mr. Bartlett.

Perhaps the biggest canard in the Majority's arguments for so-called regulatory reform is the purported damaging impact of regulations on the Nation's economy.

Throughout the previous Congress, the Majority cited a deeply flawed study that estimated regulations had a $1.75 trillion cost of regulations.

This figure is utterly unreliable and meaningless. And, again, don't take my word for this.

The nonpartisan Congressional Research Service conducted an extensive examination of the study and found much of its methodology to be flawed.

Moreover, CRS noted that the study's authors themselves acknowledged that their analysis was "*not* meant to be a decision-making tool for lawmakers or Federal regulatory agencies to use in choosing the 'right' level of regulation."

At the hearing the Subcommittee held on this issue last September, Professor Lisa Heinzerling testified about her well-researched academic analysis of this study and its numerous methodological flaws.

The Majority's focus on regulatory costs also completely and blatantly ignore the overwhelming net benefits of regulations.

According to the Office of Management and Budget, the net benefits of regulations through the third fiscal year of the Obama Administration exceeded $91 billion, *which is 25 times more than the net benefits during the first three years of the George W. Bush Administration.*

OMB also reports that for fiscal year 2010, federal regulations cost between $6.5 billion and $12.5 billion, but generated between $18.8 billion and $86.1 billion in benefits.

Yet another concern that I have about this hearing is that it is the *17th time* that the Committee has considered what is essentially the same topic: federal agencies and rulemaking.

I know regulations play a major role in ensuring the safety of the food we eat, the cars we drive, the air we breathe, and the medicine we consume.

And that the Nation's Great Recession was the result of too little, not too much regulation.

Major financial distress in American history has often been triggered by a regulatory failure of some type. The Great Depression largely resulted from the failure of severely undercapitalized banks that engaged in imprudent lending practices and other speculative activities.

The current Great Recession was largely fueled by an unregulated home mortgage industry and securitization market.

But come on now. During the 112th Congress, this Committee did not hold *a single hearing on:*

- the ongoing foreclosure crisis and its crippling effect on the Nation's ability to recover its financial stability as well as that of millions of Americans in communities across the Nation;
- the nearly lifelong peonage that millions of young Americans must endure to repay private student loan debt, that even bankruptcy will not alleviate; and
- the extremely deleterious effects of mandatory minimums and the resultant overincarceration particularly has on African Americans in our Nation.

I could go on and on listing the critical issues that this Committee should consider.

Finally, if we were really serious about creating jobs, then we should be focusing on those measures that will actually result in creating jobs.

Just over a year ago, President Obama addressed a joint session of Congress at which he presented his American Jobs Act, a comprehensive bill that would have:

- cut payroll taxes for qualifying employers,
- fund a work program to provide employment opportunities for low-income youths and adults;
- fund various infrastructure construction projects, including the modernization of public schools; and
- start a program to rehabilitate and refurbishing hundreds of thousands of foreclosed homes and businesses.

Unfortunately, Congress chose to ignore this worthy initiative.

As many of you know, I have a measure—H.R. 4277, the "Humphrey-Hawkins 21st Century Full Employment and Training Act"—which aims to provide a job to any American who seeks work.

My bill would create a funding mechanism to pay for job creation and training programs.

These jobs would be located in the public sector, community not-for-profit organizations, and small businesses that provide community benefits.

But, like the President's proposal, my legislation did not receive any consideration during the last Congress, which is unfortunate because both of these measures would have, in fact, created jobs and helped our Nation's economic recovery.

It's time we legislate based on facts, not rhetoric. Unfortunately, I fear today's hearing will not enable us to accomplish that goal.

Mr. COHEN. But I will mention that what the statement contains therein, which I am going to offer to the Committee, is three basic principles. First, that the majority's claim that regulations inhibit job creation is not appropriate and correct. And he uses as his supportive individuals Bruce Bartlett, the senior policy analyst in the Reagan and George H.W. Bush administration, who concluded in a statement, no hard evidence is offered for the claim that regulations cost jobs, it is simply asserted as self-evident and repeated endlessly throughout the conservative echo chamber. He also cites Susan Dudley, who was the head of OIRA during the administration of George W. Bush. And she says it is hard to know what the real impacts of regulations are unaware of any empirical, sound way to assess the impact that proposed rules have on jobs.

He also makes a point that this Committee is now on its 17th hearing on basically the same subject and that the Committee seems to sometimes forget the positive facts of regulation. According to the Office of Management and Budget, the net benefits of regulations through the third fiscal year of the Obama administration exceeded $91 billion, 25 times more than the net benefits during the first 3 years of the George W. Bush administration. OMB also reported that for fiscal year 2010, Federal regulations cost between $6.5 billion and $12.5 billion but generated between $18.8 billion and $86.1 billion in benefits. That is the Office of Management and Budget. There is other salient information that I will submit as part of the record, and hope that they will be perused and absorbed. Thank you, Mr. Chairman.

Mr. BACHUS. Thank you, Mr. Cohen. And I want to commend you as an Alabamian on your active participation in our civil rights pilgrimage. As you know, Alabama was kind of the epicenter of the civil rights struggle.

We have a very distinguished panel today, and I will begin by first introducing our witnesses.

Professor Robert Glicksman, welcome.

Professor Glicksman has published widely on the subject of environmental and administrative law. Before coming to George Washington University in 2009, he taught at the University of Kansas School of Law, where he was the Robert W. Wagstaff Distinguished Professor of Law. He is a graduate of Cornell School of Law. And Professor Glicksman worked in private practice at a firm in Washington, D.C., where he focused on environmental, energy, and administrative law issues. Professor Glicksman joined the Center for Progressive Reform in 2002 and has sat on its board of directors since 2008.

Our next witness, Mr. Drew Greenblatt. Mr. Greenblatt is the President and CEO of Marlin Steel in Baltimore, Maryland. It is one of the fastest growing companies in the United States. Marlin Steel exports engineering baskets and custom sheet metal fabrications to 36 countries around the world. Mr. Greenblatt is a leading voice for small business manufacturing, as well as taxation, regulation, trade policy, and economic growth. He serves as an executive board member of the National Association of Manufacturers and as Chairman of the board of the Regional Manufacturing Institute. In addition, Mr. Greenblatt serves on the Maryland Commission on Manufacturing Competitiveness and on the Governor's International Advisory Council. He received his bachelor's degree from Dickinson College and an MBA from Tulane University.

Welcome.

Mr. GREENBLATT. Thank you.

Mr. BACHUS. Mr. Rob James is Chairman of the Public Service Committee on the Avon Lake City Council in Ohio, a town which I named in my opening statement. From 2006 to 2012, he served as the assistant attorney general for the Ohio Attorney General's office. He clerked in the Tenth District Court of Appeals from 2005 to 2006. He received an MBA in diplomacy and foreign affairs from Miami University, and a J.D. From Catholic University Columbus School of Law.

Welcome, Mr. James.

Mr. Douglas Holtz-Eakin is President of the American Action Forum and commissioner on the congressionally chartered Financial Crisis Inquiry Commission. He began his career at Columbia University and moved to Syracuse University, where he became trustee, professor of economics, Chairman of the Department of Economics, and associate director of the Center for Policy Research. In 1989, and from 2001, he served as chief economist of the President's Council of Economic Advisers. Mr. Holtz-Eakin is a former director of the Congressional Budget Office and served as the economic policy director for the John McCain Presidential campaign. Mr. Holtz-Eakin serves on the board of the Tax Foundation, National Economists Club, and the Research Advisory Board of the Center for Economic Development. He received his B.A. In econom-

ics and mathematics from Denison University, and a Ph.D. in economics from Princeton University.

And have read several of your articles and books. And you are no stranger to Congress. And we welcome you back.

Mr. William Kovacs provides the overall direction, strategy, and management for the Environmental, Technology and Regulatory Affairs Division at the U.S. Chamber of Commerce. Since joining the Chamber in March 1998, Mr. Kovacs has transformed a small division concentrating on a handful of issues and Committee meetings into one of the most significant in the organization. His division initiates and leads multidimensional national issue campaigns on energy legislation, complex environmental rulemaking, telecommunications reform, emerging technologies, and applying sound science to the Federal regulatory process. Mr. Kovacs previously served as chief counsel and staff director for the House Subcommittee on Transportation and Commerce. He earned his J.D. From Ohio State University School of Law and a bachelor of science degree from the University of Scranton magna cum laude.

Mr. Rob Weissman is President of Public Citizen. Mr. Weissman works in the area of economics, health care, trade and globalization, intellectual property, and regulatory policy, and on issues relating to financial accountability and corporate responsibility. He has worked to lower pharmaceutical prices for AIDS victims and others in the developing world. Mr. Weissman has appeared on television and radio, and has been published and quoted in many newspapers. He earned his J.D. Magna cum laude from Harvard Law School and has led Public Citizen since 2009. Previously, he was the director of the nonprofit organization Essential Action, and edited the magazine Multinational Monitor, which tracks the activities of multinational corporations and reports on the global economy.

And I am sure we will be hearing from you on many future occasions, too. So we welcome you to the Committee.

We will now proceed under the 5-minute rule with questions. No, I am sorry, we will now have the opening statements from our witnesses, starting with Mr. Glicksman, Professor Glicksman. Mr. Frank one time had a hearing where he forgot to have the opening statements, and he started doing his questions and got about halfway through before he let the witnesses speak.

Thank you, Mr. Glicksman. Professor.

TESTIMONY OF ROBERT L. GLICKSMAN, J.B. & MAURICE C. SHAPIRO PROFESSOR OF ENVIRONMENTAL LAW, THE GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW

Mr. GLICKSMAN. My name is Robert Glicksman. I teach at the George Washington University Law School, and I thank the Committee for asking me to speak today. My testimony makes several points about the impact of regulation on society and the likely effect of proposals such as those introduced in Congress in the past couple of years, which would dramatically alter the manner in which agencies are required to adopt regulations. My written testimony elaborates on each point, which I will summarize today.

First, regulations often provide great benefits to the public interest, such as by protecting the health and safety of Americans from

pollution and other harms. As a necessary corollary, proposals that would indiscriminately block regulation would reduce or eliminate those benefits. In other words, even though those trying to slow down our regulatory system focus on the costs of regulation, they tend to ignore the very real costs that result from a failure to regulate.

In the environmental area, once those costs have been incurred, it is typically disproportionately expensive to remedy the harms caused by inadequate regulation, and it may be impossible to do so. Some illnesses are not reversible, to say nothing of deaths. Even where illness is reversible, the pain, suffering, and reduced productivity that resulted before a regulatory fix took effect cannot be eliminated retroactively. So costs flow from decisions not to regulate, just as they do from decisions to regulate.

Second, the existing Federal regulatory system is already process heavy. It is characterized by multiple regulatory obstacles and burdens that result from analytical duties that are at best duplicative and sometimes of little apparent value. The legislative proposals placed on the table in recent years would make this situation worse, not better.

In addition, the notion that changes are needed to remove barriers to effective participation in regulatory processes for industries and other affected interests is hard to fathom. The Federal Administrative Procedure Act and related Federal laws already provide ample opportunities for such participation. Studies show that regulated entities dominate the aspects of the regulatory process that involve agency solicitation and public comment.

Legislation is not needed to give regulated businesses even greater access to regulators than they already have or to improve the information base upon which agencies make regulatory choices. Rather, this kind of legislation would add to the regulatory thicket that already ensnares agencies, perhaps by design, and hinders the adoption of even the most needed and beneficial regulations. In addition, it is not hard to imagine the approval process under a bill such as the REINS Act from becoming a nakedly political exercise, reflecting the political power of special interests rather than a fair and informed evaluation of the pros and cons of regulation. Rulemaking needs to become less, not more politicized.

Third, despite numerous claims to the contrary, there is little reason to believe that existing Federal regulations issued by agencies such as EPA are imposing disproportionate costs or inhibiting economic recovery. Studies alleging negative economic effects tend to both overestimate the costs of regulation and discount or completely ignore regulatory benefits. For one thing, these studies often rely on estimates of regulatory costs that were supplied by regulated entities before the regulations were adopted, at a time when they had significant incentives to overestimate these costs. For another, retrospective studies of regulations adopted by agencies such as OSHA and EPA often show that actual compliance costs turned out to be significantly lower than predicted before the regulations were adopted.

Similarly, claims that the uncertainty created by regulation poses an obstacle to economic growth are not convincing. Even if they were, the legislative proposals being considered would in-

crease, not decrease that uncertainty by dragging out the regulatory process. Some industries have recognized the ability of rapid regulatory decisions to create a climate of certainty that businesses prefer. The major auto manufacturers, for example, did so in supporting EPA and Department of Transportation efforts to increase the fuel efficiency of cars and trucks.

Finally, if efforts to refashion the regulatory process proceed, they should be redirected. Congress should focus on ensuring that agencies have adequate resources to carry out the tasks assigned to them by statute. The proponents of change say they are concerned about agencies that take regulatory shortcuts. If so, they should be worried about forcing agencies to operate on shoestring budgets while heaping ever more burdensome procedural duties on them.

Thank you.

[The prepared statement of Mr. Glicksman follows:]

Statement of Robert L. Glicksman
to the House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial, and Antitrust Law

Hearing on "The Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness"
February 28, 2013

My name is Robert L. Glicksman. I am the J.B. & Maurice C. Shapiro Professor of Environmental Law at The George Washington University Law School. I am also a member scholar at the Center for Progressive Reform (CPR). I graduated from the Cornell Law School and have practiced and taught environmental and administrative law for more than 35 years.

This submission makes several points about the impact of regulation on society and the likely effects of proposals to dramatically alter the manner in which agencies are required to adopt regulations such as those recently introduced in Congress. First, regulations often provide great net benefits to the public interest, such as by protecting the health and safety of Americans from pollution and other harms. As a necessary corollary, proposals that would indiscriminately block regulation would reduce or eliminate these benefits. The proponents of making it more difficult for agencies to regulate tend to ignore the very real costs that result from a failure to regulate even though significant costs may flow from decisions not to regulate just as they do from decisions to regulate. Second, the existing federal regulatory system is already process heavy, characterized by multiple regulatory obstacles and burdens that result from analytical duties that are at best duplicative and sometimes of little apparent value. The legislative proposals placed on the table in recent years would make this situation worse, not better. It would create a regulatory thicket that ensnares agencies and hinders the adoption of even the most needed and beneficial regulations.

Third, despite numerous claims to the contrary, there is little reason to believe that existing federal regulations issued by agencies such as the Environmental Protection Agency are imposing disproportionate costs or inhibiting U.S. job growth and economic recovery. Studies alleging negative economic effects tend to both overestimate the costs of regulation and discount or completely ignore regulatory benefits. Fourth, legislative efforts concerning rulemaking should focus on ensuring that agencies have adequate resources to carry out the tasks assigned to them by statute, not on forcing agencies to operate on shoestring budgets while heaping ever more burdensome procedural duties on them under the guise of regulatory "reform."

I. REGULATIONS HAVE BENEFITED SOCIETY GREATLY; THE FAILURE TO REGULATE HAS CREATED SIGNIFICANT HARM

All regulations share the same starting point: A provision in a statute passed by both Houses of Congress and signed by the President that authorizes or directs an agency to regulate. Whenever an executive or independent agency issues a rule, it is acting pursuant to authority provided in duly enacted legislation for achieving a specified policy goal, although that authority often leaves room for the exercise of at least some agency discretion. The legislation from which agencies derive their authority to regulate reflect a determination by a majority of both Houses of Congress and the President that there is social problem that merits the government's attention, and that regulation is an appropriate response to that problem because it will promote the public interest in some way, such as by protecting health and the environment.

It is a good thing that Congress has directed agencies to issue regulations to achieve important social goals because these regulations have produced enormous benefits for the American people.[1] Consider the following:

- In its most recent report to Congress, the Office of Management and Budget (OMB) estimates that the total benefits of significant regulations for the past ten years exceeded theirs costs by a ratio as high as 16 to 1. The Environmental Protection Agency (EPA) estimates that the regulatory benefit of the Clean Air Act exceeds its costs by a ratio of 25 to 1. Similarly, a study of EPA rules issued during the Obama Administration found that their regulatory benefits exceeded costs by a ratio as high as 22 to 1.
- Several recent catastrophes illustrate the huge costs of failing to regulate when it is appropriate and necessary. The BP oil spill has imposed tens of billions of dollars in damages to the Gulf of Mexico and affected Gulf Coast communities—far more than the cost of complying with regulations that would have prevented this tragedy. A recent Government Accountability Office (GAO) study concluded that the 2008 Wall Street collapse, which might have been avoided through more extensive financial regulation, has cost the U.S. economy as much as $22 trillion.[2]
- Dozens of retrospective evaluations of regulations adopted by the EPA and the Occupational Safety and Health Administration (OSHA) pursuant to the Regulatory Flexibility Act have found that the regulations were still necessary and that they did not produce significant job losses or have adverse economic impacts for affected industries, including small businesses.

II. THE PROBLEM OF UNDER-REGULATION

The regulatory system created by Congress and implemented by agencies is designed to protect the American people against unacceptable risks to important values such as a safe and healthy environment, but the destructive convergence of inadequate resources, political interference, and outmoded legal authority often prevents regulatory agencies from fulfilling this task in a timely and effective manner. Unsupervised industry "self-regulation," which has often

[1] *See* Sidney A. Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* (Ctr. for Progressive Reform, White Paper 1109, 2011), *available at* http://www.progressivereform.org/articles/RegBenefits_1109.pdf.
[2] U.S. GOV'T ACCOUNTABILITY OFFICE, FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF DODD-FRANK ACT 17, 21 (2013), *available at* http://www.gao.gov/assets/660/651322.pdf.

filled the resulting vacuum, is not an adequate substitute, as the predictably catastrophic results of inadequate regulation regularly demonstrate.

The consequences of inadequate regulation and enforcement are apparent—from the BP oil spill in the Gulf of Mexico to the Upper Big Branch Mine disaster that claimed the lives of 29 men; from the decaying natural gas pipeline networks running beneath our homes to the growing risk of imported food tainted with salmonella, botulism, or other contaminants showing up on grocery store shelves. And, of course, inadequate regulation of the financial services industry helped trigger the current economic recession and left millions unemployed, financially ruined, or both.

III. A REGULATORY PROCESS PLAGUED BY OSSIFICATION

Inadequate funding is one of the main reasons for the absence of the kinds of effective regulation that could have prevented these disasters. The proliferation of analytical and procedural requirements in the rulemaking process is another significant hindrance to effective regulation.[3] Regulatory agencies must negotiate a slew of analytical hurdles as a prerequisite to the adoption of regulations, even as their statutory responsibilities expand and their budgets remain constant or shrink. As agencies grow more "hollowed-out"—stretched thin by the demands of doing more with less—their pursuit of new safeguards becomes subject to increasing delays, while many critical tasks are never addressed at all.[4] Many of these analyses and procedures also provide powerful avenues for political interference in individual rulemakings, as the centralized regulatory review process supervised by the White House's Office of Information

[3] PUBLIC CITIZEN, THE FEDERAL RULEMAKING PROCESS, *available at* http://www.citizen.org/documents/Regulations-Flowchart.pdf.
[4] Sidney A. Shapiro et al, *Regulatory Dysfunction: How Insufficient Resources, Outdated Laws, and Political Interference Cripple the "Protector Agencies"* 6-8 (Ctr. for Progressive Reform, White Paper 906, 2009), *available at* http://www.progressivereform.org/articles/RegDysfunction_906.pdf.

and Regulatory Affairs (OIRA) clearly illustrates.[5] A 2011 CPR study found that OIRA frequently uses this review process to delay or weaken rules following closed-door meetings with corporate lobbyists.[6]

Careful analysis of both the need for and consequences of regulation is important, but the regulatory process has already become so ossified by needless or duplicative procedures and analyses that larger rulemakings commonly require several years—possibly more than a decade—to complete. Some studies indicate that the average time it takes to complete a rule after it is proposed is about 1.5 to 2 years, but no one thinks that any type of significant rule can be completed in such a short time frame. As my colleague Professor Richard Pierce of the GW Law School has observed, "[I]t is almost unheard of for a major rulemaking to be completed in the same presidential administration in which it began. A major rulemaking typically is completed one, two, or even three administrations later."[7] The EPA told the Carnegie Commission that it takes about five years to complete an informal rulemaking.[8] A Congressional report found that it took the Federal Trade Commission five years and three months to complete a rule using more elaborate hybrid rulemaking procedures.[9] These reports do not take into account additional analytical requirements that have been imposed since their publication date.

The fact that it may take five years or more to complete the process for adopting important rules should be no surprise, as the following, entirely realistic time schedule for significant rules indicates:

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[5] *Id.* at 12-14.
[6] Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 2011), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf [hereinafter Steinzor et al., *Behind Closed Doors*]. Specifically, the study found that OIRA routinely meets corporate interests behind closed doors during the review process and then delays or changes rules that are subject of such meetings at a disproportionately higher rate.
[7] Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 912 (2007).
[8] CARNEGIE COMM'N, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 108 (1993).
[9] FEDERAL TRADE COMM'N, 98th Cong., 2nd Sess., 155-66 (Comm. Print 98-cc 1984).

- 12-36 months to develop a proposed rule
- 3 months for OIRA review of the draft proposal
- 3 months for public comment
- 12 months to review comments and write final justification
- 3 months (or more) for OIRA review of the final rulemaking
- 2 months delay under the Congressional Review Act
- 12-36 months for judicial review (assuming a court stays the rule)

  TOTAL: 47-95 months (3.9-7.9 years)

This estimate of 4 to 8 years assumes the comment period only takes 3 months, which is usually not the case, and that an agency can respond to rulemaking comments, which can number in the hundreds or even thousands, in 12 months. It also assumes the agency does not have to (1) hold an informal hearing, (2) utilize small business advocacy review panels under the Small Business Regulatory Enforcement Fairness Act (SBREFA), (3) consult with advisory committees, and (4) go through the Paperwork Reduction Act process at OIRA. Although some of these activities might be undertaken simultaneously with the development of a rule or responding to rulemaking comments, these activities have the potential to delay a rule by another 6-12 months.

IV. PROPOSED REGULATORY PROCESS LEGISLATION FROM THE 112TH CONGRESS WOULD EXACERBATE THE OSSIFICATION PROBLEM, FURTHER AMPLIFYING THE PROBLEM OF UNDER-REGULATION AND LEAVING THE PUBLIC AND THE ENVIRONMENT AT UNNECESSARY RISK

In the 112th Congress, several bills were introduced that would have added still new layers of analytical and procedural requirements to an already excessively convoluted rulemaking process. Although these bills differed in their particulars, the end result, and the apparent aim, of such bills remained the same: to dilute or block outright the ability of agencies to put in place critical safeguards necessary for protecting people and the environment. If these

bills had been law in the 1970s, many of the most critical health, safety, and environmental protections which Americans have long enjoyed would likely never have become a reality.

A. The REINS Act

The REINS Act would change the rulemaking process by requiring that "economically significant" regulations—generally, those with annual economic impact of $100 million or more—receive Congress's affirmative approval—by means of a joint congressional resolution of approval signed by the President—before they can go into effect. This bill would effectively bar agencies from relying on existing statutory authority, often enacted by overwhelming congressional majorities, to implement almost any large regulation—no matter how beneficial they would be for the public.

By design, the REINS Act would make Congress the final arbiter of all significant regulatory decisions. While superficially this may seem like a good idea—after all, Members of Congress are elected and regulators are not—the REINS Act would replace what is good about agency rulemaking with what is bad about the legislative process.

Neither most Members of Congress nor their staffs are likely to have sufficient expertise regarding complex regulatory matters to make a considered decision whether to adopt a regulation, and if so, what kind, particularly within the limited time frame legislators would have to act. Congress has scaled back staffing levels and, unlike agencies, Congressional offices do not employ doctors, epidemiologists, botanists, or statisticians. The result would likely be mistaken judgments about the need for regulation and the potential benefits it would provide, even assuming good faith efforts by legislators to assess the merits of agency regulatory proposals. In fact, it is not hard to imagine the approval process becoming a nakedly political

exercise, reflecting the political power of special interests rather than a fair and informed evaluation of the costs and benefits of regulation. Rulemaking needs to become less politicized, not more.

Even if Congress did have the necessary expertise to review regulations, the type of careful and time-consuming review that would be required would impose significant analytical burdens on it, diverting members and their staffs from other business. Because this review would have to occur within a short time frame, the REINS Act has the potential to stop (or at least slow down) important other business, assuming that legislators and their staffs actually spent the time necessary to understand complex regulations.

B. The Regulatory Accountability Act

The Regulatory Accountability Act would drastically overhaul the Administrative Procedure Act (APA), by amending the statute to add over 60 new procedural and analytical requirements to the agency rulemaking process. The bill would make more than 30 pages worth of changes to the current, relatively simple structure of the APA.

The Regulatory Accountability Act would change the rulemaking process in the following ways:

- Agencies would have to make a series of "preliminary and final determinations" with respect to several different "rulemaking considerations." Although agencies already account for some of these considerations, others are new, and would require highly complex, resource-intensive, and time-consuming analyses by the agencies.
- Reviewing courts would be empowered to review the adequacy of agency determinations of the "rulemaking considerations." If a court determines that an agency has failed to adequately conduct a required determination, and finds that this failure is prejudicial, it would be empowered to torpedo the entire rule, resulting in more delay and waste of agency resources.
- The Regulatory Accountability Act would overrule more than 25 environmental, health, and safety statutes by requiring that regulatory agencies justify their final rules by balancing questionable regulatory cost estimates against hard to quantify regulatory benefits, even though most of these statutes direct agencies to make

regulatory decisions based on other factors. It would also require agencies to choose the least-cost alternative available to it. Most environmental, health, and safety statutes direct agencies to make regulatory decisions according to different criteria, including identifying standards that are based on the best existing technology or that are necessary to achieve certain public health outcomes.

- The Regulatory Accountability Act would require agencies to complete an advanced notice of proposed rulemaking (ANPRM) for all of their bigger rules, even where this step would add little value to the process of adopting rules.
- The Regulatory Accountability Act would require Information Quality Act (IQA) hearings to resolve disputes over underlying regulatory science and data. These hearings unnecessarily duplicate the notice-and-comment process under the APA, which already provides a mechanism for ensuring that agencies establish the reliability of the evidence and information upon which they rely.
- The Regulatory Accountability Act would greatly expand the circumstances under which agencies would be required to employ formal rulemaking hearings. Because of the great expense of these hearings and the modest value they add to the rulemaking process, almost no serious administrative law expert regards formal rulemaking as reasonable in many of the contexts in which the Act would mandate it. Precisely because of its limited value in regulatory areas such as public health and environmental protection, where determinations are based on broad social judgments rather than the kinds of individualized factual determinations characteristic of trial-type adjudication, the use of formal rulemaking hearings has been all but relegated to the dustbin of history.
- The Regulatory Accountability Act would require burdensome ongoing look-back procedures for existing regulations. Such look-backs can be very useful if designed properly and if agencies are provided with the necessary budgetary and personnel resources for conducting them, but the Regulatory Accountability Act's look-back procedures failed to meet either of these criteria. As proposed, the Act as a practical matter would require diverting some agency staff away from working on developing new rules to address unaddressed high priority threats and toward reanalysis of matters the agency may consider to be less important.
- The Regulatory Accountability Act would establish onerous judicial review requirements. These requirements would authorize courts to review complex policy matters that are well beyond the ken of generalist judges. In addition, the Regulatory Accountability Act would alter the APA's judicial review provisions by directing reviewing courts not to defer to agency determinations or interpretations under certain circumstances.
- The Regulatory Accountability Act would require agencies to account for several complex policy considerations and to consult with OIRA before they can issue "major" guidance documents. These one-size-fits-all requirements would deprive agencies of the flexibility needed for issuing these guidance documents in a timely fashion. The result would be harm to regulated industries that rely on these documents to minimize regulatory uncertainty.

All of these additional analytical and procedural requirements would add significant delays to the rulemaking process. In fact, for bigger rules, the Regulatory Accountability Act would likely add at least 21-33 months to the already bloated rulemaking process under current law:

- 6-12 months to complete the additional analytical requirements
- 3 months for the Advanced Notice of Proposed Rulemaking (ANPRM) process
- 6-12 months to respond to comments received after the ANPRM
- 6-12 months to complete the formal rulemaking procedures

  Total: 21-39 months (1.75-3.25 years) extra

As noted above, it already takes four to eight years for an agency to promulgate and enforce many significant rules, and the proposed procedures could potentially add another 21 to 39 months to that process. Under the Regulatory Accountability Act, the longest rulemakings could take more than 12 years—spanning potentially four different presidential administrations—to complete.

V. THE PROPOSED REGULATORY PROCESS LEGISLATION AMOUNTS TO A SOLUTION IN SEARCH OF PROBLEM

The justification commonly given for the proposed regulatory process legislation such as the bills discussed above is that federal regulatory agencies are issuing too many burdensome regulations, which in turn are inhibiting U.S. job growth and economic recovery. The goal of the proposed legislation purports to be the creation of new processes and procedures that would prevent agencies from issuing too many regulations, or regulations that are excessively burdensome. Upon closer examination, however, this narrative concerning what ails the U.S.

regulatory system, and the underlying assumptions on which it is based, is completely off the mark.

A. The Rulemaking Process is Already Fair and Accountable

Administrative agencies are already subject to a thick web of analytical and procedural requirements to prevent agencies from issuing unnecessary or excessively burdensome regulations. If anything, there are already too many of these overlapping and duplicative requirements, resulting, as indicated above, in the need to conduct years of analysis before significant rules may be adopted. In addition, existing federal laws that govern the rulemaking process already provide many opportunities for stakeholders to participate to make their views known, inform the agency if its regulatory proposals reflect factual misunderstandings, and protect their interests.

The APA requires agencies to provide persons potentially affected by their regulations a fair opportunity to influence the rulemaking process, and several mechanisms exist for holding agencies accountable for their regulatory actions. Under traditional APA rulemaking, a regulatory proposal is meant to start the discussion, not end it. Indeed, the agency must solicit and actually *consider* comments it receives from the public on the proposal. If the agency discovers during the comment process that it has strayed beyond its statutory authority, neglected relevant considerations, or misunderstood the science on which it based its proposal, the APA requires the agency to revise the rule accordingly before finalizing it, or not adopt the rule at all. This is not some hollow exercise. Rather, the courts strictly enforce it. If an agency adopts a rule without taking into account relevant public comments, the court in a challenge to the validity of the rule has the power to send the rule back to the agency and preclude its implementation.

The APA has provided these protections during the rulemaking process for affected interests since 1946, but statutes and executive orders adopted beginning in the 1980s have added multiple layers of new rulemaking procedures and analytical requirements not required by the APA. As a result, the rulemaking process has become an inordinately complex, time-consuming, and resource-intensive process:

- As of 2000, an agency was subject to as many as 110 separate procedure requirements in the rulemaking process.[10] Additional procedural requirements have been added since 2000.[11]
- A flowchart developed by Public Citizen to document the rulemaking process covers several square feet, and, because of the complexity involved, it still requires tiny font in order to include every last rulemaking step.[12]

Regulated businesses not only take full advantage of these existing participatory opportunities. All of the available evidence demonstrates that corporate and business entities dominate the rulemaking process in doing so. For example, when Professor Wendy Wagner and her coauthors examined 39 hazardous air pollutant rulemakings at the EPA, they found that industry interests had an average of 84 contacts per rule, while public interest groups averaged 0.7 contacts per rule.[13] These included meetings, phone calls, and letters.

Data available on the OIRA website indicate that regulated industry participates far more frequently in meeting concerning rules undergoing OIRA review than do public interest groups. A CPR white paper analyzed these data and found that 65 percent of meeting participants

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[10] *See* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. L. REV. 533 (2000) (documenting that executive orders and statutory requirements could require as many as 110 different requirements for rulemaking), *available at* http://www.law.fsu.edu/journals/lawreview/downloads/272/Seid.pdf.
[11] *See, e.g.*, Exec. Order No. 13,586, 76 Fed. Reg. 3,821 (Jan. 18, 2011).
[12] *See* PUBLIC CITIZEN, THE FEDERAL RULEMAKING PROCESS, *available at* http://www.citizen.org/documents/Regulations-Flowchart.pdf.
[13] Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA's Toxic Air Regulations*, 63 ADMIN. L. REV. 99, 225 (2011).

represented corporate interests compared to just 12 percent who represented public interest groups.[14]

These data unequivocally confirm that interested parties—particularly regulated industries—have fair, if not sometimes excessive, access to agencies and OIRA to influence the outcome of proposed rules. Moreover, since agencies have to justify rules by responding to every comment they receive, it is simply not plausible to contend that they are not accountable for the decisions that they make. Finally, since agencies are subject to a host of analytical requirements, it is beyond dispute that they are required to think carefully about what they do before they do it.

The regulatory reform proposals discussed above would therefore add clutter to the rulemaking process and increase the time required to regulate without increasing the likelihood of better informed or wiser rules.

B. Regulations Do Not Impose Unreasonable Costs

Over the past few years, regulatory opponents have attempted to make the case that regulations impose unreasonable costs by citing a string of studies purporting to demonstrate the magnitude of total regulatory burdens. Each of these reports suffers from such extensive methodological flaws as to render them unsuitable for consideration in serious debate regarding regulatory policy.

A 2010 study by Nicole Crain and Mark Crain—performed under contract for the Office of Advocacy of the Small Business Administration (SBA)—is among those most frequently cited by regulatory opponents to support the proposition that regulations impose unreasonable costs on the U.S. economy. Among its many conclusions, the Crain and Crain study purported to find

[14] Steinzor et al., *Behind Closed Doors*, *supra* note 6 at 15-27.

that the total annual cost of federal regulations in 2008 was about $1.75 trillion.[15] A CPR White Paper found that the methods used by Crain and Crain to arrive at their cost figure were so flawed that their estimate must be regarded as unreliable.[16] More generally, the Crain and Crain study failed to provide any accounting of regulatory benefits. Thus, even if its estimate of regulatory costs were reliable, the study would provide no useful information regarding the value of the U.S. regulatory system. After all, a discussion of any investment is inherently incomplete if it focuses on costs without considering benefits. Under such an approach, almost any economic transaction—from the purchase of a loaf of bread to the construction of a manufacturing plant—would be counted as a drain on the economy, because they only include the costs not the benefits. The point of regulatory impact analysis is to compare the costs imposed by regulation with the resulting regulatory benefits. If a regulation's benefits exceed its costs, it represents an obvious net gain to society. Concluding that a regulation is detrimental to society because of its costs, while ignoring the benefits of regulation and their relationship to costs, is nonsensical. It provides a skewed and distorted picture of the value of regulation that bears no relation to reality.

The significance of this failure to consider regulatory benefits cannot be overstated: Several studies to consider both cost and benefits of various regulations have found that the benefits outweigh costs several times over.[17] Indeed, when full costs and benefits are considered, it is clear that federal regulations are—from a strictly economic perspective—among the best government programs in existence.

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[15] NICOLE V. CRAIN AND W. MARK CRAIN THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2010) *available at* http://www.sba.gov/sites/default/files/rs371tot.pdf.

[16] Sidney A. Shapiro et al., *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs* (Ctr. for Progressive Reform, White Paper 1103, 2011) *available at* http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf.

[17] *See supra* text accompanying note 1.

Subsequently, the nonpartisan Congressional Research Service (CRS) published its own report examining the Crain and Crain study, which found the same flaws as identified in the CPR White Paper, and additional problems as well.[18] Former OIRA Administrator Cass Sunstein has characterized the Crain and Crain study as "deeply flawed," characterizing it as an "urban legend."[19]

A more recent study by the American Action Forum (AAF) claims that federal regulators added more than $236 billion in regulatory costs in 2012.[20] In reaching this finding, the AAF study employs inherently flawed data—that is, it relies exclusively on agency *ex ante* cost estimates, even though experience indicates that these estimates tend to systematically overstate the costs that regulations actually impose following implementation.

To generate these *ex ante* cost estimates, agencies primarily rely on surveys of representative companies that the regulation will likely affect. Because companies know the purpose of the surveys, they have a strong incentive to overstate costs in order to skew the final cost-benefit analysis toward weaker regulatory standards.[21] Examples of such overstatement include the industry estimates of the costs of complying with the acid rain control provisions of

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[18] Curtis W. Copeland, *Analysis of an Estimate of the Total Costs of Federal Regulations* (Cong. Research Serv., R41763, Apr. 6, 2011)

[19] *Unfunded Mandates, Regulatory Burdens and the Role of Office of Information and Regulatory Affairs, Hearing Before the Subcomm. on Tech., Info. Pol'y, Intergovernmental Relations & Procurement Reform of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2011) (testimony of Cass Sunstein, Administrator, Office of Information and Regulatory Affairs), *available at* http://oversight.house.gov/index.php?option=com_content&view=article&id=1299%3A5-25-2011-qunfunded-mandates-regulatory-burdens-and-the-role-of-office-of-information-and-regulatory-affairsq&catid=14&Itemid=1; James Goodwin, *Sunstein Denounces SBA's 'Deeply Flawed' Study of Regulatory Costs*, CPRBlog, http://www.progressivereform.org/CPRBlog.cfm?idBlog=5758C6D6-AC7E-4BAF-CF1DA8672B3AB937 (last visited June 21, 2011).

[20] Sam Batkins, *Piling On: The Year in Regulation* (American Action Forum, 2013), http://americanactionforum.org/topic/piling-year-regulation (last visited Feb. 25, 2013).

[21] Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2011, 2044-45 (2002).

the 1990 Clean Air Act amendments.[22] Agencies must also fill in any data gaps they encounter by making various assumptions. Due to fear of litigation over the regulation, they tend to adopt conservative assumptions about regulatory costs, such that the cost assessment often ends up reflecting the maximum possible cost, rather than the mean.[23]

To make matters worse, industry cost estimates—and therefore the *ex ante* cost estimates that agencies develop—do not account for technological innovations that reduce the cost of compliance and produce non-regulatory co-benefits, such as increased productivity.[24] When companies are asked to predict which technology they will employ to comply with a particular environmental regulation, they often will point to the most expensive existing "off-the-shelf" technology available. Once the regulation actually goes into effect, however, companies have a strong incentive to invent or purchase less costly technologies to come into regulatory compliance. As a result, compliance costs tend to be less, and often much less, than the predicted costs. Moreover, the technological innovations tend to produce co-benefits unrelated to the regulation—such as increased productivity and efficiency—that the company strives to

[22] *See* Douglas Bohi & Dallas Burtraw, *SO_2 Allowance Trading: How Experience and Expectations Measure Up* (Resources for the Future, Discussion Paper 97-24, 1997).
[23] McGarity & Ruttenberg, *supra* note 21, at 2046.
[24] To take one example, a look-back review of OSHA's 1978 cotton dust rule concluded that complying with the rule had actually improved the textile industry's productivity, making it more profitable. Between 1972 and 1979, industry productivity grew by about 2.5 percent per year; between 1979 and 1991, the productivity growth rate increased to 3.5 percent per year. The review found that, in order to comply with the standard, textile factories had to make technological investments in their equipment. With modernized facilities, textile factories were able to significantly increase productivity and earn far greater profits. OCCUPATIONAL SAFETY & HEALTH ADMIN., OFFICE OF PROGRAM EVALUATION, REGULATORY REVIEW OF OSHA'S COTTON DUST STANDARD 22, 35-38 (2000), *available at* http://www.osha.gov/dea/lookback/cottondust_final2000.pdf. At the same time, OSHA's cotton dust rule significantly reduced the incidence of byssinosis (commonly referred to as "brown lung disease"), a debilitating and potentially fatal disease that significantly impairs a lung function, in textile workers. The look-back review found that the number of byssinosis cases declined from approximately 50,000 in the early 1970s to around 700 in the mid-1980s, a decline of 99 percent. *Id.* at ii, 28-33.

achieve in any event. Given these co-benefits, only a portion of the innovative technology's costs can fairly be counted as compliance costs.[25]

As the following chart indicates, retrospective studies of regulatory costs find that the initial cost estimates are often too high.

Retrospective Studies of Regulatory Costs

Study	Subject of Cost Estimates	Results
PHB, 1980[26]	Sector level capital expenditures for pollution controls	– EPA overestimated capital costs more than it underestimated them, with forecasts ranging 26 to 126% above reported expenditures
OTA, 1995[27]	Total, annual, or capital expenditures for occupational safety & health regulations	– OSHA overestimated costs for 4 of 5 health regulations, with forecasts ranging from $5.4 million to $722 million above reported expenditures
Goodstein & Hedges, 1997[28]	Various measures of cost for pollution prevention	– Agency and industry overestimated costs for 24 of 24 OSHA & EPA regulations, by at least 30% and generally by more than 100%
Resources for the Future, 1999[29]	Various measures of cost for environmental regulations	– Agency overestimated costs for 12 of 25 rules, and underestimated costs for 2 rules

[25] McGarity & Ruttenberg, *supra* note 21, at 2049-50. Studies of OSHA's vinyl chloride and cotton dust standards concluded that actual compliance costs were much lower than predicted costs in part because of overall productivity gains achieved by regulatees. When company scientists and engineers were forced to concentrate on cost-effective compliance techniques, they also identified ways to improve the overall productivity of an industrial process, or even an entire industry. *See* OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 24 (identifying extensive technological improvements and increased productivity in the textile industry spurred by OSHA's cotton dust standard); RUTH RUTTENBERG, REGULATION IS THE MOTHER OF INVENTION 42, 44-45 (Working Papers for a New Society, May/June 1981), (identifying six regulation-induced changes in the vinyl chloride industry that resulted in increased productivity).

[26] Winston Harrington, Richard D. Morgenstern, & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates* 6 (Resources for the Future, Discussion Paper 99-18, 1999) (citing PUTNAM, HAYES, & BARTLETT, INC., COMPARISONS OF ESTIMATED AND ACTUAL POLLUTION CONTROL CAPITAL EXPENDITURES FOR SELECTED INDUSTRIES (Report prepared for the Office of Planning & Evaluation, U.S. Envtl. Protection Agency, 1980)), *available at* http://www.rff.org/documents/RFF-DP-99-18.pdf.

[27] OFFICE OF TECHNOLOGY ASSESSMENT, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH 58 (1995).

[28] Eban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, 8 AM. PROSPECT 64 (Nov./Dec. 1997).

[29] Harrington, Morgenstern, & Nelson, *supra* note 26. The Resources for the Future study notes that actual compliance costs can also be less than an agency estimates because there can be less regulatory compliance than the agency anticipates. If an agency overestimates the extent of pollution reduction, or some similar benefit, then the regulation may cost less than the agency estimates. In such cases, the original agency estimate might have been accurate, but it turns out to be wrong because the regulatory industry does not obey the regulation to the extent that the agency predicted. *Id.* at 14-15.

More generally, the AAF study also replicates the Crain and Crain study's error of only considering regulatory costs while ignoring regulatory benefits. As noted above, this inherently incomplete evaluative approach would make any economic transaction appear to be a poor investment.

Regulatory opponents' unrelenting focus on the allegedly high costs of regulation suffers from an even more fundamental problem, however. Regulations, strictly speaking, typically do not impose *new* costs on society, as Robert Adler, one of the current commissioners of the Consumer Product Safety Commission (CPSC), observed in a *New York Times* op-ed. Rather, they "simply re-allocate who pays the costs."[30] In other words, when an environmental regulation is blocked, the costs to society of that regulation do not vanish into thin air simply because industry is relieved of the obligation to incur compliance costs. Instead, those costs take a different form and are shifted to the general public, in terms of lives lost, preventable cancers, and lost work days. These costs can be just as or more damaging to economic productivity as the industry compliance costs would have been.

For example, a 2011 study of the environmental and public health externalities generated by different industries found that coal-fired power plants create air pollution damage that is much larger than the value these plants provide to society.[31] The general public bears the costs of inadequately regulated polluting activities in the form of adverse health consequences and ensuing productivity declines. Improved regulation of coal-fired power plants would shift some or all of these costs to the power plant owners. If the plants' owners increase the costs of the

[30] Robert S. Adler, Op-Ed, *Safety Regulators Don't Add Costs, They Decide Who Pays Them*, N.Y. TIMES, Oct. 16, 2011, *available at* http://www.nytimes.com/2011/10/17/opinion/safety-regulators-dont-add-costs-they-decide-who-pays-them.html?_r=2&partner=rssnyt&emc=rss.

[31] Nicholas Z. Muller, Robert Mendelsohn & William Nordhaus, *Environmental Accounting for Pollution in the United States Economy*, 101 AM. ECON. REV. 1649 (2011), *available at* http://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.101.5.1649.

products they supply to account for the increased costs of regulation, the question is whether the higher prices consumers must pay for electricity are outweighed by the public health protections provided by the regulation. To blast the regulation because of the increased costs it imposes on plant owners and their customer without comparing those costs with the value of avoided illnesses and related regulatory benefits is to engage in an incomplete, misleading, and inaccurate evaluation of the effects of regulation.

C. Regulations Do Not Inhibit Economic Growth

Regulatory opponents contend that regulations slow economic growth and contribute to job losses, but existing studies do not support this claim. Instead, the studies find either no overall impact or, in some cases, an actual increase in net employment.[32] For example, one economic analysis found that the EPA's strict proposal to regulate coal ash waste would result in a net increase of 28,000 jobs.[33] Further, Department of Labor data suggest that few jobs are lost because of regulation.[34] The Department issues reports on "extended mass layoffs" – events in which a firm lays off 50 or more employees within 30 days. From 2007-2009, more than four million workers were laid off in such events. In 99.7 percent of the cases, the cause of the layoffs was something other than regulations – according to the firms themselves. This result is

[32] *See* Isaac Shapiro & John Irons, *Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown* (Envtl. Pol'y Inst., Briefing Paper No. 305, 2011) (summarizing the evidence), *available at* http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf; Frank Ackerman & Rachel Massey, *Prospering with Precaution: Employment, Economics, and the Precautionary Principle* (Global Dev. & Env't Inst., Working Paper, 2002) (same), *available at* http://www.healthytomorrow.org/attachments/prosper.pdf.

[33] FRANK ACKERMAN, EMPLOYMENT EFFECTS OF COAL ASH REGULATION (Stockholm Environment Institute – U.S. Center, Tufts University, 2011), *available at* http://sei-us.org/Publications_PDF/Ackerman-coal-ash-jobs-Oct2011.pdf. While higher electricity prices caused by the regulation would lead to some job losses, these losses are more than offset by the job gains that would result from the expenditures by industry to come into compliance with the strict standard. In particular, coal-fired power plants would need to spend money on waste management, wastewater treatment, and construction and operation of facilities and equipment—all of which are labor-intensive activities and would generate significant increases in employment.

[34] Isaac Shapiro & John Irons, *Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown* 20 (Envtl. Pol'y Inst., Briefing Paper No. 305, 2011), *available at* http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf;.

similar to data concerning layoffs before 2007.[35] By comparison, the same data find that extreme weather events to which climate change may have contributed have caused more extended mass layoffs.[36]

D. Regulatory Uncertainty Is Not An Obstacle to Economic Growth

A shopworn refrain among regulatory opponents is that regulatory uncertainty is holding back the economy, preventing the United States from completing emerging from the Great Recession. All of the available evidence directly contradicts this claim:

- The sectors of the economy in which the most regulatory activity is taking place—the healthcare industry, mining, and the financial sector—have among the lowest levels of unemployment in the country, and the unemployment rate in these sectors is significantly lower than the national average.[37]
- Surveys of business owners reveal relatively little anxiety over the current regulatory climate. Instead, many business owners cite the lack of demand as the biggest impediment to economic growth and hiring.[38]
- The experience of other countries with similar economies further calls regulatory uncertainty arguments into question. Those countries that are not planning any major regulatory initiatives are experiencing the same anemic economic recovery as the United States.[39]

Even assuming the facts supported the regulatory uncertainty argument, the REINS Act, the Regulatory Accountability Act, and other similar regulatory process legislation would exacerbate regulatory uncertainty rather than alleviate it. Their new analytical and procedural

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[35] *Id. See also* EBAN GOODSTEIN, THE TRADE-OFF MYTH: FACT AND FICTION ABOUT JOBS AND THE ENVIRONMENT 35-37 (1999). (summarizing data from 1970-90 and finding similarly small numbers of workers being laid off because of environmental regulations).

[36] *Regulations Do Not Hinder U.S. Job Market, Paper Finds*, OMB WATCH, http://www.ombwatch.org/node/11615 (last visited Oct. 21, 2011).

[37] *See* Matthew Yglesias, *Where Is The Evidence That 'Regulatory Uncertainty' Has Increased? What Would Decrease It?*, THINKPROGRESS, Sept. 8, 2011, http://thinkprogress.org/yglesias/2011/09/08/314950/where-is-the-evidence-that-regulatory-uncertainty-has-increased-what-would-decrease-it/ (last visited Oct. 18, 2011).

[38] *See, e.g.*, Kevin G. Hall, *Regulations, Taxes Aren't Killing Small Business, Owners Say*, MCCLATCHY, Sept. 1, 2011, *available at* http://www.mcclatchydc.com/2011/09/01/122865/regulations-taxes-arent-killing.html.

[39] *See* Daniel Farber, *Ten Fatal Flaws in the "Regulatory Uncertainty" Argument*, CPRBLOG, Sept. 12, 2011, http://www.progressivereform.org/CPRBlog.cfm?idBlog=5DF93B0F-D47C-D726-5762812075 4ECD93 (last visited Oct. 18, 2011).

requirements would delay significant new regulations and cast doubt on whether regulatory proposals will ever be completed, thereby amplifying existing regulatory uncertainty.

VI. TO IMPROVE THE REGULATORY SYSTEM, EXECUTIVE AGENCIES MUST BE REENERGIZED

The supporters of the proposed regulatory process bills discussed above are right about one thing: The U.S. regulatory system is not promoting the public interest as well as it should be. But their diagnosis of the problem could not be farther from the mark, and their proposed bills would only make the situation worse.

To fix the regulatory system, we should instead focus on finding ways to help agencies effectively achieve their statutory missions, such as protecting people and the environment. Here are some places to start:

Provide agencies with the resources they need. One of the reasons that regulatory agencies cannot fulfill their statutory missions is that financial resources and available personnel have been reduced or maintained at constant levels in recent years. This has been occurring as the agencies' missions have become more complex, forcing these agencies to effectively do more with less. Many agencies' budgets have stagnated for decades, while the job at hand – more food and imported toys to inspect, for instance – has grown. And the situation is getting worse, not better. For example, the looming sequestration would cut $700 million from the EPA's $8.4 billion budget. Among other things, these cuts would force the agency to scrap several air pollution monitoring sites and scale back its program for assessing the human health impacts of several potentially harmful chemicals.

Provide agencies with enhanced legal authority. For many regulatory agencies, the statutes under which they operate have not been reviewed or refreshed in decades. The

intervening years have revealed shortcomings in those statutes while new public health, safety, and environmental issues that were not initially addressed by the original statutes have emerged. In some cases, agencies lack the authority they need to tackle these issues. It is time to end the political gridlock that has prevented the adoption of legislative changes to accommodate shifting social needs.

Free agencies from unnecessary analytical requirements. Over the past few decades, the rulemaking process has become encumbered by a growing number of analytical requirements. These analytical obstacles draw upon agencies' already stretched resources and distract them from focusing on their regulatory missions without meaningfully improving the quality of agency decision-making. Regulatory process legislation of the kind introduced in Congress during the last few years would exacerbate this situation, creating a rulemaking process so laden with unnecessary and unhelpful requirements that the process would become completely dysfunctional. Perhaps that is the true aim of those who advocate an overhaul of regulatory process requirements – to construct a system that is so burdensome for agencies to navigate that they become incapable of adopting even urgently needed regulatory protections whose social benefits greatly exceed their costs. Even taking the reformers' aims at face value, they have misdiagnosed the problems with existing regulatory processes and proposed solutions that are ill-equipped to achieve the socially optimal levels of regulation they seek.

Mr. BACHUS. Thank you.
Mr. Greenblatt?

TESTIMONY OF DREW GREENBLATT, PRESIDENT AND OWNER, MARLIN STEEL WIRE PRODUCTS, LLC, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. GREENBLATT. Chairman Bachus, Ranking Member Cohen, thank you for inviting me today to testify——

Mr. BACHUS. I am not sure the microphone is on. Or just pull it right under you. Get it as close as you can there.

Mr. GREENBLATT. Is this better?

Mr. BACHUS. Better.

Mr. GREENBLATT. Okay. Great.

Mr. BACHUS. Much better.

Mr. GREENBLATT. Thank for inviting me today to discuss regulation and its impact on manufacturing. My name is Drew Greenblatt. I am the owner of Marlin Steel. We are a manufacturer of sheet metal baskets, wire baskets. We make everything in the USA. We export to 36 countries. We make it in Baltimore City. Twenty percent of our employees are degreed mechanical engineers. We primarily use recycled steel. All of our steel comes from Indiana, Illinois, and Pennsylvania.

When I bought the company, the company made $800,000 in sales, we had 18 employees. Now we have over 32 employees, and we are growing. We have grown 7 years in a row. I am on the board of the National Association of Manufacturers. I am an executive board member. We represent 12,000 factories throughout America, and both small and large factories. A total of 12 million people are represented by NAM.

America is the world's largest manufacturer. Eighteen percent of global manufacturing is done by America. More than China. And we support 17 million jobs. These are great jobs, high-paying jobs. The average wage of a manufacturer is $77,000. We want to coddle these jobs. We want these jobs to grow. Matter of fact, since 2009 they have grown a half million jobs.

However, we have had a setback. At the bottom of the recession we lost 2 million jobs. We need to have improved economic conditions and improved government policies so that we can grow these jobs to heights that we have never seen in the past.

NAM has a growth agenda, four goals for manufacturing resurgence in America. Number one, we want to be the best place in the world to manufacture. Number two, we want to be the world's best innovator. Number three, we need access to the global markets. We need to sell to the 95 percent of the world that doesn't live in America. Number four, we have to have the best trained workforce in the world.

One of our biggest challenges are poorly designed regulations. Duplicative paperwork causes a lot of heartburn and slows us down from our mission of growing, growing, growing, and hiring people. Let me give an example of what has happened in our government and with Marlin. We got a love letter from the Department of Treasury, and it was a $15,000 fine in 2010. Why? Because in 2006, there was a 20-page form sent to me. I diligently signed it

in two places. However, in 2006 I missed one signature, and I got a $15,000 fine.

So I had my smartest people trying to fight this. It was a lot of aggravation. It was a lot of anxiety. And it is a complete lack of mission-critical focus for a company that is trying to hire people in the inner city of Baltimore.

Let me give you another example. We export. We make everything in Baltimore City using American steel. And we export to 36 countries, including China, okay? This is a good thing for our country. However, it takes time to fill out all the paperwork to ship and export, which is a good thing. So we have to have very smart people filling out all kind of forms that doesn't add any value. So, for example, it takes us 3 minutes for a NAFTA form and it is 20 minutes for a form that is non-NAFTA. That is a waste of our time and waste of our smartest people's efforts.

But it is not just Marlin. Seventy-four percent of manufacturers said unfavorable business climate caused by regulations and taxes is a primary challenge facing business. And this has gone up from 62 percent. And this poll was taken in December. Seventy-six percent indicated that a pressing priority for the Obama administration and this Congress should be reducing the regulatory burden for the factories.

A couple examples of the cost burden on us. It is about $14,000 per employee. I assure you China doesn't have these kinds of burdens on their factories. And for small factories, it is closer to $28,000 per factory—per employee at a factory. So NAM has five ideas on how we can improve the regulatory environment so that we could grow jobs and hire more people and get us out of the recession.

Number one, we have to hold independent regulatory agencies accountable. We need agencies like the NLRB, the SEC, the Consumer Product Safety Commission to have control by the executive branch. Congress should confirm this authority to the President.

Number two, we need to streamline regulations through sunsetting them. Recently, Representative Randy Hultgren of Illinois has the Sunset and Review Act of 2013. This would implement a mandatory retrospective review of regulations to remove conflicting and outdated laws. This is wonderful. We need this.

Three, we have to increase sensitivity to small business. Small businesses are burdened more than the average company.

Number four, we have to strengthen and codify sound regulatory principles. We have to do things based on science and math.

Number five, we have to improve the institutions. We have to have these offices properly staffed and resourced.

So in conclusion, Congressman Bachus, Ranking Member Cohen, and Members of the Subcommittee, thank you again for this opportunity to testify today. The President stated in his Executive Order 13653 on improving regulations, and regulatory review and our regulatory system should promote economic growth, should promote innovation and competitiveness, and job creation. Manufacturers agree with the President, and we are committed to working toward policies that will restore common sense to our regulatory system. We hope this Subcommittee will hold the administration to its commitment in the executive order. The best way to ensure con-

tinued economic growth and employment by enacting a comprehensive, consistent set of policies that allow manufacturers to compete in the global marketplace. Reforming our regulatory systems to prevent the continued piling on of unnecessary regulations is an immediate priority.

[The prepared statement of Mr. Greenblatt follows:]

Testimony

of Drew Greenblatt
President and Owner
Marlin Steel Wire Products, LLC
on behalf of the National Association of Manufacturers

before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law
of the Committee on the Judiciary
U.S. House of Representatives

"The Obama Administration's Regulatory War on Jobs, the Economy and America's Global Competitiveness"

February 28, 2013

COMMENTS OF THE NATIONAL ASSOCIATION OF MANUFACTURERS
BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 28, 2013

Chairman Bachus, Ranking Member Cohen and members of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, thank you for the opportunity to testify before you about the Administration's regulatory agenda and its impact on manufacturing and job creation.

My name is Drew Greenblatt, and I am president and owner of Marlin Steel Wire Products, LLC, based in Baltimore, Maryland. Marlin Steel Wire is a leading manufacturer of custom wire baskets, wire forms and precision sheet metal fabrication assemblies—all produced entirely in the United States. The customers for our materials-handling solutions come from pharmaceutical, medical, industrial, aerospace and automotive industries all over the world. We export to 36 countries. Twenty percent of Marlin Steel Wire's employees are mechanical engineers. Like so many other manufacturers in the United States that compete in a global economy, Marlin Steel Wire succeeds through innovation, investment and the hard work of our dedicated employees. The innovative ideas from the engineering team propel success at Marlin Steel Wire. When I bought the company in 1998, we had about $800,000 in sales with 18 workers. Last year was our most successful one as a business with $5 million in sales. Today,

Marlin Steel Wire employs 32 people. Our growth has come despite government policies and regulations that make it harder for us to grow, export and create jobs.

I am pleased to testify on behalf of the National Association of Manufacturers (NAM). I serve as a member of the NAM Board of Directors and as a member of its Executive Committee. The NAM is the nation's largest manufacturing trade association, representing 12,000 member companies consisting of small and large manufacturers in every industrial sector and state. As the voice of the 12 million men and women who work in manufacturing in America, the NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs.

The United States is the world's largest manufacturing economy, producing 18.2 percent of global manufactured products. Manufacturing in the United States alone makes up 12.2 percent of our nation's GDP. More importantly, manufacturing supports an estimated 17.2 million jobs in the United States—about one in six private-sector jobs. Manufacturing offers high-paying jobs, too. In 2011, the average manufacturing worker in the United States earned $77,060 annually, including pay and benefits—22 percent more than the rest of the workforce.

For many manufacturers in the United States, the economy is showing definite signs of improvement. Manufacturing has added about 500,000 jobs since the end of 2009, but there is still a long way to go. More than 2 million manufacturing jobs were lost in the past recession, and output remains well below the 2007 peak, indicating how serious the recent recession really was. To compete on a global stage, manufacturing in the United States needs policies that enable companies to thrive and create jobs. Growing manufacturing jobs will strengthen the U.S. middle class and continue to fuel America's economic recovery.

To regain manufacturing momentum and return to net manufacturing job gains, we need both improved economic conditions and government policies. Because of the

significant challenges affecting manufacturing, the NAM developed a strategy to enhance our growth.

The NAM earlier this month released *A Growth Agenda: Four Goals for a Manufacturing Resurgence in America*, a policy blueprint for the Administration and new Congress that sets four goals with bipartisan appeal for enhanced competitiveness and economic growth: (1) The United States will be the best place in the world to manufacture and attract foreign direct investment; (2) Manufacturers in the United States will be the world's leading innovators; (3) The United States will expand access to global markets to enable manufacturers to reach the 95 percent of consumers who live outside our borders; and (4) Manufacturers in the United States will have access to the workforce that the 21st-century economy demands. To achieve these goals, we need sound policies in taxation, energy, labor, trade, health care, education, litigation and, certainly, regulation.

I can attest that poorly designed regulations and duplicative or unnecessary paperwork requirements create real costs that affect manufacturers' bottom lines. In 2010, Marlin Steel Wire received a letter from the Department of Treasury imposing a fine of $15,000 for inadvertently omitting a third signature on a 20-page form when we created a 401(k) plan for our employees. This simple oversight led to several weeks of unnecessary anxiety and communications unrelated to operating a business. Though we paid a smaller penalty for the missed signature, valuable resources were diverted away from our business activities because of a missed signature on a form.

Marlin Steel Wire's success as a manufacturer in the United States relies on our ability to reach the 95 percent of consumers living outside our borders. But unnecessary, burdensome paperwork imposed on us by the federal government harms our productivity. For example, we spend three minutes filling out a form when we ship products to Canada or Mexico. But if we ship products to a non-NAFTA country, we

spend 20 minutes filling out forms. The longer form does not seem necessary and only harms our productivity relative to foreign competitors looking to serve the same markets.

Regulatory Burdens: The Cost of Regulations

The focus of today's hearing is on regulatory policies that threaten a manufacturing resurgence in this country. In fact, excessive regulatory burdens weigh heavily on the minds of manufacturers like me. In a NAM/*IndustryWeek* Survey of Manufacturers released in December 2012, 74.7 percent of respondents cited an unfavorable business climate caused by regulations and taxes as a primary challenge facing businesses, up from 62.2 percent in March 2012. Also in the December survey, 76.4 percent of respondents indicated that a pressing priority for the Obama Administration and the 113th Congress should be reducing the regulatory burden on manufacturers. These concerns are further quantified by a 2011 study conducted by the Manufacturing Institute and the Manufacturers Alliance for Productivity and Innovation (MAPI), which found that, excluding the cost of labor, manufacturers in the United States face a 20 percent structural cost burden compared to nine major trading partners because of government-imposed policies, including regulations. This is an increase from their 2008 study, which demonstrated domestic policies added 17.6 percent to the cost of manufacturing in the United States.

Employers across the United States, especially manufacturers, face considerable uncertainty that stifles economic growth and discourages hiring. The cost disadvantage confronting domestic manufacturers is a result of decisions made here in Washington, not by those outside our borders. Our competitors in Europe, Asia and South America aggressively seek new customers, markets and opportunity. Countries know that a strong manufacturing sector is a key to jobs, innovation and prosperity. They are strategizing for success in manufacturing and to improve their global competitive

positions. Government policies should support our global competitiveness, not impose increasing burdens. In the United States, manufacturers are forced to face challenges that our global competitors do not have.

Because manufacturing is such a dynamic process, involving the transformation of raw materials into finished products, it involves more environmental and safety issues than other businesses. The burden of environmental regulation falls disproportionately on manufacturers, and it is heaviest on small manufacturers because their compliance costs often are not affected by economies of scale. A 2010 study commissioned by the U.S. Small Business Administration's Office of Advocacy found that manufacturers in 2008 spent on average $14,070 per employee to comply with regulations, 75 percent more than all U.S. businesses spend per employee. The study estimated that manufacturers spend $7,200 per employee to comply with environmental regulations alone. For all regulations, the cost per employee for small firms (fewer than 20 employees) was $28,316, or more than twice the amount per employee than larger firms.

In his State of the Union address, the President said we should make America a "magnet for new jobs and manufacturing." The NAM welcomed recent efforts by the Administration to reduce regulatory burdens. The President has signed executive orders, and the Office of Management and Budget has issued memoranda on the principles of sound rulemaking, considering the cumulative effects of regulations, strengthening the retrospective review process and promoting international regulatory cooperation. Unfortunately, these initiatives have yet to realize real cost reductions for manufacturers.

These directives are well-intentioned, but any benefits realized by these efforts have been subsumed by the unnecessarily burdensome regulations that federal agencies have been and are promulgating. Based on data from the Government Accountability Office, 330 major new regulations—defined as having an annual effect on

the economy of at least $100 million—were issued over the previous four years. On average, the Obama Administration has issued 20 more major regulations per year than the previous Administration. These regulations include significant burdens imposed on manufacturers in the United States and represent real compliance costs that affect our ability to expand and hire workers.

Regulatory Environment: Challenges Facing Manufacturers in the United States

The Environmental Protection Agency (EPA) is a significant contributor to costly and unnecessary burdens placed on the economy. The EPA has embarked on a decades-long process to implement the Clean Air Act and its amendments. There is no doubt that our nation has gained enormous benefits from efforts to improve air quality, but the continued ratcheting down of emission limits produces diminishing returns at far higher marginal costs. This means that each new air rule will have a greater impact on job creation than those in the past.

In November 2012, the NAM released a new study, entitled *A Critical Review of the Benefits and Costs of EPA Regulations on the U.S. Economy*,[1] which examined the harmful economic impact of six major EPA regulations on the U.S. economy. The study showed that these burdensome regulations could cost manufacturers hundreds of billions of dollars annually. In a worst-case scenario, the regulations could mean the loss of $630 billion, 4.2 percent of GDP and between 2 million and 9 million jobs.

The EPA will this year consider tightening the National Ambient Air Quality Standards for Ozone (known as Ozone NAAQS), which is one of the rules included in the NAM's 2012 study. The EPA abandoned a 2010 reconsideration that would have lowered the NAAQS, but EPA scientists are now recommending levels that would be at or very close to ozone levels that naturally exist in the atmosphere without any industrial

[1] Available at http://www.nam.org/~/media/423A1826BF0747258F22BB9C68E31F8F.ashx

activity. A 2010 study[2] by MAPI estimates that reducing Ozone NAAQS to levels sought by the EPA would result in the loss of 7.3 million jobs by 2020 and add $1 trillion in new regulatory costs per year between 2020 and 2030.

The EPA's push to lower Ozone NAAQS is only one part of the agency's highly aggressive regulatory agenda for 2013 and beyond. Over the next two years, the EPA is expected to issue a series of major regulations concerning greenhouse gas emissions and domestic energy production. The agency is also seeking to accomplish through guidance—circumventing regulatory procedures—an unprecedented expansion of its jurisdiction under the Clean Water Act.

Complying with these regulations is capital intensive. In a time of economic recovery where capital is extremely scarce, every dollar diverted from productive use creates additional pressure to reduce labor costs. And when commodities and other manufacturing inputs are increasing in costs, even more pressure builds to squeeze labor costs. In this environment, it is very clear that unnecessary or cost-ineffective regulations will dampen economic growth and will continue to hold down job creation. For some firms, it will be the final marginal straw that destroys the whole business.

We must recognize that one of America's great competitive advantages is our dynamic labor market. Companies must move quickly to meet the demands of a rapidly changing marketplace, and the continuing expansion of federal mandates and labor regulations undermines employer flexibility. In addition, increasing costs discourage the hiring of new employees. To encourage competitiveness, the United States should reject new federal regulations that dictate rigid work rules, wages and benefits and that introduce conflict into employer–employee relations.

Over the past few years, the National Labor Relations Board (NLRB) has passed a series of rules that seek to restrict the rights of employers and increase the cost of

[2] Available at http://www.nam.org/~/media/21F1AC2179154220896445E0C37855B0/MAPI_Study.pdf

doing business. The agency exceeded its statutory authority when it issued a 2011 final rule requiring employers to post a notice of employees' rights. The NLRB also issued a final rule in 2011 (the "ambush elections" rule) that drastically shortens the time between when a union election is announced and when it is held. The rule also limits employers' rights prior to the election. This new regulation would pose a considerable burden on employers—particularly smaller-sized manufacturers who lack the legal expertise to navigate complex and detailed labor laws—and could result in numerous NLRB violations for unknowing employers. The NAM and other parties filed multiple suits against the NLRB, and the cases are on appeal.

In 2013, the NLRB is expected to issue a proposed rule that would require employers to provide union officials the e-mail addresses and phone numbers of all employees who would be eligible to vote in a consent election. Such a rule would allow unions to impinge on an employee's privacy outside the workplace to a greater extent than possible. Employer privacy is also under attack. In 2011, the Department of Labor proposed sweeping changes to the rules concerning how an employer works with legal counsel to comply with the complex and nuanced laws governing labor relations. Current law requires employers, law firms and other labor union experts to disclose when employers have sought assistance from consultants who intend to directly persuade employees regarding union members. These proposed changes would make it more difficult for manufacturers, especially smaller-sized manufacturers, to access necessary legal assistance. For decades, the law has included a very important exemption: employers were allowed to obtain legal advice from attorneys to remain compliant with current law. Broadening the definition would violate the tenants of the attorney–client privilege and confidentiality.

In August 2012, the Securities and Exchange Commission (SEC) issued its final rule on conflict minerals, establishing burdensome reporting requirements for companies

whose products contain minerals (tin, tantalum, tungsten and gold) from the Democratic Republic of Congo (DRC) and adjoining countries. Manufacturers support the underlying goal of addressing the problems occurring in the DRC and adjoining countries, and we have long advocated for a reasonable rule that achieves that objective. However, the final rule requires a massive amount of companies' resources to try to uncover information that is oftentimes not readily available, if ever at all, through their supply chains and to conduct due diligence and, in some cases, include outside private audits. The necessary infrastructure is not in place around the world to trace the origin of the minerals or verify that the processing centers located outside of the United States did not use "conflict minerals." Without these two vital pieces of information, it is nearly impossible for companies to know if their products contain conflict minerals from the DRC or adjoining countries. The rule fails to include a *de minimis* exemption, meaning that a manufacturer's use of even a miniscule amount of minerals from the DRC in one input in a lengthy supply chain will trigger disclosure obligations. The NAM and other parties are challenging the rule in court.

Reducing Regulatory Impediments

The cumulative burden of the multitude of new and costly regulations is nearing a tipping point. If we are to be successful in creating a more competitive economy, we must also reform the design of our regulatory system to ensure we never again reach the state we find ourselves in today. To promote growth, serve the general public and protect individuals and the environment, the NAM supports regulatory policies designed to favor markets and adhere to sound principles of science, risk assessment and cost-benefit analysis.

Hold Independent Regulatory Agencies Accountable—The President does not exercise similar authority over independent regulatory agencies, such as the NLRB, the

SEC and the Consumer Product Safety Commission (CPSC), as he does over other agencies within the executive branch. As discussed above, the rules issued by these agencies can impose significant costs on manufacturers, but these agencies are not required to comply with the same regulatory principles as executive branch agencies. As a result, Congress should confirm the President's authority over these agencies. The same reasons for which a centralized White House review of regulations benefits other single-mission agencies, such as a broader economy-wide perspective on regulatory proposals, would similarly benefit independent agency rules. Consistency across the government in regulatory procedures and analysis would only improve certainty and transparency of the process. The case for the inclusion of independent regulatory agencies in centralized review of regulations is clear, and Congress should act to make it certain.

Streamline Regulations Through Sunsets—The best incentive for high-quality retrospective reviews of existing regulations is to sunset those rules that are not affirmatively chosen to be continued. The NAM supports the Regulatory Sunset and Review Act of 2013 (H.R. 309), introduced by Rep. Randy Hultgren of Illinois, that would implement a mandatory retrospective review of regulations to remove conflicting, outdated and often ineffective regulations that build up over time. If an outdated rule has no defender, no continued need for existence or is shown to have decreased in effectiveness over time, it should be sunset.

Increase Sensitivity to Small Business—The Regulatory Flexibility Act (RFA) requires agencies to be sensitive to the needs of small businesses when drafting regulations. It has a number of procedural requirements, including that agencies consider less costly alternatives for small businesses, and in some cases, must empanel a group of small business representatives to help consider a rule before it is proposed. Under the RFA, only a small number of regulations require this analysis because

"indirect effects" cannot be considered, and the small business panel process only applies to three agencies. We believe this process is helpful and has saved billions of dollars in regulatory costs for small businesses. However, agencies are able to avoid many important RFA requirements by simply asserting that a rule will not significantly impact small businesses. The NAM supports legislation that would ensure agencies fully comply with a law intended to reduce burdens on those small businesses.

Strengthen and Codify Sound Regulatory Principles—The complexity of rulemaking and its reliance on highly technical scientific information has only increased since the Administrative Procedure Act (APA) was passed in 1935. Our administrative process has not kept up with those changes, and agency accountability is lacking without meaningful judicial review. Moreover, the process by which the government relies on complex, scientific information as the basis for rules should be improved and subject to judicial review as well. Efforts to encourage peer review of significant data and to create consistent standards for agency risk assessment should be part of that process. The NAM supports legislative reforms to the APA to incorporate the principles and procedures of Executive Order 12866 into the DNA of how every rule is developed. We also support legislation that would improve the quality of information used by agencies to support their rulemakings.

Improving Institutions—Offices within the federal government have been established to improve the quality of regulations and reduce the burdens imposed on the public. These offices should be appropriately staffed and resourced to improve agency analysis of the impact of regulations on the economy, industry and small business. In addition, Congress should enhance its own resources to be able to challenge inaccurate agency claims about the costs and benefits of rules.

Conclusion

Chairman Bachus, Ranking Member Cohen and members of the Subcommittee, thank you again for the opportunity to testify today on the regulatory burdens borne by domestic manufacturers. The President stated in his Executive Order 13653 on improving regulation and regulatory review that our regulatory system should promote "economic growth, innovation, competitiveness and job creation." Manufacturers agree and are committed to working toward policies that will restore commonsense to our regulatory system. We hope the Subcommittee will hold the Administration to its commitment in the Executive Order. The best way to ensure continued economic growth and employment is by enacting a comprehensive and consistent set of policies that allow manufacturers to compete in the global marketplace. Reforming our regulatory system to prevent the continued piling on of unnecessary regulatory costs is an immediate priority.

Mr. BACHUS. Thank you, Mr. Greenblatt.

And, Mr. James, welcome to you.

TESTIMONY OF ROBERT K. JAMES, MEMBER OF THE AVON LAKE CITY COUNCIL

Mr. JAMES. I would like to thank Chairman Bachus, Ranking Member Cohen, and the other Members of the Subcommittee for inviting me to testify today. My name is Rob James, and I am a member of the City Council of Avon Lake, Ohio, where I represent the residents of Ward 1. Avon Lake is a beautiful community of over 23,000 residents on the shores of Lake Erie, approximately 20 miles west of Cleveland.

Although I am currently an attorney in private practice, I previously served as an assistant attorney general for the Ohio Attorney General, where I represented the State of Ohio and its agencies, including the Ohio EPA. My work as an assistant attorney general included enforcing the environmental laws and regulations, and ensuring that the natural resources of Ohio were protected. However, I am here today because I think it is important that Congress understands the impact of Federal regulation, and specifically Federal environmental regulation on local communities such as Avon Lake.

Almost exactly a year ago, on February 29, 2012, GenOn Energy, Inc., announced that it would close the coal and fuel oil-fired electric generating plant in Avon Lake in 2015. The Avon Lake Generating Station is capable of generating 734 megawatts, providing baseload electric capacity and load-following capability to the grid, as well as essential peaking capacity and black start capability. This facility plays an important role in providing a reliable and affordable supply of electricity.

The reasons behind this closure are clear. GenOn stated that the closure was a result of the rising costs associated with EPA's regulations and the fact that the overwhelming costs associated with complying with the rules could not be recovered by continuing to operate the facility. In particular, GenOn cited the EPA Mercury and Air Toxic Standards rule, known as MATS, as the primary reason motivating the Avon Lake deactivation.

On July 22, 2012, NRG Energy, Inc., and GenOn announced that they would combine the two companies, leaving NRG as the successor company. Despite the merger, NRG has publicly stated that the Avon Lake Generating Station remains as schedule to be deactivated in 2015. Although NRG has left open the possibility of reevaluating the projected deactivation of the facility, and there is the prospect that the small oil-fired boiler may remain operational, the unavoidable truth remains that the Avon Lake facility will be deactivated in 2015.

While some may celebrate the closure of these types of facilities based on broader policy objectives, the loss of power plants as a consequence of Federal regulation has a very real impact on communities in which they are located. These are not just abstract costs. The families of my community will have to absorb these significant losses.

The most immediate impact of the closure will be on the 80 people employed at the Avon Lake facility. These type of quality jobs

at the Avon Lake plant are increasingly hard to find in our country, let alone in Ohio and in the greater Cleveland area. But it is more about than just the jobs or the people employed at the plant. Instead, it is about the ripple effect that harms an entire community. In present dollars, closure of the Avon Lake generating facility will cost the city of Avon Lake $69,000 in income taxes and over $291,000 in property taxes each year.

This loss of taxes does not just represent the loss of general revenue used to fund the city and its programs. Significantly, a sizable portion of the property taxes collected is used to fund Avon Lake paramedics and emergency medical services. The loss of $71,000 annually from the EMS budget, which is the amount that would be lost from the closure, would reduce the EMS operating budget by half. Undoubtedly, this will have a direct impact on the health of Avon Lake residents.

Even more concerning is the impact the closure will have on the Avon Lake School District and other educational institutions in Avon Lake. At present, Avon Lake schools collect $1.8 million in utility taxes alone, and another $1.5 million in real property taxes each year. This potential loss of $3.3 million each year would have an unimaginable effect on Avon Lake schools. Not only will the loss of revenue directly impact the ability of the schools to provide a high quality of education for all students, but many of the programs offered by the schools for students with the greatest needs will be lost.

In addition, consumers in northeastern Ohio are likely to pay more for their electricity. Catholic Charities of Cleveland has previously testified to Congress that the loss of power plants would have a devastating effect on the people of Ohio and on our country, particularly the poor and elderly.

As the Subcommittee continues to evaluate the extent and the impact of Federal regulation, I hope you will keep in mind communities like Avon Lake. While government regulation is appropriate in certain circumstances, the Federal Government must understand the consequences of its regulations on our communities. Places like Avon Lake need affordable and reliable electricity, a strong educational system, and opportunities for our economies to rebuild and grow. The U.S. economy is still struggling to recover, and northeastern Ohio is at the center of the struggle. We know that we can have clean air, good jobs, and reliable electricity, but only if policies are implemented based on sound analysis and with full consideration of the real costs of the choices made by regulators.

Thank you again for the opportunity to testify today.

[The prepared statement of Mr. James follows:]

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COUNCIL OFFICE

TESTIMONY OF ROBERT K. JAMES
MEMBER OF THE AVON LAKE CITY COUNCIL
BEFORE THE
U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

"The Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness"

February 28, 2013

I would like to thank Chairman Bachus, Ranking Member Cohen, and the other members of the subcommittee for inviting me to testify today. My name is Rob James, and I am a member of the City Council of Avon Lake, Ohio, where I represent the residents of Ward 1. In addition, I am the chairman of the Public Service Committee, a member of the Economic Development Committee, and a former member of the Environmental Committee for City Council. Avon Lake, Ohio is a beautiful community of over 23,500 residents on the shores of Lake Erie, approximately twenty miles west of Cleveland.

Although I am currently an attorney in private practice, I have previously served as an assistant attorney general for the Office of the Ohio Attorney General, where I represented the State of Ohio and numerous state officials and agencies, including the

Ohio Environmental Protection Agency. My work as an assistant attorney general included enforcing environmental laws and regulations and ensuring that the natural resources of Ohio were protected. However, I am here today because I think it is important that Congress understands the impact of federal regulation, and specifically federal environmental regulation, on local communities such as Avon Lake.

Introduction

Almost exactly a year ago, on February 29, 2012, GenOn Energy, Inc. announced that it would close the coal and fuel-oil fired electric generating plant in Avon Lake in 2015. The Avon Lake Generating Station is capable of generating 734 megawatts, providing baseload electric capacity and load-following capability to the grid, as well as essential peaking capacity and black start capability. This facility plays an important role in providing a reliable and affordable supply of electricity.

The reasons behind the closure are clear. GenOn stated that the closure was a result of the rising costs associated with EPA's regulations, and the fact that the overwhelming costs associated with complying with the rules could not be recovered by continuing to operate the facility.[1] In particular, GenOn cited the EPA Mercury and Air Toxics Standards ("MATS") rule as the primary reason motivating the Avon Lake deactivation. At the time of the announcement, the Avon Lake facility was the largest of the GenOn fleet announced to be closed.

[1] "GenOn Reports 2011 Results and Announces Expected Deactivation of Generation Units," GenOn Energy, Inc. press release, February 29, 2012, accessed February 26, 2013, http://phx.corporate-ir.net/phoenix.zhtml?c=124294&p=irol-newsArticle_print&ID=1667152&highlight=.

On July 22, 2012, NRG Energy, Inc. and GenOn announced that they would combine the two companies, and on December 14, 2012 the merger was completed, leaving NRG as the successor company. Despite the merger, NRG has publicly stated that the Avon Lake Generating Station "remains as scheduled to be deactivated in 2015."[2] Although NRG has left open the possibility of re-evaluating the projected deactivation of the facility, and there is the prospect that the small oil-fired boiler may remain operational, the unavoidable truth remains that the Avon Lake facility will likely be deactivated in 2015.

While some may celebrate the closure of these types of facilities based on broader policy objectives, the loss of power plants as a consequence of federal regulation have a very real impact on the communities in which they are located. These are not just abstract costs. The families of my community have to absorb theses significant losses.

Impact on the City of Avon Lake

The most immediate impact of the closure will be on the 80 people employed by the Avon Lake facility. The type of quality jobs at the Avon Lake plant are increasingly hard to find in our country, let alone in Ohio and in the greater Cleveland area. But this is about more than just the jobs of the people employed at the plant; instead, it is about the ripple effect that harms an entire community. In present dollars, closure of the Avon Lake generating facility will cost the City of Avon Lake $69,878.62 in income taxes, and $291,977.00 in property taxes per year.

[2] Bryan Wroten, "Power plant still scheduled to close despite GenOn merger," *The Press*, August 1, 2012, accessed February 26, 2013, http://2presspapers.northcoastnow.com/power-plant-still-scheduled-to-close-despite-genon-merger/.

This loss of taxes does not just represent the loss of general revenue used to fund the city and its programs. Significantly, a sizeable portion of the property taxes collected is used to fund Avon Lake paramedics and emergency medical services. The loss of $71,827.06 annually from the EMS budget, which is the amount that would be lost from the closure, would reduce the EMS operating budget by half.

In particular, the loss would be realized by the inability to fund critical items ranging from paramedic supplies (i.e. cardiac medications, oxygen, oxygen masks, heart monitors), ambulance maintenance and repair, fuel, insurance, the purchase of ambulances, and the training and education of paramedics. With respect to personnel costs, it may eliminate one of the eight paramedics funded by property tax revenues, which represents a 12.5% reduction in the paramedic work force.

In addition to the taxes paid by the Avon Lake power plant, NRG and its predecessor GenOn have donated various equipment and training to the Avon Lake Fire Department and EMS. For instance, the Fire Department has received a thermal imaging camera, with an approximate value of $7,200, which assists firefighters to see heat in limited visibility, locating victims and the exact location of the fire more rapidly. Additionally, the Fire Department has been given a piercing nozzle, which has a value of nearly $6,000, and is used in firefighting to penetrate steel and other materials to combat hidden or inaccessible fires, and well as firefighting foam, worth several thousands of dollars, which helps extinguish flammable and combustible liquid fires.

Despite the announced closure, NRG has continued to play an active role in the community, most recently becoming a lead sponsor of the 24th Annual Charity Ball of

Community Resource Services ("CRS"), which is the chief health and welfare assistance organization in Avon Lake as well as the adjacent municipality of Avon. The charity ball is among the largest fundraising effort for CRS. The mission of CRS is to diminish the effects of poverty in Avon and Avon Lake by providing basic needs assistance and individualized resource and referral services.

Thus, the closure would directly affect ability of the City of Avon Lake to effectively deliver an emergency paramedic and firefighting service to its 23,500 residents. The closure will also indirectly affect the health and welfare of Avon Lake residents through the loss of charitable giving to such worthwhile organizations as CRS.

Impact on the Avon Lake City School District and Other Educational Institutions

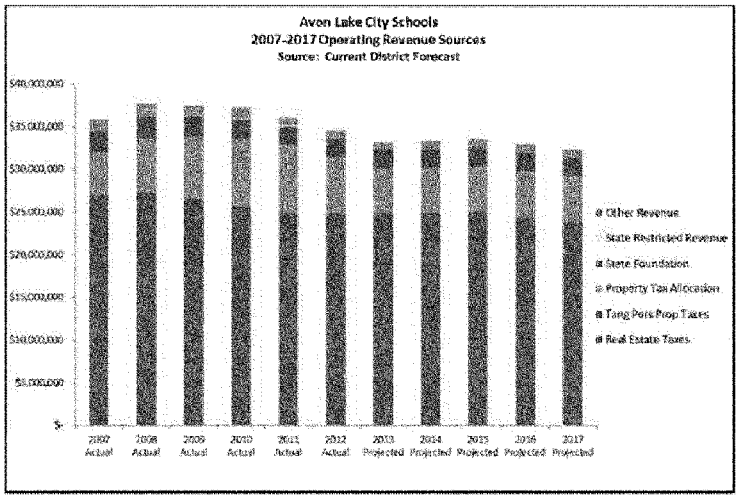
Even more concerning is the impact the closure will have on the Avon Lake City School District. The Avon Lake City School District currently has an enrollment of approximately 3834 students. In fiscal year 2012, it had 249 teachers, of whom 100% percent are state certified, and 70% have master's degrees or higher. In addition, the district had another 257 non-teaching staff, which includes administrative assistants, custodians, bus drivers, and other employees.

In 2012, 93% of Avon Lake graduates enrolled in a two year college, four year college, or in the military, and 70% of the students received college credit before graduating. Moreover, the students earned approximately $17 million in scholarship awards for college.

Not surprisingly, Avon Lake City School District has been rated as "Excellent" or better by the State of Ohio for the past ten consecutive years. Last year, the district

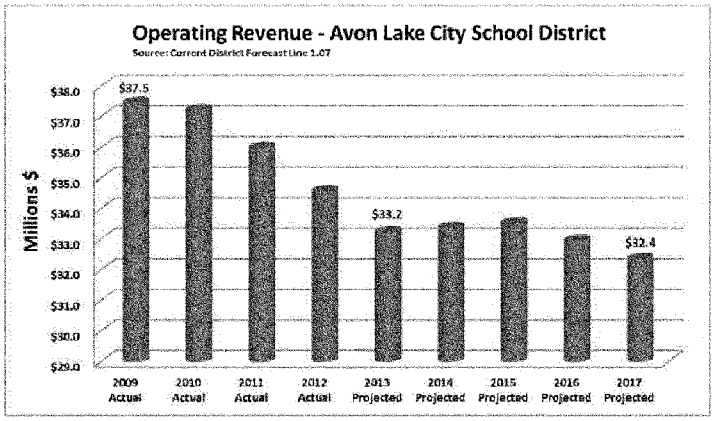
earned an "Excellent with Distinction," which is Ohio's highest rating. Of 937 school districts in the state, Avon Lake ranks 25th, or in the top 2.5% of all districts.

At present, Avon Lake City School District collects $1.8 million in utility taxes alone, and potentially another $1.5 million in real and tangible personal property taxes based on the future use of the property. The potential loss of nearly $3.3 million dollars *each year* would have an unimaginable effect on Avon Lake's schools. Based on fiscal year 2012 revenue of $34,941,153.00, a loss of $3.3 million equates to a 9.4% reduction. Revenues for fiscal years 2013 and 2014 are forecast to be even lower, so the reduction will likely be even greater. This projected loss to the school district can be summarized in the following chart:



Notably, these projections *only* take into account the loss of revenue from the utility tax, and not the potential loss of real and tangible personal property taxes as it is

difficult to project the future use and potential devaluation of the property. The loss of $1.8 million annually in revenue can starkly be observed in this chart:



The significant decline in operating revenue from 2012 to 2017 can clearly be seen, which largely represents the loss of taxes from the Avon Lake power plant.

Continuing loss of revenue may require the reduction of up to 51 full-time employees by the 2014-2015 school year. Inevitably, these reductions would result in an increase in class sizes. For instance, kindergarten classes currently average 20 to 25 students per class, but with reductions, class size may exceed 30 students. Educational opportunities may be reduced or eliminated, such as Advanced Placement classes, dual credit classes with the local community college, and electives for all age groups, including art, music, physical education, and college preparatory classes. The district has already prepared for the worst by reducing 15 full-time equivalent positions for the 2013-2014 school year.

Not only will the loss of revenue directly impact the ability of the schools to provide the high quality of education that it currently offers, but many of the programs offered by the school for students with the greatest needs would be lost. The loss of the Avon Lake power plant could force the school district to end, for example, outreach services at the Cleveland Clinic Learner Center for Autism that help meet the needs of autistic students without having to send them to outside placement; no-cost programs at Applewood Center, which helps children and teens who are struggling with depression, anxiety, Attention Deficit Hyperactivity Disorder, the effects of trauma or abuse, or are having behavioral difficulties at home or in school; anonymous counseling and awareness programs from the Lorain County Alcohol and Drug Abuse Services, and a program through Genesis House and Teen Street Team to assist students in talking to their peers about abuse.

In addition to the Avon Lake School District, it should be noted that other educational institutions will also feel the loss of tax revenue from the closure of the Avon Lake power plant, including the Avon Lake Public Library and the Lorain County Joint Vocational School District. The Avon Lake Public Library is projected to lose upwards of $100,557.88 per year in property tax revenue, a loss of nearly 3% of its revenue, and the Lorain County Joint Vocational School District will see a decrease of $87,988.15, a decrease of 2.59%.

As Avon Lake School District Superintendent Robert Scott has noted, these losses are "devastating," especially in light of the fact that the school district is already having to reduce the number of teachers in schools because of state budgetary issues.

Numerous additional losses will be realized by the district from both state and local sources, such as:

2007-2011	State Decrease:	Continued phase out of Tangible Personal Property Tax
2010	State Decrease:	8.9% in State Foundation
2010	Local Decrease:	4.79% reduction in Avon Lake property valuation (Lorain County Triennial Update)
2011	Local Decrease:	Power Plant devaluation resulted in more than $1,200,000 decrease for the District
2012	State Decrease:	$710,158 in Tangible Personal Property Tax Hold Harmless Reimbursements
2012	State Decrease:	$710,158 in Public Utility Personal Property Tax Hold Harmless Reimbursements
2012	Local Decrease:	6% reduction in Avon Lake property values (Lorain County Reappraisal)
2013	State Decrease:	$710,158 in Tangible Personal Property Tax Hold Harmless Reimbursements
2013	State Decrease:	$710,158 in Public Utility Personal Property Tax Hold Harmless Reimbursements
2015	Local Decrease:	Power Plant projected to close in April 2015
2016	Local Decrease:	Partial Impact of Power Plant Closing Realized
2017	Local Decrease:	Full Impact of Power Plant Closing Realized

Parents and friends of the Avon Lake School District share similar sentiments with Mr. Scott. Deborah Ludwig, a parent of a student at Troy Elementary School, stated:

> With the Avon Lake GenOn closing, it will highly impact the community's energy costs and quality of life. There are many unforeseen factors that will be generated by this plant's closing that will impact not only the residential establishments BUT also the Avon Lake School System. With the Federal Government continually raising the bar on EPA standards and in effect costing our energy plants upgrades that they cannot afford to make, the end result will be a wealth of empty and useless plants across the state, higher consumer costs and a downgrade on everyone's quality of life especially here in Avon Lake.

Kris Simecek, a parent of a student at Westview Elementary School, shares a similar perspective. She said:

> My husband and I moved to Avon Lake over 20 years ago because of one specific reason – the quality of Avon Lake City Schools. Since then, we have raised four boys who all went through the Avon Lake school system. If GenOn closes, the economic impact on our high quality school system will be highly detrimental. The future of the school system, and therefore the future of the children of Avon

> Lake, is dependent on consistent resources. As a mother, the health of my children is very important. If the closing of GenOn is the only way to improve the air quality and the health of our children and community, it should not be done to the detriment of those very same children and community members.

The loss of the Avon Lake power plant clearly represents an incredibly difficult challenge for the Avon Lake School District and other Avon Lake educational institutions. While the intended objective of clean air is important, the unintended consequence of the loss of revenue to the schools must be considered in promulgating any federal regulation, and especially environmental regulations.

Impact on the Cost of Electricity

In addition, consumers in Northeast Ohio are likely to pay more for their electricity. Catholic Charities of Cleveland has previously testified to Congress that the loss of power plants "would have a devastating effect on the people of Ohio and our country, particularly the poor and the elderly."

The group attempted to quantify the impact of such closures as follows:

> The overall impact on the economy in Northeast Ohio would be overwhelming, and the needs that we address at Catholic Charities in Ohio with the elderly and poor would be well beyond our capacity and that of our current partners in government and the private sector. In a recent study on Public Opinion on Poverty, it was reported that one-quarter of Americans report having problems paying for several basic necessities. In this study, currently 23% have difficulty in paying their utilities - that is, one out of four Americans.

Unfortunately, other communities in addition to Avon Lake are suffering from the costs of federal environmental regulation. In Ohio alone, nine other power plants

have announced that they will close, including Conesville, Muskingum River, Picway, Beckjord, Miami Fort, Ashtabula, Bay Shore, Eastlake, Lake Shore, and Niles. This represents a loss of 5,870 megawatts in just Ohio. Additional losses will be felt outside of Ohio, including Glen Lyn, Virginia; Muskegon, Michigan; and Upper Mount Bethel Township, Pennsylvania. In each of these communities, and all the other locations where plants are closing, it will be harder to pay for the schools, hospitals, and basic services that keep communities vibrant and healthy.

Conclusion

As this subcommittee continues to evaluate the extent and impact of federal regulation, I hope that you will keep in mind communities like Avon Lake. While government regulation is appropriate in certain circumstances, the federal government must understand the consequences of its regulations on our communities. Places like Avon Lake need affordable and reliable electricity, a strong educational system, and opportunities for our economies to rebuild and grow. The U.S. economy is still struggling to recover, and Northeast Ohio is at the center of this struggle. We know that we can have clean air, good jobs, and reliable electricity—but only if policies are implemented based on sound analysis, and with full consideration of the real costs of the choices made by federal regulators.

Thank you again for the opportunity to testify today.

Mr. BACHUS. Thank you, Mr. James.

And now, Dr. Holtz-Eakin, we welcome you. And let you give your opening statement.

TESTIMONY OF DOUGLAS HOLTZ-EAKIN, PRESIDENT, AMERICAN ACTION FORUM

Mr. HOLTZ-EAKIN. Chairman Bachus, thank you. Ranking Member Cohen, Members of the Committee, it is a privilege to be here today. I submitted a written testimony which is a very elaborate accounting of recent regulatory costs, both annually, cumulatively over the past several Congresses, those that can be attributed to major pieces of legislation such as the Affordable Care Act, the Dodd-Frank legislation, and attempted to put these in a global context and to identify particular impacts on small businesses. It is chock full of numbers, and I respect you too much to go through it all.

Let me just say three things. Number one, as a starting point, these regulatory costs are quite significant. At the moment, there are 128 so-called economically significant regulations under consideration. We have seen nearly $300 billion in regulatory activity in 2011, another $200 billion in 2012. Over the past 4 years, roughly $520 billion in regulatory costs.

I would point out that these are on the same order of magnitude as the much ballyhooed fiscal cliff tax increase we saw at the beginning of the year, but often get much less attention. And their likely incidence, the people who will ultimately bear their costs, are much more focused on workers and the middle class than those increases would be. They are also having an increasing impact on U.S.' standing in international competitiveness. And as Chairman Goodlatte mentioned in his remarks, the U.S. is lagging behind other countries in terms of broad-based attempts to look at the impact of the regulatory system on their economic performance.

Britain got a lot of attention for its one-in, two-out approach, but countries as small as Portugal are looking at the impact of their regulatory approaches on economic performance. They have adopted something called the Simplex approach. The Organization for Economic Cooperation and Development has placed regulatory review at the top of its policy agenda. And I think all of this highlights the importance of thinking about this for the United States, where we have in recent years seen two executive orders from the President, which are laudable, but which are small by comparison and have not produced large changes in the regulatory burden.

The second point I would make is that I believe it is indisputable that this is slowing the recovery from the very large recession that followed the financial crisis of 2008. It is straightforward textbook economics to recognize the impact of large tax increases on the pace of such recoveries. The regulatory burdens are of the same character. And as I mentioned, they are quite large, over $0.5 trillion dollars.

Some of the pieces of legislation have had very specific and large-scale impacts. The Affordable Care Act has a big regulatory burden, $35 billion in measured regulatory costs, something like $80 million in hours of compliance.

But it is also now recognized to have large impacts across the economy. The employer mandate to provide insurance is a real impediment to labor market performance. It is going to hit especially minimum wage workers, where employers will be obligated to layer on top of that existing compensation more in the way of health

compensation with no offset in cash wages. That is going to hurt hiring. We are already seeing a spate of companies reorganize the hours of work to make sure that people fall under the threshold for full-time workers, and thus create part-time employment instead of full-time employment. That is a cost by any measure.

We have done a lot of research at the American Action Forum on the implications of the various mandates within the Affordable Care Act for greater benefits, the MOR rule, things like that, on the costs of insurance. And those insurance costs in an employer-sponsored system will be passed along as costs to the labor force, and thus impede hiring and expansion as well. So we have seen these kinds of impacts, and they are indeed slowing the recovery.

The last point I would emphasize is that many of these costs are concentrated in disproportionate ways on smaller businesses. One of the outstanding features of the data that we have seen over the past several years is the diminished rate at which small businesses are created in the United States. It is also an empirical regularity that small-business creation is associated with job creation. It is new firms that create a lot of jobs. The diminished creation of small businesses is directly related with our poor job growth.

In the testimony there is a table that looks, for example, at the Affordable Care Act rules on small businesses, from menu labeling, to vending machine labeling, to an enormous number of payment rules. All of these I think are having a big impact. And the Dodd-Frank rule does the same thing. We did some work on what the combination of the QRM, QM, and Basel III accords will do for mortgage origination in the United States. In normal circumstances, it will be down about 20 percent. That translates directly into smaller number of housing starts. And housing contractors are one of our most vibrant small businesses.

So I am pleased to have the chance to be here today. I look forward to answering your questions, and would just raise the importance of these issues on our overall economic importance and growth.

[The prepared statement of Mr. Holtz-Eakin follows:]

Regulation, Jobs, and America's Global Competitiveness

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Douglas Holtz-Eakin, President*
American Action Forum

February 28, 2013

*The views expressed here are my own and not those of the American Action Forum. I thank, without implication, Sam Batkins, Dan Goldbeck, and Cameron Smith for their assistance.

Chairman Goodlatte, Subcommittee Chairman Bachus, Ranking Member Cohen, and Members of the Committee, thank you for the opportunity to appear today. In this testimony, I wish to make three basic points:

- Virtually everyone agrees that we need some type of regulatory reform, but the starting point is to understand the current scale of regulatory costs,
- New regulatory burdens are an important part of the current sluggish performance of the U.S. macroeconomy, and
- New businesses, an important source of job creation, are especially burdened by recent regulatory initiatives.

Let me provide additional detail on each in turn.

The Scale of Regulatory Burdens

Although President Obama has issued four seminal executive orders outlining his vision for the regulatory state, to date there has been relatively modest efforts to "modify, streamline, expand, or repeal" burdensome regulations. Instead, the pace of new regulations has dwarfed notable rescissions.[1]

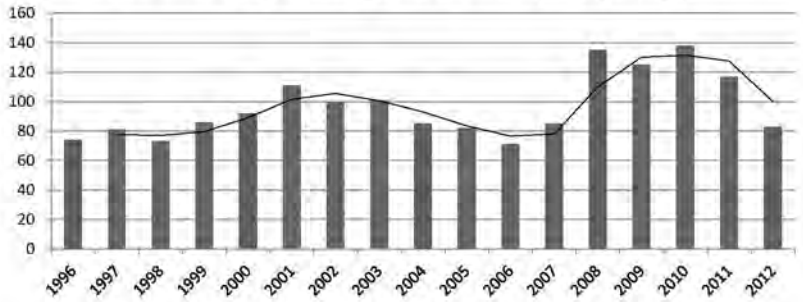
In this regard, here are a few facts on regulations taken directly from the administration's Office of Information and Regulatory Affairs (OIRA):

- Last fiscal year, the total U.S. paperwork burden grew by more than 355 million hours, or four percent.[2]
- Currently, the U.S. must manage more than 9,100 government forms, imposing 10.2 billion hours of paperwork.[3]
- In 2010, the White House reviewed more "economically significant" regulations than at any time in the past fifteen years (see Chart 1).
- The current "Unified Agenda" of federal rulemakings contains 128 "economically significant" regulations (impact of $100 million or more).

[1] "Improving Regulation and Regulatory Review," Executive Order 13563 of January 18, 2011.
[2] Office of Management and Budget, Information Collection Budget of the United States Government 2012.
[3] Office of Information and Regulatory Affairs (OIRA), Inventory of Currently Approved Information Collections.

Chart 1

Economically Significant Regulations Reviewed (moving average)



The American Action Forum (AAF), in an effort to track 100 percent of federal rulemakings, has tallied the cumulative burden of regulations since 2011. Looking to document the impact beyond "economically significant" rules, AAF has tracked thousands of regulations in the past three years. All of the figures listed below are merely data recorded directly from the Federal Register, the "Daily Journal of the United States Government." AAF does not re-estimate or modify agency estimates. If an agency says a rule will impose $3 billion in costs, or save $3 billion, we record the data as listed each day.

From an economic perspective, the totals are sobering: $294 billion in regulatory activity since 2011, including $43 billion in final rules that year, and $215.9 billion in 2012, the highest AAF has recorded. During the past four years, the cumulative regulatory cost burden has increased by more than $520 billion, taking into account proposed rules yet to be finalized. These figures place significant obstacles to growth in a time of persistently high unemployment.

To put the $520 billion figure in perspective, it is more than the combined gross domestic product of Portugal and Norway, and there is little evidence 2013 will slow this pace. Based on a review of the 2012 Unified Agenda, AAF identified $123 billion in possible regulations this year, based on only 40 regulations (out of 2,387 active actions).[4]

To date, the federal government has published more than $12.2 billion in new costs ($5.5 billion in final rules and $6.7 billion in proposed rules). These figures include the three significant cost-cutting measures from the administration:

- A $3.2 billion proposed rule from Health and Human Services to enhance "Efficiency, Transparency, and Burden Reduction" in Medicare and Medicaid;

[4] American Action Forum, Regulatory Calendar: Administration Releases 2013 Regulatory Plan, available at http://americanactionforum.org/topic/regulatory-calendar-administration-releases-2013-regulatory-plan.

- A final EPA rule reducing burdens on engine manufacturers by $520 million; and
- A $52 million amendment from EPA rescinding burdens for the Portland Cement industry.

Without these efforts to rescind or streamline existing regulations, there would be more than $16.1 billion in cumulative regulatory burdens for 2013, putting the U.S. on track for another year of $100 billion in regulatory costs.

However, the pace and implementation of the President's two lodestar executive orders, 13,563 and 13,579, simply cannot offset the new burdens. For example, according to White House data, few independent agencies have submitted a final plan to rescind outdated regulations.[5] With the implementation of Dodd-Frank generating approximately 400 new regulations, examining the role of independent agencies is even more vital to achieving substantive regulatory reform.

Dodd-Frank and Affordable Care Act Contribution to Burdens

As noted above, the federal government added more than 355 million paperwork burden hours in the last fiscal year. To put that in perspective, it would take more than 177,000 employees working 2,000 hours annually to complete the new red tape, and these are the workers required to serve only the regulatory additions in FY 2011.

The main drivers of this paperwork are Dodd-Frank and the Affordable Care Act (ACA). According to OIRA, "new statutory requirements" have produced 711 million new hours in the last two fiscal years alone. The President's new paperwork burdens comprise 42 percent of all statutory requirements since 2001, and there are still hundreds of Dodd-Frank and ACA rules to implement in 2013.

Based on AAF's tabulation, the ACA has produced $33.8 billion in costs on private entities, and state and local governments. These costs have translated into significant paperwork requirements as well, 80.9 million hours. Based on OIRA records, there are eight ACA rules at the White House currently, 17 expected by the third quarter of 2013, and four more scheduled for December 2013. Few dispute that these 29 rulemakings will add billions of dollars in costs and several million more paperwork hours.

Dodd-Frank has produced similar regulatory burdens, but because independent agencies are not required to provide quantitative cost-benefit analysis, the listed costs are far lower. Since 2010, Dodd-Frank has generated $15.1 billion in direct compliance costs and 59.7 million paperwork burden hours.

At first glance, it is easy to discern that Dodd-Frank's cost profile is woefully under-reported. For example, of Dodd-Frank's 115 regulations that have imposed reporting requirements, only

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[5] Regulatory review plans under Executive Order 13563, available at http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system.

67 listed costs, or 58 percent. When agencies did list cost data, the average rulemaking imposed $217 million in burdens.

The lack of data translates into 19 million paperwork hours without listed compliance costs. The cost of red tape under Dodd-Frank varies tremendously, up to $400 an hour, but agencies have used $100 an hour as a central estimate for many rulemakings. If we assigned these 19 million paperwork hours a cost, Dodd-Frank's burden would jump to $17 billion. Again, with 103 "active" Dodd-Frank rulemakings scheduled in 2013, these costs will only grow. Sadly, from a policy and transparency perspective, many agencies will never conduct a full analysis, and the public will never know the full impact of implementation.

Economic Implications of the Additional Regulatory Costs

As noted above, during the past four years the cumulative regulatory cost burden has increased by more than $520 billion. Put differently, the regulatory initiatives of the past several years have imposed a nearly half-trillion dollar tax on the economic expansion. This has an unambiguously negative impact on economic growth. There are several perspectives from which to view this.

The first is to acknowledge that regulatory initiatives are not born in a vacuum; they instead stem from a desire to seek environmental, financial stability, social welfare, or other policy objectives. From this perspective, the regulatory costs reflect a decision to put these objectives above the goal of more rapid economic growth – a decision that is part of a fair debate over policy priorities.

Second, these regulatory initiatives can have a profound impact on U.S. competitiveness, namely for our manufacturing sector. In a report issued earlier this month, AAF identified at least $359 billion in regulatory burdens imposed on manufacturers during the last ten years.[6] In addition, there were nearly 100 economically significant regulations issued during that time from EPA, and the Departments of Energy and Labor alone, chief regulators of the manufacturing sector. The recent Unified Agenda offers little hope for relief, as regulators have outlined an additional $9.2 billion in costs for manufacturers.

From another perspective, the regulatory initiative is of a scale comparable to the tax increases in the recently enacted "fiscal cliff". There has been deserved concern over the wisdom of a sharp tax increase in the midst of a recovery that has failed to attain even near-trend economic growth, but advocates have argued that the progressive nature of the tax increases provides income distributional gains that outweigh the negative growth consequences. It is harder to advocate for the regulatory burden that both harms growth and imposes the greatest economic burden on workers.

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[6] American Action Forum, The Intersection of Regulation and Manufacturing, available at http://americanactionforum.org/sites/default/files/AAF%20Regulation%20and%20Manufacturing.pdf.

Impact on Global Competitiveness

Curbing regulatory growth is not only a bipartisan issue, but also an international concern, as nations around the globe craft pro-growth reform efforts. From the United Kingdom, to South Korea, to Portugal, sensible regulatory policy is hardly a U.S. concern alone.

The United Kingdom has already adopted an aggressive regulatory reform system that contains the following elements: "1) operating a 'one in, two out' rule for business regulation, 2) assessing the impact of each regulation, 3) reviewing the effectiveness of government regulations, 4) reducing regulation for small businesses, 5) improving enforcement of government regulations, and 6) using alternatives to regulation." Although there are legal hurdles in the U.S. to adopting a "one in, two out," framework, the other items above are already practiced with some regularity on the federal and state level; however, few are codified, and even fewer apply to independent agencies.

If a "one in, two out," regulatory budget is adopted in the U.S., it could save billions of dollars. The UK reports that their budgeting system for new rules has saved £919 million, or approximately $1.3 billion, since the Cameron government instituted the program.[7]

According to a report from the Organisation for Economic Co-operation and Development (OECD), South Korea "has made impressive progress in a very short time period implementing regulatory reform to streamline regulations."[8] Korea has already reviewed more than 11,000 regulations, halving their number, and reforming another 2,400 rules. Needless to say, OECD has issued no such report highlighting U.S. efforts to halve the number of burdensome regulations.

Finally, Portugal, a country struggling to motivate growth, has implemented a number of successful reforms. According to OECD, Portugal has introduced "Simplex Test, mainly to assess the administrative burdens which new regulation could impose on citizens and businesses." This Simplex Program "catalogues specific and cross-cutting initiatives to reduce or eliminate the costs which administrative procedures impose on citizens and firms." The ultimate goal of these efforts is to improve the business environment and to attract foreign investment.

The U.S. regulatory system should also be an international model, as opposed to an aberration. Emulating just a handful of the reforms above would lead to a more rational and more effective regulatory state. OECD has 12 specific recommendations for reform, and as our current economic performance indicates, the U.S. has millions of different reasons for codifying

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[7] Department for Business and Innovation Skills, The Fifth Statement of New Regulation, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/36833/12-p96c-fifth-statement-of-new-regulation.pdf.

[8] OECD, Korea: Progress in Implementing Regulatory Reform, available at http://www.oecd.org/regreform/38238965.pdf.

internationally recognized principles for reform. Our overseas competitors are acting, and so should we.[9]

Small Business Implications of U.S. Regulatory Growth
Small and startup businesses have been a traditional cornerstone of job creation in the United States. Accordingly, it is useful to examine the implications of various regulatory initiatives on the climate for their activities.

Environmental
The EPA is often the center of attention for regulatory critics and progressive environmentalists, and for good reason. OIRA's caseload is routinely filled with major EPA rules, and it concluded review of 93 agency rules in 2010 alone, including 21 economically significant regulations, the highest amount since 1994.

Beyond the topline aggregate burdens of EPA's rules during the last four years ($252 billion), there are real local and small business impacts. For example, according to AAF calculations, approximately 100 power plants have announced their retirement, partly because of EPA regulations. No one discounts the impact that low natural gas prices have on our fuel generation mix, but with 42,000 megawatts likely going offline in the next few years, and more than 14,000 employees directly affected, the economic implications of overregulation are profound.

Dodd-Frank Financial Reform
The Dodd-Frank Wall Street Reform and Consumer Protection Act imposes direct compliance costs and its distortions induce economic costs in the form of reduced capital investment, inferior risk sharing, and lost competitiveness. Regulators rarely measure these burdens during implementation of the law.

Despite the intent of the legislation, many small entities are increasingly targeted by regulators. Unlike their larger counterparts, small businesses lack rent-seeking capabilities and a team of regulatory compliance staff.

Using AAF's database of federal regulations, we found 29 Dodd-Frank regulations that even the agencies admit could have a "significant economic impact" on small entities. This term is undefined, but in all 29 instances, regulators conceded that their rules could burden small businesses. Combined, these regulations will impose more than 15.2 million paperwork burden hours and $6.5 billion in costs.

These regulations affecting small businesses are too numerous to list here, and only ten listed quantified compliance costs, meaning many agencies simply declined to discuss all possible impacts on small entities. When agencies did quantify burdens, the average regulation imposed $665 million in costs. If agencies displayed greater transparency and conducted an analysis of the possible costs and benefits, the figures above would be far higher.

Health

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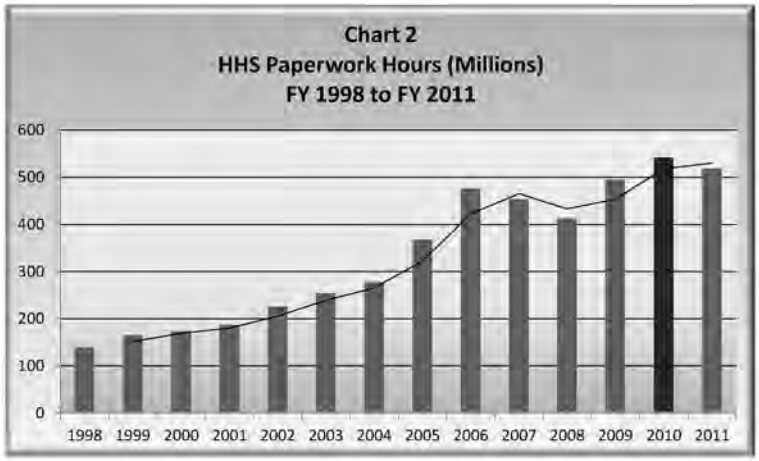
[9] OECD, Recommendation of the Council on Regulatory Policy and Governance, available at http://www.oecd.org/gov/regulatory-policy/49990817.pdf.

When the Congressional Budget Office (CBO) reviewed the ACA under the Unfunded Mandates Reform Act (UMRA), it acknowledged the law "would greatly exceed" statutory cost thresholds ($70 million for local governments and $141 for the private sector) "in each of the first five years that the mandates would be in effect." After approximately three years of implementation, CBO's estimate was on the mark. The ACA's regulatory burdens have greatly exceeded UMRA's thresholds.

The ACA has imposed $24 billion in costs on private entities and more than 80 million paperwork burden hours, figures that fall disproportionately on small entities.

Even the White House agrees HHS's paperwork budget has increased. In FY 2008, HHS imposed 412.8 million hours of red tape; in FY 2011, that figure stood at 518.8 million, a jump of 106 million hours, or 25 percent in just three years. The ACA is the direct cause of many of these new requirements. The figure below (see Chart 2) details HHS's rising regulatory burden, with the pronounced jump in 2010.



AAF did not end its analysis of the law's costs alone. We also searched the relevant Regulatory Impact Analyses (RIA's) to determine aggregate benefits. Sadly, costs outweigh benefits by a ratio of at least 3 to 1 – $33.8 billion in costs to $9 billion in quantified benefits. The ACA not only fails the regulatory cost-benefit test, but the budgetary and policy tests as well.

As noted, under the RFA, all federal agencies must consider the impact of their proposal on small entities, seek appropriate input, and develop regulatory alternatives for small businesses. Frequently, agencies ignore the RFA, but acknowledging that a regulation imposes a "significant economic impact on a substantial number of small entities" is rare, mostly because the term is undefined.

However, the ACA has met this threshold on almost a dozen occasions. Below are eleven regulations that HHS conceded would place significant burdens on small businesses. Combined, rural hospitals and doctors would incur more than $1.9 billion in burdens and 11.3 million paperwork hours.

ACA Rules Burdening Small Businesses According to HHS

Regulation	Cost	Paperwork Burden
Proposed Menu Labeling	$757.1 Million	622,000 Hours
Final Shared Savings Program	$451 Million	N/A
Proposed Vending Machine Labeling	$423.1 Million	842,000 Hours
Final Physician Fee Schedule	$172.9 Million	365,197 Hours
Proposed Covered Outpatient Drugs	$81.4 Million	391,212 Hours
Final Billing for Skilled Nursing Facilities	$29.93 Million	913,884 Hours
Final Payment Policies	$11.58 Million	196,509 Hours
Final Patient Notification Requirements	$2.55 Million	138,032 Hours
Final Outpatient Prospective Payment	N/A	1,010,876 Hours
Final Inpatient Prospective Payment	N/A	6,838,293 Hours
Final Hospital Payment System	N/A	N/A[10]
Aggregate Small Business Impact: $1.9 Billion and 11.3 Million Hours		

These regulations are only part of the law's overall burden. Several of the administration's regulations admit they will adversely affect small rural hospitals. One proposal covering Skilled Nursing Facilities [SNF] concluded, "We anticipate that the impact on small rural hospitals would be similar to the impact on SNF providers overall. Therefore, the Secretary has determined that this final rule may have a significant impact on the operations of a substantial number of small rural hospitals."

Although $1.9 billion in costs, and adverse impacts on doctors and rural hospitals might appear significant, the actual burden is much higher, as many of the administration's formal regulatory publications never capture the macroeconomic impact.

Examining Cumulative Regulatory Burdens

It is clear the U.S. cannot continue to add significant regulation after significant regulation without any regard to cumulative regulatory burdens. On that point, President Obama agrees. In Executive Order 13,610, the President established four key principles for identifying and reducing regulatory burdens. The Order read: "[A]gencies shall give consideration to the cumulative effects of their own regulations, including cumulative burdens, and shall to the extent practicable and consistent with law give priority to reforms that would make significant progress in reducing those burdens while protecting public health, welfare, safety, and our environment."

[10] According to the rule, "These requirements are exempt from the PRA [Paperwork Reduction Act] in accordance with the provisions of the Affordable Care Act." 75 *Fed. Reg.* 72238.

Few would disagree with that statement, but after numerous executive orders and OIRA memos, the pace of burden reduction is hardly commensurate with the burdens of new rules. To date, we still do not have a comprehensive database outlining all agency rules, and their cumulative impact. It is virtually impossible to reform our regulatory system without an idea of the costs and benefits of the rules in place.

Although I do not believe agencies are likely to publish their regulatory "budget" anytime soon, there are perhaps easier options for Congress and agencies to evaluate cumulative regulatory burdens. The Paperwork Reduction Act (PRA) has forced agencies to catalogue red tape requirements since 1980. As mentioned, the current government-wide total is 10.2 billion hours.[11] If agencies view a comprehensive retrospective review of their regulatory agenda as impractical, the PRA may allow agencies to balance their "paperwork budget" without threatening "public health, welfare, safety, and our environment."

For example, HHS currently collects 1,147 forms, with more than 3.2 billion annual responses; this translates into more than 521 million paperwork burden hours, and a reported cost of $412 million, from just one government agency. One idea AAF has put forth in the past would establish regulatory neutrality for paperwork collections. Thus, if an agency sought to add to an existing collection or propose a new paperwork form, it would have to rescind outdated collections or merge existing requirements with new burdens.

This is hardly an impossible task. The Consumer Financial Protection Bureau recently amended its collections for Regulations X and Z, saving more than 8.4 million hours. Other agencies could emulate this approach to ensure the cumulative burden of paperwork does not impose too high of a burden for businesses and individuals.

According to the National Federation of Independent Businesses (NFIB), paperwork is one of the biggest concerns for small businesses. By forcing agencies to live within a paperwork budget, businesses and individuals would gain needed certainty, and public health and safety protections would not be undermined. This is a modest policy proposal, but one that achieves the goals of regulatory transparency and burden reduction.

Conclusion

All Members of this Committee would agree that we need a regulatory system that encourages entrepreneurship, promotes economic growth, and protects the health and safety of Americans. There are doubtless benefits associated with the regulatory costs outlined, but we cannot ignore the cumulative impact of regulations, or the burden on small businesses that are ill equipped to handle thousands of hours of paperwork.

By introducing much-needed transparency across all federal agencies, measuring costs and benefits of new rules, and attempting to keep our "regulatory budget" neutral, we can achieve the dual goals of promoting economic growth and protecting public health.

Thank you. I look forward to answering your questions.

[11] Office of Information and Regulatory Affairs (OIRA), Inventory of Currently Approved Information Collections.

Mr. BACHUS. Thank you very much.

And now, Mr. Kovacs, I welcome you and the Chamber to this hearing.

TESTIMONY OF WILLIAM L. KOVACS, SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY & REGULATORY AFFAIRS, U.S. CHAMBER OF COMMERCE

Mr. KOVACS. Good morning, Chairman Bachus and Ranking Member Cohen and Members of the Committee. Thank you for inviting me here. I guess when Congressman Cohen was saying this is the 17th hearing, one of the things that was going through my mind is, I think this is my 17th year talking about some form of regulatory reform, and I guess it sort of feels like Groundhog Day.

One of the things I wanted to do is maybe give a little bit of perspective without just going into this reg is bad or this reg——

Mr. BACHUS. Pull that just a little closer to you.

Mr. KOVACS. Certainly.

Mr. BACHUS. Thank you.

Mr. KOVACS. Is that fine?

Mr. BACHUS. That is great.

Mr. KOVACS. You know, when I was preparing for the testimony, we sort of looked at the legislative history. This issue has been going on as to whether or not regulations harm jobs for almost 45 years. Congress had, in the 1960's, a very extensive debate at the beginnings of the Clean Air Act, and what was so fascinating about the debate is, if you looked at it, some of the Democrats at that time had some of the same issues as the Republicans have today. And what was interesting is—and we are talking the Bella Abzugs of the world and Jennings Randolphs—they recognized, the Congress recognized overwhelmingly that they needed to clean the air and the water. There were serious environmental problems and they had occur. But they also recognized that as part of that they were going to impose regulations to protect health and safety that were going to have adverse economic impacts on cities, industries, and people. And they came to a deal, which is something Congress could do in those days, and that is, they decided that they were going to give the agencies the authority to put the regulations in that would protect health and welfare.

In exchange, Congress asked the agency, in particular EPA, to do what they call a continuing evaluation of potential job loss and shifts in employment. And why that was so important is because they knew they were putting these burdens on society. And when they were putting the burdens on, Congress needed to be able to monitor what was happening and what was happening to particular industries.

And this is not something that, you know, we are now imagining. There were two Supreme Court cases, one written by Justice White, who was a liberal, and one by Scalia, who is a conservative, both recognizing the same principle: That this was where it acted. But what happened is, over the years, Congress forgot to do its oversight, so I thank you for doing more, and the agencies themselves forgot—they remembered to do the regulations, they remembered to say costs aren't a problem, but they also forgot to do the continuing analysis which showed the impact on jobs, and that is really crucial.

And so one of the things that, as the chamber was looking in this, we wanted to know what has happened in the system. And we did this study, we had hired it out to NERA, and we asked,

from 1997 forward what has the EPA done in terms of any kind of ananalysis on the effects of these regulations on employment? And one of the things we found is, out of the 58 regulations, they only looked at jobs 18 times, and out of the 18 times that they looked at jobs in some way, 16 of them were the wrong analysis. They used a partial versus an economy-wide analysis. But they never did the continuing analysis, and the difference between the RIA and the continuing is the RIA looks at a very specific industry and asks the question, what does it take to come into compliance, and that model will show job creation.

On the other side of the issue, if you do an economy-wide, you see the costs that you are imposing on the industry flow through the economy. And I wanted to give you an idea of just the difference using only EPA statistics.

If you did the Utility MACT using EPA's data, just EPA's data, EPA got 54,000 jobs created. That is what it would have taken for that industry to come into compliance. If you look at the added costs that flow through society, you come up with a 180,000 to 215,000 job loss. And in some of the regs that are going to come out later this year, like ozone, for example, EPA refused to do even a regulatory analysis looking at impact, but we decided to do it, and it is 609,000 jobs. So these are big differences.

The point that I am really trying to make as I wrap up my last 38 seconds is, this is an institutional issue. Congress has made a deal. You passed the law. And where I say it is an institutional issue is, the agencies really at this point in time—I mean, you may have some control over their budget but it is getting to be less and less—but the agencies are really free to do what they want. And at some point, we really beg you, that the Congress needs to get involved in the process because it is a serious process. It does involve not just cost and benefit, that is very theoretical, but it does involve real people, real displaced workers, real communities. And when these regulations hit, they are not affecting what we would call computer model people. These regulations are affecting real people and displacing real people. Thank you very much.

[The prepared statement of Mr. Kovacs follows:]

Statement of the U.S. Chamber of Commerce

ON: THE OBAMA ADMINISTRATION'S REGULATORY WAR ON JOBS, THE ECONOMY, AND AMERICA'S GLOBAL COMPETITIVENESS

TO: HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

BY: WILLIAM L. KOVACS, SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY & REGULATORY AFFAIRS

DATE: FEBRUARY 28, 2013

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

BEFORE THE COMMITTEE ON THE JUDICIARY OF THE U.S. HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

"The Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness"

Testimony of William L. Kovacs
Senior Vice President, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce

February 28, 2013

Chairman Bachus, Ranking Member Cohen and distinguished Members of the Subcommittee, my name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. This statement describes the Chamber's perspective on the question of how regulation can affect people's ability to get and keep jobs, and the resulting impact on the quality of their lives. I want to emphasize at the outset that the Chamber recognizes that regulations are an essential part of a complex society such as ours. Over the decades, well-designed regulations have clearly made Americans and American workers healthier and safer. Yet the scope and pace of federal rulemakings have increased dramatically in the past few years. Hastily-written regulations issued in the health care, environmental, and financial arenas have been written with little or no apparent regard for the dramatic effect they have on employers and employees and on the ability of businesses to grow and to hire more employees.

According to a study conducted for the Small Business Administration's Office of Advocacy, the total annual cost to comply with federal regulations was an estimated **$1.82 trillion** in 2011.[1] Regulations finalized since 2011 further increase these compliance costs. Moreover, since 2011, the number of new rules each year that impose compliance costs of a billion dollars or more has increased.[2] The combined effect of the

[1] Crain, Nicole V. and Crain, W. Mark, *The Impact of Regulatory Costs to Small Firms*, Office of Advocacy, U.S. Small Business Administration (Sept. 2010) available at http://archive.sba.gov/advo/research/rs371tot.pdf. The 2011 estimate is benchmarked from the 2008 estimate of $1.75 trillion in the 2010 study. While the Crain and Crain study does not examine the detailed costs and benefits of each individual regulation, it remains the only comprehensive estimate of the cost impact of federal rules on the U.S. economy.

[2] In 2011 alone, federal agencies developed seven rules that would each impose over a billion dollars in new compliance costs. *See* Letter from President Barack Obama to Speaker John Boehner, August 30, 2011.

already-large existing regulatory footprint and the quickening pace of additional major rulemakings hobbles our economy and inhibits growth and job creation.

Regulations impact jobs in three ways: (1) they impose significant compliance costs that consume resources that would otherwise be used for other needs, such as hiring, (2) they can cripple or even destroy industries that are facing competitive pressures, and (3) they create additional complexity and uncertainty that discourages business expansion and job creation. To bring healthy growth back to this country, we must understand the impacts of excessive regulation. The environmental regulatory experience offers a good example. As far back as the late 1960s, Congress recognized that environmental regulations necessarily impose substantial costs and can make U.S. industries uncompetitive, but that America needed to address its environmental problems. Because of the significant regulatory impacts on industries and the communities who depend on them, Congress required the agencies charged with cleaning up the environment, the U.S. Environmental Protection Agency (EPA) in particular, to conduct continuing evaluations of the potential losses and shifts in employment resulting from regulations. The agencies subsequently charged forward with over 45,000 pages of regulations, but to this day EPA has ignored the requirement to keep Congress informed of the potential job losses or shifts in employment due to environmental regulation. Congress needs to compel EPA to conduct the employment analyses mandated by no less than **six** separate environmental statutes. It is only reasonable to better understand the price people and communities are actually paying for the environmental progress promised by regulation.

A. Regulations Impact Job Creation

1. Regulations Impose Significant Compliance Costs, Diverting Resources Away From Other Needs.

When resources are expended to comply with new regulatory requirements, those resources often have to be diverted from other competing needs. Even larger companies often must secure financing to pay for technology and equipment that is required by regulations. The cost of regulatory compliance can have a dramatic impact on a company's bottom line—and its ability to grow and hire.

For example, the Clean Air Act Maximum Achievable Control Technology (MACT) rule[3] for cement plants, as issued in final form by EPA in 2010, imposed very

[3] National Emissions Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, 75 Fed. Reg. 54,970 (September 9, 2010) (Final Rule). The final 2010 Portland Cement MACT

stringent new standards for air emissions from U.S. cement plants. The 2010 Cement MACT rule was expected to cost more than **$3 billion** to implement and to result in the closure of at least 20% of the existing cement plants across the U.S.[4] As a result, domestic cement production was anticipated to fall and the price of cement to rise. This rule, along with at least four other EPA rules proposed in 2010, would add **$20 to $36** to the cost of every ton of cement used by small Ready-Mix companies to make concrete.[5] This would translate to a **33 percent price increase** for cement, which is the most critical ingredient these small concrete companies must purchase to make their product. Given that a difference of as little as **$1 per ton** of concrete can determine whether a company wins or loses its bid for a particular project, a cost increase of this magnitude could easily wipe out a concrete company, particularly a small business.

Companies hit with these kinds of costs will have to struggle harder simply to survive, and will not be in a position to hire new employees or upgrade their equipment. At a minimum, virtually all new regulations directly impose some degree of new costs on regulated businesses, as well as indirect costs on supply chains and customers. For many businesses, confronting a new regulatory cost usually means choosing what competing need or project will not be funded so that the regulatory cost can be paid.

2. Regulations Can Cripple—or Even Destroy—Entire Industries.

In some cases, entire industries have been harmed—and even destroyed—by an overreaching regulation or combination of regulations. This has been particularly true of American industries that face intense competition from foreign companies that operate in a less heavily-regulated marketplace.

Forestry in Washington and Oregon. In the wake of the 1994 Northwest Forest Plan, which was designed to preserve spotted owl habitat, logging activities in the federal timberlands of Oregon and Washington came to a virtual halt. The regulatory requirements of the Plan made it nearly impossible to harvest timber from the formerly highly-productive federally-owned lands in the western portions of those states. As a result, employment in the forestry sector, traditionally a major driver of the regional economy, plummeted in the Pacific Northwest from 1995 onward. The number of forestry and logging jobs in Oregon and Washington fell from 27,656 in 1990 to 16,298 in 2009, a **41 percent decline** (compared to a 14.6 percent decline in the rest of the

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rule was challenged in court, and EPA and the cement industry ultimately agreed to a revised MACT standard with more achievable requirements. EPA also agreed to allow additional time for cement plants to comply. *See* 78 Fed. Reg. 10,006 (February 12, 2013).

[4] Portland Cement Association, 2011 estimate.

[5] Portland Cement Association, 2011 estimate.

U.S.).[6] Together with other impacted industries in the region (e.g., fishing), the downturn in the forestry industry caused Oregon and Washington to lead the nation in unemployment by 2002. Ironically, the spotted owl has continued to have difficulties, not because of lost habitat but because of a rival owl species that competes more successfully.

Forest Products. The fate of the Pacific Northwest forestry industry has been shared by other industries in recent years. The forest products industry has been heavily impacted nationwide by high regulatory costs that have impacted its ability to operate pulp and paper plants, sawmills, and manufactured wood products facilities. A variety of requirements affecting the operation of boilers, the use of solvents and adhesives in building products, and the availability of fuels resulted in the loss of over 100,000 jobs in the industry in 2010 alone.[7]

Furniture Manufacturers. Furniture manufacturers in many states have been hit very hard by increasing regulatory costs, at the same time they must contend with intense foreign competition and rising labor costs. Recent regulations such as Boiler MACT, the Non-Hazardous Solid Waste definition rule, new restrictions on formaldehyde use, and Lacey Act limitations on wood sourcing have caused American furniture makers to scale back their operations or shut down. According to the Bureau of Labor Statistics, total employment in the U.S. furniture industry declined from over 600,000 workers in 2002 to just 350,000 in 2011.[8] North Carolina alone lost 1/3 of its workers in the industry from 1996 to 2006, and more have been lost in recent years.

Coal. All segments of the coal industry have recently been hit with crippling new regulations: a combination of final and proposed rules affect coal mining methods, the combustion of coal in industrial and utility boilers, the disposal of coal ash, and potentially, the shipment of coal overseas. Clean Air Act rules such as the Utility MACT rule and the proposed New Source Performance Standards for greenhouse gases from utility boilers would make future coal-fired power plants infeasible, if not impossible. According to the U.S. Energy Information Administration, the percentage of coal providing electricity to the U.S. has fallen over the past six years from nearly 50 percent of all fuels to less than 40 percent. The federal effort to curtail coal use has taken a toll on jobs in the coal mining industry, as well as on jobs that depend on coal combustion. In West Virginia, for example, about 2,000 coal mining jobs were lost just in May-June 2012.[9]

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[6] U.S. Department of Commerce, Bureau of Economic Analysis, "Annual State Personal Income and Employment."
[7] Estimate from the American Forest & Paper Association (2011).
[8] Bureau of Labor Statistics, http://data.bls.gov/timeseries/CES3133700001?data_tool=XGtable.
[9] West Virginia Coal Association estimate (June 2012).

Many other industries have not been wiped out by regulation, but they have been hurt and forced to scale back. These industries include the makers of medical devices, who have to send their products outside of the U.S. to be cleaned and sterilized because of EPA restrictions on the use of critical halogenated solvents. Other significantly affected industries include heavy manufacturers such as electroplaters, smelters, foundries, iron and steel manufacturing, shipbuilders, brick manufacturing, paint and coatings makers, dry cleaners, and miners of all types. In total, these industries—and others—have lost hundreds of thousands of workers over the past 15 years, in part because of wave after wave of new federal regulations.

3. Regulations Impose Complexity and Uncertainty That Discourages Business Expansion.

A 2010 study by the Swedish Agency for Growth Policy Analysis evaluated regulatory burdens across nations and the effects of regulations on economic growth and vitality. The study found that higher regulatory burdens (1) raise the costs of business operations, (2) make capital financing more expensive and harder to obtain, and (3) act as a barrier to entry for new firms, resulting in less competition and less ability to innovate and adapt to new economic conditions or new technologies. Countries having a heavier regulatory environment were found to be less entrepreneurial and to experience significantly slower growth of per capita income. In sum, excessive regulation results in a stagnant, ossified economy and an overall lower standard of living t than is found in countries with similar resources but less burdensome regulations.[10]

Besides raising costs and harming individual industries, regulations also increase the complexity and uncertainty of the business environment, which can discourage investment and business expansion. These factors often arise in the context of obtaining necessary permits or authorizations to undertake expansion or new projects. The large cumulative number of regulatory requirements can make it much more difficult to obtain project approvals in a timely manner, and project sponsors often walk away after years of costly delays. In 2011, the Chamber unveiled *Project ~~No Project~~*, an initiative that assesses the broad range of energy projects that are being stalled, stopped, or outright killed nationwide due to a broken permitting process and a system that allows nearly limitless opportunities for opponents of development to raise challenge after challenge.[11]

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[10] Swedish Agency for Growth Policy Analysis, "The Economic Effects of the Regulatory Burden." Report 2010:14. www.growthanalysis.se.

[11] U.S. Chamber of Commerce, Project No Project, Progress Denied: A Study on the Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects (March 2011); results of the study are compiled onto the *Project ~~No Project~~* website http://www.projectnoproject.com.

The purpose of the *Project ~~No Project~~* study was to understand potential impacts of serious project impediments on our nation's economic development prospects, and it was the first-ever attempt to catalogue the wide array of energy projects being delayed nationwide.

Through *Project ~~No Project~~*, the Chamber found consistent and usable information for 333 distinct projects. These included 22 nuclear projects, 1 nuclear disposal site, 21 transmission projects, 38 gas and platform projects, 111 coal projects and 140 renewable energy projects—notably 89 wind, 4 wave, 10 solar, 7 hydropower, 29 ethanol/biomass and 1 geothermal project. Since some of the electric transmission projects were multi-state investments and, as such, necessitate approval from more than one state, these investments were apportioned among the states, resulting in 351 state-level projects attributed to 49 states.

In total, the 351 projects identified in the *Project ~~No Project~~* inventory could have produced a $1.1 trillion boost to the economy and created 1.9 million jobs *annually* during the projected seven years of construction. Moreover, these facilities, once constructed, would have continued to generate jobs, because they would have operated

for years or even decades. The Chamber recognizes that moving forward on all the projects is highly unlikely. There simply would not be enough materials or skilled labor to construct all 351 projects at the same time, and to do so in a cost-effective manner. However, even a subset of the projects would yield major value. For example, the construction of only the largest energy project in each state would generate $449 billion in economic value and 572,000 annual jobs.

Regulatory barriers to obtaining permits for economic activity are a serious challenge for maintaining American competitiveness with other countries. In mining, for example, a recent report found that the U.S. is tied for last place (with Papua New Guinea) among twenty-five countries in the amount of time it takes to permit a new mine – **seven to ten years** on average.[12]

B. Congress Mandated Continuing Evaluation of Potential Loss or Shifts in Employment to Determine Impacts of Regulations

For decades, Congress has mandated that the employment effects of regulations must be evaluated by agencies so that Congress can monitor the impact of regulations on industry. The Congressional intent behind these mandates is clear: Congress knew that regulations, such as the Clean Air Act, would cause economic hardship and lead to the closing of facilities. In order to monitor those adverse impacts and, where needed, ameliorate them, Congress crafted and enacted statutory provisions that would require ongoing analysis of regulations on employment, including job losses and shifts in employment. EPA's failure and, at times, defiance in conducting these Congressionally-mandated employment effects evaluations must be addressed.

The earliest direct discussion of these employment effects evaluations is found in the 90th Congress (1967 – 1968) during debate over the Air Quality Act. As part of the debate, Congress mandated that the Secretary of Health, Education and Welfare undertake a comprehensive study of the economic impacts of air quality standards on the nation's industries and communities. Several studies on this topic were released by Senator Jennings Randolph in 1969.[13]

Similarly, in the debates over the Clean Air Act Amendments of 1977, Congress even more directly confronted the issue of the impact of regulations on jobs when it enacted a provision requiring that the Secretary of Labor, in consultation with the EPA Administrator, conduct a study of potential dislocation of employees due to

[12] *2012 Ranking of Countries for Mining Investment*, Behre Dolbear Group at 8. *See* www.dolbear.com.
[13] Senate Resolution 267, October 16, 1969 and Senate Resolution 369, April 27, 1970.

implementation of the laws administered by the Administrator and that the Secretary submit to Congress the results of the study not more than one year after August 7, 1977.[14] This provision was codified as section 321(a) of the Clean Air Act and now reads:

> **(a) Continuous evaluation of potential loss of shifts of employment**
>
> The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans, including where appropriate, investigating threatened plant closures, or reductions in employment allegedly resulting from such administration or enforcement."[15]

In the 95th Congress, the debate over the employment impacts of regulation was clear, direct and extensive. The Committee noted:

> Among the issues which have arisen frequently since the enactment of the 1970 Amendments is the extent to which the Clean Air Act or other factors are responsible for plant shutdowns, decisions not to build new plants, and consequent losses of employment opportunities.
>
> * * *
>
> In any particular case in which a substantial job loss is threatened, in which a plant closing is blamed on Clean Air Act requirements, or possible new construction is alleged to have been postponed or prevented by such requirements, the committee recognized the need to determine the truth of these allegations. For this reason, the committee agreed to section 304 of the bill, which establishes a mechanism for determining the accuracy of any such allegation.[16]

The Committee went on to state:

> Section 304 of the committee bill is based on a nearly identical provision in the Federal Water Pollution Control Act. The bill establishes a new section 319 of the Act. Under this provision, the Administrator is mandated to undertake an ongoing evaluation of job losses and employment shifts due to requirements of the act.

[14] Section 403(e) of Public Law 95–95; West, Federal Environmental Laws 2012, Historical and Statutory Notes, p. 1404.
[15] Section 321(A) of the Clean Air Act; 42 U.S.C. § 7621; this section became law as part of the 1977 Amendments to the Clean Air Act.
[16] 95 Cong. House Report 294; CAA77 Leg. Hist. 26 at 227.

> This evaluation is to include investigations of threatened plant closures or reductions in employment allegedly due to requirements of the act or any actual closures or reductions which are alleged to have occurred because of such requirements.[17]

In conference, the Senate concurred with the House employment effects provision, which required the EPA Administrator to evaluate and investigate the loss of employment and plant closures.[18] This common understanding of the importance of employment impacts assessments reflects Congress's acknowledgement that in exchange for allowing environmental standards like National Ambient Air Quality Standards to be set without regard to the cost impacts, the agency must repeatedly evaluate the overall impact of the growing body of environmental requirements on employment and job shifts. That way, Congress would be informed of the ongoing economic impacts of environmental regulation and take that information into account in agency oversight and in consideration of potential new environmental requirements.

With the specific language of provisions like section 321(a), Congress unmistakably intended to track and monitor the effects that the Clean Air Act and similar environmental regulations would have on employment. The legislative history of these environmental regulations, as well as the United States Supreme Court, confirm this intent. In *EPA v. National Crushed Stone Ass'n*, the Supreme Court analyzed an employment effects provision in the Clean Water Act, which served as the model for section 321(a) in the Clean Air Act. In the 1980 decision, Justice White opined:

> [A]n employee protection provision was added, giving EPA authority to investigate any plant's claim that it must cut back production or close down because of pollution control regulations. § 507(e), 86 Stat. 890, 33 U.S.C. § 1367(e). This provision has two purposes: to allow EPA constantly to monitor the economic effect on industry of pollution control rules and to undercut economic threats by industry that would create pressure to relax effluent limitation rules.... As we see it, Congress anticipated that the 1977 regulations would cause economic hardship and plant closings: '*[T]he question ... is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations.*'[19]

In the legislative history of the Clean Water Act's employment effects provision, Representative Abzug states that: "'[t]his amendment will allow the Congress to get a

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[17] *Id.*
[18] 95 Cong. Conf. Bill H.R. 6161; CAA77 Leg. Hist. 24.
[19] *Environmental Protection Agency v. National Crushed Stone Ass'n, et al.*, 449 U.S. 64, 82-83 (1980) (footnote omitted) (emphasis added).

close look at the effects on employment of legislation such as this, and will place us in a position to consider such remedial legislation as may be necessary to ameliorate those effects.'"[20]

In *Whitman v. American Trucking Ass'ns*, Justice Scalia, writing for a near unanimous court, echoed the 1980 opinion of Justice White.[21] Analyzing the Clean Air Act, Justice Scalia wrote in *American Trucking*:

> In particular, the economic cost of implementing a very stringent standard might produce health losses sufficient to offset the health gains achieved in cleaning the air – for example, by closing down whole industries and thereby impoverishing the workers and consumers dependent upon those industries. That is unquestionably true, and Congress was unquestionably aware of it. Thus, Congress had commissioned in the Air Quality Act of 1967 (1967 Act) 'a detailed estimate of the cost of carrying out the provisions of this Act; a comprehensive study of the economic impact of air quality standards on the Nation's industries, communities and other contributing sources of pollution.' § 2, 81 Stat. 505. The 1970 Congress, armed with the results of this study, see The Cost of Clean Air, S. Doc. No. 91 – 40 (1969) not only anticipated compliance costs could injure the public health, but provided for that precise exigency.[22]

The *American Trucking* opinion only reinforced the view that Congress knew very well that environmental requirements negatively impact the economy and American jobs. Armed with that knowledge, Congress required EPA to gather and evaluate data on the employment effects of environmental mandates.

Despite the clear congressional directive, EPA has refused to conduct the employment studies required by section 321(a). For example, in 2009 when a large number of regulations were being issued by EPA, six U.S. Senators wrote to EPA requesting the results of its continuing Section 321(a) evaluation of potential loss or shifts of employment which may result from the suite of regulations EPA had proposed or finalized.[23] On October 26, 2009, EPA responded to the six Senators stating "EPA has not interpreted CAA section 321 to require EPA to conduct employment investigations in taking regulatory actions."[24]

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[20] *Id.* at n. 24 (citing Leg.Hist. 654-659).
[21] *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).
[22] *Id.* at 466.
[23] Letter from Senators Vitter, Risch, Johanns, Inhofe, Ensign and Hatch to EPA Administrator Lisa Jackson (October 13, 2009).
[24] Letter from EPA Assistant Administrator Gina McCarthy to Senator Inhofe (October 26, 2009) at 2.

Moreover, on September 12, 2012, the U.S. Chamber filed a Freedom of Information (FOIA) request with EPA asking the agency to provide "[a]ll draft, interim, and final reports and/or evaluations prepared by EPA or its contractor(s) pursuant to section 321 of the Clean Air Act." EPA acknowledged receipt of the FOIA request and requested an extension of time to respond until December 1, 2012. Subsequently, on January 22, 2013, EPA informed the Chamber that the agency's records indicated that our FOIA request had been responded to and that the request had been removed from the agency's FOIA log.[25] As of the date of this hearing, EPA has not provided any document responding to the Chamber's FOIA request or denied that request.

Therefore, a debate that started 45 years ago when Congress directly mandated a study of the employment effects of regulations so as to determine the truth of conflicting allegations about whether regulations adversely impact jobs is still unresolved because EPA has refused to conduct the continuous evaluation. As the next section will illustrate, job loss caused by regulations, no matter how beneficial they may be, still can be very harmful to the industry, community and person impacted. Avoiding knowledge of the harmful effects is not an appropriate way in which to conduct public policy.

Job Losses: Looking At the Problem A Different Way

The negative economic impacts of overly-broad, poorly-designed regulations on economic growth, productive investment and labor productivity are clear. The 2008-09 financial crisis, recession and ensuing slow recovery focused new attention on the importance of considering the employment impacts of all government policy decisions. Likewise, President Obama's 2011 Executive Order 13563[26] for the first time explicitly directed agencies to include consideration of the regulatory impacts on jobs in their assessments of the costs and benefits of regulations. Prior to Executive Order 13563, agencies infrequently addressed specific employment impact concerns. Agencies typically assumed that the economy would normally operate at full employment and that any disruptions caused by regulations would be relatively brief and quickly corrected by the re-employment of displaced workers in other jobs within a growing economy. EPA, for example, discussed specific employment impacts of proposed air quality regulations in only 11 of the 48 rulemakings over the 1995 to 2010 period. By contrast, following the issuance of Executive Order 13563 in 2011, EPA included employment impact estimates in 7 of 12 rulemakings (*See* Figure 1).

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[25] Electronic mail message from Sounjay Gairola, Air Enforcement Branch, U.S. EPA to William Kovacs, Senior Vice-President, U.S. Chamber of Commerce (January 25, 2013)("I am so sorry for the confusion. I am in the process of tracking down this problem and issue regarding your FOIA no longer appearing on the FOIA list.").

[26] Executive Order 13,563 (January 18, 2011).

Agencies are required to conduct a Regulatory Impact Analysis (RIA) to accompany every proposed "major rule."[27] An RIA typically contains an estimate of the economic impacts of that specific proposed rule on regulated industries, along with the general impact of the rule on consumer prices, energy prices, and production levels. In some cases, the RIA may estimate the direct employment impacts of the proposed rule on the regulated industry itself. The RIA does not consider the overall employment effects of multiple rules that apply to an industry or the general economy. As such, an RIA is fundamentally different from the jobs and displacement analysis required by section 321 of the Clean Air Act. Section 321 – and its counterparts in five other statutes[28] – requires a broader assessment of employment effects throughout the U.S. economy as a consequence of all of the rules issued under the statute in question. This type of analysis considers the cumulative effect of clean air or clean water, or hazardous waste requirements on jobs in the economy. As such, it is a valuable tool to understand how these regulations actually transform our economy and affect the opportunities for employment.

The reason for the renewed interest in the job impacts of regulations could not be clearer. Today over 12 million Americans are looking for work and millions more who would like to work have simply given up looking. Long-term unemployment is at record high levels. Many people also cannot find full-time work and are getting by with part-time jobs. Unemployment and underemployment have devastating impacts on workers, their families, and their communities. In addition to loss of income while jobless, many workers who lose long-held jobs never return to full-time work, and those who do often continue to earn below their previous wage levels long after re-employment.

While Executive Order 13,563 has compelled EPA to consider job impacts in the Regulatory Impacts Analyses that must be prepared for each new rulemaking, Congress has still been left without the required continuing evaluation of job loss and shifts in employments due to regulations as a whole.

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[27] Regulatory Impacts Analyses are required for major rules (typically, rules that are expected to have a $100 million or more impact on the economy each year) by Executive Order 12,866, *Regulatory Planning and Review* (September 30, 1993). *See also* Office of Management and Budget, Circular A-4, *Regulatory Analysis* (September 17, 2003).

[28] Clean Air Act (42 U.S.C. § 7621(a), Clean Water Act (33 U.S.C. § 1367), Solid Waste Disposal Act (42 U.S.C. § 6971, Toxic Substances Control Act (15 U.S.C. § 2623), Powerplant and Industrial Fuel Use Act (42 U.S.C. § 8453), and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9610).

Figure 1: Timeline of Air Regulatory Impact Analyses Found to Contain Employment Impact Estimates

Year of RIAs	EPA Rule
1997	Locomotive Emission Standards
	Ozone and $PM_{2.5}$ NAAQS
	Medical Waste Incinerators NSPS
	Highway Heavy-Duty Engines
	Pulp & Paper NESHAP
1998	NOx SIP Call & Section 126 Petitions
	Non-Road Diesel Engines
	New Fossil-Fuel-Fired Steam Generating Units
	National VOC Standards
1999	Phase 2 Nonroad Non-Handheld SI Engines
	Regional Haze Rule
	Gasoline Sulfur Control Requirements
	Section 126 Petition
2000	Phase 2 Nonroad Handheld SI Engines
	2004+ Model Year Highway Heavy-Duty Engines
	Stratospheric Ozone Reductions
	Heavy-Duty Engine & Fuel Control Requirement
2001	
2002	Nonroad & Recreational Spark-Ignition Engines
2003	PSD & NSR: Routine Maintenance and Repair
2004	**Auto. & Light-Duty Vehicle NESHAP**
	Industrial Boilers & Process Heaters NESHAP
	Stationary Reciprocating IC Engine NESHAP
	Plywood & Composite Wood Products NESHAP
	Nonroad Diesel Rule
2005	**Clean Air Interstate Rule**
	Clean Air Mercury Rule
	Clean Air Visibility Rule/BART Guidelines
2006	Sec 126 Petition NO_x Revs to CAIR & Acid Rain Rgm
	Stationary Compression Ignition IC Engine NSPS
	$PM_{2.5}$ NAAQS
2007	Control of HAP from Mobile Sources
	Clean Air Fine Particle Implementation Rule
2008	Ozone NAAQS
	Petroleum Refineries NSPS
	Locomotive & Marine Diesel Engines < 30 L/cyl
	Lead NAAQS
	Nonroad Spark-Ignition Engines and Equipment
2009	Marine CI Engines Emissions Stds >30 L/cyl
	GHG Mandatory Reporting Rule
2010	Ozone NAAQS Reconsideration
	NO_2 NAAQS
	Existing Stationary Comp-Ignit. Engines NESHAP
	Title V Greenhouse Gas Tailoring Rule and GHG PSD
	Light-Duty Vehicle GHG & CAFE Standard
	SO_2 NAAQS
	Existing Stationary Spark-Ignit. Engines NESHAP
	Portland Cement NSPS & NESHAP
2011	Sewage Sludge Incineration NSPS
	Industrial Boiler NESHAP
	Industrial Solid Waste Incinerator NSPS
	Chlor Alkali Plant Hg Emissions NESHAP
	Cross-State Air Pollution Rule
	Oil & Gas Industry NSPS & NESHAP
	Heavy-Duty Vehicle GHG & CAFE Std
	Manganese Ferroalloys RTR
	Utility Mercury and Air Toxics Std

Employment Impact Provided Using Partial Analysis

Employment Impact Provided Using Computable General Equilibrium Analysis

If no green or orange, EPA did not provide an employment impact estimate

U.S. CHAMBER OF COMMERCE

EPA's recent estimates of the employment impacts of its regulations have been consistently upbeat. The agency has claimed that its latest air regulations will actually **create** jobs on balance – based on construction and maintenance of new equipment for existing plants or for new power plants that must replace coal-fired plants shuttered by regulations. For example, EPA claimed that its Utility Mercury Air Toxics Standard (MATS) would have a net effect of creating 54,000 new jobs in the utility industry.

As industries have announced job layoffs due to newly issued regulations, the inconsistency with EPA's continuing claims of regulatory job creation has become apparent. To resolve this conflict, the Chamber undertook a study to understand how EPA reached its jobs impacts conclusions and to investigate the soundness of EPA's claims that its regulations actually create jobs. The Chamber in 2012 commissioned NERA Economic Consulting (NERA) to undertake a study to review and assess EPA's methods for estimating employment impacts related to air quality regulations.

NERA's study reveals striking omissions and inconsistencies in EPA analyses.[29] While the study found that a number of recent EPA regulatory analyses claimed job-creating net benefits for their air quality rules; NERA found that the approach on which EPA based such optimistic forecasts was flawed in several ways:

- EPA's analyses used data and a jobs impact formula that relies on ***aggregated*** data from four individual industries that do not mirror the industries targeted by recent EPA rules, and which was derived from 1980s data no longer relevant for assessing current impacts.
- The methods used by EPA considered only part of the potential employment impacts.
- EPA's partial analysis methods ignored the effects of regulatory compliance costs on prices.

NERA concluded that the more complete approach for assessment of the overall economic and employment impacts of rules is to model the impact of regulation compliance cost through a "whole-economy" model that takes into account the cascading effects of a regulatory change across interconnected industries and markets nation-wide.[30] NERA also found that EPA possessed the capability to perform such "whole-economy"

[29] NERA Economic Consulting, "Estimating Employment Impacts of Regulations – A Review of EPA's Methods for its Air Rules (October 2012).

[30] The NERA study used EPA's published Regulatory Impact Analysis estimates of the direct compliance costs for facility operation, construction, equipment acquisition and maintenance associated with each proposed rule. These direct costs were incorporated as inputs to the NERA whole-economy model to derive impacts on operation, construction or closure, price impacts, and other economy-wide effects.

modeling and had actually done so in connection with two rulemakings in 2005.[31] EPA's failure to use the more comprehensive economic analysis tool in its recent rulemakings results in misleadingly optimistic assessments of employment impacts attached by EPA to its air quality rulemakings.

NERA further applied the whole-economy approach to estimate the impact of EPA's MATS standard. EPA's partial-economy analysis showed the regulation would create 46,000 temporary construction jobs and 8,000 net new permanent jobs. By contrast, NERA's analysis found that the rule would have a negative impact on worker incomes equivalent to 180,000 to 215,000 lost jobs in 2015, and the negative worker income impacts would persist at the level of 50,000 to 85,000 such job-equivalents annually thereafter. NERA also analyzed three other EPA rules using the whole-economy model and found similar results of widespread adverse employment effects:

- EPA's Cross State Air Pollution Rule (CSAPR) would have an impact on worker incomes equivalent to the annual loss of 34,000 jobs from 2013 through 2037, compared to EPA's claim of 700 jobs per year gained.
- EPA's Boiler MACT rule would have a negative impact on worker's incomes equivalent to 28,000 jobs per year on average from 2013 through 2037, compared to EPA's claim of 2,200 jobs per year gained; and
- EPA's planned Ozone National Ambient Air Quality Standard (NAAQS) would reduce worker incomes by the equivalent of 609,000 jobs annually on average from 2013 through 2037. EPA has not yet published an employment impact for the Ozone NAAQS.

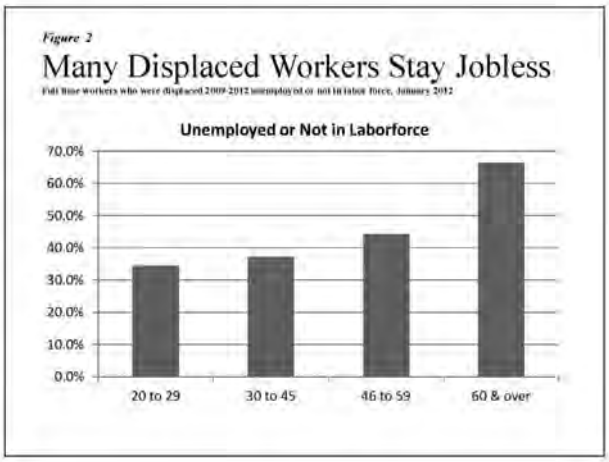
Job Losses: The Human Dimension

Regulators too optimistically assume that workers who are displaced from long-held jobs by regulations will quickly find new, comparable work. In reality, many workers never return to full-time work, and those who do often earn below their previous wage levels long after re-employment. The Bureau of Labor Statistics' Displaced Worker Survey in January 2012 found that among the 6.1 million workers who lost long-tenured jobs between 2009 and 2011, 44% were still unemployed up to three years later.

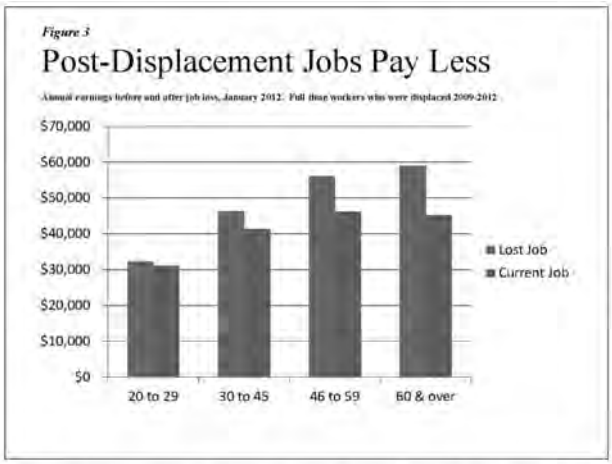
[31] EPA used "whole-economy" modeling for the Clean Air Interstate Rule (CAIR) and the CAVR/BART rule. When using the more comprehensive model, EPA found that both rules would result in a decrease in wages, and evidence that the CAIR rule would lead to a decline in employment. EPA reported inconsistent and sometimes conflicting results after using multiple models, but failed to provide discussion or commentary to put the results into a meaningful context.

Workers age 60 or older are the most likely to be unemployed or not in labor force),[32] and more than half of those without jobs drop completely out of the labor force, and simply give up looking for work (*see* Figure 2). For workers age 65 and older who are displaced, 75% remain jobless up to three years later. Further, BLS data shows that even for workers in their 20s, more than 30 percent remain jobless up to **three years** after losing a job that they had held for a significant time.

Similarly, regulators usually assume that workers who lose jobs because of their regulatory decisions will find new jobs that pay as well as lost jobs. The reality is that even when displaced workers find new jobs, those jobs pay less than their lost jobs. The earnings loss is greater for older displaced workers, and the earnings loss is not just temporary. Studies of payroll records show that the negative impacts last for decades. Twenty years after losing a long-tenured job, workers earn 15% to 20% less than comparable workers who experienced no job loss (*see* Figure 3).[33]



[32] U.S. Chamber analysis of micro-data (independent respondent records) files of the Displaced Worker Survey supplement to the Current Population Survey published by the Bureau of Labor Statistics/Census Bureau at http://thedataweb.rm/TheDataWeb/launchDFA.html.
[33] *Id.*



Over the past 40 years, many American industries that have declined or disappeared were once the economic bulwarks of communities and the nation. While a variety of factors have played a part in each of these changes in the industry structure of the economy, a common thread running through all of them has been the role of regulatory mandates and costs. Even when regulations are not the primary cause of change, regulations can provide the tipping point that leads to plant closures and adverse economic impacts that otherwise might have been avoided or cushioned over time.

The workers who lose their jobs today because regulation forces the plants where they have invested their working lives to shut down typically do not have the skills needed to take the new jobs that EPA promises will materialize, and typically new jobs when they materialize are in different places than the jobs destroyed. For example, the basic idea that a job lost today at a power plant in Ohio that shuts down will be replaced within a year or two by a new job at an electric vehicle plant in California is little comfort for workers who need to feed their families and to make their mortgage payments in Ohio today.

Consider the potential economic losses faced by just the 2,000 Appalachian coal miners who lost their jobs in May and June 2012. Based on average experience reported in the most recent BLS survey of displaced workers, 860 of those 2,000 workers can expect to still be jobless (either looking for work or given up looking) three years from now. Based on the average hourly pay of production workers in the coal mining

industry,[34] those 860 workers and their families can expect each to lose over $151,000 in income from three years of joblessness. That amounts to a total economic loss of $126 million for those 840 families over three years and more losses as more years of joblessness accumulate. What of the other workers, the ones who are lucky enough to find new jobs within three years? Based on the averages from current average duration of unemployment published by BLS, even they will face 39 weeks of unemployment and an income loss of $38,313 each during their job search (totaling $36.7 million for those 1,140 workers and their families.) The displaced worker survey data also suggests that 615 of them will have to take a significant cut in pay when they do find new work, adding further to the burden that they carry from their job displacement.

The table below shows the employment decline in a few of the industries significantly affected by EPA rulemaking since 1990.[35] Furniture, steel, sawmills/wood preserving and underground coal mining have been particularly hard-hit, each losing over 40 percent of the jobs that existed in 1990. The six industries shown accounted for over one million jobs in 1990 and, by 2011, job losses totaled 472,300.

Table A
Employment Losses Selected Industries 1990 to 2011

	Employment (thousands)	**Percent Change**
Bituminous coal and lignite surface mining	**17.1**	**30.6%**
Bituminous coal underground mining and anthracite mining	**32.8**	**40.8%**
Sawmills and wood preservation	**64.0**	**43.2%**
Lime, gypsum, and other nonmetallic mineral products	**16.3**	**16.7%**
Iron and steel mills and ferroalloy production	**93.2**	**49.9%**

[34] The average hourly pay is $24.31 per hour, according to Bureau of Labor Statistics Occupational Employment and Earnings Survey data for May 2011. Weekly and annual earnings do are based on 40 hours per week and do not include overtime pay that many miners receive.

[35] The change in employment by industry was calculated by a U.S. Chamber analysis of annual average employment by industry data published by BLS for 1990 and for 2011. In each case, the published 2011 average annual employment level was subtracted from the 1990 level to obtain the differences indicated in the chart (in each case the difference is a loss, because 2011 total employment for each industry was less than the 1990 level. The percentage change was calculated as the job loss total divided by the 1990 employment level.

Furniture and related products	**248.9**	**41.4%**
Total	**472.3**	**40.4%**
Source: Bureau of Labor Statistics, Current Employment Statistics series		

Even if job growth was spurred in other industries, the reality is that 472,000 workers and their families were burdened with the economic costs of job loss and the necessity to search for and retrain for replacement jobs. In many cases they have faced many months of unemployment before finding new jobs. In today's economy, according to Bureau of Labor Statistics data, the average job seeker has been looking for work for 39 weeks – over nine months.

This is not an exhaustive list. It is merely a list of a few selected industries that have been affected by EPA regulations. While these job losses were not necessarily solely the result of environmental regulations, even in cases where industries were also declining for other reasons, it is reasonable to argue that regulatory burdens made matters worse. The important point is that EPA has not done the work that Congress repeatedly called for it to do with respect to investigating and tracking industries impacted by its regulations (past and proposed) to determine the extent to which worker displacement is the result of environmental regulations and to consider what steps could be taken by the government to ameliorate the burdens of job displacement that government policy decisions impose on working families.

Recent studies highlight the startling human dimension of unemployment. For example, one study of mid-career workers who lose long-held jobs found:[36]

> A worker displaced in mid-career can expect to live about one and half years less than a non-displaced counterpart. The reduction in life expectancy is smaller for older workers who experience lower lifetime earnings losses and are exposed to increased mortality for a shorter period of time. Our results do not speak to the role of non-economic factors such as stress, self-worth, and happiness.[37]

Moreover, the rate of suicides for unemployed workers also increased by up to ten percent.[38] These are real people, and not EPA's computer modeled people.

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[36] Daniel Sullivan and Till von Wachter, "Job Displacement and Mortality: An Analysis Using Administrative Data: Quarterly Journal of Economics, Vol. 124 (2009), number 3 (Aug), pp. 1265-1306 at http://qje.oxfordjournals.org/content/124/3/1265.short.

[37] Sullivan and von Wachter at 1290.

[38] *Id.* at note 49. *See also* Annie Lowery, "Death and Joblessness," Washington Independent, August 17, 2010 at http://washingtonindependent.com/94925/death-and-joblessness.

EPA needs to consider more than the supposed net impacts of a new regulation, viewed in isolation. While EPA's regulations have both benefits and costs, the reality is that the winners and the losers are usually not the same people and usually do not even live in the same communities. EPA's regulatory decisions create massive shifts in the structure of the economy, benefiting some workers, some communities and some industries and imposing costs or devastation on others. Even if EPA's redistributive mandates yield a net benefit for society as a whole over time, the rapidity of change that EPA mandates and the nationwide scope of change is a tremendous shock to the economic system. EPA needs to consider how it can lessen the burdens it is placing on the workers, families and communities that it targets for losses.

EPA could reduce the economic shocks of its rules by adopting more gradual approaches that phase in new standards over longer periods of time and that apply new standards only to new facilities, thereby cushioning the impacts on existing facilities and the communities they are located in. New technologies yield net benefits to society, but efficiency gains come with costs as jobs and industries dependent on older technologies are replaced. But in the case of technological change, the typical experience is gradual adjustment that cushions the shocks of economic change. EPA should endeavor to make its program of environmental change resemble more closely the successful experience of adoption of technological change. In addition to gradual schedules for adoption of new standards, EPA might also feature greater reliance on voluntary compliance, demonstrations, and incentive programs. A more gradual approach to regulation implementation would yield the added benefit of facilitating empirical study of effects to ensure that policies really are effective and on the right track.

Conclusion

Congress recognized for more than four decades there are huge benefits to a cleaner environment, but many times these benefits come at a significant cost to industry, communities and people. Moreover, many of these human costs are imposed on those least able to bear them. Congress has unequivocally mandated that agencies study and report back on these costs, but the agencies do not comply. Agencies, as required by law, need to start providing accurate accounting for the shifts in employment and related economic costs imposed on citizens by existing and proposed regulations so that Congress has the needed information to make sound public policy decisions.

For its part, Congress needs to require the EPA to actually conduct the employment analyses that Congress mandated in no less than **six** separate environmental

statutes.[39] It is only reasonable to better understand the price people and communities are actually paying for the environmental progress promised by regulation.

Thank you for the opportunity to submit this testimony. I look forward to answering any questions you may have.

[39] Clean Air Act (42 U.S.C. § 7621(a), Clean Water Act (33 U.S.C. § 1367), Solid Waste Disposal Act (42 U.S.C. § 6971, Toxic Substances Control Act (15 U.S.C. § 2623), Powerplant and Industrial Fuel Use Act (42 U.S.C. § 8453), and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9610).

Mr. BACHUS. Thank you, Mr. Kovacs.

And, Mr. Weissman. And we will get the microphone and we won't start the time till we have got all that in place.

TESTIMONY OF ROBERT WEISSMAN, PRESIDENT, PUBLIC CITIZEN

Mr. WEISSMAN. Want the rules of the road be fair for everybody.

Thank you very much, Mr. Chairman, Mr. Cohen, Members of the Committee. I have three points today, and I will disclose out front that the third point has subpoints. So before you criticize my math.

The first point is this: The regulatory system in this country makes us a stronger Nation, makes us healthier, makes our economy more secure, makes us fairer, makes our environment cleaner. It is a point that I think is lost in much of the regulatory policy debate that focuses on cost. Indeed, there is no small irony in the proponents of cost-benefit analysis, when it comes to regulation, talking about regulatory policy, but focussing exclusively on cost and ignoring altogether the benefits of the fair kind of analysis they suggest should be done.

For example, if you look at the American Action Forum analysis on cost, costs are fairly calculated. The cost for 2012 regulations are on the order of $220 billion. The primary cost in that figure is $150 billion attributed to fuel efficiency standards, the CAFE standards that will take effect in 2017, also to just relying on an EPA analysis. They neglect, however, to mention the benefits. The benefits are far greater than the costs. And these are not abstract benefits. They are not based on health impacts. They are primarily based just on savings at the gas pump.

So, in the model year 2025, consumers will pay $1,800 additional for an automobile, but they will save between $5,700 and $7,400 per automobile. In fact, if you look at the CAFE standards that started in 2012 and the new ones that will come into place in 2017, the overall net benefit to the United States is $1.7 trillion—trillion with a "t." That is indeed one of the most efficient regulations we could imagine. It will have huge benefits for small business and massively increase global competitiveness for American business.

Second point. Too much of the debate about regulation, jobs and the economy ignores the cause of our current jobs crisis. The housing bubble, the financial bubble, financial crash, great recession, ongoing stagnation are traceable in very large measure to regulatory failure. It is indeed, as Mr. Issa said, in part a failure of regulatory enforcement. It is also a result of the rollback of previously existing regulation and the failure to adopt additional regulation to deal with ongoing issues.

So, for example, there was insufficient regulation on toxic and predatory mortgage lending, there was too little regulation on securitization, too little regulation and inadequate enforcement on the credit rating agencies, too little regulation—actually no regulation on financial derivatives that expanded the crisis, insufficient capital standards required of financial institutions, and so on. Many other examples listed in my testimony. It is worth underscoring the impact of the great recession: $13 trillion in reduced economic output, $9 trillion in lost home equity, though that partly is inflated by the actual housing bubble itself.

Third point. To say that the regulatory system provides so many protections for our country is not to say that all is well. There are indeed many problems with the regulatory system. It needs very

far-reaching repairs. I have got a number of examples elaborated in my testimony. I wanted to highlight just a few.

First—if you could put the chart up, please, sir—the regulatory system now is characterized by a Rube Goldberg process, that it actually builds in endless delay, and this chart follows that Rube Goldberg process, although it is unreadable unless we blow it up to a screen about six times bigger than that one. I think the lesson from that is not that new additional analytic requirements should be imposed on agencies, but that we ought to try to streamline the process to the extent we can. But new analytic requirements of the kind embodied the Regulatory Accountability Act, I think, are the wrong way to go.

A second point, which is also implicit from that chart. The OIRA is a roadblock to effective new rulemaking, and there needs to be not an expansion of the scope of OIRA authority, as would be required under several so-called regulatory reforms, but increased transparency at OIRA and increased accountability at the agency. Indeed, I think as regards the independent agencies, those are accountable to Congress, not to the executive, and it would be a mistake to expand the executive direct authority over them.

Third point. There are issues about regulatory enforcement and rulemaking and undue influence of regulated parties and of regulated agencies. That is a hard problem to deal with, but one important thing we could do is to crack down on revolving door abuses which continue despite some reforms by the Obama administration.

And a last point, on the matter of small business. There is an important discussion to be had about the nexus between regulatory policy and small business interests, but one thing I think that has been too overlooked is how competition policy is needed to advance small business interests. I go into some detail about this in my testimony, but one area that perhaps there can be bipartisan agreement about is start by looking at the too-big-to-fail financial institutions that get an implicit subsidy of about $80 billion, according to Bloomberg, and I think that is a complete unfair situation as regards small banks and it disadvantages other businesses as well. Maybe that is an area where there actually could be some regulatory policy going forward across party lines to advance small business interests.

Thank you so much.

Mr. BACHUS. Thank you.

[The prepared statement of Mr. Weissman follows:]

Written Testimony of

Robert Weissman
President, Public Citizen

before the

The Subcommittee on Regulatory Reform, Commercial and Antitrust Law
U.S. House of Representatives

on

"The Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness"

February 28, 2013

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on regulatory policy issues. I am Robert Weissman, president of Public Citizen. Public Citizen is a national public interest organization with more than 300,000 members and supporters. For more than 40 years, we have advocated with some considerable success for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Public Citizen co-chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 75 consumer, small business, labor, scientific, research, good government, faith, community, health and environmental organizations joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all. Time constraints prevented the Coalition from reviewing my testimony in advance, and today I speak only on behalf of Public Citizen.

This hearing has the provocative title, "The Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness." While the rhetorical flourish is eye-catching, the premise of the title is mistaken. There is no such regulatory war underway.

Regulations issued under the Obama administration, like those issued under previous administrations, Republican and Democratic alike, have made our country stronger, better, safer, cleaner, healthier and more fair and just.

Over the last century, and through the Obama administration, regulations have made our food supply safer; saved hundreds of thousands of lives by reducing smoking rates; improved air quality, saving hundreds of thousands of lives; protected children's brain development by phasing out leaded gasoline; saved consumers billions by facilitating price-lowering generic competition for pharmaceuticals; reduced toxic emissions into the air and water; empowered disabled persons by giving them improved access to public facilities and workplace opportunities; guaranteed a minimum wage, ended child labor and established limits on the length of the work week; saved the lives of thousands of workers every year; protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques; ensured financial system stability (at least when appropriate rules were in place and enforced); made toys safer; saved tens of thousands of lives by making our cars safer; and much more.

There has been no significant surge in rulemaking under the Obama administration, a surprising fact given the relative paucity of rulemaking under the previous administration and the large number of new rules mandated by Congress as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The benefits of rules adopted during the Obama administration, as with rules adopted during the Bush administration, vastly exceed the costs, even when measured according to corporate-friendly criteria.

There is in fact a significant nexus between regulation and jobs. It was regulatory failure that was significantly responsible for the Great Recession, which has imposed far greater costs on the economy and cost far more jobs than regulations ever could.

To review the facts of how regulation strengthens our country and safeguards jobs, however, is not to suggest that all is well with the regulatory system. There is a need for significant regulatory reform -- reforms to toughen regulatory enforcement, increase criminal penalties for corporate wrongdoers, reduce industry influence over the rulemaking process, and address anti-competitive practices that injure small businesses, consumers and the national economy.

The first section of this testimony argues that regulatory benefits vastly exceed costs and that regulatory failure -- inadequate rules, and too little regulatory enforcement -- should be understood as a key cause of the Great Recession and ongoing economic weakness. The second section of the testimony focuses on needed reforms to strengthen our regulatory system so that it fulfills its role of protecting the American people and strengthening our economy.

I. Regulations are Economically Smart

A. Regulatory benefits vastly exceed costs

Although most regulations do not have economic objectives as their primary purpose, in fact regulation is overwhelmingly positive for the economy.

While regulators commonly do not have economic growth and job creation as a mission priority, they are mindful of regulatory cost, and by statutory directive or on their own initiative typically seek to minimize costs; relatedly, the rulemaking process gives affected industries ample opportunity to communicate with regulators over cost concerns, and these concerns are taken into account. To review the regulations actually proposed and adopted is to see how much attention regulators pay to reducing cost and detrimental impact on employment. And to assess the very extended rulemaking process is to see how substantial industry influence is over the rules ultimately adopted -- or discarded.

There is a large body of theoretical and non-empirical work on the cost of regulation, some of which yields utterly implausible cost estimates. There is also a long history of business complaining about the cost of regulation -- and predicting that the next regulation will impose unbearable burdens. More informative than the theoretical work, anecdotes and allegations is a review of the actual costs and benefits of regulations, though even this methodology is significantly imprecise and heavily biased against the benefits of regulation. Every year, the Office of Management and Budget analyzes the costs and benefits of rules with significant economic impact. The benefits massively exceed costs.

The principle finding of *OMB's draft 2012 Report to Congress on the Benefits and Costs of Federal Regulation* is:

> The estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2001, to September 30, 2011, for which agencies estimated and monetized both benefits and costs, are in the aggregate between $141 billion and $700 billion, while the estimated annual costs are in the aggregate between $43.3 billion and $67.3 billion. These ranges reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.[1]

[1] Office of Management and Budget, Office of Information and Regulatory Affairs. (2012). Draft *2012 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal*

In other words, even by OMB's most conservative accounting, the benefits of major regulations over the last decade exceeded costs by a factor of more than two-to-one. And benefits may exceed costs by a factor of 14.

These results are consistent year-to-year:

Total Annual Benefits and Costs of Major Rules by Fiscal Year (billions of 2001 dollars)[2]

Fiscal Year	Number of Rules	Benefits	Costs
2001	12	22.5 to 27.8	9.9
2002	2	1.5 to 6.4	0.6 to 2.2
2003	6	1.6 to 4.5	1.9 to 2.0
2004	10	8.8 to 69.8	3.0 to 3.2
2005	12	27.9 to 178.1	4.3 to 6.2
2006	7	2.5 to 5.0	1.1 to 1.4
2007	12	28.6 to 184.2	9.4 to 10.7
2008	11	8.6 to 39.4	7.9 to 9.2
2009	15	8.6 to 28.9	3.7 to 9.5
2010	18	18.6 to 85.9	6.4 to 12.4
2011	13	34.3 to 98.5	5.0 to 10.2

The reason for the consistency is that regulators pay a great deal of concern to comparative costs and benefits (too great a concern, in our view, given the built-in bias of cost-benefit analysis against regulatory initiative[3]). Very few major rules are adopted where projected costs exceed projected benefits, and those cases typically involve direct Congressional mandates.

Relatively high regulatory compliance costs, it should be noted, do not necessarily have negative job impacts; firm expenditures on regulatory compliance typically create new jobs within affected firms or other service or product companies with which they contract.

Moreover, the empirical evidence also fails to support the claim that regulation causes significant job loss. Insufficient demand is the primary reason for layoffs. In extensive survey

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Entities. p.3. Available from: <http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf>.

[2] Office of Management and Budget, Office of Information and Regulatory Affairs. (2012). Draft *2012 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities. Table 1-3,* p. 19. Available from: <http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf>. ; 2001 data from: Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities. Table 1-3,* p. 19-20. Available from: <http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf>.

[3] *See, e.g.*, Shapiro, S. et al., *CPR Comments on Draft 2010 Report to Congress on the Benefits and Costs of Federal Regulations* 16-19 (App. A, Pt. C.) (2010), Available from: <http://www.progressivereform.org/articles/2010_CPR_Comments_OMB_Report.pdf>; Steinzor, R. et al., *CPR Comments on Draft 2009 Report to Congress on the Benefits and Costs of Federal Regulations* 16-19 (App. A, Pt. C.) (2009), Available from: <http://www.progressivereform.org/articles/2009_CPR_Comments_OMB_Report.pdf>.

data collected by the Bureau of Labor Statistics, employers cite lack of demand roughly 100 times more frequently than government regulation as the reason for mass layoffs![4]

Reason for layoff: 2008-2011[5]

	2008	2009	2010	2011
Business Demand	516,919	824,834	384,564	366,629
Governmental regulations/intervention	5,505	4,854	2,971	2,736

It is also the case that firms typically innovate creatively and quickly to meet new regulatory requirements, even when they fought hard against adoption of the rules.[6] The result is that costs are commonly lower than anticipated.

While there is a long history of industry claiming that the next regulation under consideration would unreasonably raise the cost of doing business, those claims routinely prove to be overblown.

- Bankers and business leaders described the New Deal financial regulatory reforms in foreboding language, warning that the Federal Deposit Insurance Commission and related agencies constituted "monstrous systems," that registration of publicly traded securities constituted an "impossible degree of regulation," and that the New Deal reforms would "cripple" the economy and set the country on a course toward socialism.[7] In fact, those New Deal reforms prevented a major financial crisis for more than half a century -- until they were progressively scaled back.
- Chemical industry leaders said that rules requiring removal of lead from gasoline would "threaten the jobs of 14 million Americans directly dependent and the 29 million Americans indirectly dependent on the petrochemical industry for employment." In fact, while banning lead from gasoline is one of the single greatest public policy public health accomplishments, the petrochemical industry has continued to thrive. The World Bank finds that removing lead from gasoline has a ten times economic payback.[8]
- Big Tobacco long convinced restaurants, bars and small business owners that smokefree rules would dramatically diminish their revenue -- by as much as 30 percent, according to industry-sponsored surveys. The genuine opposition from small business owners -- based on the manipulations of Big Tobacco -- delayed the implementation of smokefree rules and cost countless lives. Eventually, the Big Tobacco-generated

[4] U.S. Department of Labor, Bureau of Labor Statistics. (2012, November). *Extended Mass Layoffs in 2011. Table 5. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2009-2011.* Available from: <http://www.bls.gov/mls/mlsreport1039.pdf>.
[5] U.S. Department of Labor, Bureau of Labor Statistics. (2012, November). *Extended Mass Layoffs in 2011. Table 5. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2009-2011.* Available from: <http://www.bls.gov/mls/mlsreport1039.pdf>; U.S. Department of Labor, Bureau of Labor Statistics. (2011, November). *Extended Mass Layoffs in 2010. Table 6. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2008-2010.* Available from: <http://www.bls.gov/mls/mlsreport1038.pdf>.
[6] Mouzoon, N., & Lincoln, T. (2011). *Regulation: The Unsung Hero in American Innovation*. Public Citizen. Available from: <http://www.citizen.org/documents/regulation-innovation.pdf>.
[7] Lincoln, T. (2011). *Industry Repeats Itself: The Financial Reform Fight*. Public Citizen. Available from: <http://www.citizen.org/documents/Industry-Repeats-Itself.pdf>.
[8] Crowther, A. (2013). *Regulation Issue: Industry's Complaints About New Rules Are Predictable – and Wrong. p.8.* Available from: <http://www.citizen.org/documents/regulation-issue-industry-complaints-report.pdf>

opposition was overcome, and smokefree rules have spread throughout the country -- significantly lowering tobacco consumption. Dozens of studies have found that smokefree rules have had a positive or neutral economic impact on restaurants, bars and small business.[9]

- Rules to confront acid rain have reduced the stress on our rivers, streams and lakes, fish and forests.[10] Industry projected costs of complying with acid rain rules of $5.5 billion initially, rising to $7.1 billion in 2000; ex-ante estimates place costs at $1.1 billion - $1.8 billion.[11]
- In the case of the regulation of carcinogenic benzene emissions, "control costs were estimated at $350,000 per plant by the chemical industry, but soon thereafter the plants developed a new process in which more benign chemicals could be substituted for benzene, thereby reducing control costs to essentially zero."[12]
- The auto industry long resisted rules requiring the installation of air bags, publicly claiming that costs would be more than $1000-plus for each car. Internal cost estimates actually showed the projected cost would be $206.[13] The cost has now dropped significantly below that. The National Highway Traffic Safety Administration estimates that air bags saved 2,300 lives in 2010, and more than 30,000 lives from 1987 to 2010.[14]

There is a long list of other examples from the last century -- including child labor prohibitions, the Family Medical Leave Act, the CFC phase out, asbestos rules, coke oven emissions, cotton dust controls, strip mining, vinyl chloride[15] -- that teach us to be wary of Chicken Little warnings about the costs of the next regulation.

The important lessons here are that impacted industries have a natural bias to overestimate costs of regulatory compliance, and projections of cost regularly discount the impact of technological dynamism. Indeed, regulation spurs innovation and can help create efficiencies and industrial development wholly ancillary to its directly intended purpose.

It should also be emphasized that while the discussion here is confined to narrow economic terms, health, safety, consumer, environmental, employment and similar regulatory protections yield benefits that are not easily monetized; and attempts to translate these benefits into monetary terms almost always fall short of capturing the full range of improvements they afford to our standard of living.

"While cost, inconvenience, complexity and hardship can play roles in regulation, this corporate taxonomy fails to consider the most important freedom -- the freedom of victims," wrote David

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[9] *Regulation Issue: Industry's Complaints About New Rules Are Predictable -- and Wrong*. p.10.
[10] Environmental Protection Agency. *Acid Rain in New England: Trends*. Available from: <http://www.epa.gov/region1/eco/acidrain/trends.html>.
[11] The Pew Environment Group. (2010, October). *Industry Opposition to Government Regulation*. Available from: <http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Fact_Sheet/Industry%20Clean%20Energy%20Factsheet.pdf>.
[12] Shapiro, I., & Irons, J. (2011). *Regulation, Employment, and the Economy: Fears of job loss are overblown*. Economic Policy Institute. Available from <http://www.epi.org/files/2011/BriefingPaper305.pdf>.
[13] Behr, P. (August 13, 1981). U.S. Memo on Air Bags in Dispute. Washington Post.
[14] National Highway Traffic Safety Administration. (2012). Traffic Safety Facts: Occupant Protection. Available from: <http://www-nrd.nhtsa.dot.gov/Pubs/811619.pdf>.
[15] *Regulation Issue: Industry's Complaints About New Rules Are Predictable -- and Wrong*; Hodges, H. (1997). Falling Prices: Cost of Complying With Environmental Regulations Almost Always Less Than Advertised. Economic Policy Institute. Available from: <http://www.epi.org/publication/bp69>; Shapiro, I., & Irons, J. (2011). *Regulation, Employment, and the Economy: Fears of job loss are overblown*. Economic Policy Institute. Available from: <http://www.epi.org/files/2011/BriefingPaper305.pdf>.

Bollier and Joan Claybrook a quarter century ago. "Victims do not assert an imperial, callous freedom that tramples on the sanctity of other individuals. Their quest is for a freedom from the myriad of harms that threaten their lives and health."[16]

B. Job-destroying regulatory failure and the Great Recession

Missing from much of the current policy debate on jobs and regulation is a crucial, overriding fact: The Great Recession and the ongoing stagnant jobs market and national economy is a direct result of too little regulation and too little regulatory enforcement.

A very considerable literature, and a very extensive Congressional hearing record, documents in granular detail the ways in which regulatory failure led to financial crash and the onset of the Great Recession. "Widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets," concluded the Financial Crisis Inquiry Commission.[17] "Deregulation went beyond dismantling regulations," notes the Financial Crisis Inquiry Commission. "[I]ts supporters were also disinclined to adopt new regulations or challenge industry on the risks of innovations."[18]

The regulatory failures were pervasive, the Financial Crisis Inquiry Commission concluded:

> The sentries were not at their posts, in no small part due to the widely accepted faith in the self-correcting nature of the markets and the ability of financial institutions to effectively police themselves. More than 30 years of deregulation and reliance on self-regulation by financial institutions, championed by former Federal Reserve Chairman Alan Greenspan and others, supported by successive administrations and Congresses, and actively pushed by the powerful financial industry at every turn, had stripped away key safeguards, which could have helped avoid catastrophe. This approach had opened up gaps in oversight of critical areas with trillions of dollars at risk, such as the shadow banking system and over-the-counter derivatives markets. In addition, the government permitted financial firms to pick their preferred regulators in what became a race to the weakest supervisor.

A sampling of the very extensive regulatory failures that contributed to the crisis include:

Failure to stop toxic and predatory mortgage lending that blew up the housing bubble. Concludes the Financial Crisis Inquiry Commission: "The prime example is the Federal Reserve's pivotal failure to stem the flow of toxic mortgages, which it could have done by setting prudent mortgage-lending standards. The Federal Reserve was the one entity empowered to do so and it did not."[19] Regulators failed almost completely to use then-existing authority to crack down on abusive lending practices. The Federal Reserve took three formal actions against subprime lenders from 2002 to 2007.[20] The Office of Comptroller of the Currency, with authority

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[16] Bollier, D. and Claybrook, J. (1986). Freedom From Harm: The Civilizing Influence of Health, Safety and Environmental Regulation. Washington, D.C.: Public Citizen and The Democracy Project.
[17] Financial Crisis Inquiry Commission. (2011). *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*. Washington, D.C.: Government Printing Office. p. 30.
[18] *The Financial Crisis Inquiry Report*. p. 53.
[19] *The Financial Crisis Inquiry Report*. p. xvii.
[20] Tyson, J., Torres, C., & Vekshin, A. (2007, March 22). *Fed Says It Could Have Acted Sooner on Subprime Rout*. Bloomberg. Available from: <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a1.KbcMbvliA&refer=home>.

over almost 1,800 banks, took three consumer-protection enforcement actions from 2004 to 2006.[21]

Repeal of the Glass-Steagall Act. The Financial Services Modernization Act of 1999 formally repealed the Glass-Steagall Act of 1933 (also known as the Banking Act of 1933) and related laws, which prohibited commercial banks from offering investment banking and insurance services. The 1999 repeal of Glass-Steagall helped create the conditions in which banks created and invested in creative financial instruments such as mortgage-backed securities and credit default swaps, investment gambles that rocked the financial markets in 2008. More generally, the Depression-era conflicts and consequences that Glass-Steagall was intended to prevent re-emerged once the Act was repealed. The once staid commercial banking sector quickly evolved to emulate the risk-taking attitude and practices of investment banks, with disastrous results. "The most important consequence of the repeal of Glass-Steagall was indirect -- it lay in the way repeal changed an entire culture," notes economist Joseph Stiglitz. "When repeal of Glass-Steagall brought investment and commercial banks together, the investment-bank culture came out on top. There was a demand for the kind of high returns that could be obtained only through high leverage and big risk taking."[22]

Unregulated Financial Derivatives. The 2008 crash proved Warren Buffet's warning that financial derivatives represent "weapons of mass financial destruction" to be prescient.[23] Financial derivatives amplified the financial crisis far beyond the troubles connected to the popping of the housing bubble. AIG made aggressive bets on credit default swaps (CDSs) that went bad with the housing bust, and led to a taxpayer-financed rescue of more than $130 billion. AIG was able to put itself at such risk because its CDS business was effectively subject to no governmental regulation or even oversight. That was because first, high officials in the Clinton administration and the Federal Reserve, including SEC Chair Arthur Levitt, Treasury Secretary Robert Rubin, Deputy Treasury Secretary Lawrence Summers and Federal Reserve Chair Alan Greenspan, blocked the Commodity Futures Trading Commission (CFTC) from regulating financial derivatives;[24] and second, because Congress and President Clinton codified regulatory inaction with passage of the Commodity Futures Modernization Act, which enacted a statutory prohibition on CFTC regulation of financial derivatives.

The SEC's Voluntary Regulation Regime for Investment Banks. In 1975, the SEC's trading and markets division promulgated a rule requiring investment banks to maintain a debt-to-net capital ratio of less than 12 to 1. It forbade trading in securities if the ratio reached or exceeded 12 to 1, so most companies maintained a ratio far below it. In 2004, however, the SEC succumbed to a push from the big investment banks -- led by Goldman Sachs, and its then-

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[21] Torres, C., & Vekshin, A. (2007, March 14). *Fed, OCC Publicly Chastised Few Lenders During boom*. Bloomberg. Available from: <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6WTZifUUH7g&refer=us>.
[22] Stiglitz, J. (2009). Capitalist fools. *Vanity Fair, 51*(1).
[23] Buffett, W. (2003). *Report to Shareholders, February 21, 2003*. Berkshire Hathaway. Available from: <http://www.berkshirehathaway.com/letters/2002pdf.pdf>.
[24] After the collapse of Long-Term Capital Management, Born issued a new call to regulate financial derivatives. "This episode should serve as a wake-up call about the unknown risks that the over-the-counter derivatives market may pose to the U.S. economy and to financial stability around the world," Born told the House Banking Committee two days later. "It has highlighted an immediate and pressing need to address whether there are unacceptable regulatory gaps relating to hedge funds and other large OTC derivatives market participants." But what should have been a moment of vindication for Born was swept aside by her adversaries, and Congress enacted a six-month moratorium on any CFTC action regarding derivatives or the swaps market. In May 1999, Born resigned in frustration. Born, B. (1998). *Testimony of Brooksley Born, Chairperson, Commodity Futures Trading Commission Concerning Long-Term Capital Management Before the U.S. House of Representatives Committee on Banking and Financial Services*. Available from: <http://www.cftc.gov/opa/speeches/opaborn-35.htm>.

chair, Henry Paulson -- and authorized investment banks to develop their own net capital requirements in accordance with standards published by the Basel Committee on Banking Supervision. This essentially involved complicated mathematical formulas that imposed no real limits, and was voluntarily administered. With this new freedom, investment banks pushed borrowing ratios to as high as 40 to 1, as in the case of Merrill Lynch. This super-leverage not only made the investment banks more vulnerable when the housing bubble popped, it enabled the banks to create a more tangled mess of derivative investments -- so that their individual failures, or the potential of failure, became systemic crises. On September 26, 2008, as the crisis became a financial meltdown of epic proportions, SEC Chair Christopher Cox, who spent his entire public career as a deregulator, conceded "the last six months have made it abundantly clear that voluntary regulation does not work."[25]

Poorly Regulated Credit Ratings Firms. The credit rating firms enabled pension funds and other institutional investors to enter the securitized asset game, by attaching high ratings to securities that actually were high risk -- as subsequent events revealed. The credit ratings firms have a bias toward offering favorable ratings to new instruments because of their complex relationships with issuers,[26] and their desire to maintain and obtain other business dealings with issuers. This institutional failure and conflict of interest might and should have been forestalled by the SEC, but the Credit Rating Agencies Reform Act of 2006 gave the SEC insufficient oversight authority. In fact, under the Act, the SEC was required to give an approval rating to credit ratings agencies if they adhered to their own standards -- even if the SEC knew those standards to be flawed.

The regulatory failure story can perhaps be summarized as follows: Financial deregulation and non-regulation created a vicious cycle that helped inflate the housing bubble and an interconnected financial bubble. Weak mortgage regulation enabled the spread of toxic and predatory mortgages that helped fuel the housing bubble. Deregulated Wall Street firms and big banks exhibited an insatiable appetite for mortgage loans, irrespective of quality, thanks to insufficiently regulated securitization, off-the-books accounting, the spread of shadow banking techniques, dangerous compensation incentives and inadequate capital standards. Reckless

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[25] Faoila, A., Nakashima, E., & Drew, J. (2008, October 15). *What Went Wrong*. The Washington Post. Available from: <www.washingtonpost.com/wp-dyn/content/story/2008/10/14/ST2008101403344.html>.

[26] The CEO of Moody's reported in a confidential presentation that his company is "continually 'pitched' by bankers" for the purpose of receiving high credit ratings and that sometimes "we 'drink the Kool-Aid.'" A former managing director of credit policy at Moody's testified before Congress that, "Originators of structured securities [e.g., banks] typically chose the agency with the lowest standards," allowing banks to engage in "rating shopping" until a desired credit rating was achieved. The agencies made millions on mortgage-backed securities ratings and, as one member of Congress said, "sold their independence to the highest bidder." Banks paid large sums to the ratings companies for advice on how to achieve the maximum, highest quality rating. "Let's hope we are all wealthy and retired by the time this house of cards falters," a Standard & Poor's employee candidly revealed in an internal email obtained by congressional investigators.

Other evidence shows that the firms adjusted ratings out of fear of losing customers. For example, an internal email between senior business managers at one of the three ratings companies calls for a "meeting" to "discuss adjusting criteria for rating CDOs [collateralized debt obligations] of real estate assets this week because of the ongoing threat of losing deals." In another email, following a discussion of a competitor's share of the ratings market, an employee of the same firm states that aspects of the firm's ratings methodology would have to be revisited in order to recapture market share from the competing firm.

See Weissman, R., & Donahue, J. (2009, March). *Sold Out: How Wall Street and Washington Betrayed America*. Essential Information and Consumer Education Foundation. Available from: <http://wallstreetwatch.org/reports/sold_out.pdf>.

financial practices were ratified by credit ratings firms, paving the way for institutional funders to pour billions into mortgage-related markets; and an unregulated derivatives trade offered the illusion of systemic insurance but actually exacerbated the crisis when the housing bubble popped and Wall Street crashed.

The costs of this set of regulatory failures are staggeringly high, and far outdistance any plausible story about the "cost" of regulation.

To prevent the collapse of the financial system, the federal government provided incomprehensibly huge financial supports, far beyond the $700 billion in the much-maligned Troubled Assets Relief Program (TARP). The Special Inspector General for the Troubled Assets Relief Program (SIGTARP) estimated that "though a huge sum in its own right, the $700 billion in TARP funding represents only a portion of a much larger sum -- estimated to be as large as $23.7 trillion -- of potential Federal Government support to the financial system."[27] Much of this sum was never allocated, and most of the TARP funds are being paid back. However, the regulatory reform policy debate should acknowledge that such unfathomable sums were put at risk thanks to regulatory failure.

Even more significant, however, are the actual losses traceable to the regulatory failure-enabled Great Recession. These losses are real, not potential; they are at a comparable scale of more than $20 trillion; they involve an actual loss of economic output, not just a reallocation of resources; and they have imposed devastating pain on families, communities and national well-being.

A recent GAO study finds that "[t]he 2007-2009 financial crisis, like past financial crises, was associated with not only a steep decline in output but also the most severe economic downturn since the Great Depression of the 1930s."[28] Reviewing estimates of lost economic output (current and projected until a return to the baseline scenario in 2018), GAO reports that the present value of cumulative output losses could exceed $13 trillion.[29] Additionally, GAO finds that "households collectively lost about $9.1 trillion (in constant 2011 dollars) in national home equity between 2005 and 2011, in part because of the decline in home prices."[30]

The recession threw millions out of work, and has left millions still jobless. "The monthly unemployment rate peaked at around 10 percent in October 2009 and remained above 8 percent for over 3 years, making this the longest stretch of unemployment above 8 percent in the United States since the Great Depression," GAO notes.[31]

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[27] Special Inspector General for the Troubled Assets Relief Program (SIGTARP) (2009, July 21.) Quarterly Report to Congress. p. 129. Available from: <http://www.sigtarp.gov/Quarterly%20Reports/July2009_Quarterly_Report_to_Congress.pdf>.

[28] U.S. Government Accountability Office. (2013, Jan. 13). *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. p. 12. Available from: <http://www.gao.gov/products/GAO-13-180>.

[29] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. p. 16.

[30] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. p. 21. There is necessarily a significant amount of uncertainty around such analyses. Other estimates have placed the loss somewhat lower. A recent Congressional Budget Office study estimates the cumulative loss from the recession and slow recovery at $5.7 trillion." (Congressional Budget Office. 2012. *The Budget and Economic Outlook: Fiscal Years 2012 to 2022*. p. 26.) One complicating issue is determining which losses should be attributed to the recession and which to other issues. For example, GAO notes, "analyzing the peak-to-trough changes in certain measures, such as home prices, can overstate the impacts associated with the crisis, as valuations before the crisis may have been inflated and unsustainable.[30] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. p. 17.

[31] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. pp. 17-18.

The economic impact on families is crushing, even leaving aside social and psychological consequences. "Displaced workers -- those who permanently lose their jobs through no fault of their own -- often suffer an initial decline in earnings and also can suffer longer-term losses in earnings," reports GAO. For example, one study found that workers displaced during the 1982 recession earned 20 percent less, on average, than their nondisplaced peers 15 to 20 years later.[32] Thanks to lost income and especially collapsed housing prices, families have seen their net worth plummet. According to the Federal Reserve's Survey of Consumer Finances, median household net worth fell by $49,100 per family, or by nearly 39 percent, between 2007 and 2010.[33]

The foreclosure crisis stemming from the toxic brew of collapsing housing prices, exploding and other unsustainable mortgages and high unemployment has devastated families and communities across the nation.[34]

The financial crash and Great Recession is also, not so incidentally, the primary explanation for historically high federal deficits. Reports GAO:

> From the end of 2007 to the end of 2010, federal debt held by the public increased from roughly 36 percent of GDP to roughly 62 percent. Key factors contributing to increased deficit and debt levels following the crisis included (1) reduced tax revenues, in part driven by declines in taxable income for consumers and businesses; (2) increased spending on unemployment insurance and other nondiscretionary programs that provide assistance to individuals impacted by the recession; (3) fiscal stimulus programs enacted by Congress to mitigate the recession, such as the American Recovery and Reinvestment Act of 2009 (Recovery Act); and (4) increased government assistance to stabilize financial institutions and markets.[35]

It should be noted that there are, to be sure, dissenting views to narratives that place regulatory failure at the core of the explanation for the Great Recession and financial crisis. Perhaps the most eloquent version of this dissent is contained in the primary dissenting statement to the Financial Crisis Inquiry Commission.

The dissent explains that "we ... reject as too simplistic the hypothesis that too little regulation caused the Crisis,"[36] arguing that the *amount* of regulation is an imprecise and perhaps irrelevant metric. This is a reasonable position (and it applies equally to those who complain about "too much" regulation); what matters is the quality of regulation -- both the rules and standards of enforcement.

The FCIC dissent starts its explanation for the financial crisis with the creation of a credit bubble and a housing bubble, which it says laid the groundwork for a financial crisis thanks to a series of other, interconnected factors, including the spread of nontraditional mortgages, securitization, poor functioning by credit rating firms, inadequate capitalization by financial firms, the amplification of housing bets through use of synthetic credit derivatives, and the risk of contagion due to excessive interconnectedness.

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[32] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. pp. 18-19.
[33] Cited in *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. p. 16.
[34] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. pp. 23-24.
[35] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. p. 26.
[36] *The Financial Crisis Inquiry Report*. (Dissenting Views By Keith Hennessey, Douglas Holtz-Eakin, and Bill Thomas.) p. 414.

However, to review this list is to see how the FCIC dissent also implicitly argues that the crisis can be blamed in large part on regulatory failure. For all of these factors should have been tamed by appropriate regulatory action.

II. Improving Regulation

There is no regulatory war on jobs or the economy. However, there is an acute need for regulatory reform, to increase and improve regulatory enforcement, stiffen penalties for corporate wrongdoing, improve transparency, address undue industry influence over the rule-making process, correct inappropriate judicial review of regulations, and adopt pro-competitive rules to level the playing field for small business and improve the economy and consumer well-being. I discuss these problem areas in this portion of my testimony, concluding each section or subsection with proposed remedies.

A. Strengthening regulatory enforcement

In general, it is fair to say that the inspection agencies are understaffed and under-resourced.

Nowhere is the shortfall of inspectors more glaring than in the workplace safety and health area. "The federal Occupational Safety and Health Administration (OSHA) and the state OSHA plans have a total of 2,178 inspectors (892 federal and 1,286 state inspectors) to inspect the 8 million workplaces under the OSH Act's jurisdiction," according to AFL-CIO analysis. "Federal OSHA can inspect workplaces on average once every 131 years; the state OSHA plans can inspect them once every 73 years. The current level of federal and state OSHA inspectors provides one inspector for every 58,687 workers."[37] Our nation's workers deserve better.

To take another example among many, there is general agreement that the Food and Drug Administration (FDA) does not have sufficient resources to meet its statutorily mandated responsibilities to ensure the safety of drugs and medical products, including through inspection of overseas plants. "Our current examination of FDA's resources confirms that the agency's ability to protect Americans from unsafe and ineffective medical products is compromised," the GAO recently found.[38] GAO explained that "[t]he structure of the agency's funding -- its reliance on user fees to fund certain activities, particularly those related to the review of new products -- is a driving force behind which responsibilities FDA does and does not fulfill. The approval of new products has increasingly become the beneficiary of the agency's budget, without parallel increases in funding for activities designed to ensure the continuing safety of products, once they are on the market."

Of course, the issue with adequate enforcement is not solely a matter of resources. Many agencies do an inadequate job of enforcing rules due less to resource limitations than issues involving allocation of resources, prioritization and/or insufficient rigor. The recent and ongoing fungal meningitis outbreak, for example, could and should have been prevented by FDA. The agency issued a warning letter to the New England Compounding Center in 2006, instructing the company to stop manufacturing-scale operations. However, FDA failed to follow up

[37] AFL-CIO. (2012, April.) Death on the Job: The Toll of Neglect. p. 1. Available from: <http://www.aflcio.org/content/download/22781/259751/DOTJ2012nobugFINAL.pdf>.
[38] Government Accountability Office. (2009, June.) Food and Drug Administration: *FDA Faces Challenges Meeting Its Growing Medical Product Responsibilities and Should Develop Complete Estimates of Its Resource Needs*. p. 34. Available from: <http://www.gao.gov/new.items/d09581.pdf>.

adequately. For whatever reason, whether inattentiveness or lack of compliance and legal resources, by not aggressively enforcing the regulations related to drug manufacturing and interstate commerce, the FDA allowed the company to continue its wide-scale manufacturing and interstate distribution operation of multiple high-risk drugs, including injectable steroids. The eventual result was the current outbreak and 48 deaths.[39]

Remedies: The agency resource problem is easily solved with sufficient political will, though of course the prospect of the budgetary sequester becoming operative suggests the government is about to proceed in the wrong direction in this regard. Ensuring a sufficiently robust enforcement culture at regulatory agencies is not a problem that lends itself to a simple solution, though addressing the revolving door problem (see below) and stronger Congressional oversight of agency enforcement would go a long way.

B. Criminal prosecution of corporations for egregious violation of regulations and criminal statutes.

Although there are some areas of vibrant corporate criminal prosecution, including for violations of the Foreign Corrupt Practices Act, illegal marketing of drugs and some environmental crimes, in many areas, massive corporate wrongdoing escapes criminal enforcement. Widespread illegality by Big Banks and Wall Street firms, including in connection with the ongoing foreclosure crisis, is a case in point.

Often, corporations are able to commit crimes but escape criminal prosecution, even when caught. In the past decade, there has been a dramatic rise in federal prosecutors choosing not to prosecute corporations that have committed crimes. Instead, the U.S. Department of Justice has adopted an alternative approach, forming agreements with corporations to either defer prosecution or abstain from prosecution entirely if the corporation meets the terms set out in these agreements. When first introduced, these types of agreements, also known as "pre-trial diversion," were intended to apply not to corporations, but primarily to juvenile delinquents, with the aim of clearing the courts to allow them to attend to major criminal cases.[40] Yet, when deferred and non-prosecution agreements are used in response to massive corporate crimes, it is exactly such perpetrators of major crimes that reap the benefits.

Prior to 2003, the DOJ entered into fewer than five deferred prosecution agreements and non-prosecution agreements with corporations per year. In the first decade following the millennium, these numbers gradually crept upwards, entering the double digits by 2005. Numbers rose to a high of 42 deferred and non-prosecution agreements in 2007 and continue to number in the dozens every year, according to a forthcoming report from Public Citizen.[41]

Deferred and non-prosecution agreements are a special gift to large corporations, which are enabled to escape prosecution for serious crimes in a manner not usually afforded to individuals or small business. The logic of these agreements is that they permit prosecutors to put in place special compliance mechanisms to prevent future wrongdoing. These compliance mechanisms can equally be obtained through criminal plea agreements, however, so the claim that deferred and non-prosecution agreements offer some unique benefit is incorrect. Worse, deferred

[39] See Carome, M. and Wolfe, S. (2012, October 24.) Letter to Secretary of Health and Human Services Kathryn Sebelius. Available from: <http://www.citizen.org/documents/2080.pdf>.
[40] Mokhiber, R. (2005). Crime without Conviction: The Rise of Deferred and Non Prosecution Agreements. Available from: <http://corporatecrimereporter.com/deferredreport.htm>.
[41] Ben-Ishai, E. and Weissman, R. (forthcoming, 2013). Justice Deferred -- and Denied. Public Citizen.

prosecution agreements offer little or no deterrent effect, either for the (non-)charged corporation or for others. Corporations entering into deferred and non-prosecution agreements have a strikingly high recidivism rate, including companies such as AIG, Barclays, Bristol-Myers Squibb, Chevron, GlaxoSmithKline, Hitachi, Lucent, Merrill Lynch, Pfizer, Prudential and UBS.[42]

A recent, particularly appalling example of the abuse of deferred prosecution -- one which emphasizes how this kid-glove treatment is designed primarily for giant corporations -- involves the banking giant HSBC. In December, the company agreed to pay more than $1 billion in fines and entered into a deferred prosecution agreement for anti-money laundering and sanctions violations. Assistant Attorney General Lanny Breuer said the company was guilty of "stunning failures of oversight -- and worse" and that the "record of dysfunction that prevailed at HSBC for many years was astonishing."[43]

Breuer was correct.

The statement of facts attached to the deferred prosecution agreement with HSBC is startling. Just two illustrative examples:

- As regards money laundering for Latin American drug cartels, "Senior business executives at HSBC Mexico repeatedly overruled recommendations from its own AML [anti-money laundering] committee to close accounts with documented suspicious activity. In July 2007, a senior compliance officer at HSBC Group told HSBC Mexico's Chief Compliance Officer that '[t]he AML committee just can't keep rubber-stamping unacceptable risks merely because someone on the business side writes a nice letter. It needs to take a firmer stand. It needs some cojones. We have seen this movie before, and it ends badly.'"[44]

- As regards efforts to facilitate evasion of U.S. government sanctions against other countries, the statement of facts says, "[B]eginning in the 1990s, HSBC Bank plc ("HSBC Europe"), a wholly owned subsidiary of HSBC Group, devised a procedure whereby the Sanctioned Entities put a cautionary note in their SWIFT payment messages including, among others, 'care sanctioned country,' 'do not mention our name in NY,' or 'do not mention Iran.' Payments with these cautionary notes automatically fell into what HSBC Europe termed a 'repair queue' where HSBC Europe employees manually removed all references to the Sanctioned Entities. The payments were then sent to HSBC Bank USA and other financial institutions in the United States without reference to the Sanctioned Entities, ensuring that the payments would be processed without delay and not be blocked or rejected and referred to OFAC. HSBC Group was aware of this practice."[45]

Why did a company engaging in such egregious practices, which facilitated illegal drug trafficking and evasion of U.S. sanctions against foreign countries, escape without a criminal prosecution?

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[42] Ben-Ishai, E. and Weissman, R. (forthcoming, 2013). Justice Deferred -- and Denied. Public Citizen.
[43] Breuer, L. (2012, December 11.) *Assistant Attorney General Lanny A. Breuer Speaks at the HSBC Press Conference*. Available from: <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1212111.html>.
[44] United States of America Against HSBC Bank USA, N.A. and HSBC Holdings PLC, HSBC Deferred Prosecution Agreement Attachment - Statement of Facts. (2012, December 11.) p. 13. Available from: <http://www.justice.gov/opa/documents/hsbc/dpa-attachment-a.pdf>.
[45] HSBC Deferred Prosecution Agreement Attachment - Statement of Facts. pp. 22-23.

According to Breuer, the worry was that a criminal prosecution of a giant bank like HSBC might bring down the company and threaten the global financial system's stability.[46] "In trying to reach a result that's fair and just and powerful, you also have to look at the collateral consequences," Breuer said at the news conference announcing the deferred prosecution deal.[47] "If you think that by doing a certain thing you risk either a charter being revoked, you think that counterparties in a massive financial institution may go away, you think that there is a risk that many, many innocent people will be harmed from a resolution, and by another resolution you think you can mitigate the risk of innocent people suffering, the economy being affected, and you can home in on those and the institutions and address the issues underlying, to the Department of Justice, that's a very real factor, and so it is a fact that you consider. It's one factor," Breuer said.[48]

A smaller bank, presumably, would have received no such deferential treatment.

In other words, the mere fact of its excessive size enabled HSBC to escape criminal penalties; it has been judged too big to jail.

American Banker -- not an outlet known for shrill criticism of the banking industry -- has eloquently captured the moral outrage of this state of affairs. American Banker highlighted the case of G&A Check Cashing, a small firm found to have violated anti-money laundering laws for over $8 million in transactions. (By contrast, HSBC was found to have laundered at least $881 million in drug trafficking proceeds, and failed to monitor properly $200 trillion in wire transfers.) Two of its executives were sentenced to jail terms, and the company was placed on probation for two years. The case highlights "the disparate treatment of certain institutions for violations of anti-laundering laws," American Banker commented. "[M]any have responded to the settlement with disdain for the basic message they said it sent about parity under the law."[49]

A related issue at the nexus of regulatory violations and criminal penalties is insufficient criminal penalties for companies that recklessly endanger consumers or their workers. There are no or inadequate statutory criminal penalties for violating auto safety rules in ways that endanger consumers, for recklessly selling unsafe pharmaceuticals, for recklessly putting other hazardous consumer products into the stream of commerce, and for endangering or killing workers due to unsafe working conditions.

Remedies: Justice has gone the wrong way with the proliferation of deferred and non-prosecution agreements for wrongdoing corporations. Whether from inside the Department of Justice or imposed by Congress, there needs to be new guidelines regarding deferred and non-prosecution agreements. If they are not prohibited outright, at minimum a strong presumption against such deals should be established, so they are used only in rare cases upon specific showings of their necessity.

The HSBC example, as well as other examples from the financial sector, point to the need to look not just at prosecutorial policy. Given plausible claims that prosecution of giant financial

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[46] O'Toole, J. (2012, December 12.) *HSBC: Too Big to Jail?* CNNMoney. Available from: <http://money.cnn.com/2012/12/12/news/companies/hsbc-money-laundering/index.html>.
[47] Viswanatha, A. and Wolf, B. (2012, December 12.) HSBC to pay $1.9 billion U.S. fine in money-laundering case. Reuters. Available from: <http://www.reuters.com/article/2012/12/11/us-hsbc-probe-idUSBRE8BA05M20121211>.
[48] Finkle, V. (2013, Jan. 22.) *Are Some Banks 'Too Big To Jail'?* American Banker. Available from: <http://www.americanbanker.com/issues/178_15/are-some-banks-too-big-to-jail-1056033-1.html?zkPrintable=1&nopagination=1>.
[49] *Are Some Banks 'Too Big To Jail'?*

institutions threatens financial system stability, the only way to prevent giant financial institutions from unfairly escaping criminal prosecution -- and it is a virtual certainty that this situation will recur -- is to break up these goliaths.

Congress should act to remedy this problem of insufficient criminal penalties by adopting a reckless endangerment criminal statute, making it a crime for businesses to recklessly expose consumers or workers to deadly products or working conditions.[50]

C. Combating unreasonable delay

Unreasonable delay permeates almost all aspects of the rulemaking process. The consequences of delay are serious. As opposed to issuance of new rules, delay creates the regulatory uncertainty that many business spokespeople denounce. Delay also means that lives are needlessly lost, injuries needlessly suffered, environmental harm needlessly permitted, consumer rip-offs extended, and more.

Last July, Public Citizen conducted an analysis of public health and safety rulemakings with congressionally mandated deadlines.[51] Our analysis showed that most rules are issued long after their deadlines have passed, putting American consumers at risk. Of the 159 rules analyzed, 78 percent missed their deadline and more than half remained incomplete at the time. Federal agencies miss these deadlines for a variety of reasons, including having to conduct onerous analyses, dealing with politically motivated delays, inadequate resources or agency commitment, and fear of judicial review.

A high proportion of pending rules with statutory deadlines are mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The financial regulatory agencies are far behind schedule. The most recent report from the law firm DavisPolk finds that, as of February 1, 2013, a total of 279 Dodd-Frank rulemaking requirement deadlines have passed. Regulators have missed almost two thirds -- 176 -- of those deadlines, and met 103 with finalized rules.[52]

A thicket of legislatively mandated process and multiple analyses mires rulemaking with significant economic impact in delay.

By way of example, consider the issuance of the Occupational Safety and Health Administration's cranes and derricks rule, designed to improve construction safety. By the late 1990s, construction accidents involving cranes were killing 80 to 100 workers a year. OSHA later estimated that a modernized rule would prevent about 20 to 40 of those annual tragedies. Worker safety advocates and the construction industry alike wanted an updated rule.

Nonetheless, it took a dozen years to get a final rule adopted. "During the dozen years it took to finalize the cranes rule," a Public Citizen report summarized, "OSHA and other federal agencies held at least 18 meetings about it. At least 40 notices were published in the Federal Register. OSHA was required by a hodgepodge of federal laws, regulations and executive orders to produce several comprehensive reports, and revisions to such reports, on matters such as the

[50] See, for example, The Dangerous Products Warning Act, H.R. 322, introduced in the last Congress by Rep. John Conyers.
[51] Mouzoon, N. (2012). *Public Safeguards Past Due: Missed Deadlines Leave Public Unprotected*. Public Citizen. Available from: <http://www.citizen.org/documents/public-safeguards-past-due-report.pdf>.
[52] DavisPolk. (2013, Feb.) *Dodd-Frank Progress Report*. Available from: <http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report>.

makeup of industries affected by the rule, the number of businesses affected, and the costs and benefits of the rule. OSHA also was repeatedly required to prove that the rule was needed, that no alternative could work, and that it had done everything it could to minimize the effects on small businesses. The regulatory process afforded businesses at least six opportunities to weigh in with concerns that the agency was required to address."[53]

Although it is not the case for most Dodd-Frank rules, one important source of rulemaking delay is prolonged review at the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). Among rules included in Public Citizen's July 2012 analysis, all 14 rules then under review at OIRA had been there longer than the agency's allotted four-month review period.[54]

One notable example of OIRA-exacerbated delay is OSHA's silica rule. OSHA's lifesaving silica dust standard has been delayed for more than nine years. More than two million workers in the United States are exposed to silica dust, with construction, foundry, and metal workers most at risk. Inhaling the dust causes a variety of harmful effects, including lung cancer, tuberculosis, and silicosis (a potentially fatal respiratory disease). OSHA acknowledges that its current silica dust standard is obsolete.[55] The first concrete action it took to update the standard was in October 2003, when it convened a small business panel to review its proposed rule. Two years ago, OSHA submitted to OIRA a draft proposed rule to reduce exposure to deadly silica dust. Although OIRA is supposed to complete reviews in three months, it is instead functioning as a regulatory black hole; workers are still waiting for OIRA to complete the review. One asks in vain for an explanation.

What is clear: people are dying needlessly due to delay. Over this nine-year period of delay, a standard would have prevented an estimated 165 cases of lung cancer, 365 cases of fatal silicosis, and 22,400 cases of non-fatal silicosis.[56]

There's no way for the public to know why OIRA is delaying the silica rule, in part because OIRA processes are closed and non-transparent.[57] What is known is that OIRA meetings with outside parties are dominated by regulated industries, and that meetings correlate with changes in rules. We also know that OIRA is a one-way ratchet, insisting that rules get weaker, but almost never stronger.

A 2011 report from the Center for Progressive Reform found that:

- Industry dominates the OIRA meetings process. In the 10 years studied in the report, OIRA hosted 1,080 meetings, with 5,759 appearances by outside participants. Sixty-five percent of the participants represented regulated industry interests; 12 percent of participants appeared on behalf of public interest groups.

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[53] Lincoln, T. and Mouzoon, N. (2011, April.) Cranes & Derricks: The Prolonged Creation of a Key Public Safety Rule. Public Citizen. p. 4. Available from: <http://www.citizen.org/documents/CranesAndDerricks.pdf>.
[54] *Public Safeguards Past Due: Missed Deadlines Leave Public Unprotected.*
[55] OSHA Occupational Exposure to Crystalline Silica, 75 Fed. Reg. 79.603 (2010, Dec. 20).
[56] OSHA, Preliminary Initial Regulatory Flexibility Analysis of the Draft Proposed OSHA Standard for Silica Exposure for General Industry and Maritime (2003). OSHA, Preliminary Initial Regulatory Flexibility Analysis of the Draft Proposed OSHA Standard for Silica Exposure in Construction (2003). Assumes PEL of 50 µg/m3.
[57] Government Accountability Office. (2009, April.) *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews.* Available from: <http://www.gao.gov/new.items/d09205.pdf>.

- OIRA meetings correlate with changes to rules. Rules that were the subject of meetings were 29 percent more likely to be changed than those that were not. OIRA does not disclose its changes, but it is widely understood that OIRA-initiated revisions are intended to weaken rules.
- OIRA ignores public disclosure requirements. OIRA is required by executive order to make available "all documents exchanged between OIRA and the agency during the review by OIRA," and agencies are required to "identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA." Such requirements are routinely ignored.[58]

The last Congress saw introduction of many bills that would further hinder agencies' abilities to do their jobs, imposing vast new analytic requirements on agencies and increasing the scope of OIRA authority. The Regulatory Analysis Act, for example, would have added more than 60 new procedural and analytic requirements to the rulemaking process, subordinated statute-specific regulatory missions to an overarching and overbearing cost-benefit analysis including an analysis of *indirect* costs and benefits and cumulative costs and benefits, and forced agencies to more frequently adopt formal rulemaking processes that add still more delay.[59] Another misguided effort was the Independent Agency Regulatory Analysis Act, which would have expanded OIRA's scope of authority to cover independent agencies, including the financial regulators.

Remedies: Instead of imposing new delays on the rulemaking process -- delays which are the primary source of regulatory uncertainty -- lawmakers should seek ways to alleviate the undue burdens on agencies. Agencies should be sufficiently resourced to issue rules, including those directly mandated by Congress. And if OIRA is going to continue to its current function, it must be subject to much more transparency requirements. For example, agencies should put in the rulemaking docket all documents submitted to OIRA, and all changes and comments that they receive on proposed and/or final rules from OIRA or other agencies.

D. Reining in judicial regulatory overreach

Rules that do finally get adopted are frequently challenged in court, imposing still more delay, and with judges frequently abrogating well-crafted rules. The relationship between Congress, the regulatory agencies and the courts is a complicated one, not subject to simple formulaic rules about appropriate level of judicial deference to agency action. On the one hand, it is appropriate for the courts to ensure agencies are faithful to Congressional directives. On the other hand, the courts need show deference to the technical expertise of agencies, which are designed to convert broad Congressional directives into concrete rules.

Recent developments do point to two, interconnected areas of judicial overreach in reviewing regulations. First, in some instances, Congress directs agencies to create specific rules. While translating legislation into rulemaking inevitably requires the agencies to make countless

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[58] Steinzor, R., Patoka, J. and Goodwin, J. Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety and the Environment. Center for Progressive Reform. 2011. Available from: <http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf>.

[59] See Coalition for Sensible Safeguards, (2012.) *The Regulatory Accountability Act of 2011: Legislation Would Override and Threaten Decades of Public Protections.* Available from: <http://www.sensiblesafeguards.org/assets/documents/raa_fact_sheet.pdf>; Coalition for Sensible Safeguards, (2012.) Impacts of the Regulatory Accountability Act. Available from: <http://www.sensiblesafeguards.org/assets/documents/impact_of_the_regulatory_accountability_act.pdf>.

implementation decisions, where the agency is following a specific Congressional directive, courts should afford it more deference. Second, as cost-benefit analysis has intruded deeper into the rulemaking process, courts have begun to subject these analyses to scrutiny, or to impose their own cost-benefit requirements on agency decision making. Because of the inherent imprecision of cost-benefit analysis, and because of relative institutional strengths, courts should subject agency cost-benefit analyses to no or exceedingly deferential review and should not impose cost-benefit requirements on agencies. Even ardent supporters of cost-benefit analysis, such as Cass Sunstein, the former OIRA administrator, argue that cost-benefit analysis is more appropriate as a guidance tool for agencies, rather than a definitive metric directing agencies into a particular course of action.[60]

Business Roundtable v. SEC[61] is a case that highlights the concern about courts and cost-benefit analysis. In *Business Roundtable*, the D.C. Circuit struck down rule 14a-11 (the "proxy access rule"). Adopted by the SEC pursuant to authority under the Dodd-Frank Act, the rule would have allowed long-term shareholders to include nominees for the board of directors in a publicly traded company's proxy statement. Without such a right, shareholders in most instances have no realistic means of running candidates for director against management-selected candidates.

The D.C. Circuit held that the SEC had failed to meet its "unique obligation"[62] to analyze rules for their impact upon "efficiency, competition, and capital formation"[63] under Section 3(f) of the Exchange Act,[64] thereby rendering the SEC's promulgation of the rule "arbitrary and capricious."[65] Yet, nothing in the relevant legislative history indicates that Congress intended for the SEC's economic analyses relating to "efficiency, competition, and capital formation" to be akin to full blown cost-benefit analysis or take precedence over the SEC's primary mission to protect investors.[66] Nonetheless, in a string of recent cases,[67] the D.C. Circuit has interpreted this language as imposing a duty on the SEC to fully assess the costs and benefits of their regulations and determine, in some instances, that the regulation yields a "net benefit."[68] In the *Business Roundtable* opinion, the D.C. Circuit lambasted the SEC for "having failed once again ... adequately to assess the economic effects of a new rule"[69] by having "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgment; contradicted itself; and failed to respond to substantial problems raised by commenters."[70]

Several features of the decision are remarkable. First, the SEC was acting pursuant to specific Dodd-Frank-conferred power, which authorized the agency to adopt a rule requiring "that a

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[60] U.S. Senate Comm. on Homeland Sec. and Governmental Affairs, Pre-hearing Questionnaire for the Nomination of Cass R. Sunstein to Be Administrator of the Office of Information and Regulatory Affairs, p. 5. Available from: <http://www.ombwatch.org/files/regs/PDFs/Sunstein_questions.pdf>. ("[C]ost-benefit analysis is a tool meant to inform decisions; it should not be used to place regulatory decisions in an arithmetic straightjacket").
[61] *Business Roundtable v. SEC* 647 F.3d 1144 (D.C. Cir. 2011).
[62] *Business Roundtable v. SEC*,1148.
[63] *Business Roundtable v. SEC*,1148.
[64] 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a–2(c).
[65] *Business Roundtable v. SEC*, 1155.
[66] *See Generally* James D. Cox and Benjamin J.C. Baucom, *The Emperor Has No clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 Tex. L. Rev 1811 (2012).
[67] *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005); *American Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010).
[68] *Business Roundtable v. SEC*, 1153.
[69] *Business Roundtable v. SEC*, 1148.
[70] *Business Roundtable v. SEC*, 1148-49.

solicitation of proxy, consent, or authorization by (or on behalf of) an issuer include a nominee submitted by a shareholder to serve on the board of directors of the issuer."[71] This fact was unmentioned in the court's decision, and earned the agency no deference. Second, the court failed to address the fact that the benefit of advancing shareholder democracy is inherently non-quantifiable. Third, the extraordinarily intrusive review of agency decision-making included a challenge to the benefit of shareholder democracy -- a value that one might think speaks for itself, but in any case was clearly the underlying objective of Congress in authorizing the SEC to issue a proxy access rule.[72]

Subsequent cases show the dangers of the overly expansive rationale of *Business Roundtable*. For example, various business interests are now challenging a "conflict mineral" rule (requiring public companies to disclose whether they use conflict minerals -- those originating from the Democratic Republic of the Congo) mandated by Dodd-Frank. Even though Congress *mandated* the rule, industry challengers claim the rule should be disallowed because the SEC did not quantify the degree to which the rule would decrease conflict and violence in the Democratic Republic of the Congo. Industry petitioners also similarly challenge other key elements of the SEC's rule, arguing that they fail cost-benefit-type tests.[73]

Remedies: *Business Roundtable* has cast a shadow over Dodd-Frank and other agency rulemaking, making agencies fearful and reluctant to proceed with rulemakings. Congress should act to establish clearer and more deferential standards of judicial review where agencies are acting in response to specific Congressional directives, and as regards cost-benefit analysis.

E. Stopping the revolving door

Notwithstanding some important recent reforms from the Obama administration, the revolving door continues to spin rapidly between regulated agencies and regulated industries. The traffic through the door goes both ways: from industry to regulator, from regulator to industry.

A recent report from the Project on Government Oversight (POGO) highlights the pervasiveness of the problem at one agency, the Securities and Exchange Commission. POGO found that "from 2001 through 2010, more than 400 SEC alumni filed almost 2,000 disclosure forms saying they planned to represent an employer or client before the agency." And those disclosures, POGO notes, "are just the tip of the iceberg, because former SEC employees are required to file them only during the first two years after they leave the agency."

The POGO report considers the case of the SEC's recent failed effort to tighten regulations of money market funds, an instance where the desire of the Commission's then-chair, Mary Schapiro, was thwarted. Noting that it's not possible to identify the exact cause for why Schapiro's effort failed, the report identifies the numerous former staff who lobbied the agency on the issue on behalf of the investment industry.

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[71] Section 971.

[72] *Business Roundtable v. SEC*. ("By ducking serious evaluation of the costs that could be imposed upon companies from use of the rule by shareholders representing special interests, particularly union and government pension funds, we think the Commission acted arbitrarily.")

[73] *National Association of Manufacturers; Chamber of Commerce of the United States of America; Business Roundtable v. Securities Exchange Commission*, U.S. District Court of Appeals for the District of Columbia Circuit, Opening brief of petitioners, January 16, 2013.

The POGO report contains an interesting comment from a mutual fund company spokesperson, arguing that the revolving door actually helps investors. "We strongly believe that having people with industry experience work for a regulator and having people with a regulatory background work in the industry benefits both sides as well as investors," T. Rowe Price spokesman Brian Lewbart said in an e-mail message to POGO.

It's easy enough to see why regulated companies might maintain a good-faith belief in the merits of the revolving door. Agency staff with industry experience understand how industry works and are generally sympathetic to industry's standard practices. Former agency staff at companies can give insights into how things look from the regulator perspective. The revolving door from this perspective offers efficiencies and facilitates insightful and informed mutual interaction.

Of course, from the public point of view, these dynamics explain exactly what is wrong with the revolving door. Regulators become too close to industry, too sympathetic to their rationalizations, too willing to give the benefit of the doubt to friends and former colleagues, too easily influenced by former colleagues now lobbying for industry, too prone to be soft on enforcement and too reluctant to issue appropriately tough new rules.

Remedies: That's why the revolving door is a key *regulatory* problem, and one that a genuine regulatory reform effort should try to address, with longer cooling off periods before ex-agency staff can lobby their former agency for pecuniary purposes, broader definitions of what constitutes lobbying activity, strong rules against the reverse revolving door (persons moving from regulated industry employment to regulating agencies) and with high standards for any exceptions.

F. Regulation to assist small business and promote competitive markets

Much of the regulatory policy debate over the last couple years has misleadingly focused on the impact of regulation on small business, with regulation critics claiming that regulation poses unreasonable burdens on small business. In surveys and poll data, small businesses generally do not agree with their purported advocates. They cite inadequate demand and economic uncertainty as their biggest problems.[74]

What has been missing from the regulatory policy debate is a focus on the ways that regulation does -- or should -- assist small business in creating a level playing field. Leading sectors of the economy are highly concentrated, and widespread anti-competitive conduct unfairly disadvantages small business, while also hurting consumers and overall economic efficiency.

Congress and regulators should look to reinvigorate antitrust and competition policy. Action across a broad range of areas would very meaningfully advance small business success, and ensure smaller companies are not unfairly exploited, disadvantaged or eliminated by larger rivals.

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[74] Small Business Majority. (2011). *Opinion Survey: Small Business owners Believe National Standards Supporting Energy Innovation Will Increase Prosperity for Small Firms*. Available from: <http://smallbusinessmajority.org/energy/pdfs/Clean_Energy_Report_092011.pdf>. Similarly, in a 2011 informal survey, McClatchy/Tribune News Service found no business owners complaining about regulation. Hall, K. G. (2011, 1 September). *Regulations, taxes aren't killing small business, owners say*. McClatchy Newspapers. Available from: <http://www.mcclatchydc.com/2011/09/01/122865/regulations- taxes-arent-killing.html>.

- Large banks receive a massive implicit government subsidy thanks to the widespread market perception that these institutions are "too big to fail" -- in other words, that protestations to the contrary, the government will in times of crisis bail out these giant banks to prevent a financial system meltdown. Because the market judges these institutions too big to fail, the giant banks are able to access capital at costs significantly below that available to regular banks. Bloomberg has recently calculated the value of this subsidy for the 10 largest banks at a staggering $83 billion, or $64 billion for the top five.[75]

  Remedies: This subsidy plainly disadvantages smaller banks and credit unions, and is itself a compelling reason -- there are many other such reasons -- to break up the giant banks. At bare minimum, this goliath bank subsidy emphasizes the imperative of a financial sector competition policy that removes the unfair advantage giant firms obtain.

- Patent enforcement by patent acquiring entities -- often known colloquially as "patent trolls" -- imposes a significant tax on innovation, especially by small business. Enforcement actions and license fees by these entities are skyrocketing, now costing almost $30 billion a year, with researchers finding only a quarter of this total flowing back to innovation.[76] ***Remedies:*** Stronger rules should protect small business innovators, and innovative large corporations as well, from improper patent enforcement actions.

- Anticompetitive practices are widespread in the energy industry, including in electricity markets. "Anticompetitive agreements between sellers in regional wholesale electricity markets have forced consumers to pay hundreds of millions of dollars more for electricity than they would have in the absence of such conduct," notes the America Antitrust Institutes Diana Moss. "In these markets, which are structurally vulnerable to the exercise of market power, anticompetitive agreements spanning even a short time can result in large wealth transfers from consumers to suppliers."[77] Those consumers include small business.

  Recently, enforcement against anticompetitive conduct by the Federal Electric Regulatory Commission has picked up considerably, with FERC notably suspending companies found to have lied to regulators and engaging in anticompetitive actions. However, the deregulated structure of electricity markets creates the potential for anticompetitive activity, and suggests the need for new rules to ensure competitive benefits are actually accruing.

  Remedies: New rules should be created to ensure transparency standards apply to the non-governmental agencies, known as Regional Transmission Organizations, charged

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[75] Bloomberg. (2013, Feb 20.) *Why Should Taxpayers Give Big Banks $83 Billion a Year*. Available from: <http://www.bloomberg.com/news/2013-02-20/why-should-taxpayers-give-big-banks-83-billion-a-year-.html>.

[76] See Leibowitz., J. (2012, Dec. 10.) Patent Assertion Entity Workshop: Opening Remarks. Federal Trade Commission. Available from: <http://www.ftc.gov/speeches/leibowitz/121210paeworkshop.pdf>; Skitol, R. (2012, Dec. 14.) FTC-DOJ Workshop on Patent Assertion Entity Activities: Fresh Thinking on Potential Antitrust Responses to Abusive Patent Troll Enforcement Practices. Available from: <http://www.antitrustinstitute.org/~antitrust/sites/default/files/PAE%20Workshop%20(3051321_1).pdf>.

[77] Moss, D. (2013, Jan. 10.) *Collusive Agreements in the Energy Industry: Insights into U.S. Antitrust Enforcement*. American Antitrust Institute. p. 6. Available from: <http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI%20Working%20Paper%2013-2_%20Section%201%20Energy.pdf>.

with running deregulated electricity markets. New rules should be established to ensure consumer, small business and state government representation in their decision-making processes. Additionally, legislation or perhaps new regulation is needed to overturn the "filed rate doctrine," which can immunize electricity traders from antitrust liability where conduct involves regulated, filed rates.

- Concentration and monopolies in agribusiness markets deny farmers access to open and competitive markets. Livestock and poultry farmers are unable to sell on competitive markets, for example, and are forced to work as de facto contract workers for giant packers and processors.[78] Meanwhile, oligopolistic control over seed markets squeezes farmers on the input side, and threatens biodiversity.[79] ***Remedies:*** Recent USDA regulations would limit some unfair packer practices, and it is important that Congress not interfere with those rules. In fact, stronger pro-competitive rules are needed.[80] If antitrust enforcers are unable to break the seed cartel, then new competition policy rules are needed to do so.

- Private antitrust enforcement -- an important tool for small firms victimized by unfair practices from larger competitors -- has become increasingly difficult. One notable obstacle to effective private enforcement are unreasonably high pleading standards, which require victimized plaintiffs to make evidentiary showings that they frequently cannot make before undertaking discovery. ***Remedies:*** Congress should act to overturn the ruling in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), as well as *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

- Forced arbitration provisions in contracts are denying small businesses and consumers effective access to justice on a large scale. These provisions also often unfairly treat small business franchisees, which are often victimized by forced arbitration provisions in their franchise agreements.

  In recent years, the Supreme Court has issued a series of rulings holding that the pro-arbitration preference of the Federal Arbitration Act preempts state rules designed to ensure consumers access to traditional civil courts, as well as state rules protecting consumers' rights to join together in class actions. As a result, large corporations are able to include forced arbitration provisions in standard form contracts; and to insert anti-class action language into their arbitration provisions as a way to block collective actions that are often critical to addressing wrongdoing that affects large numbers of people in a small way.

  A pending case at the Supreme Court, *American Express v. Italian Colors Restaurant*, illustrates the potential stakes for small business. In this case, American Express seeks to enforce an arbitration agreement that prohibits merchants that accept its charge cards from filing class actions or otherwise sharing the cost of legal proceedings against it. The merchants are attempting to hold American Express liable for a tying arrangement that violates antitrust laws (American Express insists merchants accept its unpopular credit cards if they want to accept its popular charge cards), but because expensive expert

[78] See Hauter, W. *Foodopoly: The Battle Over the Future of Food and Farming in America*. New York: New Press, 2012.
[79] See Hauter, W. *Foodopoly: The Battle Over the Future of Food and Farming in America*. New York: New Press, 2012.
[80] National Family Farm Coalition. (2012, Sept. 11) *Letter to Senators*. Available from: <http://www.nffc.net/Pressroom/Letters/2012/gipsaltr.sept2012.pdf>.

testimony is required to prove the claims, the cost of arbitrating an individual case would dwarf any possible recovery. This is a case where a large company is using its market power to force on small business a provision that prevents them from seeking a remedy to an abuse of market power. Public Citizen has argued in an *amicus* brief that arbitration agreements that actually prevent arbitration by making it impossible to assert statutory rights are not enforceable under the Federal Arbitration Act, but it remains unclear how the Court will rule.[81]

Remedies: Congressional remedies to these problems should include a prohibition on forced arbitration provisions in consumer, employment and civil rights cases[82] and restore states' authority to enforce their contract and consumer protection laws.

Strengthening the system of regulatory safeguards to strengthen America

There is much to celebrate in our nation's system of regulatory protections. It has tamed marketplace abuses and advanced the values we hold most dear: freedom, safety, security, justice, competition and sustainability. We should celebrate the achievements of regulatory protections.

But in its current form, the regulatory system is failing to meet its promise. Rather than looking at how to scale back or hinder the regulatory system, Congress should look to reforms to strengthen regulatory enforcement, speed the rulemaking process, curtail undue industry influence at regulatory agencies, and rein in judicial overreach.

[81] Brief of Amicus Curiae Public Citizen, Inc., Supporting Respondents. *American Express v. Italian Colors Restaurant* (2013, Jan.) Available from: <http://www.citizen.org/documents/American-Express-v-Italian-Colors-Restaurant-Amicus.pdf>.
[82] See the Arbitration Fairness Act, H.R. 1873, introduced by Rep. Hank Johnson in the previous Congress.

Mr. BACHUS. And we will now proceed under the 5-minute rule with questions, and I begin by recognizing the gentleman from Georgia, Mr. Doug Collins, for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate it.

This is a concern, as I stated in my opening statement, the issue that we have moving forward with this. I want to start with Pro-

fessor Glicksman, if you would. One of the things that I have for you is a discussion that just came up with banks. There is regulation that needs to be here. Many times Republicans and conservative Republicans and myself are painted as just do away with government and we don't need regulation. That is the furthest thing from the truth. We need proper regulation.

What was just mentioned here, especially with the Dodd-Frank issue, is we are killing community banks. I am from northeast Georgia, and we had a bank which had nine employees in its home office. They had two other branches. When the auditors and all came in, they brought 14 people and complained because they didn't have enough room to do their work.

Is there a certain point in time that you would agree that there is need for base regulations, but the continued expansion of regulation is killing jobs?

Mr. GLICKSMAN. I don't think there is strong evidence that existing regulations are killing jobs. Surveys conducted by the Bureau of Labor Statistics and others consistently demonstrate that when businesses are asked what the problems they are facing are, they tend to point to low demand and general economic conditions, not excessive regulation. There may, however——

Mr. COLLINS. But, Professor, let me stop right here. Have you smarted a small business?

Mr. GLICKSMAN. No, I haven't.

Mr. COLLINS. Have you worked outside of academia?

Mr. GLICKSMAN. Yes, I have.

Mr. COLLINS. Okay. In the last how many years?

Mr. GLICKSMAN. Oh, the last 15 years.

Mr. COLLINS. Okay. I think the interesting thing is we can do policy and then we can do polls, and we all know how polls go around here, and if they say, well, we don't say it. But when you get into the real world, you come travel with me in the Ninth District of Georgia, you will see how it affects real jobs, and it is not according to some survey. It is according to the fact that they have jobs that are at issue.

The other thing I have, and I read your testimony, and I appreciate opinions, but one of the things that you bring up that really is disturbing to me, and it is popular in the country right now, is that the Congress is too stupid to do this act. And you put it in your testimony where you said, "Neither most Members of Congress, nor their staffs, lack the sufficient expertise regarding complex regulatory matters to consider decisions on whether to adopt a regulation or not."

I want to think that is very offensive, one, to Congress, and the staff and the resources that we have, but it just also goes back to, I mean, I have a question for you. If that is where we are looking at right now, then should we have juries—I mean, does that not affect whether they have juries in which DNA and scientific evidence and where you have members of the population, should we say, well, they don't have enough understanding of scientific, so we need to change our jury system. I mean, is that not just a straw argument you are throwing up there to maintain a regulatory system?

Mr. GLICKSMAN. I didn't mean to offend the Members of Congress or the staff. Congress created——

Mr. BACHUS. We get offended every day, so don't worry about that. That is not a problem.

Mr. GLICKSMAN. Congress created agencies and has been doing so for well over 100 years because it recognizes that it has neither the time nor the expertise to legislate in the detail that is reflected in agency regulations. Congress certainly has the expertise to set broad policy, and it appropriately should do so, but it delegates to agencies the responsibility for translating the broad legislative goals into detailed regulatory mandates, and I think that is perfectly appropriate for it to do so.

Mr. COLLINS. And one of the things is, too, is remembering that we have, from a perspective of designating, yes, but also having oversight, because we are the ones who have to stand before the people and actually have to say, you know, here is why we are running and here is what the government is doing or not doing.

Mr. GLICKSMAN. It would be appropriate for Congress to amend a statute if it felt on review that the agencies are not doing an appropriate job implementing it.

Mr. COLLINS. Thank you.

Mr. Weissman, should it be easy? I mean, you showed this wonderful chart and this graph about how hard it is. Should it be easy? I mean, let's go to the other side here. You know, what is the balance that you see? If you make the sort of the chart here that says, well, this is just awful and terrible, should it be easy?

Mr. WEISSMAN. Should it be easy to issue——

Mr. COLLINS. To do regulations that impact businesses on which the regulators themselves do not have to feel the impact?

Mr. WEISSMAN. Well, the decision should be informed, but, yeah, for sure, it shouldn't be subjected to needless red tape, just the way businesses should not be subject to red tape.

Mr. COLLINS. I think one last thing, I know my time is running out. But, Mr. James, you provide a face to this. We can be academic, we can be congressmen, and we can go back and forth and be offended and not offended, that is normal. But for you, you provide a face to this, and I think that is what is missing often when we talk about these in these large economic terms and we talk about it in large policy terms, and I just wanted to thank you for being a part of this and showing that there is a balance that can be struck. And any comments that you would like to elaborate from your testimony I would like to hear.

Mr. JAMES. Well, thank you, Congressman. And you are absolutely right, these aren't abstract costs. And we can talk about statistics and numbers all day long, but the reality of it is, is that this is going to have a real impact on my community. It is not just the power plant. There is a ripple effect that will be associated with it. It will be the closing of restaurants near the power plant. It will be the closing of dry cleaners that clean the uniforms for the plant workers. This will affect families. It will affect the children. It is not just about these high ideals. There is a real impact here and it worries me every day as an elected official. Thank you.

Mr. COLLINS. Well, I appreciate that.

Mr. Bachus. Thank you.

Mr. Collins. Mr. Chairman, I yield back.

Mr. BACHUS. Thank you.

Mr. Cohen, for 5 minutes.

Mr. COHEN. Thank you, Mr. Chair.

Dr. Holtz-Eakin, in your opinion, was the great recession largely fueled by the unregulated mortgage industry and securitization market? Was that a great——

Mr. HOLTZ-EAKIN. No.

Mr. COHEN. It is not your opinion.

Mr. HOLTZ-EAKIN. No, that is not my opinion. As you know, I was on the Financial Crisis Inquiry Commission. We spent 2 years looking at this issue. We had housing bubbles, both residential and commercial, in Spain, in Ireland, England, New Zealand, and those took place in vastly different regulatory markets. There is nothing about the regulatory system that appears to be correlated with the presence of big housing bubbles and the aftermath. It is also true that we had large institutions fail in, for example, in the United Kingdom, Northern Rock, with a very different regulatory system. They have a unified regulator.

So I find it utterly uncompelling to assert that somehow it was the regulatory system per se and uniquely that generated this phenomenon.

Mr. COHEN. Do you think there should be regulations on securitization of these mortgages?

Mr. HOLTZ-EAKIN. Indeed, there have been for a long time. I mean, securitization came from the creation of Fannie Mae, Freddie Mac. It was originally designed to bridge what were regional lending markets in the United States which led to financial market failures when we had crop failures, in particular, earlier in our stage of economic development. And so those were never unregulated markets. They were part and parcel of government policy.

Mr. COHEN. Mr. Weissman, I would like you to respond to that. I mean, you, in your testimony, talked about this issue.

Mr. WEISSMAN. Well, since the author is here I don't want to put words in his mouth, but I did review again the dissent that you coauthored to the Financial Crisis Inquiry Commission report. It is indeed a thoughtful perspective on in trying to explain the crisis.

My interpretation, though, is it is not fundamentally one that is at odds necessarily with the majority, but in any case, with a view that says that regulatory failure was a considerable contributing factor. I mean, the framework explanation and the dissent is that there was a housing bubble and a financial bubble, those were sort of structural factors, and as you look at this cross-cultural comparison, they may not be attributed to any regulatory issue or anything that is domestic, but that they were exacerbated—but those problems were exacerbated by a number of things—bad mortgages, relatively unregulated securitization, financial derivatives in the derivatives trade, and credit ratings failures, all things that were listed in the dissent.

From my point of view, at least, and I can't speak for Dr. Holtz-Eakin, those are all things that either should have been prevented altogether or problems that should have been limited through ap-

propriate regulation, either better enforcement or stronger rules on the books.

Mr. COHEN. Federal Reserve Chairman Alan Greenspan opposed regulation of the practices that allowed subprime mortgages to be bundled into large securities—opposed those regulations—and sold to investors. In 2008, however, he testified, "I made a mistake in presuming that the self-interest of organizations, specifically banks and others, were such that they were the best capable of protecting their own shareholders, and their equity in the firms." I think Alan Greenspan was right to make his mea culpa and admit that the regulations should have been in place and that they did help result in that.

Let me ask you this. Dr. Holtz-Eakin,you have made some criticisms of the Affordable Care Act. Your criticism, I presume, was not that you don't think we should have health care for people that otherwise aren't getting it. You are in favor then, I guess, of a single-payer system?

Mr. HOLTZ-EAKIN. No, I am not, sir.

Mr. COHEN. No, you are not. So what are you in favor of? Any health care at all for the poor people that aren't getting health care today?

Mr. HOLTZ-EAKIN. The Affordable Care Act has two key components. Key component number one is an expansion of health insurance coverage, largely through the exchanges and the Federal subsidies——

Mr. COHEN. Right. Which we wouldn't have if we had a single-payer system.

Mr. HOLTZ-EAKIN. But those aren't care decisions. Care decisions, the actual use of health care services are things to which people are constitutionally entitled, that has been determined, and which are happening right now.

So the second big piece of the Affordable Care Act is those activities which would change the delivery system, produce higher quality care, in particular move us away from fee-for-service medicine, which is widely recognized as part of the problem.

I believe the act has, you know, sort of three key features. Number one, I think the insurance expansions are very poorly designed and will harm us from a budgetary and economic point of view. I think the delivery system reforms are under-exploited. I mean, this doesn't solve our cost problem, which is the fundamental health care problem in the United States and which harms the ability of the less affluent and everybody to get affordable care. And the third is timing. It is not a pro-growth strategy to impose $700 billion in new taxes, create a trillion-dollar new entitlement program at a time when our entitlements need to be reformed to begin with, and impose the large regulatory burdens that come with the ACA. That is what we did at a time when we were trying to crawl out of the greatest recession since the Great Depression.

Mr. COHEN. Dr. Holtz-Eakin——

Mr. HOLTZ-EAKIN. So that is why I think it flunks the benefit-cost estimate, because if you think about it, you wouldn't do it.

Mr. COHEN. Well, I did think about it, and I was for it and I am still for it because somebody——

Mr. HOLTZ-EAKIN. Well, you asked what I thought.

Mr. COHEN. I know I did. And I am saying you don't take into consideration people whose lives would be lost. If you are 65 years old and you need a lung and you can't afford it, you don't have insurance, you can't wait for years to come. And this whole regulatory scheme of EPA and health care and China is wonderful and China has less regulations, China's air is awful and their people don't have the life expectancy we have, nor do they have it in India. And a lot of things we do that are regulations save peoples lives, and nobody here seems to be concerned with life expectancy, quality of life, health care, all of which are affected by regulations that this Congress has passed that have become law and make America the best country in the world.

I yield back the balance of my time.

Mr. BACHUS. Thank you. And I would let Mr. Holtz-Eakinrespond, though.

Mr. COHEN. Then I am going to respond. Congress always gets the last say. You know that.

Mr. BACHUS. Well, how about 20 seconds?

Mr. HOLTZ-EAKIN. Eighteen.

Mr. BACHUS. Eighteen seconds.

Mr. HOLTZ-EAKIN. None of my remarks raised China, the desirability of air pollution regulation, all of which I do have opinions on, but wasn't my point. The Affordable Care Act has relatively modest expansions of the actual access to health care in the United States. We spend $3.6 trillion already. We have aggressive programs at the State and Federal level for the elderly and low income. It does add some, but I don't think it passes the benefit-cost test in terms of those very important issues. We have better ways to accomplish the same things, and that would have been my goal.

Mr. BACHUS. Thank you.

Mr. Farenthold, who is next. Then Mr. Rothfus after that.

Mr. FARENTHOLD. I am sorry?

Mr. BACHUS. Five minutes.

Mr. FARENTHOLD. I will be as brief as possible. I know we have got a busy day. We got a big panel. Lots of people to ask questions.

The district I represent is the heart of the Eagle Ford Shale development in Texas. It is providing unprecedented amounts of energy for our country at incredibly low cost. Right now there are just a ton, there are actually 10 agencies now that have been charged with regulating the hydraulic fracking industry. I mean, it seems ridiculous that we have to go through this many regulatory hoops to regulate one activity. It seems like there is a natural desire for everybody to get their hand into the pudding.

How can we structure something where, whether it be hydraulic fracking, building a much-needed bridge or a new railroad or infrastructure, or developing a plant that will put people back to work, how can we consolidate this without putting in jeopardy the environment? I will throw that open to give each of you all 15 or 20 seconds for your best idea, and we will start with Professor Glicksman.

Mr. GLICKSMAN. It is funny that you ask that question because my latest article is on exactly that, and I commend it to all of you.

What my coauthor and I do in that article is to look at the different dimensions upon which regulation and agency relationships

can proceed in. So we look at whether or not it makes sense to have centralized or decentralized regulation, whether if we have decentralized regulation one ought to have an array of authorities that are distinct, with each agency having jurisdiction over a separate problem or whether we ought to have overlapping authority. And finally, we look at whether or not it makes sense to have coordination among the agencies that have jurisdiction over a single problem or whether we want them to act independently.

Mr. FARENTHOLD. You have given me some light reading for the flight home. I appreciate that, Professor.

Mr. GLICKSMAN. We make suggestions about how best to answer those questions.

Mr. FARENTHOLD. Thank you.

Mr. GLICKSMAN. Very context specific.

Mr. GREENBLATT. America hit the lottery when we figured out fracking in natural gas. This is wonderful for our country. This is wonderful for our factories. This is going to grow employment in our country. So we have to streamline the environmental regulatory authority so that——

Mr. FARENTHOLD. I am sorry. I don't mean to rush you. I have got one more. I have got another question I want to ask, though. Quickly, give me your bullet point, anything we can do, where is our biggest bang for the buck?

Mr. GREENBLATT. I think if we have one entity in charge of fracking and all other groups have to——

Mr. FARENTHOLD. Great idea.

Mr. GREENBLATT [continuing]. Cede authority to them.

Mr. FARENTHOLD. Mr. James.

Mr. JAMES. Thank you, Congressman. I will be brief. When an environmental agency, either it is the Ohio EPA or the U.S. EPA, is promulgating a regulation, they look at the direct cost of that regulation, and when they analyze direct cost, it is usually the cost of compliance with that regulation. My suggestion would be simple, that these agencies look at other costs associated with that regulation, particularly indirect costs to communities that those regulations impact. Thank you.

Mr. FARENTHOLD. Sold on that one, too.

Mr. HOLTZ-EAKIN. I haven't written on this, but my instinct is monopolies are bad and government monopolies are just as bad, and while it is messier, multiple jurisdiction provides checks and balances that go back to our founders.

Mr. KOVACS. This Committee has already had a great start. Last year you passed out of the House the Regulatory Accountability Act, which allows good data to get into the system and for a way to check the data that is bad, and second, permanent streamlining, very important. And the few pilots that we have had, both in SAFETEA-LU and in the Recovery Act, showed that we can cut permit time in half.

Mr. FARENTHOLD. All right. Mr. Weissman.

Mr. WEISSMAN. I think the key issue that is highlighted is what happens when there is a new technology or an old technology that is operating at a scale beyond anything that happened before. And I think there is a key role for Congress in saying, look, we need

a framework to think about this. The frustration you have, I think, is agencies just trying to catch up. They are behind.

Mr. FARENTHOLD. All right. Thank you very much.

Mr. James, Corpus Christi, my hometown, similar to you, we have a large petrochemical industry. We are suffering as a result of regulation. Fortunately, the low cost of natural gas, you know, in the 3.25 range is making it awful attractive to overcome either our higher labor costs or our higher regulatory costs, but not necessarily both.

I mean, obviously we talk about the jobs. But in your community, what are you seeing is the impact on people and families as jobs are evaporating? Your population has got to be suffering.

Mr. JAMES. Absolutely. And it truly does keep me awake at night and throughout the day thinking about what I am going to tell families when they find out that their job has been eliminated and they call me and they tell me that they can't make their mortgage payments and I have to refer them to some of our welfare services to help them out. It is these kind of indirect costs that I think Congress and the administration and agencies need to look at as they are making——

Mr. FARENTHOLD. I appreciate that. And my word to our agencies and regulators, every day you delay in approving that permit is a day somebody doesn't go back to work. And I wish more of our regulators were staying up at night worrying about the people that the regulations are affecting.

Thank you. I yield back.

Mr. BACHUS. Thank you. And now the gentlelady from Washington state, Ms. DelBene, is recognized for 5 minutes.

Ms. DELBENE. Thank you, Mr. Chair.

Mr. Greenblatt, I wanted to ask you about, you talked about sunsetting regulations, and I assume that the intent is that we put together regulations, we have an idea of what the intent is of the regulation and the result of that, and after some period of time we evaluate whether or not that is working or not working or how we can improve and it would either sunset or be reinstated. Is that what you are suggesting?

Mr. GREENBLATT. I agree.

Ms. DELBENE. And so when we look across our environment, another scenario where we have a similar challenge is in our tax system. And do you think that that would also be a place where we should put things in place and let those sunset as well so that we don't continue to build complexity on top of complexity?

Mr. GREENBLATT. I am sorry. You are talking about taxes or you talking about environment or both?

Ms. DELBENE. Tax system. Things like exemptions and incentives that are also put in place with an intent to either help——

Mr. GREENBLATT. Sunsetting is a good idea. It cleans things out.

Ms. DELBENE. Well, we have had this conversation in our state a lot, and I agree that if we can get rid of the layers and we are better stewards of policy and keep it up to date, we would probably reduce a lot of complexity. Thank you.

Mr. Weissman, several witnesses are suggesting that regulations are a significant factor in our current unemployment situation, and clearly we have talked about the benefits and challenges, but I

wondered what proposals you might have or what we could do in our regulatory system to support job creation and innovation and what changes we might make to reduce that burden.

Mr. WEISSMAN. I think there is a huge number of things. I think the first point is that much of the regulation that is being criticized actually itself is a spur to new innovation. So if we talk, for example, about the fuel efficiency standards, that is going to spur all kinds of new innovation in the auto industry. The various environment or energy efficiency standards that are being promulgated by EPA will massively spur innovation.

So, if you look in the auto industry, same kind of things. In fact, we were looking at the airbag example, and I mentioned some of this in my testimony. When airbags were first being proposed and seriously considered in the 1970's, the industry said that the cost—publicly they said the cost was going to be well over $1,000 and sometimes up to $1,500 or more. It turned out that their internal data showed that the cost would be more like $200, and thanks to economies of scale and dynamic efficiencies, actually the costs are now far, far lower and we are saving $2300 a year.

So, actually a lot of regulation is itself innovation-spurring. If we want to look, I think, broadly, in terms of making the economy more stable in the regulatory area, I think given the experience we have just had with the great recession, the most important thing is to stabilize the financial system. I think there probably is pretty widespread agreement that the system remains quite fragile.

From my point of view, if there is a single most important thing to do, it really is to go after the large institutions that are able to hold hostage prosecutors, enforcement agencies, and some extent Congress, and I don't think there is any solution to that short of breaking them up.

Ms. DELBENE. Thank you. I yield back the remainder of my time, Mr. Chair.

Mr. BACHUS. Thank you. That is much appreciated.

Mr. Rothfus, the gentleman from Pennsylvania, is recognized for 5 minutes.

Mr. ROTHFUS. Thank you, Mr. Chairman.

And thank you to the panel. It is a fascinating discussion.

I represent a big swath of southwestern Pennsylvania. It is unique in that we have a significant concentration of national leaders in health care, energy, financial services, and manufacturing. In fact, it is hard for me to think of another region of the country that has the number of leaders across these fields that southwestern Pennsylvania does.

I think every regulation that requires a private sector entity to undertake a certain action and expend funds can rightly be called a tax. You know, the Small Business Administration has stated that the cost of compliance with the current regulatory framework that we have is over $1.75 trillion. You know, we are competing in a world economy, and I think that overburdening regulations, along with higher taxes, as well as other costs being passed along to employers, such as through the Affordable Care Act, are strangling our economy. You know, the fourth quarter we saw a contraction, and we see unemployment chronically high and wages are stagnant. So, I do think that we need to be taking a look at what is

going on with the regulatory framework. I am looking at a list of regulations that are, you know, on the deck at EPA and very concerned about what the impact is going to be on the ability of our job creators.

A little bit, you know, Professor Glicksman, I would like to go in a little bit about the REINS Act that you had mentioned, and a concern about interjection of politics. You know, I am a little puzzled by that, and I wonder if you could maybe elaborate on that. I look at under our constitutional framework, that the legislative branch is the law making. We have the responsibility. I mean, if you take your analysis, isn't every piece of legislation that we put out of here has some kind of political background?

Mr. GLICKSMAN. Yes, certainly it does, and I am not disputing the fact that Congress has the responsibility and the right to make legislative policy, which is based in part upon political judgments. My point was simply that the detailed regulatory decisions made by agencies such as EPA are based upon the information provided by experts, such as toxicologists and epidemiologists.

I have been teaching and writing about environmental law for 35 years. I don't have the technical expertise to know whether a particular air quality standard ought to be set at 0.08 parts per million or 0.075 parts per million. That is beyond my expertise.

Mr. ROTHFUS. Do you think it is beyond the expertise of this body to pull the experts in to ask questions so that we can understand that, too, or do we have to have elites over in the agencies telling us this?

Mr. GLICKSMAN. I wouldn't call agency members elites. I think they are experts. And they have been delegated authority by Congress precisely so that Congress is relieved of the burden of making detailed technical judgment.

Mr. ROTHFUS. Relieved of the burden or relieved of the responsibility to evaluate that?

Mr. GLICKSMAN. I would say relieved of the burden. If you determine that an agency is not operating pursuant to the mandate that you delegated to the agency, you certainly have the right to amend a statute, to change the agency's mandates and authorities. But it seems to me that making the kind of technical judgments reflected in the regulations that are issued on a daily basis by agencies is going to swamp Congress. I don't think, realistically, practically, there is any way to do an adequate job overseeing the details of every regulation issued by Federal agencies in a timely manner.

Mr. ROTHFUS. Dr. Holtz-Eakin,I would like to follow up. You mentioned Fannie and Freddie, and there were attempts under the Bush administration to provide some further regulations for Fannie and Freddie, weren't there?

Mr. HOLTZ-EAKIN. Yeah. When I was CBO director, there were a number of initiatives to change the special provisions that surrounded the housing GSEs, and most importantly, to increase the capital requirements. They were very thinly capitalized entities.

Mr. ROTHFUS. And then, you know, you look at, you know, a gentleman like former Congressman Frank, who wanted to, quote, roll the dice with Fannie and Freddie. Any idea what was he was talking about there?

Mr. HOLTZ-EAKIN. I won't speak on behalf of the former Congressman, but I think the reality was, and there are CBO reports to this effect, it was predictable that there was a very high probability that the taxpayers would have to step in, and history has shown it happened quicker than even we thought it would.

Mr. ROTHFUS. Mr. Weissman, any idea what Congressman Frank would have been talking about when he wanted to roll the dice with Fannie and Freddie?

Mr. WEISSMAN. No. And I will follow the example of not wanting to speak for him. But I agree with your point. I think that it is correct that they were undercapitalized and underregulated.

Mr. ROTHFUS. Any thoughts, Dr. Holtz-Eakin, onefforts such as the REINS Act to have the Congress really exercise its constitutional responsibility when it comes to the law-making, you know, responsibility within this government?

Mr. HOLTZ-EAKIN. It is standard practice in Congress to authorize activities for finite amounts of time, to do oversight of those activities, and then to decide whether to reauthorize or not. This strikes me as entirely consistent with that way of doing business. And I know that there is concern about the relative balance of benefits and costs, which is the fundamental legitimate issue, but I don't see, if Congress is involved on a regular basis, how that can get too far out of whack. In fact, I think that helps keep the broad measure of benefits and costs in balance.

Mr. ROTHFUS. Thank you.

Mr. BACHUS. Thank you.

Mr. ROTHFUS. I yield back.

Mr. BACHUS. Thank you.

Mr. Garcia, the gentleman from Florida, is recognized for 5 minutes.

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

Mr. Kovacs, I noticed you said that you have been coming here for 17 years on this issue, which strikes me, because I thought it was Obama that declared the war. So I wanted to know exactly when is it that we went off the rails here.

Mr. KOVACS. Well, I have said this to Republicans and Democrats. I think that Congress has delegated far too much authority to the agencies. And it probably happened 45 years ago. The Administrative Procedure Act is now over 65 years old and last year was the first time anyone looked at how agencies operate.

I think the first thing, and this is just gratuitous advice, is that Congress, as an institution, is the elected representatives of the people, not the agencies, and that when he you have a divided government that we have today, one of the difficulties is the executive controls it, not the Congress. And so to a large extent you have lost control over the legislative process because the courts have actually recognized, like you look at the American Trucking Association case where Scalia says you delegated it away. Your job is to get it back, and I think that is the most important thing now, because if you look at it—and let me start with my one example.

Mr. GARCIA. Mr. Kovacs, I have a limited amount of time, but I don't disagree with you. I have worked in regulatory agencies. It has been a major part of my career, particularly because I am so bad at getting elected, so I have to pray I am getting appointed.

But I would agree with you, and my worry is that the tone and tenor of this debate should be rational.

Mr. KOVACS. Yes.

Mr. GARCIA. It shouldn't be about extremes. I think this side of the aisle would love to cooperate with the other side, and I am sure that you and Mr. Weissman could sit down and come up with all sorts of regulatory mumbo jumbo that we need to get rid of, and Mr. Greenblatt would probably agree with you. My suggestion is it is something that we should try. I mean, if we are broken here, there needs to be some form, particularly from outside us, because we are busy here sort of posing and preening, but we are not getting much done. But there is a need for the system to go forward. And you are right, because we have a divided government, the ability to strike at things that are obviously wrong in the regulatory system, just like there are things that we can do better.

Mr. Greenblatt, I read your testimony, and first of all, I want to congratulate you for your tremendous business success.

Mr. GREENBLATT. Thank you.

Mr. GARCIA. I assume that is not because we overregulate you. It must be because of your exceptional talent?

Mr. GREENBLATT. I have a great team of people.

Mr. GARCIA. Very good. Mr. Greenblatt, you mentioned China. Would you believe that a communist government with central planned economy is a better format for dispensing business wisdom or a better environment for business?

Mr. GREENBLATT. No, absolutely not.

Mr. GARCIA. Okay. I just wanted to make sure. I didn't want to sort of get it wrong. You do realize that where we are reading about cancer——

Mr. GREENBLATT. And I——

Mr. GARCIA. No, no, that is my point. You are competing with them.

Mr. GREENBLATT. I am competing with China. We lock skulls with them every day of the week.

Mr. GARCIA. I understand.

Mr. GREENBLATT. When we win jobs, we are taking them——

Mr. GARCIA. There is a great British phrase that says choose your enemiescarefully because in the end you will be most like them, and we certainly don't want to look like China when you look at cancer spreading, you have cancer clusters all over manufacturing areas. It is certainly not a place you want to be.

I wanted to ask Mr. James. Do you know what mercury cause, what happens when mercury is ingested by life?

Mr. JAMES. Absolutely, Congressman. I spent part of my career as an assistant attorney general enforcing the Clean Air Act.

Mr. GARCIA. Very good.

Mr. JAMES. And I believe very deeply in it. But at the same time, when an employee of the plant that is closed down and they come to me and they don't know where to look for work, it is very difficult for me to tell them that EPA has said that 54,000 jobs have been created. What do I tell them to do? Do I tell them to leave Avon Lake?

Mr. GARCIA. I don't know. It is better than helping one of your constituents bury a child, right? And those are things that are just as serious. I understand——

Mr. JAMES. I respect that, Congressman, but at the same time, if I can——

Mr. GARCIA. Mr. James, Mr. James, if you will let me finish. I was asking a specific question. My point to you, Mr. James, is I have regulated the energy industry and I have regulated power companies and I have worked for the FERC, and many times when energy companies say we have decided to get out of the business because of regulations—how old is the power plant in your district?

Mr. JAMES. It is approximately 60 years old.

Mr. GARCIA. Right. Well, Mr. James, I guarantee you that that power plant is closing not because of regulatory overview. That power plant is closing because it is no longer competitive with other forms of energy that are being developed by places where my colleagues reside, and that is a reality. And you know, I am sure that the last buggy whip manufacturing facility employed a lot of people. Unfortunately, we weren't in the business of buggy whips anymore. Likewise, power plants after 60 years are almost impossible to maintain, they are impossible to be productive, and what you are experiencing is free market and its effects.

And I say this because I understand. I have been a regulator and I have shut down power plants. I had one power plant where a local manatee group came to say let's keep the power plant open because it puts hot water into the river so we can keep the manatees warm in the winter. While it was a wonderful idea, a nice little water heater would have been better than keeping a power plant that was inefficient.

And those market efficiencies, I think, are what all of you in business want. A 60-year old power plant, a 60-year old coal-fired power plant is technology that long ago ceased to be the best to have in the market. But thank you, and I do sympathize for you.

I yield back the balance of my time.

Mr. MARINO [presiding]. Mr. James, I am going to give you 30 seconds if you would like to respond.

Mr. JAMES. Thank you, Congressman.

Congressman, I would remind you that I am not here on behalf of private business, but I am here on behalf of city government, and I am concerned when a power plant closes and the jobs aren't replaced and the income tax isn't replaced and we can't afford to pay for ambulances anymore. And so when that child is sick and they call 911 and we can't send an ambulance to come get that child and take them to the hospital, what do we do? That is a serious problem as well.

Mr. GARCIA. Mr. Chairman, if I could respond very quickly. I do sympathize.

Mr. MARINO. No, sir. We are not going to have an exchange of an argument back and forth. You have had your time. He responded to your statement, and we are going to move on to Mr. Jeffries from New York.

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

Earlier today, our distinguished Ranking Member made the observation that he was concerned with the inflammatory nature of

the title, and I would agree with the distinguished gentleman from Memphis, Tennessee. I was quite startled when I took a look at the title, "The Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness." Sounds very ominous, paints a picture of doom and gloom. I looked at it this morning and I was concerned with the history of the Republic and our ability to actually move forward and sustain ourselves as the great Nation that we are because of this apparent regulatory overreach. And we have got a few witnesses today, real world witnesses who are here to present evidence of this doom-and-gloom concern that we have with the history of the Republic proceeding as we know it.

And I appreciate your presence, Mr. Greenblatt, and you have obviously been a very successful businessman. And I salute you for that, inner-city community apparently in Baltimore, but you provided an example in your testimony of the type of concern that you have and you cited a $15,000 dollar fine. Is that right?

Mr. GREENBLATT. Yes, sir.

Mr. JEFFRIES. Okay. And that $15,000 fine, apparently you eventually paid, you negotiated it down, and it was somewhere south of $15,000. Is that correct?

Mr. GREENBLATT. Yes.

Mr. JEFFRIES. Now, on your Web site you indicated that you are one of the fastest growing businesses in America. Is that right?

Mr. GREENBLATT. Yes.

Mr. JEFFRIES. And last year, I just want to make sure I get this right, your revenues were in excess of $4.5 million, or maybe that was 2011. Is that right?

Mr. GREENBLATT. We crossed over $5 million last year.

Mr. JEFFRIES. I congratulate you on that. So apparently this regulatory overreach, as evidenced by the $15,000 fine that you, yourself, cited as Exhibit A in your testimony hasn't been overly burdensome in your ability to become one of the fastest-growing companies in America. Correct?

Mr. GREENBLATT. If I had my people focused on important things like growing the company, we would hire more unemployed steelworkers in Baltimore City. I think you and I both want me to thrive and prosper because when I thrive and prosper we hire more people. We are trying to end the recession in our small way.

Mr. JEFFRIES. Thanks very much. I salute you on your success.

Council Member James, I appreciate your concern. I was involved in State government before having the opportunity to serve here in the House of Representatives. And as my distinguished colleague from Miami pointed out, the reality is probably more likely that that 60-year-old plant closed because of reasons of market competitiveness, having nothing to do with a concern, very legitimate one, presumably, for the human intake of mercury.

But let's put that aside. You are citing, I believe, an issue with the possibility of $70,000 in tax revenue, painful, but am I correct, I guess the number of $69,878.62, that is the concern?

Mr. JAMES. Honestly, Congressman, my concern would be less for the city of Avon Lake and more for the Avon Lake School District. The Avon Lake School District is anticipating losing $3.3 million per year—per year—in revenue. I mean, that is going to challenge

Avon Lake's ability to educate its students, it is going to challenge the ability to take care of the students that have the most needs.

Mr. JEFFRIES. I agree with you. I agree with you absolutely. And one of the things that I think we supported, certainly on this side of the aisle, is an increased investment in first responders all across this country, so perhaps those EMS personnel, those challenges that you raised, that could be addressed. An increased investment in teachers, we are facing an $85 billion sequestration. But we are here at a doom-and-gloom hearing related to alleged regulatory overreach.

Now, my time is limited, but, Mr. Kovacs, the economy collapsed in 2008. Is that correct?

Mr. KOVACS. Around there, yes.

Mr. JEFFRIES. Okay. And this was the worst economic crisis since the Great Depression, is that correct? That is what it triggered?

Mr. KOVACS. Well, I do not know. I mean, I am not going to characterize it as the worst. It was bad.

Mr. JEFFRIES. Okay. Mr. Holtz said that in his testimony, so I will accept that.

Who was the President in 2008?

Mr. KOVACS. It was George Bush.

Mr. JEFFRIES. Okay. And would you describe the Bush administration as excessive in its regulatory zeal?

Mr. KOVACS. I think I have been pretty clear in what I have said. I think that the regulatory process—and we have a chart that shows how 180,000 new regulations have started since 1980—the regulatory process has been growing for a very long time, and we have suggested and we have tried to keep it in a very bipartisan, nonpartisan way, that Congress has an institutional stake in getting control of the agencies.

Mr. JEFFRIES. Thank you. I see my time is limited, but one last question. Would you agree that the $22 trillion that the Wall Street collapse cost the American economy is a more significant problem that perhaps related to the underregulation of the market? Not the mortgage-backed securities—as Mr. Holtz indicated, they were regulated to some degree—but the credit the false default swaps which grew to about $50 trillion that was an entirely unregulated insurance product? Do you think that was a problem that perhaps needed to be addressed by Dodd-Frank and this Congress?

Mr. KOVACS. Congressman, there are very few times in my life I say I really don't know how to respond to that issue. I am not an expert in banking, so I am just going to tell you I don't know.

Mr. JEFFRIES. Thank you.

Mr. GARCIA. We never in Congress say we don't know.

Mr. BACHUS [presiding]. Thank you.

I guess we are to the point where I will ask questions. Everybody else has.

My first question, and I will ask this to you, Dr. Holtz-Eakin,according to the National Federation of Independent Businesses, paperwork is one of the biggest concerns for small businesses. Could you explain how paperwork diverts resources from productive activity and how the administration has failed to fulfill its commitment to reduce red tape? And I am sure this is not the first administration to fail in that commitment.

Mr. HOLTZ-EAKIN. I think we have heard very clear testimony on this from Mr. Greenblatt.

Mr. BACHUS. Right.

Mr. HOLTZ-EAKIN. You have hours in the day, you have workers, and you can task them for things that will increase your sales and your productivity, or you can task them to comply. And those are clear tradeoffs.

One of the things that I have found most disturbing about the recent regulatory initiatives is the White House, OIRA in particular, issuing a statement that said it was okay to count as a benefit of regulation the people hired to comply with that regulation. Any clear accounting of benefits and costs puts that on the cost side of the ledger. And I think at a minimum we ought to do that right.

Mr. BACHUS. I did also note Mr. Greenblatt when he said you had a form and you just failed to sign in one of three places.

Mr. GREENBLATT. Right. We signed it in two of three places. I omitted signing the last, as an oversight, it was a 20-something page form, and because of that we received a $15,000 fine from the government. Our top team had to spend hours on the phone, you know, waiting on hold with the IRS trying to do something about it. It was a complete distraction of important, mission-critical tasks.

Mr. BACHUS. So it wasn't a failure to pay moneys.

Mr. GREENBLATT. No, no. It was a 2006 form, it was an annual form you are supposed to fill out, and it was one of those things where there is pages and pages of forms, and my bookkeeper told me where to sign, I signed it, and I didn't sign the third one. Either she or I overlooked it. It was 4 years before. And it is dispiriting that the government finds that as a productive task.

Mr. BACHUS. Did you get any notice? Did they first send it back and say please sign this?

Mr. GREENBLATT. The first form was a fine.

Mr. BACHUS. Wow. Okay.

Mr. James, I think your testimony kind of brings it down to the community and the individual level. Have you had a chance to meet any parents or students who have benefited from social services offered at Avon for children with autism, depression, or who have been abused? What can you tell them about the effects, as a city councilman, of coming budget cuts of these services due to the loss of revenue from the plant closing? And what do you expect will happen to these children?

Mr. JAMES. Well, I can tell you they are very concerned, and they don't know what the answer is, and honestly the city doesn't know what the answer is yet either. You know, there has been comments this morning that market forces are closing the power plant. We are not talking about a typewriter factory and the typewriter factory is being closed because of computers. We are talking about an electric power plant. We are going to need electricity today, we are going to need electricity tomorrow. And so I question whether it is really market forces that are closing this or an overaggressive regulation that is making the market incapable to deal with the costs of the regulation.

Mr. BACHUS. Okay. But did you mention or have a reason to believe that some of the services may have closed in Avon park already?

Mr. JAMES. If the power plant does close, nearly half of the $3.3 million that the school district is talking about losing comes just from the generation of electricity. They are going to have to make significant cuts, and they are going to have to look at the special programs that they offer, everything from AP programs for the educated and gifted students, to the social services, the autism, the community counseling, the other kinds of things that needy children and needy families need.

Mr. BACHUS. Okay.

Mr. Kovacs, do you think that the House-passed regulatory reform bills from last term, especially the Regulatory Accountability Act, the REINS Act, the Regulatory Flexibility Improvement Act, and the Sunshine for Regulatory Decrees and Settlements Act would help substantially to address some of the economically impacting regulations that have been identified today?

Mr. KOVACS. I think it is fair to say that some are more important than others. I think that the permit streamlining bill that this Committee passed out of Committee and passed through the House last year is very important. That could cut the time for getting permits in half. At least that is what the pilot programs have shown. And it does so without really offending anyone's rights. It literally puts a lead agency in charge, drives the process and timeframes. Very, very workable.

The Regulatory Accountability Act is very important because it allows more transparency of the agencies and the information that they are relying on, and it allows us, as the regulated community, to put more information into the system. And it begins to take away the deference from the agencies and restore it to more of a level playing field so Congress has more of a role.

I think on the sue-and-settle litigation, I don't know what it is called this year, that is certainly important because one of the things that does is when you have a sue-and-settle arrangement between the agencies, an outside group is actually deciding how the agency is going to prioritize its time and its budget.

I would put those in the top three. But I would certainly say permit streamlining is something that I think you can get agreement with. I think even the Obama administration talks about it. CEQ has talked about it. So if you are talking on all of the bills, on permit streamlining you really start narrowing it to where if you want to do something that is practical, that is it.

Mr. BACHUS. All right. Thank you.

And I will say, Mr. Weissman, too big to fail, I think Chairman Bernanke again testified yesterday that it was causing some distortions.

I can conclude the hearing. However, we don't have votes. And if Members would like to have a second round of questions.

Mr. COHEN. Can I go to the dentist instead?

Mr. BACHUS. Dentist? To the dentist? Sure. Sure. And I don't know if Mr. Garcia wants to stay.

Mr. GARCIA. Mr. James, I don't want you to take offense to my questioning. I do understand. And I know how tough it is to have

revenue that you want to put into your city. You know, I appreciate the Chairman and talking about social services. There is nothing more that heartens me more than to have Republicans talk about a social safety net provided by a competitive model that doesn't work, which of course implies subsidization, which I am sure Mr. Greenblatt would love to pay taxes for. And then Mr. Weissman would agree to, Mr. Kovacs would object to, Mr. Glicksman would justify, and Mr. Holtz-Eakin would say you are all crazy. All right?

So the reality here is that we all want what is best for our country. I would suggest to you that when you are looking at a power plant of that age, you are done. It has nothing to do with regulation. But it is easier for your local power plant, which contributes to your local chamber of commerce, which is an essential element to your community, to blame it on us in Washington. Everybody blames it on us in Washington, and most of the time they are right.

But you are at a point where, I would suggest to you, you know, use the power of your office to find an alternative process, because you are going to get yourself in trouble, right? To depend on keeping a power plant open at this timeframe with the innovations that the market has created in energy. We are about to experience an energy boom in our country that is going to make Mr. Greenblatt more productive, is going to create more customers for the Chamber of Commerce, and is going to give Mr. Glicksman and Mr. Weissman more work trying to regulate.

But the reality is that we are looking at a renaissance. And so I say this just so you are aware of it, because we sometimes are misled by community leaders who feel, it is unfortunate, but 60-year-old coal-fired power plants are usually a little bit behind the time. And that is all I wanted to make a point about.

Mr. BACHUS. All right. Thank you.

Mr. Marino, do you?

Mr. MARINO. No, my gift to everybody is I have no questions. But thank you. It was very interesting and I learned a great deal today. Thank you.

Mr. BACHUS. Thank you.

Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman. We have disagreements across the aisle here, and I understand that. I used to be in the industry as well with smokestack monitoring and other things. Right now we are cleaner than we have ever been. And I agree, there is regulations that need to be in place. But to say that, and to attack a 60-year-old plant, you can come to Georgia, we have got less than 60-year-old plants that are looking to close. And they are closing because of regulation. Okay. And you understand that, and I respectfully agree.

The problem is here is there is a regulatory issue and there is regulatory problems. There is a balance that needs to be struck. And right now, from my perspective, there is—and we have heard testimony today that there is areas that we can agree on or disagree on, but there is an effect. And that is why I appreciate Mr. James and Mr. Greenblatt and others, and also the professors who are here and from the chamber discussing this in an open format. I think the interesting question is, when you talk about investment, and the discussion I think my other colleague from across

the aisle said, well, we wanted to put more EMS and more firefighters and teachers. Well, we are doing that with borrowed money, and we are also doing it with strings attached. We are talking about regulatory reform here. And we are going to add that together.

One last sort of question, Mr. Greenblatt, the $15,000, which was made sort of light of in the fact that you have a very successful company and that. Were you able to calculate how much—you said mission essential—how much do you think you lost, in addition to whatever you may have ended up paying, what did you time-wise, do you even have a calculation of what actual cost, not just to do this, but just the distraction factor here?

Mr. GREENBLATT. My CFO had to spend 15 to 20 hours, you know, on hold, discussing, negotiating with the IRS. We had to write letters. We had to get our accountant involved. It was thousands of dollars. And, you know, that CFO could have been doing job costing so we could quote the next job well, you know. He could have been negotiating with our vendors, all productive tasks. Instead, he is doing things that add no value. And we are fighting with China every day. So we need to have a very streamlined system so that we can be more competitive so we can export more and hire more locals.

Mr. COLLINS. I know this has been many hearings, and I am new and have not been a part of the 17 hearings, but to me if we do 17 hearings, if doing 17 hearings makes a difference in job creation, job growth, and a better government, then let's have 17 more. Let's get it done. Because our people are looking for that. They are not looking for anything else. And I appreciate my friends across the aisle in discussing this. And we will have more discussions as we go, Mr. Chairman. I yield back.

Mr. GARCIA. Mr. Chairman, if I could. With all respect to the gentleman from Georgia, I would love to sit here and, you know, work on regulatory reform. You know, we know it is broken. But all government is broken. It is the nature of why we have a Congress. We have to meet regularly to fix it. But there is no question that cool heads can prevail, not declare war, whether it be Obama or other Presidents that may have declared war. I didn't even know that he had invoked the war powers, because we certainly didn't vote it out of Congress.

But my hope would be that on all of this that reasonable men and women sitting in this chamber can agree that there are huge swaths of—that Mr. Greenblatt is filling out a form should be absurd to all of us, right? With our computer technology, that he has to sit there and do this. And I am more than happy, if the Chairman wants to convene a working group, or if we want to set—I am a freshman. We are not doing anything here anyway.

So the reality is that we have time to sit down and try to work on these solutions. And I am sure that the Chamber of Commerce would give us lodging space and lock us in a room and feed us every once in a while. But we understand there is regulation and then there is excessive regulation. There are rules that have been there too long. There are billions of dollars of unnecessary loopholes that no longer make sense. And we could be working on all of this. Yet we have had this week our sum total of important vote

was naming a space center after Neil Armstrong, which is a wonderful thing.

Mr. BACHUS. We actually approved the journal, too.

Mr. GARCIA. On a recorded vote.

Mr. BACHUS. Mr. Cohen?

Mr. COHEN. Let me ask one small question, and we probably shouldn't be lost in the weeds. But Mr. Greenblatt, I was concerned, $15,000 for a signature. Was that signature one that if you would have signed it you would have put yourself under some penalty or some oath that by signing here you are indicating that everything above is subject to penalties? Was it one of those type signatures that by not signing it——

Mr. GREENBLATT. It was a form we received in 2006. And in 2010, we got the fine. So there was this empty time where nothing happened.

Mr. COHEN. Right.

Mr. GREENBLATT. And I had to sign the form in three different places. It was for our 401(k) program. And, you know, so I hit two of the three. I missed the third.

Mr. COHEN. So when you failed to sign it, you had gone through two administrations. That was the Bush administration that levied the fine?

Mr. GREENBLATT. Yeah. I mean, the point is it is paperwork——

Mr. COHEN. I know, it does seem absurd.

Mr. GREENBLATT. We are trying to grow jobs. We are fighting China and Mexico.

Mr. COHEN. And you have done a great job, and I hope that Tulane stays in the Big East with Memphis, and we will have many good games in the future.

Mr. BACHUS. Thank you. Thank you.

This concludes today's hearing. Thanks to all our witnesses for attending. Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned. And I will say this. We are going to take up, Mr. Garcia, and get a working group together and invite some of you in on those discussions in a balanced approach. Thank you.

[Whereupon, at 11:10 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Spencer Bachus, a Representative in Congress from the State of Alabama, and Chairman, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Since the November 2012 election, the Obama Administration has moved into overdrive in its regulatory war on jobs, the economy, and America's global competitiveness.

Let me be clear. Congress cannot sit silent while America's economic growth is imperiled. One of my top priorities in this Congress will be to do everything possible to reduce the regulatory burdens that our nation's small businesses are facing, to get more Americans back to work, and to help grow our economy.

A study last summer by the Organization for Economic Cooperation and Development revealed that after measuring countries by the number of regulations they have, "it is now easier to start a business in Slovenia, Estonia and Hungary . . . than in America."

According to former CBO Director Douglas Holtz-Eakin, countries from England, to South Korea to Portugal have already undertaken regulatory reforms. England has been particularly aggressive, adopting a "one in two out" rule for new regulations, which requires policymakers introducing a new regulation to rescind or modify an existing regulation that costs double so the total regulatory burden is actually reduced.

The governments of our international competitors are not merely paying lip service to lightening the regulatory load, they are taking meaningful actions. We seem to be moving in the opposite direction.

Last fiscal year, the total U.S. paperwork burden grew by more than 355 million hours, or four percent.

A 2012 report by NERA Economic Consultants on the regulations affecting the manufacturing sector found that exports in 2012 might have been as much as 17% lower than they would have been without the estimated regulatory burden. Such loss in output directly represents lost jobs and economic opportunities.

Instead of the regulatory burden diminishing to keep American businesses competitive and hiring, experts expect the pace of regulation to increase in President Obama's second term.

Just prior to Election Day, the *National Journal* reported that "[f]ederal agencies are sitting on a pile of major health, environmental, and financial regulations that lobbyists, congressional staffers, and former administration officials say are being held back to avoid providing ammunition to Mitt Romney and other Republican critics." Now the floodgates are open. For example, the Patient Protection and Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act created a host of regulatory obligations which agencies have yet to fulfill.

Similarly, the American Action Forum identified $123 billion in possible regulations in the Administration's 2012 Unified Regulatory Agenda that would also add more than 13 million hours of paperwork burden. It is no wonder the Administration delayed releasing this agenda, and its plans for 128 new "economically significant" regulations until after the election.

What is most striking perhaps is this Administration's insensitivity to the negative effects overregulation has on vulnerable groups. Overregulation costs Americans jobs and a new study shows agencies' cost benefit analyses fail to consider that over 75% of older workers who lose their jobs remain unemployed three years later and those who can find work frequently must accept as much as 20% less pay.

Overregulation also disproportionately burdens low income households. Because of the law of diminishing returns, new regulations require spending increasingly more money to mitigate increasingly smaller risks. Many of these costs are passed down to consumers. New research from the Mercatus Center shows low income households would be much better off spending this money mitigating more immediate personal risks, for example, by using money that should rightfully be theirs to afford rents in safer neighborhoods.

In light of these very real trade-offs, I am deeply concerned that some pro-regulation advocates are calling for an Executive Order to "rescind requirements" that there be cost-benefit analyses of significant regulations. I hope that stories from Main Street about the negative impacts plant closures have on lives and communities will help sensitize regulators and their allies to the very real suffering that even well-meaning regulatory advocacy can impose.

However, we cannot rely on hope to turn the tide of excessive regulation. I am committed to restoring accountability and providing relief from excessive regulation to our nation's small businesses and job creators who need it most.

Last Congress, the Committee reported a number of important and far-reaching bills to reform overregulation, ease the burden on jobs and the American economy, and restore America's competitiveness. The House passed them all, but the Democrat-led Senate refused to act and President Obama threatened to veto them.

The overreach of Obama Administration regulations is one of the chief reasons the economy has failed adequately to recover and produce new jobs throughout the Obama Administration. Congress and the President must act to take a different direction that will allow America's jobs, economy, and competitiveness to be restored. The House will do its part, and for the sake of our economic future, I call on the Senate and the Obama Administration to do theirs.

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

On a typical day, I wake up, brush my teeth, take a shower, maybe have some breakfast, get dressed, and go outside to where I parked my car, which I drive to work.

I then spend most of the day at the office, in hearings, on the House floor, or meeting constituents. I will grab some lunch and dinner when I find the time.

At the beginning and end of the week, whenever the House is in session, I get on a plane, as I will this afternoon, to travel between Washington and Memphis.

I can do all this without thinking twice about whether any of those activities will expose me to a high risk of harm.

The reason I can take my well-being for granted in these day-to-day activities is because our Nation has a strong regulatory system, one that strives to protect our environment and our health and ensure the safety our workplaces, our public spaces, our consumer products, our cars, and our airplanes, among many other things.

Yet the regulatory debates in this Subcommittee over the last couple of years have been focused almost exclusively on the costs of implementing regulations. It is often left to those of us on this side of the aisle to point out not only that there are benefits to regulation, but that those benefits consistently outweigh regulation's costs.

In addition to ignoring the net benefits of regulation, those who focus solely on regulatory costs also tend to ignore the even greater costs of regulatory failure. As two of our witnesses—Robert Glicksman of George Washington University Law School and Robert Weissman of Public Citizen—will discuss in greater detail, regu-

latory failure is far more costly for the economy and for society than the existence or creation of new regulations.

We must not forget that it was the *lack* of adequate regulation which caused the Deepwater Horizon oil spill, the Sago Mine disaster, the mortgage foreclosure crisis, and the 2008 financial crisis and Great Recession that followed.

In short, there is a far greater human and economic cost to stopping agencies from regulating than there is to allowing new regulations to take effect.

I will leave the rest of the discussion to our witness panel and to our question time, but I would like to offer this plea.

We ought to be able to have a serious, substantive, and nuanced discussion about what problems exist in the federal regulatory system and what Congress ought to do to address those problems.

But so long as we continue to hold hearings with inflammatory and partisan titles like this one, where the premise suggests that the debate should revolve only around regulatory costs, such a discussion will be difficult to have, as it only invites defensiveness and conflict.

We will, as we did last Congress, devolve into a hollow debate, a battle of talking points, without really engaging each other.

I hope that we can do better going forward.

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

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Let me be clear. Congress cannot sit silent while America's economic growth is imperiled. One of my top priorities in this Congress will be to do everything possible to reduce the regulatory burdens that our nation's small businesses are facing, to get more Americans back to work, and to help grow our economy.

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Similarly, the American Action Forum identified $123 billion in possible regulations in the Administration's 2012 Unified Regulatory Agenda that would also add more than 13 million hours of paperwork burden. It is no wonder the Administration delayed releasing this agenda, and its plans for 128 new "economically significant" regulations until after the election.

What is most striking perhaps is this Administration's insensitivity to the negative effects overregulation has on vulnerable groups. Overregulation costs Americans jobs and a new study shows agencies' cost benefit analyses fail to consider that over 75% of older workers who lose their jobs remain unemployed three years later and those who can find work frequently must accept as much as 20% less pay.

Overregulation also disproportionately burdens low income households. Because of the law of diminishing returns, new regulations require spending increasingly more money to mitigate increasingly smaller risks. Many of these costs are passed down to consumers. New research from the Mercatus Center shows low income households would be much better off spending this money mitigating more immediate personal risks, for example, by using money that should rightfully be theirs to afford rents in safer neighborhoods.

In light of these very real trade-offs, I am deeply concerned that some pro-regulation advocates are calling for an Executive Order to "rescind requirements" that there be cost-benefit analyses of significant regulations. I hope that stories from Main Street about the negative impacts plant closures have on lives and communities will help sensitize regulators and their allies to the very real suffering that even well-meaning regulatory advocacy can impose.

However, we cannot rely on hope to turn the tide of excessive regulation. I am committed to restoring accountability and providing relief from excessive regulation to our nation's small businesses and job creators who need it most.

Last Congress, the Committee reported a number of important and far-reaching bills to reform overregulation, ease the burden on jobs and the American economy, and restore America's competitiveness. The House passed them all, but the Democrat-led Senate refused to act and President Obama threatened to veto them.

The overreach of Obama Administration regulations is one of the chief reasons the economy has failed adequately to recover and produce new jobs throughout the Obama Administration. Congress and the President must act to take a different direction that will allow America's jobs, economy, and competitiveness to be restored. The House will do its part, and for the sake of our economic future, I call on the Senate and the Obama Administration to do theirs.

Prepared Statement of the Honorable Doug Collins, a Representative in Congress from the State of Georgia, and Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Opening Statement- RRCAL Hearing on Regulatory Reform
Congressman Doug Collins (GA-09)
Thursday, February 27, 2013
DRAFT – JL

THANK YOU MR. CHAIRMAN. I APPRECIATE YOU CONVENING A HEARING ON THIS IMPORTANT TOPIC.

IT IS AN UNFORTUNATE MISCONCEPTION TO PAINT THE REGULATORY ARENA AS BEING DISCONNECTED FROM THE EVERY DAY LIVES OF AMERICANS. REGULATIONS AFFECT THE AIR WE BREATHE, THE TYPE OF CAR WE DRIVE, AND THE FOOD WE FEED OUR PETS.

UNFORTUNATELY, THE OBAMA ADMINISTRATION HAS CREATED A WEB OF REGULATIONS THAT ARE TOO COMPLEX, TOO EXPENSIVE, AND COMPLETELY INEFFECTIVE. ECONOMIC GROWTH CANNOT OCCUR IF JOB CREATORS CONTINUE TO BE CRUSHED BY THE FATAL GRIP OF OVERREGULATION.

IN THE UPCOMING DAYS, I PLAN TO INTRODUCE THE "SUNSHINE IN REGULATORY DECREES AND SETTLEMENTS ACT OF 2013." THIS LEGISLATION ENDS THE ABUSE OF CONSENT DECREES AND SETTLEMENTS TO REQUIRE MORE REGULATIONS.

REGULATORS OFTEN USE CONSENT DECREES AND SETTLEMENTS TO SECRETLY ESTABLISH NEW RULES, OUTSIDE THE REGULAR RULE-MAKING PROCEDURES, WITHOUT TRANSPARENCY AND PUBLIC PARTICIPATION. THIS "SUE AND SETTLE" APPROACH HAS ENABLED AGENCIES TO IMPOSE HIGHER COSTS WITH NO ACCOUNTABLY TO THOSE DIRECTLY IMPACTED.

I LOOK FORWARD TO HEARING FROM THE WITNESSES ON THIS ISSUE, AND MANY OTHERS. I THANK THE CHAIRMAN AND YIELD BACK THE BALANCE OF MY TIME.

Prepared Statement of the Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Georgia, and Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

This politicized hearing is yet another example of a Majority more interested in attacking the President than providing thoughtful solutions to our Nation's most pressing issues.

This hearing purports to explore solutions to growing the economy, creating jobs, and increasing America's competitiveness internationally. These are all worthy, laudable goals. But we cannot pretend that this hearing is about economic growth or American prosperity.

The Majority pre-supposes that regulations have harmful effects, despite ample evidence from leading bipartisan and non-partisan reports have found the opposite. The Majority continues to rely on studies that are partisan or have been debunked, and overlooks the public benefits associated with regulation. For instance, the BP oil spill costs tens of billions in damages to the Gulf of Mexico and the Gulf Coast communities. Likewise, the 2008 Wall Street collapse stemmed from an avoidable lapse of financial regulation, costing trillions and collapsing the global economy. These costs far exceed the cost of paperwork or compliance, and are only recent examples.

We have already heard testimony on the issue in numerous hearings in the Committee and this Subcommittee. We have debated these issues tirelessly. And now, instead of addressing important issues, this Do Nothing Congress is using yet another hearing in its attempt to discredit President Obama.

If this body does not address sequestration, American workers will face yet another hurdle to providing for their families and realizing the American dream. This mindless austerity takes a meat-cleaver approach to cutting programs, regardless of the wisdom of doing so or the long-term costs that these cuts would create. Indeed, the only plan that the Majority has advanced is one that would not stem job loss, but one that would cut the programs that help the unemployed, the sick, and the poor. Sequestration threatens to forestall economic recovery, amplifying the effects of the recession on so many Americans.

If the Majority was truly concerned with growing the economy, creating jobs, and protecting American competitiveness, we would have come together with a Grand Bargain of spending cuts to address the government's long-term budget deficits and prevented sequestration long ago. Instead, sequestration will arbitrarily take 85 billion dollars of out our economy, lower our GDP, cost jobs, and harm our economic recovery and global competiveness. The Republican leadership failure will be felt nationwide, and its impact on my home state of Georgia is of grave concern to me.

We cannot pretend that this hearing is about growing the economy or creating jobs.

I also take considerable issue with the title of this hearing. In a week when this Committee discussed terrorism at length in a hearing on drones and national security, the title of this hearing belittles the great sacrifices our brave men and women in the military have made in support of our country's security. I ask that the Majority consider the hardships and sacrifices that so many Americans have made when using the words "regulatory war."

Material submitted by the Honorable Hakeem Jeffries, a Representative in Congress from the State of New York, and Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

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TIME

Monday, Mar. 17, 2008

Credit Default Swaps: The Next Crisis?

By Janet Morrissey

As Bear Stearns careened toward its eventual fire sale to JPMorgan Chase last weekend, the cost of protecting its debt, through an instrument called a credit default swap, began to rise rapidly as investors feared that Bear would not be good for the money it promised on its bonds. Not familiar with credit default swaps? Well, we didn't know much about collateralized debt obligations (CDOs) either — until they began to undermine the economy. Credit default swaps, once an obscure financial instrument for banks and bondholders, could soon become the eye of the credit hurricane. Fun, huh?

The CDS market exploded over the past decade to more than $45 trillion in mid-2007, according to the International Swaps and Derivatives Association. This is roughly twice the size of the U.S. stock market (which is valued at about $22 trillion and falling) and far exceeds the $7.1 trillion mortgage market and $4.4 trillion U.S. treasuries market, notes Harvey Miller, senior partner at Weil, Gotshal & Manges. "It could be another — I hate to use the expression — nail in the coffin," said Miller, when referring to how this troubled CDS market could impact the country's credit crisis.

Credit default swaps are insurance-like contracts that promise to cover losses on certain securities in the event of a default. They typically apply to municipal bonds, corporate debt and mortgage securities and are sold by banks, hedge funds and others. The buyer of the credit default insurance pays premiums over a period of time in return for peace of mind, knowing that losses will be covered if a default happens. It's supposed to work similarly to someone taking out home insurance to protect against losses from fire and theft.

Except that it doesn't. Banks and insurance companies are regulated; the credit swaps market is not. As a result, contracts can be traded — or swapped — from investor to investor without anyone overseeing the trades to ensure the buyer has the resources to cover the losses if the security defaults. The instruments can be bought and sold from both ends — the insured and the insurer.

All of this makes it tough for banks to value the insurance contracts and the securities on their books. And

it comes at a time when banks are already reeling from write-downs on mortgage-related securities. "These are the same institutions that themselves have either directly or through subsidiaries invested in the subprime market," said Andrea Pincus, partner at Reed Smith LLP. "They're suffering losses all over the place," and now they face potentially more losses from the CDS market.

Indeed, commercial banks are among the most active in this market, with the top 25 banks holding more than $13 trillion in credit default swaps — where they acted as either the insured or insurer — at the end of the third quarter of 2007, according to the Comptroller of the Currency, a federal banking regulator. JP Morgan Chase, Citibank, Bank of America and Wachovia were ranked among the top four most active, it said.

Credit default swaps were seen as easy money for banks when they were first launched more than a decade ago. Reason? The economy was booming and corporate defaults were few back then, making the swaps a low-risk way to collect premiums and earn extra cash. The swaps focused primarily on municipal bonds and corporate debt in the 1990s, not on structured finance securities. Investors flocked to the swaps in the belief that big corporations would seldom go bust in such flourishing economic times.

The CDS market then expanded into structured finance, such as CDOs, that contained pools of mortgages. It also exploded into the secondary market, where speculative investors, hedge funds and others would buy and sell CDS instruments from the sidelines without having any direct relationship with the underlying investment. "They're betting on whether the investments will succeed or fail," said Pincus. "It's like betting on a sports event. The game is being played and you're not playing in the game, but people all over the country are betting on the outcome."

But as the economy soured and the subprime credit crunch began expanding into other credit areas over the past year, CDS investors became jittery. They wondered if the parties holding the CDS insurance after multiple trades would have the financial wherewithal to pay up in the event of mass defaults. "In the past six to eight months, there's been a deterioration in market liquidity and the ability to get willing buyers for structured finance securities," causing the values of the securities to fall, said Glenn Arden, a partner at Jones Day who heads up the firm's worldwide securitization practice and New York derivative.

The situation is already taking a toll on insurers, who have been forced to write down the value of their CDS portfolios. American International Group, the world's largest insurer, recently reported the biggest loss in the company's history largely due to an $11 billion writedown on its CDS holdings. Even Swiss Reinsurance Co., the industry's largest reinsurer, took CDS writedowns in the fourth quarter and warned of more to come in the first quarter of 2008.

Monoline bond insurance companies, such as MBIA and Ambac Financial Group Inc., have been hit the hardest as they scramble to raise capital to cover possible defaults and to stave off a downgrade from the ratings agencies. It was this group's foray out of its traditional municipal bonds and into mortgage-backed securities that caused the turmoil. A rating downgrade of the monoline companies could be devastating for

banks and others who bought insurance protection from them to cover their corporate bond exposure.

The situation is exacerbated by the heavy trading volume of the instruments, the secrecy surrounding the trades, and — most importantly — the lack of regulation in this insurance contract business. "An original CDS can go through 15 or 20 trades," said Miller. "So when a default occurs, the so-called insured party or hedged party doesn't know who's responsible for making up the default and if that end player has the resources to cure the default."

Prakash Shimpi, managing principal at Towers Perrin, downplays this risk, noting that contractual law requires both parties to inform and get approval from the other before selling the CDS policy to someone else. "These transactions don't take place on a handshake," he said. Still, being unregulated, there is no standard contract, no standard capital requirements, and no standard way of valuating securities in these transactions. As a result, Pincus said she wouldn't be surprised to see a surge in litigation as defaults start happening. "There's a lot of outcry right now for more regulation and more transparency," said Pincus.

A meltdown in the CDS market has potentially even wider ramifications nationwide than the subprime crisis. If bond insurance disappears or becomes too costly, lenders will become even more cautious about making loans, and this could impact everyone from mortgage-seekers to municipalities that need money to fix roads and build schools. "We're seeing players in all of those spaces being more circumspect about whose credit they're going to guarantee and what exactly the credit obligation is," said Ellen Marshall, partner at Manatt, Phelps & Phillips LLP.

Shimpi admits a meltdown or even a slowdown in the CDS market would affect the amount and cost of liquidity in the market. However, he dismisses concerns that municipalities and others seeking capital could be left in the dust. "Even if the U.S. takes a hit, there are other markets in the world that have different dynamics, and capital flows are international," he said.

Still, most agree the potential repercussions are far-reaching. "It's the ripple effects, the domino effects" that are worrisome, said Pincus. "I think it's [going to be] one of the next shoes to fall" in the credit crisis. Miller said the subprime debacle, rising unemployment, record-high oil prices, and now CDS market troubles "have all the makings of the perfect storm.... There are some economists who say this could be another 1929 — but I don't believe it," he said. "We have a lot of safeguards built into the system that did not exist in 1929 and 1930." None of them, though, are directly targeted at CDS. On Wall Street, innovators are always ahead of regulators. And that can sometimes have a very steep price.

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STOKER COMING SOON

September 23, 2008

New York to Regulate Credit Default Swaps

By DANNY HAKIM

Gov. David A. Paterson said Monday that New York would begin regulating credit-default swaps, the arcane financial instruments that were little known outside Wall Street before the credit crisis.

New state regulations will take effect on Jan. 1, but the governor said New York had jurisdiction to regulate only about a fifth of the sprawling market, and he called on the federal government to take steps of its own to oversee credit-default swaps, which have gone unregulated.

Credit-default swaps essentially function like insurance contracts to protect bond buyers from the risk that companies will default, but over the years they have become a favorite tool of speculators who use them to bet that a certain company will fail.

Exposure to the roughly $62 trillion market was one of the main reasons that the American International Group, the insurance giant, required a federal bailout, and contributed to the crises that led to the collapses of Bear Stearns and Lehman Brothers.

The governor's move reverses previous state policy, which did not consider any credit-default swaps to be insurance products.

"The absence of regulatory oversight is the principal cause of the Wall Street meltdown we are currently witnessing," the governor said in a statement. "While I applaud the recent federal intervention to stabilize the market — and thus our entire economy — it is important we also take the next step as a nation by regulating areas of the market which have previously lacked appropriate oversight."

In an interview Monday, Mr. Paterson added that credit-default swaps were "the real problem with A.I.G."

"When we peeled back the onion, we found out that A.I.G. had so many credit-default swaps that we couldn't calculate how much money they probably had wasted," he said.

Last week, Mr. Paterson's administration allowed A.I.G. to borrow $20 billion from its own subsidiaries to help bolster its capital, not long before the federal government announced an $85 billion bailout. The credit crisis is expected to weigh heavily on New York, which derives a fifth of its tax revenue from Wall Street.

Officials at the Federal Reserve and the Treasury Department had no immediate comment on the governor's plan, or on his call for federal regulation. Ben S. Bernanke, the Federal Reserve chairman, is scheduled to testify before Congress on Tuesday, and credit-default swaps are likely to be on the agenda.

The governor said the state's insurance department would begin regulating credit-default swaps as insurance products in cases where the buyer of the swap also owns the underlying bond it is meant to back.

In those cases, only licensed insurers will be able to issue credit-default swaps. New guidelines will also increase minimum capital requirements and the reserves that financial institutions must maintain.

Rules will also be aimed at preventing financial institutions from insuring too many bonds from a single source and will consider a number of different factors, including who originates the bonds and who services the debt.

The Paterson administration said it would also limit insurers in guaranteeing collateralized debt obligations.

Eric R. Dinallo, the New York State insurance superintendent, said that "the severity of this crisis was substantially increased by what the government chose not to regulate, principally credit-default swaps."

"We are providing an appropriate way for those with an insurable interest to protect themselves," he said "and we are going to ensure that whoever sells them that protection is solvent, in other words, can actually pay the claims."

He added: "We will urge the federal government that there should be some sort of national regulatory system that manages credit-default swaps."

Tomasz Piskorski, an assistant professor of finance and economics at the Columbia Business School, said, "It's a good idea to bring some light to this market, to impose some rules, some transparency and some standardization of the contracts and increase the likelihood that these contracts will be honored."

Mr. Piskorski said he did not favor many types of regulation, including the recent ban on some short-selling, but added that "this is one instance where it would be good to get some involvement of the federal authorities to draft some good rules."

Until recently, credit-default swap was a term little known beyond Wall Street. Mr. Paterson conceded as much during a meeting on Monday with editors and reporters of The New York Times.

"I didn't even know what a credit-default swap was until I read about it in The Economist about six months ago," he said, adding, "I thought they should be regulated by the gaming industry, because it's gambling."

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Response to Questions for the Record from Robert L. Glicksman, J.B. & Maurice C. Shapiro Professor of Environmental Law, The George Washington University School of Law

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on
The Obama Administration's Regulatory War on Jobs, the Economy and American's Global Competitiveness
February 28, 2013

Questions for the Record

Question from Subcommittee Ranking Member Steve Cohen for Mr. Glicksman

1. Why do you say in your prepared testimony that the rulemaking process is ossified? What are the principal contributing factors to such ossification?

   Agencies must comply with analytical requirements under a host of statutes and executive orders. Often, these requirements are duplicative, and sometimes they require agencies to analyze factors that they are not allowed to consider in the statutes they are implementing. The result of this agglomeration of analytical requirements is to greatly slow down the regulatory process.

2. How do regulations benefit businesses?

   Regulations benefit businesses in many ways. One of the most important is to ensure that a business's competitors are not able to undercut its product or service prices by taking short cuts (such as not providing a safe workplace or not disposing of pollution responsibly) that a responsible business would not undertake.

3. What are some of the principal defects of the American Action Forum study the Mr. Holtz-Eakin discusses in his testimony?

   The American Action Forum study suffers from two major flaws that immediately call its usefulness into question. First, the study does not account for regulatory benefits, and as such portrays the U.S. regulatory system in a highly distorted and misleading fashion. Any policy, even if it provides significant net benefits, will look terrible if one only considers its costs. Congress should therefore reject these kinds of "cost-only" studies when evaluating regulatory policy. Second, the study's primary data source—agencies' *ex ante* cost estimates (i.e., the agencies' attempt to predict the costs of a rule before it has been issued)—is highly flawed. These estimates suffer from several methodological problems leading them to almost invariably overestimate regulatory costs. By relying on these estimates, the American Action Forum study grossly overstates rules' costs, again providing a misleading depiction of the regulatory system.

4. In your view, does the current rulemaking process already provide sufficient opportunities for transparency and public participation in agency decisionmaking? Does

industry already have significant, and perhaps too much, influence on agency decisionmaking as it stands?

The Administrative Procedure Act requires federal agencies engaged in rulemaking to provide notice and an opportunity to comment before issuing regulations and to provide a statement or basis and purpose to accompany final regulations. The courts are available to seek reversal of agency rulemakings that do not comply with these procedures. The rulemaking process under the APA provides adequate opportunities for regulated businesses to participate in the rulemaking process. However, under executive orders, major rules must be cleared by the Office of Information and Regulatory Affairs before issuance. This process is supposed to be transparent but often is not. Studies have shown that business interests have disproportionate access to OIRA, and they take advantage of that access by trying to convince OIRA to weaken or block regulation.

5. Mr. Holtz-Eakin argues that cost-benefit analysis mandates should apply to independent regulatory agencies.

What are your thoughts about this proposal?

I am not convinced of the accuracy of cost-benefit analysis in the area with which I am most familiar – environmental regulation – for reasons I explained in my testimony. It is therefore inappropriate to require agencies to base regulatory decisions in this area primarily on cost-benefit analysis. This analysis is no more suitable for independent than executive branch agencies engaged in environmental regulation. In addition, statutes such as the Clean Air Act prohibit EPA from making decisions based on cost-benefit analysis in some contexts. If independent agencies are similarly constrained, they should not be required to conduct cost-benefit analyses.

Why do you suppose Congress has not previously sought to make independent regulatory agencies subject to mandatory cost-benefit analysis?

Congress created many of these agencies to address policy issues that are both complex and critical to the well-being of all Americans—policy issues such as the safe handling of nuclear waste or the smooth functioning of the U.S. financial system. It recognized that a flawed tool such as cost-benefit analysis could inhibit the effective functioning of these agencies, and thus chose not to require its use by independent agencies. In addition, there have been doubts as to the constitutionality of executive branch control over the substantive decisions by independent agencies.

6. Do you think it is useful for Congress to look at how other industrialized countries manage their regulatory systems, as Mr. Holtz-Eakin does in his testimony? What might be some of the drawbacks of such an approach?

A comparative evaluation of that sort can be useful. In conducting it, however, differences in U.S. and foreign legal systems, cultures, traditions, and social and economic contexts should be kept in mind. In particular, one must resist the urge to

compare the relative "stringency" of one nation's regulatory system to that of another. Regulatory systems are complex, and any effort to reduce them to a single metric, such as stringency, would be meaningless at best and misleading at worst. Congress should be wary of any reports or studies purporting to rank or compare the stringency of different country's regulatory systems.

7. Should Congress enact a single, uniform retrospective review requirement for all federal agencies? What are some of the potential drawbacks and benefits of doing so? If Congress considers passing such a requirement, what form should it take?

   Retrospective review can be useful. Statutes such as the Clean Water Act require agencies (EPA, in that case) to periodically review existing regulations. But a uniform requirement that agencies review all regulations is not a good idea if Congress does not supply adequate funding for agencies to fulfill existing regulatory responsibilities and any additional duties to engage in retrospective review. It would not seem to be an efficient use of an agency's time, for example, to review a regulatory program that seems to be working well and that has not generated criticism. In addition, it should be clear that retrospective review includes assessment of whether existing regulations are inadequate to achieve statutory goals, not just whether they are excessive. In other words, retrospective reviews must be balanced in the sense that they also look for opportunities where an agency must strengthen existing regulatory safeguards in order to meet the goals of the statute that the agency is implementing.

Questions from Subcommittee Member Hank Johnson for <u>Mr. Glicksman</u>

1. Mr. Glicksman, in your testimony you state that inadequate funding is a reason for the absence of effective regulation that could prevent major disasters like the BP oil spill or the Upper Big Branch Mine disaster. How will sequestration impact agencies that are critical to the public interest?

   I am not familiar with many of the details of sequestration. However, reducing the availability of appropriated funds needed by an agency to administer its regulatory duties can greatly weaken regulatory programs and prevent achievement of regulatory goals, including protection of public health, safety, and the environment. The problem is that sequestration is coming at a time when agencies are already so starved of resources that they are prevented from carrying out their statutory mission in an effective and timely manner. It is still too early to predict the extent of the impact that sequestration will have on these agencies, but there can be little doubt that overall sequestration will have a negative impact on the public interest.

2. Mr. Glicksman, in your testimony you state that larger rulemaking can take an average of 5 years to complete if it's meant to have a meaningful impact, some arguing that it could take up to 3 administrations for a major rulemaking to be completed. Do you think that policymakers overlook the benefits of regulation because of this delayed gratification?

There is often a risk that decisionmakers in the public and private sector will not vigorously pursue actions that will produce benefits in the future, when the credit will go primarily to future political administrations, regulators or business leaders.

3. In your testimony, you mention an example where an EPA rulemaking on hazardous air pollutants received on average of 84 contacts per rule from business interests in contrast to public interest groups making 0.7 contacts per rule. In your research of this issue did you find that these business interests were able to skew the rulemaking process in their favor by the amount of contacts they were able to make as opposed to a public interest group?

   The study of EPA hazardous air pollution rulemakings that I referred to in my testimony found that dominance of the rulemaking process by business groups did result in substantive changes to rules that benefit their interests as opposed to the public interest. This study, by Professor Wendy Wagner of the University of Texas, found that in these rulemakings changes made to the final rule after notice and comment favored industry by a factor of 4 to 1 as compared to the changes benefitting the public interest.

4. In your testimony, you argue that regulatory uncertainty is not holding back the economy, preventing the United States from completing emerging from the Great Recession. You point out that most regulatory activity is taking place in sectors with the lowest levels of unemployment in the country. Would these industries see higher employment rates with fewer regulations?

   I am not aware of any evidence that these businesses would see higher employment rates with fewer regulations. In addition, as I explained in my testimony, regulation can provide exactly the kind of certainty in which businesses can thrive. Businesses tend to prefer to know the rules are, and clear regulations can provide that knowledge. The point that must be underscored here is that there is no inherent trade-off between jobs and regulation. Well-designed regulation can spur job growth. In contrast, and just as importantly, proposals to block all regulations will likely do little or nothing to promote jobs.

Response to Questions for the Record from Drew Greenblatt, President and Owner, Marlin Steel Wire Products, LLC

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on
The Obama Administration's Regulatory War on Jobs, the Economy and American's Global Competitiveness
February 28, 2013

Questions for the Record

Question from Subcommittee Member Hank Johnson for Mr. Greenblatt

Mr. Greenblatt, you stated in your testimony that you feel burdened to do business in the United States as a manufacturing company because of the taxes and over-regulation. You cite regulations to reduce air pollution as growth inhibitors.

1. Don't the total benefits of regulations in this area offset their costs? The Office of Management and Budget has found that the benefits exceed the costs of regulation as much as 16 to 1, while different EPA estimates have found even higher ratios of benefits to costs.

   (Responses in bold)

   My answer would be a question: how is OMB measuring the costs? By the amount of federal employee time and resources put into the effort, or by the amount of time my employees are putting into filling out forms? How are they quantifying the opportunity cost of thousands of businesses like mine whose employees are focusing on regulatory forms and agency communications instead of serving and finding customers?

   Two specific examples of mine don't involve environmental regulation per se, but I think are illustrative of the problem.

   - **Marlin Steel's success as a U.S. manufacturer relies on our ability to reach the 95 percent of consumers outside of our borders. But unnecessary paperwork burdens imposed on us by the federal government harm our productivity. For example, we spend three minutes filling out a form when we ship products to Canada or Mexico. But if we ship products to a non-NAFTA country, we spend 20 minutes filling out forms. The longer form does not seem necessary and only harms our productivity relative to foreign competitors looking to serve the same markets. We took a photograph of two Marlin Steel employees standing beside the cartons that held our files to respond to government regulations a few years ago. The stack was three feet taller than them -- and would be much higher today.**

- **My company also strives to be an exemplar on safety. We've gone more than four years without a lost time accident, more than 1,650 consecutive days, an impressive record. We've courted safety inspectors at both federal and state levels for guidance on making Marlin Steel the safest environment it can be. We've been working for more than a year to join the short list of companies in our state on the "SHARP" list that recognizes the safest of employers. Now I'm told the review process could take another 18 months at least, leaving me dismayed. I think there's a fallacy that "time spent" is a measure of quality or thoroughness of investigation. We're willing to fix very quickly anything wrong that we're made aware of. Why can't regulators respond in kind?**

2. How has your business declined because of environmental regulations?

   It's not simply the regulation; it's the execution of that regulation. The time my employees spend filling out government forms is time away from serving customers, or in coming up with new, innovative approaches to compete in a global marketplace.

   Regulations impede job creation. They focus us on the wrong things. The regulations never seem to sunset, only multiply. They force us to invest resources into unproductive tasks. Our smartest people become distracted with chores that add no benefit and make us less competitive. Our clients do not care how good we are at filling out forms. Our economic rivals aren't as encumbered. We're energized by the challenges of designing and building innovative solutions for the materials handling needs of our customers. We relish vying for jobs in a global economy. We don't fear our able competitors around the world. We shouldn't have to fear so much regulation and bureaucracy at home.

   To your specific question, my business, thankfully, has grown the past seven years, but who's to say it wouldn't have grown more and that I wouldn't have hired more unemployed steel workers had the business environment and the regulatory system been better?

3. Supporting our agencies in an effort to help them provide sound policies that help businesses grow and thrive in the midst of regulations that help protect our environment and the American public. However, with the looming threats and huge deficit that our government faces, how do you propose that we strengthen these agencies with further budget cuts coming down the pike?

   Perhaps government should take a lesson from manufacturing, which has remade itself over the past generation with greater use of technology to become much more efficient. Manufacturing was pushed to a new approach to survive when cheap labor abroad made it impossible to compete in the ways that were successful decades ago. As the costs of technology and computing have come down, manufacturers of all sizes are able to employ more automation, cloud-based solutions and software analysis to speed a job that used to require more people and was more dangerous.

Our nation will produce about a fifth of the world's manufactured products this year. That's pretty much as it has for 40 years, even though the percent of the U.S. workforce involved dropped from about 20 percent to 10 percent during that period. Technology propelled massive efficiencies on the assembly line. There must be ways to assess environmental impact – which is the true objective -- that are less paperwork intensive and more effective.

My company nearly folded a decade ago after Chinese competitors began dumping steel baskets into Manhattan cheaper than I could even buy the raw steel. We refocused our product line, invested $3.5 million in automation and are now making baskets 60 times faster than before and exporting to 36 countries, including China. We used to make 300 metal bends an hour by hand; now we're doing 20,000 bends an hour or more. Our cost per bend has dropped from 2 cents to 0.0015 cents. If we had keep using the approach that had worked fine between 1968 and 1998 – heavy manual labor, no automation – we would have perished.

Government doesn't have to worry about a developing nation offering a cheaper alternative, or benchmarking against the competition. There's not as much incentive to reinvent to survive or thrive. As for the argument that leaner, more technological approaches to government assessment would cost federal jobs, my response would be that's not government's essential purpose. I'm reminded of a story about a visitor to India who was touring a canal project. When he asked why workers were digging with shovels instead of heavier equipment available, he was informed that wouldn't create as many jobs. "Why don't you give them spoons then?" was his reply.

Government can't operate in a vacuum; the hundreds of unemployed steel workers who formerly worked down the road at Bethlehem Steel, and many thousands like them, certainly aren't operating in one. Like it or not, we're competing against countries that subsidize raw materials, treat their people and the environment poorly. I'm not in any way suggesting that I want such a system. On my trip to China to accompany the governor of Maryland a few years ago, the smog in Shanghai has disgusting. The Yangtze River is about as wide as the Inner Harbor in Baltimore, several hundred meters, but you couldn't see across it. I like the Chesapeake Bay. I want to eat the crabs from there. But I believe it's a fallacy to say we can only protect our environment with a system that's complex, time-consuming and opaque. There needs to be a much greater pursuit of more innovative solutions.

Response to Questions for the Record from Robert K. James, Member of the Avon Lake City Council

CITY OF AVON LAKE, OHIO

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COUNCIL OFFICE

July 1, 2013

VIA U.S. MAIL AND EMAIL (Ashley.Lewis@mail.house.gov)

U.S. House of Representatives Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Attn.: Ashley Lewis
517 Cannon House Office Building
Washington, D.C. 20515

Re: Additional Questions from Representative Hank Johnson

Dear Madam:

Please find below responses to the additional questions from Representative Hank Johnson relating to my February 28, 2013 testimony before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing entitled "The Obama Administration's Regulatory War on Jobs, the Economy and America's Global Competitiveness."

1. **Mr. James, you stated that EPA Mercury and Air Toxics Standards ("MATS") rule was the primary reason motivating the closure of Avon Lake. What were the potential environmental issues that were at play with Avon Lake?**

   GenOn Energy, Inc. ("GenOn") stated in its February 29, 2012 press release that the EPA Mercury and Air Toxics Standards ("MATS") rule was the primary reason motivating its decision to deactivate the Avon Lake Generating Station. As a representative of the City of Avon Lake, I am not in a position to comment on the specific environmental issues that influenced GenOn in reaching its decision. My information is based on what GenOn publicly stated. As such, GenOn, or its successor-in- interest, NRG Energy, Inc. is in a better position to

represent the specific environmental issues impacting the Avon Lake Generating Station.

2. **In terms of cost, how much would it cost to re-open Avon Lake facility?**

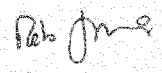
   As a representative of the City of Avon Lake, I have no information as to the cost of re-opening the Avon Lake Generating Station.

3. **Do you foresee the community coming together to help re-open the Avon Lake facility since it seems to provide such a huge community benefit?**

   Since its inception in 1926, the Avon Lake Generating Station has been a significant part of the community. As a privately-owned facility, the City of Avon Lake cannot directly re-open the Avon Lake Generating Station. However, I am certain that regardless of whether the Avon Lake Generating Station closes or remains open, the Avon Lake community – including City Council, the Mayor, NRG Energy, residents, and other stakeholders, such the Avon Lake School Board – will work hard to maximize jobs, appropriate taxes and support to the community for many years to come.

Thank you for the opportunity to answer these additional questions regarding the impact of the closure of the NRG Energy facility on the Avon Lake community. Should you have further questions or require additional information from me, please do not hesitate to let me know by contacting me at the above address or telephone number, or by email at rjames@avonlake.org.

Sincerely yours,



Rob James
Avon Lake City Council for Ward I

Response to Questions for the Record from Douglas Holtz-Eakin, President, American Action Forum

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on
The Obama Administration's Regulatory War on Jobs, the Economy and American's Global Competitiveness
February 28, 2013

Questions for the Record

Question from Subcommittee Member Hank Johnson for Dr. Holtz-Eakin

1. Mr. Holtz-Eakin, you testified that 711 million new hours of paperwork has been generated in the last two fiscal years alone because of Dodd-Frank and Affordable Care Act rules to implement in 2013. Did you also calculate the amount of hours it is taking this country to climb out of the fiscal mess that was created by the de-regulation of the financial industry that took place during the past 10 years?

Thank you for the interest in the roots of the financial crisis of 2008. As Congressman Johnson may know, I served as a member of the congressionally-chartered Financial Crisis Inquiry Committee, whose mandate was to investigate the causes of the crisis. While those years of study did not yield precisely the same calculation, it did provide a vivid portrait of the efforts made to repair the damage. For a full report, please see http://fcic.law.stanford.edu.

2. You use the United Kingdom as a model for adoption of an aggressive regulatory reform system that contains operating a 'one in, two out' rule for business regulation. I'd like to hear your opinion on how this model will grapple the horsemeat scandal currently facing British lawmakers. How will they add a regulation to prevent horsemeat in consumers' beef while removing two other regulations for business reform?

Representative Johnson, there are some legal hurdles to adopting the United Kingdom's regulatory reform model in the U.S., but under their system, there are no impediments to adopting new horsemeat regulations. Under a one-in, out-out approach, new regulations from international agreements are exempt. Thus, if the EU takes a comprehensive regulatory approach to this scandal, the United Kingdom's system will not prevent new regulation.

In addition, fines and penalties are exempt under the one-in, one-out system, allowing punitive action against those involved.

Response to Questions for the Record from William L. Kovacs, Senior Vice President, Environment, Technology & Regulatory Affairs, U.S. Chamber of Commerce

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on
The Obama Administration's Regulatory War on Jobs, the Economy and American's Global Competitiveness
February 28, 2013

Questions for the Record

Question from Subcommittee Member Hank Johnson for Mr. Kovacs

Mr. Kovacs, in your submitted testimony you cite the Crain study from 2010 in support of the proposition that federal regulations cost an estimated 1.82 trillion in 2011. As I am sure you are aware, this study has been thoroughly debunked as a non-credible account of costs of the regulation in this country. For instance, a nonpartisan study by the Congressional Research Service applied a regression analysis with similar data that found that the Crain data did not support the effect that its report claimed. Other studies also found serious errors in the Crain report.

1. ***How is the Crain report still defensible in light of these findings?***

The 2010 Crain and Crain study is the only comprehensive estimate of the total cost of regulations on the U.S. economy. The report uses data gathered from numerous sources, including the Office of Management and Budget (OMB), the Council of Economic Advisors (CEA), the Census Bureau, the Organization for Economic Cooperation and Development (OECD), and various resource organizations. It is important to note that the 2010 Crain and Crain report and the 2005 Crain report both conform to OMB's Information Quality Guidelines. Accordingly, both the 2010 and 2005 studies were peer-reviewed by external experts in the field of regulatory analysis.[1]

The Crain and Crain study on regulatory costs utilizes multiple sources of data to establish the estimate of total economy-wide regulatory impacts, and some have recently questioned the basis for the total estimate. The primary criticism of the study's estimate is its use of a World Bank Regulatory Quality Index to measure certain U.S. economic regulatory impacts. One of the World Bank Index's authors has noted that the index was not designed to be applied the way the Crain study did (i.e., as a variable in an analysis, not as a stand-alone measure). Moreover, simplified attempts to replicate the Crain analysis, including the non-peer-reviewed Congressional Research Service (CRS) study you mention, left out all of the additional control data that the Crain study used. Critics of the study have used the CRS findings to make claims that the Crain study was "de-bunked," but this is false. The index methodology in the Crain study which CRS criticized

[1] Peer review was performed under the Office of Management and Budget's directive for peer review, available at http://whitehouse.gov/omb/fedreg/2005/011405_peer.pdf.

was previously used by the Clinton Administration's OMB in its 2000 Report to Congress on the Costs and Benefits of Regulations. Additionally, while the Crain study's authors made all of the data and variables they relied on fully available to CRS, the CRS study authors have refused to disclose the specific data and variables that they used. If the CRS study is to be taken at all seriously, its authors must agree to share the data and variables they used. The U.S. Chamber publicly calls on CRS to release this information so that we can advance the overall effort conduct the best possible estimate of the cumulative cost of regulation.

The bottom line is that the 2010 Crain and Crain study and its 2005 and 2001 predecessor studies remain the only comprehensive inquiry into the total cost of federal regulations on the economy. Many of the study's critics seem to be hostile to any attempt to highlight and question the overall costs of regulation, and the impacts those costs have on the competitiveness of American industry. Yet these same critics are unwilling to allow their peers to review the variables and assumptions used to criticize the Crain and Crain study.

2. ***Does the Crain report assess the value of regulations in its calculation of their impact?***

The Crain study does not make any attempt to estimate the benefits of regulation, and is very up front in discussion of the rationale for this. During the development of new regulations it is both desirable and necessary that costs and benefits be considered together in order to determine what the "best" level of regulatory control should be. The Crain study, however, was not intended to suggest changes in the level of regulation. It is designed to highlight the impacts of cumulative regulatory costs on industry. The cost-benefit analysis of new regulations promulgated by regulatory agencies never addresses the question of cumulative regulatory costs. During the typical Executive Order 12866 analysis of even major, high profile regulations, the costs and benefits of the rule are considered as if no other regulations have been imposed on the industry in question. In reality it is usually the case that the rule under consideration is only one part of a larger suite of rules imposed on that industry over a number of years. We know that the ability of American industries to compete in a global marketplace is dependent upon their total cost structure, not merely the most recent cost, analyzed against contingent benefits as if no previous or future regulatory costs on the industry exist. The value of the Crain study is in giving us a glimpse of the total cumulative costs they must deal with. This is particularly true because EPA, despite a statutory obligation to evaluate, on a continuing basis, the cumulative impact of the Clean Air Act on job losses and shifts in employment, has failed to conduct even a single study.[2] Until EPA decides to start doing section 321 studies of cumulative impacts, the Crain study is the only available tool we have for addressing this question.

[2] *See* section 321(a) of the Clean Air Act, 42 U.S.C. § 7621(a).

3. ***The pollution in Beijing, which is due largely to unregulated burning of coal in power plants and homes, is so harmful because the particulates are small enough to enter the bloodstream and damage lung tissue. Isn't this an area where regulation, though its immediate economic value is indeterminable, is nevertheless a high value?***

   Yes. As U.S. Chamber President and CEO Tom Donahue noted in October 2010, "business has long recognized the need for sensible regulations to ensure workplace safety, guarantee worker rights, and protect public health. . . . A nation without regulations would be like a busy city street without traffic lights–unsafe and in utter chaos." I absolutely agree that regulations are an indispensible part of our modern society. We know that regulations have made the U.S. cleaner, healthier, and safer.

   But we also know that regulations are not free. We want to have a better understanding of who actually pays the cost of regulation, and what the unintended effects of regulations are. The NERA study we sponsored suggests that the true cost of regulations may be borne by workers who are displaced by overregulation and by the communities where they live.

4. ***In response to the pollution in Beijing, Japan issued guidelines this week to its citizens to stay indoors to avoid toxic smog that wafts across the ocean and affecting the local population. Isn't this an example of how under-regulation harms global competitiveness if it alienates neighbors and undermines international trade?***

   As you probably know, China, like other countries, has excellent environmental rules intended to protect the health and welfare of its citizens. These rules are not rigorously enforced, however, which leads to the air quality problems you describe. We are not aware that international trade with China, including U.S. consumers purchasing goods made in China, has been affected in any way because of poor air quality in Beijing.

Response to Questions for the Record from Robert Weissman, President, Public Citizen

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on
The Obama Administration's Regulatory War on Jobs, the Economy and American's Global Competitiveness
February 28, 2013

Questions for the Record

Question from Subcommittee Ranking Member Steve Cohen for Mr. Weissman

1. In your view, does the current rulemaking process already provide sufficient opportunities for transparency and public participation in agency decisionmaking? Does industry already have significant, and perhaps too much, influence on agency decisionmaking as it stands?

For the public, the greatest problem with transparency around the rulemaking process is the role of the Office of Information and Regulatory Analysis (OIRA). OIRA plays a substantial role in delaying and weakening public protections, but often through communications and actions that are not transparent to the public.

In contrast to the public, industry is intimately involved in every phase of the rulemaking process, often in ways that interfere with agencies carrying out their statutory missions. Problems include the resource imbalance between industry and public interest organizations (and often between industry and regulatory agencies); the special review of rules for impact on small business, which often serves as a mechanism to delay or weaken rules of broad applicability; and imbalanced access to judicial review. As regards this latter point, courts often hold that affected individuals do not have standing to challenge rules or the failure to issue rules; regulated businesses almost always are granted standing.

2. Of the various proposals that you outline in your written testimony for improving the federal regulatory system, which one should be the most urgent priority for Congress?

At the time of the testimony, the most pressing issue was unreasonable delay in issuing new rules. Problems remain in this area, but there has been improvement under the new OIRA Administrator Howard Shelanski. At this point, I would rate addressing the problem of judicial overreach as the most urgent. All of the proposals are important, and complementary.

3. The Majority argues that regulations are a significant factor in inhibiting job creation.

What, in fact, is the biggest reason for unemployment?

The main cause of serious unemployment remains the mortgage implosion and the financial crisis -- direct results of inadequate regulation and enforcement.

Some regulatory critics acknowledge that the financial crisis caused the unemployment crisis, but argue that the prospect of regulation creates uncertainty that is inhibiting investment. There is no evidence to support this claim. It also suffers from a logical fallacy: uncertainty comes not from the issuance of new rules, but the uncertainty about whether rules will be issued. Proposals or practices to delay or freeze regulations create the very uncertainty that regulatory critics bemoan.

The primary explanation of why unemployment remains so high is insufficient economic demand. Expanded stimulus spending would be the best, fastest way to reduce unemployment.

4. In the last Congress, a measure was considered that would have imposed a moratorium on the issuance of certain major regulations until the unemployment rate dropped to a specified level.

How could such a moratorium harm economic growth?

Recognizing the regulatory failure underpinning the current jobs crisis suggests not only that a regulatory freeze would not contribute to or enable job growth, but that it would risk imperiling our economy. An unregulated or under-regulated Wall Street will strongly tend to another crash, presenting the prospect of another major recession. The Dodd-Frank Wall Street Reform and Consumer Protection Act, to be sure, was an inadequate response to the crash -- most notably in its failure to more aggressively confront the problem of too-big-to-fail financial institutions -- but blocking implementation of Dodd-Frank or adoption of other financial regulations would be an invitation for the financial sector to engineer more mass rip-offs of consumers and make our economy more vulnerable to another job-devastating crash.

5. Mr. Holtz-Eakin argues that cost-benefit analysis mandates should apply to independent regulatory agencies.

What are your thoughts about this proposal?

Why do you suppose Congress has not previously sought to make independent regulatory agencies subject to mandatory cost-benefit analysis?

Subjecting independent regulatory agencies to cost-benefit requirements is a bad idea, and would undermine their ability to protect people's lives and well-being. Independent regulatory agencies are quite different from one another – in structure, in statutory authority, and in the requirements they must meet to regulate. Overriding Congress' direction to each agency and requiring instead a preeminent focus on economic impact would be bad policy. This is because cost-benefit analysis fails when benefits and costs cannot be properly quantified.

Any requirement for cost-benefit analysis across all independent regulatory agencies would limit their ability to protect Americans from nuclear meltdowns, keep lead paint off children's toys, and stand guard against another mortgage fiasco. For example, the Federal Aviation Administration (FAA) is an executive agency that works to protect the flying public. Since it has been so successful doing so, there have been relatively few plane accidents over the past decade. That very success has made it more difficult for the agency to keep its rules current because under the blanket cost-benefit analysis requirement, there has not been enough loss of life to justify safety improvements. In the financial area, to take two problems with a cost-benefit mandate, there are problems in quantifying key objectives that are non-monetary (e.g., advancing shareholder rights), and in addressing rules that aim to diminish the likelihood of catastrophic events.

Congress has created the independent agencies to advance specific objectives that it has identified. It should not lose sight of that through the imposition of an overriding cost-benefit mandate.

6. Do you think it is useful for Congress to look at how other industrialized countries manage their regulatory systems, as Mr. Holtz-Eakin does in his testimony? What might be some of the drawbacks of such an approach?

Cross-cultural policy comparisons are, generally, useful, and can helpfully illustrate policy options that may not otherwise be apparent.

It would, however, be a bad idea to look at other countries to figure out ways to provide *less* protection to the American public, as Mr. Holtz-Eakin suggests. A global competition to reduce regulation will not lead to increased economic output, but it will lead to increased harm to the public.

Given the uneven state of the U.S. regulatory system and the regulatory problems highlighted in my testimony, it may be interesting to examine other industrialized countries' regulatory processes as regards, among other issues: chemical regulation; food safety; how to act in the face of scientific uncertainty; competition policy; privacy protections.

7. Should Congress enact a uniform retrospective review requirement for all federal agencies? What are some of the potential drawbacks and benefits of doing so? If Congress considers passing such a requirement, what form should it take?

Congress should not enact a system for uniform retrospective review of all federal agencies. The main problem is allocation of resources at agencies that are, by and large, underfunded and unable to manage their forward-looking regulatory responsibilities. There is no evidence that formal retrospective reviews -- beyond the normal monitoring that agencies undertake in an ongoing way -- has delivered material benefits of consequence.

If retrospective review is to be undertaken, it should focus on the areas of regulatory failure. For example, a retrospective review of chemical policy should ask whether the Toxic Control Substances Act system is working, in light of the paltry number of chemicals for which standards have been issued. Another example: the near-inability of the Occupational Safety and Health Administration (OSHA) to issue new rules. The paucity of OSHA rules in recent decades contrasts strongly with the agency's performance at its creation. It would be a useful restrospective exercise to examine these different experiences.

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