REGULATORY FREEZE FOR JOBS ACT OF 2012

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

ON

H.R. 4078

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FEBRUARY 27, 2012

REGULATORY FREEZE FOR JOBS ACT OF 2012

MONDAY, FEBRUARY 27, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 4 p.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Cohen, Conyers, and Johnson.

Staff Present: (Majority) John Hilton, Counsel; John Mautz, Counsel; Ashley Lewis, Clerk; (Minority) James Park, Subcommittee Chief Counsel; and Rosalind Jackson, Professional Staff Member.

Mr. COBLE. Good afternoon. We will come to order. I have my opening statement, I recognize the gentleman from Michigan, and Mr. Cohen is on his way here, I am told. It has been said that there are three types of lies; lies, damn lies, and statistics. All three species abound in Washington—perhaps they abound everywhere. Last month, the Department of Labor reported the national unemployment rate as 8.3 percent. It is certainly better than 10 percent unemployment Labor reported in October, but a far cry from where we would like for it to be. And by the way, folks, you all pardon my raspy voice. I am trying to come down with my annual winter cold, so I will make it as inoffensive as possible.

In reality, many millions of able-bodied Americans are still out of work, as bills pile up and hopes dwindle, the only statistic that matters to them and their families is that they are unemployed. We who voted against President Obama's so-called stimulus plan know that Washington really cannot create jobs, and the Federal Government certainly can destroy jobs. But what I found out is that people just will oftentimes just want Washington to get out of the way. A recent Gallup poll, for example, found out that almost half of small business owners who aren't hiring, are not looking for new employees because they are worried about new government regulations, and no wonder.

With ObamaCare and Dodd-Frank on top of everything else, the red tape has been flying fast and furious lately in Washington. While the Bush administration issued an average of 63 major regulations every year, the Obama administration has issued an average of 88 regulations annually. The number of economically significant regulations also has increased. Under President Bush, the Office of Information and Regulatory Affairs, reported reviewing an average of 77 economically significant regulations biannually. OIRA's biannual average under President Obama, however, is 125.

The Heritage Foundation, conservatively estimates that President Bush added approximately 60 billion in annual regulatory costs over 80 years, but that in his first 26 months alone, President Obama added another 40 billion in annual regulatory costs. To give job creators some breathing room, Mr. Griffin, in his bill, has introduced the Regulatory Freeze for Jobs Act of 2012. Chairman Smith and I, along with several on the Subcommittee, and the full Committee, are original cosponsors of the Freeze Act, which would put a moratorium on new significant regs until the national unemployment rate stabilizes at or below 6 percent.

The Freeze Act uses concepts and definitions that are well established in administrative law. For example, it defines significant regulatory action consistent with President Clinton's long-standing executive order, 12866, but with one important difference or exception: The bill only freezes economically significant regulations that would cost the economy $100 million or more, while executive order 12866 speaks to effects on the economy of 100 million or more. If the President's common sense and the law of economics notwithstanding create jobs through regulation, then the Freeze Act won't stop them from doing so; nor would the Freeze Act permit the President from making necessary regulations such as for national security and public safety and health.

What the Freeze Act will do is to give job creators a respite from unnecessary regulations until the unemployment rate gets back down to 6 percent, which we haven't seen in 3½ years, since the lame-duck days of the last Administration. The regulatory agency should lay off the red tape.

In closing, I want to thank Mr. Griffin for sponsoring this important bill. The Freeze Act would give the economy a much needed boost and it deserve the Subcommittee's attention. I look forward to the witness' testimony, and reserve the balance of my time.

[The bill, H.R. 4078, follows:]

I

112TH CONGRESS
2D SESSION

H. R. 4078

To provide that no agency may take any significant regulatory action until the unemployment rate is equal to or less than 6.0 percent.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 17, 2012

Mr. GRIFFIN of Arkansas (for himself, Mr. SMITH of Texas, Mr. COBLE, Mr. GALLEGLY, Mr. CHABOT, Mr. FRANKS of Arizona, Mr. POE of Texas, Mr. CHAFFETZ, Mr. MARINO, Mr. GOWDY, Mr. ROSS of Florida, Mrs. ADAMS, Mr. QUAYLE, Mr. AMODEI, and Mr. CARTER) introduced the following bill; which was referred to the Committee on Oversight and Government Reform, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To provide that no agency may take any significant regulatory action until the unemployment rate is equal to or less than 6.0 percent.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Freeze for Jobs Act of 2012".

SEC. 2. DEFINITIONS.

In this Act—

(1) the terms "agency" and "rule" have the meanings given such terms under section 551 of title 5, United States Code;

(2) the term "regulatory action" means any substantive action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking, but not including any substantive action by an agency for repealing a rule;

(3) the term "significant regulatory action" means any regulatory action that is likely to result in a rule or guidance that may—

(A) have an annual cost to the economy of $100,000,000 or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, small entities, or State, local, or tribal governments or communities;

(B) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(C) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(D) raise novel legal or policy issues; and

(4) the term "small entities" has the meaning given such term under section 601(6) of title 5, United States Code.

SEC. 3. SIGNIFICANT REGULATORY ACTIONS.

(a) IN GENERAL.—No agency may take any significant regulatory action, until the Bureau of Labor Statistics average of monthly unemployment rates for any quarter beginning after the date of enactment of this Act is equal to or less than 6.0 percent.

(b) DETERMINATION.—The Secretary of Labor shall submit a report to the Director of the Office of Management and Budget whenever the Secretary determines that the Bureau of Labor Statistics average of monthly unemployment rates for any quarter beginning after the date of enactment of this Act is equal to or less than 6.0 percent.

SEC. 4. WAIVERS.

(a) IN GENERAL.—Notwithstanding any other provision of this Act, an agency may take a significant regulatory action if the President makes a determination under subsection (b) and submits written notice of such determination to the Congress.

(b) DETERMINATION BY THE PRESIDENT.—Subsection (a) applies to a determination made by the President by Executive order that an agency should take the significant regulatory action because such significant regulatory action is—

(1) necessary because of an imminent threat to health or safety or other emergency;

(2) necessary for the enforcement of criminal laws;

(3) necessary for the national security of the United States; or

(4) issued pursuant to any statute implementing an international trade agreement.

SEC. 5. JUDICIAL REVIEW.

(a) DEFINITION.—In this section, the term "small business" means any business, including an unincorporated business or a sole proprietorship, that employs not more than 500 employees or that has a net worth of less than $7,000,000 on the date a civil action arising under this Act is filed.

(b) REVIEW.—Any person who is adversely affected or aggrieved by any significant regulatory action in violation of this Act is entitled to judicial review in accordance with chapter 7 of title 5, United States Code. Any determination by the President under this Act shall be subject to judicial review under such chapter.

(c) JURISDICTION.—Each court having jurisdiction to review any significant regulatory action for compliance with any other provision of law shall have jurisdiction to review all claims under this Act.

(d) RELIEF.—In granting any relief in any civil action under this section, the court shall order the agency to take corrective action consistent with this Act and chapter 7 of title 5, United States Code, including remanding the significant regulatory action to the agency and enjoining the application or enforcement of that significant regulatory action, unless the court finds by a preponderance of the evidence that application or enforcement is required to protect against an imminent and serious threat to the national security of the United States.

(e) REASONABLE ATTORNEY'S FEES FOR SMALL BUSINESSES.—The court shall award reasonable attorney's fees and costs to a substantially prevailing small business in any civil action arising under this Act. A party qualifies as substantially prevailing even without obtaining a final judgment in its favor if the agency that took the significant regulatory action changes its position after the civil action is filed.

(f) LIMITATION ON COMMENCING CIVIL ACTION.—A person may seek and obtain judicial review during the 1-year period beginning on the date of the challenged agency action or within 90 days after an enforcement action or notice thereof, except that where another provision of law requires that a civil action be commenced before the expiration of that 1-year period, such lesser period shall apply.

○

Mr. COBLE. It is good to see the gentleman, my good friend from the banks of the Mississippi, Steve Cohen, Ranking Member.

Mr. COHEN. Thank you, and it is good to be seen and I would like to yield my time at first, if I can, to the distinguished Chairman from the State of Michigan, Mr. Conyers.

Mr. CONYERS. Thank you very much.

Mr. COBLE. Mr. Conyers, are you headed for the floor as well?

Mr. CONYERS. I was, but they tell me that our measure isn't coming up today.

Mr. COBLE. Okay.

Mr. CONYERS. But I would like to go in front of the Ranking Subcommittee Member anyway.

Mr. COBLE. All right, very well.

Mr. CONYERS. Thank you very much. We welcome our distinguished guests here from the Hoover Institute, well, both from the Hoover Institute. This is the ninth hearing on the subject so-called regulatory reform, and nearly all of these hearings there is always some discussion about how regulations depress job creation. And I am going to defer to the head of public citizens to help us examine that, but I invite our two other distinguished witnesses to join in in this evaluation. What the measure does is attempt to link regulations with employment by preventing agencies from engaging in regulatory actions if the average monthly unemployment rate exceeds 6 percent in any quarter.

This is legislatively unwise because the measure fails to acknowledge the fact that regulations play a critical role in ensuring the health and safety of Americans as well as through the economic well-being of our Nation. So what we would do is prevent agencies under this proposal from fulfilling the job that we in Congress entrusted them to do; namely, to ensure the safety of the foods we eat, the cars we drive, and the places where we work.

Cass Sunstein who heads the agency charged with reviewing Federal regulations recently said this: A moratorium would not be a scalpel or a machete, it would be more like a nuclear bomb in the sense that it would prevent regulations that cost very little, and have very significant economic or public health benefits.

And so I think unwittingly, the sponsors of this measure could not possibly be intending to deliberately jeopardize the health and safety of Americans in order to pursue their anti-regulatory political agenda, but I am afraid that that is exactly what would be the effect were this measure taken seriously and enacted into law.

Finally, there isn't any credible evidence that regulations have any substantive impact on job creation. Last year, one of the conservatives' own witness testified before this Subcommittee that "the focus on jobs can lead to confusion and regulatory debates." And that, quoting again, "the employment effects of regulation while important, are indeterminate."

And so I approach this hearing with the hope that we will recognize that our statements are going into the record as a permanent part of the Judiciary Committee's responsibility, and I urge you to be as careful as you can in giving us your well thought out observations and convictions from the Hoover Institution. And with that, Mr. Chairman, I yield back the balance of my time, and thank you.

Mr. COBLE. Thank you, gentleman from Michigan.

I am now pleased to recognize the Ranking Member of the Subcommittee, the distinguished gentleman from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Coble. This bill, the Regulatory Freeze for the Jobs Act is an instrument that creates a mistaken cure for a problem that doesn't exist. There is no ascertainable link between regulations and unemployment. There is anecdotal evidence, there is political jargon, but there is no empirical proof data that regulations affect unemployment, and to not have regulations until unemployment hits 6 percent is absolutely nonsensical. There is no reason for that. And the bill, even if it gives exemptions for the President to do certain things, gives judicial review over that process and it takes away from the Administration, and what the Constitution gives the executive otherwise.

It also awards attorney's fees and costs to small businesses whenever an agency changes its position regarding a significant regulatory action, the subject of a lawsuit, independent of whether or not the change was because of filing the lawsuit; ipso facto, no correlation. It is premised on false assertions that regulations undermine job creation. And as I said, there is no evidence; all of it is anecdotal.

One of the majority's own witnesses from a hearing last year testified that, at most, the effect of regulations on employment was indeterminate. Based on a review of their written statements, the two witnesses also did not offer evidence of an actual link, but an unemployment and regulation. They hang their arguments on unsupported notions that the creation of new rules creates uncertainty that causes businesses to hesitate in hiring. Yet surveys of business and economists show regulations have little to do with lack of hiring. It is basically the lack of demand, the destruction of the middle class, which has been done over and over through laws and policies, advocated by the majority of this House of Representatives. But it has hurt us, by being more austere rather than more robust in our economic policy, we have set the middle class back. And that has been a serious flaw.

The Wall Street Journal surveyed business economists last summer and found the main reason U.S. Companies are reluctant to step up is scant demand, not uncertainty. National Federation of Independent Business, 45 percent said, dampening business confidence is why they are not getting sales. Only 10 percent cited regulations. Proponents of this particular provision and other anti-regulatory measures forget that our unemployment problems can be traced right back to lack of regulation in the financial services industries, and the housing industry. And in this failure created the 2008 great recession, also known as the Bush recession.

There are far greater economic costs to stopping agencies from regulating, than there is allowing new regulations to take effect. It raises many questions this particular bill, when does the 6 percent go into effect if it drops? But it is not worth going into all of those things because this bill is so bad on its face that going into the particulars of what would and if happen on such a poor-drawn bill is not worthy of the time of this Committee.

There are issues that should be addressed as far as regulations. In my home city there is a regulation that says that you can't get your car inspected if you have a light that goes on that says that your engine needs to be checked. That may or may not relate to emissions. There should be a better way to test emissions than a light that your manufacturer puts on that basically says, do not pass the driver's license station; go directly to your mechanic, and put your hands up, and surrender. That is a regulation that could stop and I am going to work on that.

There are regulations in my city concerning football stadiums, the number of seats that you have to have for people with disabilities. I may be one of those people that needs one of those seats with a disability sometime in the future, but right now, we don't have enough people to attend the games to merit the number of seats that they are requiring us to have, which could cost us a prohibitive amount of money, and maybe hamper the improved stadium that could get us an approved team and get some people with disabilities the interest to go into the games. The reality is, our team has been atrocious, and the average is about 8,000 people a game, and the people with disabilities have got better things to do because only 13 of them show up at an average game. But because of regulations, the Department of Justice wants us to create 250 seats and create all of these stands for the nonexistent fans that come and watch a terrible team that has many disabilities, which we hope will be cured with our new coach.

Nevertheless, there are changes that can be made to some regulations. In EPA, it cost a lot of people a lot of money to get their light fixed who can't afford it, and that is something where there should be a waiver. In the football stadium, that makes no sense. For some reason, the University of Michigan got whatever they wanted. They had to have the same number of seats for people with disabilities as the University of Memphis has. Yet there is no comparison. One place averages 120,000 people; one averages 8,000. We have the same number of seats for the stadiums.

Well, I don't know, who went to Michigan? I don't know. Maybe somebody went to Michigan who cares about Michigan, but that is wrong. Regardless, I thank the gentleman for his opportunity, and he knows because East Carolina, his alma mater, also makes our team look awful and destroys us on the football field. I yield back the balance of my time.

Mr. COBLE. I didn't realize that you all were that inept. Steve, I will not provide you with that.

Mr. COHEN. Obviously, you have not watched us play enough.

Mr. COBLE. Thank you, Steve, I appreciate that. Gentlemen, it is good to have you all with us. Professor Meltzer, is a distinguished visiting fellow at the Hoover Institute and professor of political economy at the Temple School of Business at Carnegie Mellon University. Professor Meltzer has served as a consultant on economic policy for Congress, U.S. Treasury, the Federal Reserve, the World Bank, and foreign governments, and chaired as well the International Financial Institution Advisory Commission.

Professor Meltzer's writings have appeared in numerous journals. He is the author of numerous papers on economic theory and policy and of several books, including the newly released, Why Capitalism? Professor Meltzer earned his AB and MA from Duke University, and his Ph.D. From UCLA. Thank you, Professor, for coming to testify before the Subcommittee today.

Professor Taylor, John B. Taylor, is a George P. Shultz Senior Fellow in economics at the Hoover Institute, and professor of economics at Stanford University. He was director of the Stanford Institute for Economic Policy and Research, and founder—founding director of Stanford's introductory Economic Center. Professor Taylor has the distinguished record of public service.

Among other roles, he served as a member of the President's Council on Economic Advisors from 1989 to 1991, and Under Secretary of the Treasury for International Affairs from 2001 to 2005. He currently is a member of the California Governor's Council of Economic Advisors. Professor Taylor received a BA in economics, summa cum laude from Princeton University, and a Ph.D. In economics from Stanford University. In recognition of his many achievements, in 2010, he received the prestigious Bradley Prize. We look forward to your testimony as well, Professor Taylor. Good to have you with us.

Our final witness, Mr. Robert Weissman, as President of Public Citizens, Mr. Weissman works in the areas of economics, health care, trade, and globalization, intellectual property, and regulatory policy, and on issues related 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 is published—and has been published and quoted in many newspapers. He earned his JD degree, magna cum laude, from Harvard School of Law and has led Public Citizens since 2009. Previously, he was director of the nonprofit organization, Central Action, and edited the magazine, Multinational Monitor, which tracks the activities of multinational corporations, and reports on the global economy. Thank you as well, Mr. Weissman, for being with us today.

So welcome to all three of you. There is a timer on your desk that will reflect the green light. The green light will turn to amber, and when the amber light appears, the ice on which you are skating is getting thinner. We would like you all to close down on or about 5 minutes if you could. And then the red light will appear that will indicate that the final time has been exhausted.

Mr. Meltzer, why don't you start us off? You all can see that timer, can you not? Mr. Meltzer, you will be our lead witness.

TESTIMONY OF ALLAN H. MELTZER, CARNEGIE MELLON UNIVERSITY AND HOOVER INSTITUTION

Mr. MELTZER. Yes, sir. Thank you, Mr. Chairman, I support the proposed regulatory freeze—I support the proposed Regulatory Freeze for Jobs Act of 2012. It restricts new regulation during the current recession until the unemployment rate falls to 6 percent of the labor force. This is not an anti-regulation bill; it is a priority-setting bill. The proposed legislation includes safeguards that permit the restriction to be set aside for reasons of national security, public safety, or for some other purposes.

I have urged repeatedly that Congress limit new, costly regulation in the interest of increasing the speed and size of the economic recovery. The proposed legislation does not oppose regulation. As the short title suggests, its recovery and reduced unemployment are set as priorities, badly needed priorities. We all recognize that unemployment rates remain high, growth and investment slow. Forecasters expected slow growth to continue. One main reason is that investors and producers are uncertain about regulation and taxation.

Current and prospective regulation make estimates of future returns hard highly uncertain. Who can predict with acceptable confidence what new or pending regulation will do to future costs for energy, healthcare, finance, labor, or what they will do to productivity.

I have taught in the business school for 50 years. We teach the students in the business school to estimate what the future rate of return is going to be. They can't do that in the current conditions of uncertainty with any accuracy. That is why regulation is costly.

That is a recent survey by Michael Porter and Jan Rivkin of the Harvard Business School, asked thousands of HBS alumni about impediments to investment and job creation in the United States. The responses cited the U.S. Tax Code, the regulatory burden and uncertainty, as well as the absence of job skills among the unemployed.

Unless changes are made to reduce these costs and burdens, the alumni expect the job-creating investment to decline over the near future. During the period where new regulations would be restricted, Congress can and should improve regulatory processes and administration. Mr. Cohen, I agree with you that much regulation is well intentioned, but wrong headed. Much current regulation is ineffective and doesn't accomplish the ends that the regulation is intending to achieve. Capture is one reason. The regulated become the regulators, or the regulators have one eye focused on a career change to work for the firms or industries that they regulate.

The Securities and Exchange Commission is often cited as an example. We know that the SEC did nothing to stop Bernard Madoff's Ponzi scheme, despite several administrations—demonstrations by a financial professional directly warning the SEC of Madoff's claims could not be true.

Examples of regulatory capture are common in the academic and policy literature. The claims are supported in practice. Steve Linnick, Inspector General of the Federal Housing Agency, issued a report stating that Fannie Mae knew about extensive foreclosure abuses by its outside law firms in 2003, 4 years before the crisis started. Regulators did not stop the bad practices when they could have prevented some of the costly failures that followed. Regulation failed in that case, as in many others.

Banks are regulated by several agencies. Prior to the housing and financial crisis that started in 2007, the Federal Reserve had hundreds of regulators working inside the largest banks in New York and Charlotte. They examined the loans made during these periods. They did not prevent any bad loans. Regulation failed.

Prior to the crisis, an agreement by all principal developed countries required commercial banks that lend on mortgages to increase their capital if they increase their mortgage loans. The banks circumvented the regulation by setting up subsidiaries to hold the mortgages. Instead of more capital per dollar of mortgages, there was less.

Regulators did not object. Regulation failed. I am not opposed to all regulation. I repeat, not opposed to all regulation. Congress should work to develop effective regulation. My third principle of regulation will guide you to a more effective regulation. That principle says that regulation is effective if it changes the incentives of the regulated entity.

In closing, I would like to repeat that I support the bill. But I urge you to be concerned about the broader consequences of the large increase that has taken place in regulation. Much of the regulation we have replaces the rule of law, with the rule by regulators. The rule of law, has been a pillar of successful capitalist development here and elsewhere. Increased regulation erodes the rule of law, and invites corruption. Under the rule of law, all citizens and companies are treated alike, or nearly alike as possible. Under rule by regulators, this is no longer so. Some gain advantages over others, distorting resource allocation and making us poorer.

[The prepared statement of Mr. Meltzer follows:]

Testimony 2/27/2012 on Temporary Restrictions on New Regulation

House Committee on the Judiciary, 2141 Rayburn HOB

Allan H. Meltzer

I support the proposed Regulatory Freeze for Jobs Act of 2012 that restricts new regulation during the current recession until the unemployment rate falls to 6 percent of the labor force. The proposed legislation includes safeguards that permit the restriction to be set aside for reasons of national security, public safety, or for some other purposes. Some of the listed restrictions, such as public health and the environment can be abused to vitiate the act's purpose.

I have urged repeatedly that Congress limit new, costly regulation in the interests of increasing the speed and size of the economic recovery. The proposed legislation does not oppose regulation: As the short title suggests it sets recovery and reduced unemployment as priorities.

We all recognize that unemployment rates remain high, growth and investment slow. Forecasters expect slow growth to continue. One main reason is that investors and producers are uncertain about regulation and taxation. Investment and growth depend on estimates of the returns or earnings anticipated in future years. Current and prospective regulations make estimates of future returns highly uncertain. Who can predict with acceptable confidence what new or pending regulation will do to future costs for energy, healthcare, finance, and labor? Without confidence in estimates of predicted costs, returns to investment cannot be estimated adequately. Uncertainty increases. We all know that increased uncertainty restrains recovery.

Investors in capital equipment, in housing and other assets have responded to regulatory uncertainty in two main ways. They hold cash assets and wait for greater clarity, and they invest abroad in places where future costs are less uncertain. Cash assets are at record highs. A major reduction in regulation would release some of the cash hoards by reducing uncertainty about future costs and returns to investment. Reducing uncertainty acts as a stimulus.

A recent survey by Michael Porter and Jan Rivkin of the Harvard Business School asked thousands of HBS alumni about impediments to investment and job creation in the United States. The responses cited the U.S. tax code, regulatory burden and uncertainty, as well as the absence of job skills among the unemployed. Unless changes are made to reduce these costs and burdens, the alumni expected job-creating investment to decline over the near future.

The proposed legislation does not take a stand on the desirability of proposed regulations. It is about timing and priorities. It shifts policy to give more attention to jobs and economic recovery and away from regulation. I agree that employment and recovery should be our priority at the present time.

During the period when new regulations are restricted, Congress can and should improve regulatory processes and administration. Much current regulation is ineffective and does not accomplish the ends that the regulation was intended to achieve. Capture is one reason. The regulated become the regulators, or regulators have one eye focused on a career change to work for the firms or industry that they regulate. The Securities and Exchange Commission (SEC) is an often cited example. We know that the SEC did nothing to stop Bernard Madoff's

Ponzi scheme, despite several demonstrations by a financial professional directly warning the SEC that Madoff's claims could not be true.

Examples of regulatory "capture" are common in the academic and policy literature. The claims are supported in practice. Steve Linnick, Inspector General of the Federal Housing Finance Agency, issued a report stating that Fannie Mae knew about extensive foreclosure abuses by its outside law firms in 2003, four years before the crisis started. Regulators did not stop the bad practices when they could have prevented some of the costly failures that followed. Regulation failed in this case, as in many others.

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Currently, the Federal Housing Administration (FHA) is required to hold capital equal to 2 percent of the amount of insurance it issues. For the past three years, the FHA has not met that requirement. Currently, its capital ratio is near zero. Regulation is circumvented. Again, regulation failed.

The recent Dodd-Frank legislation imposed hundreds of new financial regulations, but left most of them to be specified by the regulators. An army of K Street lobbyists is at work to make the new rules less burdensome by circumvention. The so-called Volcker rule will almost certainly be circumvented along with many others.

Congress must devote more energy to assuring that regulatory practice is in the public interest—bringing private and social costs together.

In my recent book, Why Capitalism?, I offer three economic principles of regulation. The first says that lawyers and bureaucrats write regulations, but markets circumvent costly regulations. The second principle says that regulation is static but markets are dynamic. If a costly regulation is not circumvented at first, markets will learn to circumvent it over time. I can cite many examples.

I am not—repeat not—opposed to all regulation. Congress should work to develop effective regulation. My third principle will guide you toward more effective regulation. That principle says that regulation is effective if it changes the incentives of the regulated entity. I testified several times in favor of increased equity capital requirements for banks. I was gratified when one Senator introduced legislation that increased capital requirements relative to asset size as asset size rose.. It did not make it through the banking committees. Fortunately, an international agreement raised capital requirements. Unfortunately, it does not raise requirements for large banks relative to others.

Capital requirements change banker's incentives. They are difficult, even impossible, to avoid. And they put the cost of risky investments on the owners and managers, where they belong in a market economy. That's an effective way of reducing risk, one that does what proper regulation should do. It brings private and social costs together. In searching for regulatory rules, your guide should be to structure incentives to bring private costs as close as possible to social costs. The recent bailouts do the opposite; they relieve private costs by imposing large social and private costs on the taxpaying public.

We all recognize that full economic recovery requires recovery of the housing and mortgage markets. Ask yourself what you would do if you were a mortgage lender. One part of government urges you to speed foreclosures. At the same time, another agency sues you for alleged past practices. The conflicting actions create uncertainty and delay recovery by reducing bankers' incentives to write new mortgages. Regulators are undermining recovery.

Finally, I urge you to be concerned about the broader consequences of the large increase in regulation. Much of the regulation that we have replaces the rule of law with rule by regulators. The rule of law has been a pillar of successful capitalist development. Increased regulation erodes the rule of law. Under the rule of law, all citizens and companies are treated alike, or as nearly alike as possible. Under rule by regulators, that is not so. Some gain advantages over others, distorting resource allocation. One of many examples is familiar from recent practice. Too big to fail uses taxpayer money to prevent failure by large financial institutions. Smaller banks are allowed to fail. This is one of many examples of rule by regulators.

To repeat, I support the bill. If it becomes law, the economy would face lower uncertainty about future costs and returns. Investment, productivity and jobs would increase. This long recession and slow recovery would be shortened.

Mr. COBLE. Professor Meltzer, I notice that you earned two of your degrees from Duke University. Did you have North Carolina connections prior to your enrollment?

Mr. MELTZER. Yes, lots of—I have many examples of regulations which are misguided, or misdirected, or don't end up doing what they want. That is more likely to be the usual case, rather than the—the second, my first law of regulation, is that regulations are written by lawyers and bureaucrats, and markets learn to circumvent them. I gave a talk about that to the Council on Foreign Relations in New York, full of Wall Street people. The first question that came was from one of the lawyers who worked on Wall Street. He said, who do you think shows them how to circumvent them? We do. That was all I needed. I didn't have to argue with that.

My second law of regulation is that regulations are static, and markets are dynamic. So if they don't learn to circumvent the regulation early, they will learn later, and the regulations get circumvented all the time. The only way that you can successfully regulate to bring social and private cost together, is to change the incentives of the people you regulate.

I proposed that four times in hearings before the banking committees when they were discussion what became the Dodd-Frank regulation. One center introduced my legislation. It said, look, we now subsidize people who are too big to fail. Let's get rid of Too Big To Fail by saying the amount of capital that you have to hold rises with the size of the assets. So instead of being peanut subsidized, you are going to be penalized.

Mr. COBLE. Well, let's move on.

Mr. MELTZER. Because we the public pay for the costs of what you do.

Mr. COBLE. Well, I thank you for that, Professor. I appreciate that. We have been joined by the distinguished gentlemen from Georgia, Mr. Johnson. Hi, good to have you with us.

Mr. COBLE. Mr. Taylor, you are now recognized for 5 minutes.

TESTIMONY OF JOHN B. TAYLOR, STANFORD UNIVERSITY AND HOOVER INSTITUTION

Mr. TAYLOR. Thank you, Mr. Chairman, Ranking Member Cohen and other Members of the Committee. I would like to submit my written testimony for the record and just summarize very briefly.

Mr. COBLE. Without objection.

Mr. TAYLOR. I am very concerned about this recovery from the recession that ended in 2009. It is 2½ years old now, and it is like we don't have a recovery. And I make that assessment by comparing it to the most recent recovery from a deep recession and that was in the early 1980's. In the 10 quarters of this recovery, growth has averaged 2.4 percent. In the 10 quarters following the recession that ended in 1982, growth was 5.9 percent. There is just no comparison.

So there is a real problem here. That is why unemployment is remaining high. That is why people are dropping out of the labor force, and that is why employment growth is as weak as it is.

This recovery has been weak from the start, and as a result, a year and a half ago, I wrote an op ed for the Journal along with the distinguished gentlemen on my right, and also with George Shultz, former Treasury Secretary, Secretary of State, and several other distinguished economists. We had a comprehensive strategy we recommended to get the economy moving. One part of that strategy, was, and I will quote, "To enact an moratorium on all new regulations with exceptions of national security, and public safety."

We thought that should be part of a more comprehensive strategy which would include deficit reduction as well as a more rules-based monetary policy. Unfortunately, that recommendation was not enacted on, and as a result, this recovery, I believe, has continued to be very weak.

And that is why I am so supportive of this bill, which really takes action along those lines, I think in an improved way. Ranking Member Cohen mentioned in his remarks that the problem is a lack of demand, not too many regulations. Well, I think the demand is low because of those regulations. Business firms create demand by investing and hiring people, and one of the reasons they are concerned about this, is uncertainty about what the regulations are actually going to be.

I believe there is a growing recognition about the difficulty of regulating the economy when it gets too far. And in my testimony, I just offered this really very, I think excellent, recent issue in The Economist Magazine, entitled on the cover, The Overregulated America. And there is a detailed description of the things that really make it difficult for firms to expand. They are worried about the future. They don't know what the regulatory apparatus is going to be. By the way, there are also very worried about the tax laws, many things. So it seems to be very important to take this action now, and to really get this recovery moving.

I think the—in addition to the normal kind of growing regulation, and cost of regulation that we are seeing, we have two bills passed recently that I think make this problem worse. And the one that I focus on mostly because that is my area, and that is the financial reform bill. There is lots of discussion about what caused the financial crisis, who caused it, you heard Professor Meltzer say a few things about that. In my view, it wasn't that there was not enough regulation; it was that the regulations on the books were not enforced. I think it is very clear when you look at the details of what happened.

So in this sense, the analysis that led to the financial reform bill, misdiagnosed the crisis, instead added many new regulations which have nothing to do with the financial crisis; regulating payday loans for example, but I could go on and on. And the regulatory rules that the regulators must write now are just overwhelming to them, far more than they have had to write in the past. So it is like an order of magnitude difference.

I know that is why so many firms are sitting on cash; why banks are sitting on cash. They don't know exactly what to do. So at this point, I think it is very important to enact some kind of a freeze like what is being proposed here. That is why I support the bill. And in a way, it addresses two problems which are holding the economy back. Number one is the growing amount of regulations that we are seeing. Number two, these recent bills that are still being implemented, the Congress gives instructions to the agencies to write the rules, and they are busy every day writing rules, and no one knows quite what to expect.

So I think in this case, you kind of need a time-out on those bills; a time-out basically to digest what the rulemaking should be about. Give people a chance to digest what is going on. Maybe change some of those bills. But the regulatory freeze serves those two purposes which are, to me, extraordinarily important to get the economy moving again. Thank you.

Mr. COBLE. Thank you, Professor Taylor.

[The prepared statement of Mr. Taylor follows:]

A Regulatory Moratorium as Part of a Comprehensive Economic Strategy

John B. Taylor

Testimony before the
Subcommittee on Courts, Commercial and Administrative Law
Committee on the Judiciary
United States House of Representatives

February 27, 2012

Chairman Coble, Ranking Member Cohen, and other members of the committee, thank you for the opportunity to testify on H.R. 4078, The Regulatory Freeze for Jobs Act of 2012.

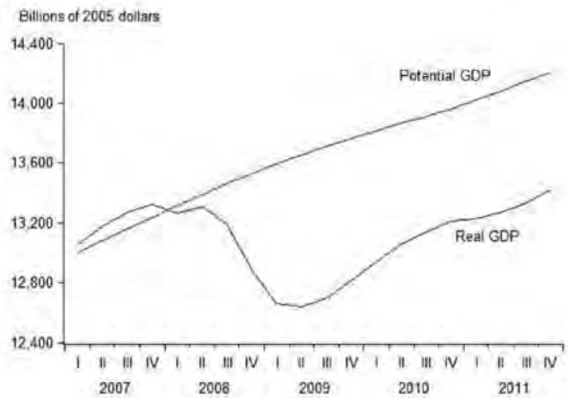
In an article published in the *Wall Street Journal* a year and a half ago (September 16, 2010), I joined several other economists experienced in economic policy and research—George Shultz, Michael Boskin, John Cogan, Allan Meltzer—to put forth an economic strategy to strengthen the very weak economic recovery following the 2007-09 recession. An essential element of that strategy was a proposal to "enact a moratorium on all new regulations for the next three years, with an exception for national security and public safety." In our view enacting such a regulatory freeze and embedding it within a broader plan to balance the federal budget credibly without increasing taxes, reduce the explosive growth of future entitlements, and make monetary policy more rule-like would go a long way to restoring a strong economic recovery with robust employment growth.

Unfortunately, neither the moratorium on new regulations nor the broader economic plan has been enacted, and, largely as a result in my view, the economic recovery has continued to be very weak. This is why it is so important to move ahead with the proposed Regulatory Freeze for Jobs Act. The act would create a moratorium on new significant regulations until the national unemployment rate stabilizes at or below 6 percent, which has an advantage over the three-year moratorium which is not tied to unemployment. Under the proposed legislation, the President could waive the moratorium for national security, but would have to explain the need for the waiver in writing, and the regulation would be subject to judicial review.

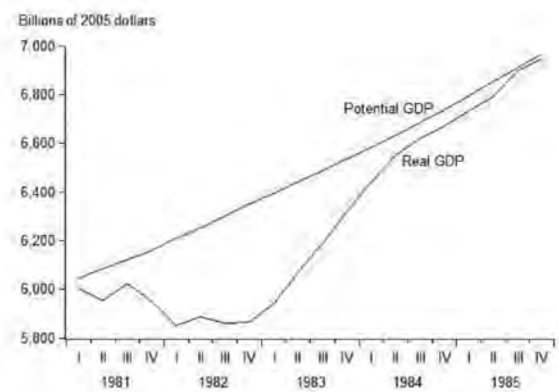
In this testimony I first provide an assessment of the state of the economic recovery, and then consider the role of regulation and regulatory uncertainty in holding back the recovery.

Recent data on employment and economic growth, as well as the recent downward revision of potential GDP by the Congressional Budget Office's (CBO), still indicate a very weak recovery. A good standard of comparison for this recovery is the most recent recovery from a very deep recession, namely the one that ended in 1982. Several charts help make the comparison.

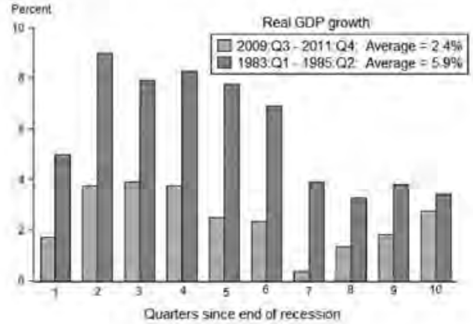
The first chart shows real GDP during the 10 quarters since the end of the 2007-2009 recession along with CBOs recently revised estimate of potential GDP. The chart clearly shows that the economy has yet to recover back to its potential. The gradual slowing of potential GDP around 2009 and 2010 reflects CBO's decision to lower its estimate of potential GDP.



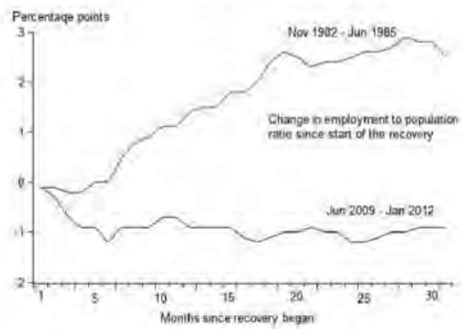
The next chart shows the recovery back to potential GDP in the 10 quarters following the 1981-82 recession. The difference between the two charts is striking, and is why one can say that the current recovery is a recovery in name only.



The two recoveries can also be compared by examining economic growth rates in the two periods; focusing on growth rates has the advantage of not relying on potential GDP which is difficult to estimate and project. The growth rates in each of the ten quarters of the two recoveries are shown in the next chart. Again the comparison is striking. Economic growth averaged 2.4 percent in the recent 10 quarters compared with 5.9 percent in the 1980s recovery.



The difference between the two recoveries is also evident in number of jobs created. The next chart compares the changes in the fraction of the working age population that is actually working in the two recoveries. Note that, even with the recent news about the lower unemployment rate, there is little or no improvement in the employment-to-population ratio in this recovery. It is still lower than it was at the bottom of the recession. The poorer performance of the employment to population ratio compared with the unemployment rate is due to a substantial decline in the number of people in the labor force as many unemployed people have stopped working and are therefore no longer counted as unemployed in the official statistics.



Some argue that weak recovery is due to special factors such as the need for people cut back on consumption and pay back debt, commonly called deleveraging. However, the stronger recovery in the early 1980s occurred while people were consuming a much smaller fraction of their income than in the recent recovery. The saving rate was as much as 10 percent then and only 3 to 4 percent now. And while housing has been weak in recent years, all strong economies have weak sectors, and housing is less of a drag now than other sectors, such as foreign trade, were in the strong 1980s recovery.

In my view the weak recovery is due to poor economic policy, including, and among other things, a large increase in both the number of significant regulations and the regulatory uncertainly related to new legislation. The recent issue of *The Economist* magazine entitled the "Over-Regulated America" provides many useful and specific examples of how the United States "is being suffocated by excessive and badly written regulation," and data support these examples.

Quantitative reports from the Office of Management and Budget (OMB) show that the costs of regulation have been growing over time especially in the past few years. The Government Accountability Office reports that federal agencies issued 43 major new rules in fiscal year 2010, including 15 in the financial area, 10 in the environmental area, and 5 in the health care area. See Gattuso (2011). Many more regulatory rules are either in the process of being written and issued or forthcoming as a result of the Wall Street Reform and Consumer Protection Act of 2010, (commonly called Dodd-Frank) and the Patient Protection and Affordable Care Act of 2010.

The new regulations in the Wall Street Reform and Consumer Protection Act of 2010 and the increased uncertainty about their implementation are already severely problematic. (See Taylor (2012) which also discusses similar problems with the new health care law.) The purpose of the Dodd-Frank bill was to prevent another financial crisis, but it misdiagnosed the crisis. As a result the bill is riddled with many new regulations that are not related to the crisis, and these require very complex rulemaking to implement.

The biggest factor contributing to the misdiagnosis was the presumption that the government did not have enough power to avoid the crisis, but it most certainly did. Instead of trying to make enforcement of existing government regulations more effective and thereby help prevent future crises, the Dodd-Frank bill vastly increased the number of regulations and power of government in ways that may even encourage future crises. For example, the bill creates a new resolution or "orderly liquidation" authority, in which the Federal Deposit Insurance Corporation (FDIC) has the power to intervene between any complex financial institution and its creditors. This could increase the likelihood of bailout rather than reduce it.

People are beginning to understand that the bill does not do what its supporters claimed. For example, *The Economist*, in the recent "Over-Regulated America" issue, focusses on the "flaws in the confused, bloated law passed in the aftermath of America's financial crisis." The sheer complexity of the regulations coming out of the Dodd-Frank bill increases uncertainly which holds back investment and firm expansion.

Former Federal Reserve Chairman Alan Greenspan has proposed that we start over on Dodd-Frank, which he views as largely un-implementable based on his knowledge of how the

Federal Reserve and other regulatory agencies operate. (See Greenspan (2011). The Dodd-Frank act requires more than 200 rulemakings by the Federal Reserve and other agencies, far more than they had to implement in comparable periods in the past. The general regulatory principles are put in the law but the detailed regulations must be implemented by the regulatory agencies, an almost impossible task to do, let alone do well, in the case of Dodd-Frank.

One example of the unintended consequences of the law occurred when the Ford Motor Credit Company, the financial services arm of Ford Motor Company, tried to issue asset-backed securities to raise funds to make loans to customers who wanted to by a car. The Dodd-Frank law requires credit rating agencies to issue a credit rating on such securities, but it also requires that the credit rating agencies be liable for their opinions.

Unsurprisingly, no credit rating agency was willing to issue a rating under that circumstance. So without the asset backed security, and thus without automobile credit, it looked like many cars were not going to be sold. But rather than change the law, the SEC staff promised not to raise the issue with the Commission. As Greenspan put it, "There are innumerable hidden problems like this in the law and the sooner we decide to start from scratch, the better off this country will be."

To sum up, a regulatory freeze is needed now for two reasons. First, the sheer number of significantly costly regulations is putting a burden on the economy and economic growth. Second in the case of the new financial law and in the case of the new health care law many of the regulations are unworkable or misplaced, and a timeout is needed before they are implemented. The proposed freeze would serve as such a timeout.

I have emphasized that it would be best for economic growth if the moratorium was part of a broad economic reform strategy. That strategy should also specify what happens after the freeze is over. In particular it should be clear that the Congress will require that new regulations should pass a rigorous cost-benefit test, perhaps conducted by an agency independent of the agencies writing the regulations. It should also require that direct as well as indirect cost estimates of regulations be published before new regulations are put into law.

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Mr. COBLE. Mr. Weissman.

TESTIMONY OF ROBERT WEISSMAN, PRESIDENT, PUBLIC CITIZEN

Mr. WEISSMAN. Thank you very much, Mr. Chairman, Mr. Cohen, Mr. Johnson. I think it is an excellent thing that the Committee is focusing on the jobs crisis facing this country. And I agree completely with Professor Taylor that it needs to be a top priority for the Congress. However, I think the legislation is a misguided way of trying to address that problem. The legislation would effectively amount to a 5-year moratorium on new significant regulation. That is, I believe, a wrong and dangerous remedy for the problem we face. We have not addressed the problem, but would create many new problems. It is worth pointing out that the waivers in the bill are very limited, particularly in the area of health and safety, where it is only—the waiver is permissible only where necessary to meet an imminent problem or a pending emergency; not why most health and safety regulations are adopted.

Let me try to make five quick points that summarize the testimony that I have submitted in writing. First point is that the evidence does not support the claim that regulation is a significant problem for a job preservation, or job creation. The real problem, as Mr. Cohen said, is indeed, the lack of demand. To the extent that there is a problem with uncertainty in the economy, the uncertainty is over the future of the economy, but not the future of regulation. And I go over in some detail evidence that I think that supports that claim.

One data point that is relevant is that when employers report the reason for mass layoffs, they cite lack of sales or lack of demand as 100 times greater factor than regulation. That is retrospective, not prospective, but that is two orders of magnitude, and highly suggestive of what we are looking at. A second data point is, rather than analyzing this theoretically, to just look at the actual significant regulations that are proposed. And if you go back over the last 10 years at almost any point, you will see the cost of almost every major regulation, is overwhelmed by the benefits, and the aggregate total of benefits exceeds the cost by 2 to 15 times. It is measured by the Office of Management & Budget under both the Obama Administration, and the Bush II administration.

The second point is that the jobs crisis we now face, I agree with Professor Taylor, is a tribute to regulatory failure. I disagree with—I am sorry, with Professor Meltzer. I disagree with Professor Taylor that it is only a problem of regulatory enforcement, although it surely was that. There were many areas in which the failure to adopt new regulations to deal with an evolving and increasingly complicated financial sector contributed to the failure. I think that suggests a need for new regulations to address those problems going forward, some of them mandated by Dodd-Frank.

Third point is that regulation, not abstracted but looked at concretely, makes our country stronger and makes us more prosperous and makes us healthier, safer, makes our country cleaner and more livable. I give a variety of examples of this in my written testimony, but it is worth mentioning that many regulations that will make our country stronger, and that are supported by the regulated industries, would be blocked for roughly 5 years by this legislation, including regulations proposed to increase the fuel efficiency of our Nation's automobiles and trucks, to improve food safety, and to enable the introduction of generic versions of biotech pharmaceuticals.

A fourth point: Beyond the area of traditional health and safety regulation, this bill would impede many of the routine functions of government in ways that I am sure the drafters do not intend, but which I think are relatively inescapable under the framework of the legislation. They would prevent issuance of new annual rules that authorize bird hunting. They would prevent issuance of rules that provide for stop-loss pay for Veterans. They would prevent issuance of rules enabling compensation for Vietnam vets. They would prevent the issuance of rules, of which there are many, and a significant portion of the annual significant regulations issued that deal with Medicare reimbursement.

A fifth and final point is to say that although I think the legislation is misguided as I have said, and I think regulation makes our country stronger and better, is not to suggest that we don't need to significantly reform the regulatory process. I absolutely agree with Professor Meltzer that regulatory captures a serious problem facing the country, and it would be an excellent thing for there to be bipartisan legislation to try to address that particular problem. I think another area of fruitful investigation is the problem of under enforcement of existing rules, and the failure to have sanctions for violations of rules that are sufficiently strong.

Mr. Conyers, for example, has introduced legislation that would make it a criminal violation to introduce products into commerce or to expose workers to life-threatening hazards without sufficiently warning them. And I think that is something that this Congress ought to be looking at as well. Thank you very much.

Mr. COBLE. Thank you, Mr. Weissman.

[The prepared statement of Mr. Weissman follows:]

Prepared Statement of Robert Weissman, President, Public Citizen

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on H.R. 4078, the Regulatory Freeze for Jobs Act of 2012. I am Robert Weissman, president of Public Citizen. Public Citizen is a national public interest organization with 250,000 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.

The Regulatory Freeze for Jobs Act would impose a moratorium on all significant regulatory action until the national unemployment rate drops to 6.0 percent. The legislation defines "significant regulatory action" as steps toward issuance of a rule having an impact on the economy of $100 million or more, or which meets other criteria. The legislation exempts action that would repeal a rule, but not to modify it (even if the modification weakened a standard). The legislation authorizes the president to waive the moratorium in certain limited cases (to address an "imminent" threat to human health or safety or other emergency; to enforce criminal laws; for national security; or pursuant to legislation implementing international trade agreements).

Given current unemployment projections, the Act would impose a roughly five-year moratorium on significant regulatory action.[1]

In the current context of scandalously high unemployment, the Committee is right to focus attention on the causes of unemployment and on needed remedies. However, excessive regulation is neither the cause of the jobs crisis nor a meaningful impediment to job creation. The Regulatory Freeze for Jobs Act is the wrong cure for the nation's serious job ailment—it wouldn't remedy the problem, could well make the problem worse, and would cause devastating side effects.

The first section of this testimony argues that regulation does not have a meaningfully harmful impact on jobs and delivers significant net economic benefits. The second section argues that regulatory failures—deregulation, underregulation and lack of enforcement—had a central role in causing the Wall Street crash and the Great Recession. Recognizing the regulatory failures undergirding the current jobs crisis emphasizes the need for new and evolving rules to prevent another job-destroying, Wall Street-induced financial crisis. The third section discusses the vital function of regulation in making our country better and stronger, and shows some of the damage that would be done by a five-year moratorium on significant regulatory action. The fourth section analyzes the ways in which the legislation would, perhaps unintentionally, interfere with a diverse set of government programs and initiatives, including matters such as rules authorizing bird hunting. The conclusion emphasizes that the regulatory system is in need of significant reform, but not in the direction proposed by the Regulatory Freeze for Jobs Act.

I. REGULATORY PROTECTIONS STRENGTHEN THE ECONOMY

The central premise of the Regulatory Freeze for Jobs Act is that regulatory protections meaningfully interfere with job preservation and creation. This premise is mistaken.

While regulators commonly do not have 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 is influence over the rules ultimately adopted—or discarded.

Even where the cost of regulatory compliance is nontrivial, the net job impact may be minimal or even positive; firm expenditures on regulatory compliance typically create new jobs within affected firms or other service or product companies with which they contract.

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.[2] The result is that costs are commonly lower than anticipated.

The economics literature on regulation does not support the claim that regulation meaningfully impedes job growth. A survey of the literature conducted by the Economics Policy Institute finds a rough consensus: regulation has little direct impact on job creation, and may offer a net positive benefit.[3] A literature review by the Office of Management and Budget, included in the *2011 Report to Congress on the Benefits and Costs of Federal Regulation,* highlights several studies articulating theoretical approaches showing why different forms of regulation—including labor market, environmental and economic regulation—might increase or decrease employ-

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[1] The Congressional Budget Office projects that unemployment will be 6.9 percent by the end of 2015 and 5.6 percent by the end of 2017. Congressional Budget Office. (2012). *The Budget and Economic Outlook: Fiscal Years 2012 to 2022.* Retrieved 24 February, 2012, from http://cbo.gov/publication/42905

[2] Mouzoon, N., & Lincoln, T. (2011). *Regulation: The Unsung Hero in American Innovation.* Public Citizen. Retrieved 24 February, 2012, from http://www.citizen.org/documents/regulation-innovation.pdf

[3] Shapiro, I., & Irons, J. (2011). *Regulation, Employment, and the Economy: Fears of job loss are overblown.* Economic Policy Institute. Retrieved 24 February, 2012, from http://www.epi.org/files/2011/BriefingPaper305.pdf

ment and, in general, concludes the empirical evidence is ambiguous.[4] Addressing the impact of a moratorium on environmental regulations, Congressional Budget Office Director Douglas Elmendorf in Senate testimony last year stated, "On balance, CBO expects that delaying or eliminating those regulations regarding emissions would reduce investment and output during the next few years, because the response to the factors that would tend to boost investment under those circumstances would probably be smaller than the response to the factors that would reduce investment." [5]

Prognostications of job loss and excess cost from specific rules routinely turn out to be significantly overstated, EPI has shown, both in government estimates of the cost of regulatory compliance with new rules and especially in industry claims.[6] Impacted industries have a natural bias to overestimate costs of regulatory compliance, and projections of cost regularly discount the impact of technological dynamism. In the case of acid rain regulations, for example, industry projected costs of $5.5 billion initially, rising to $7.1 billion in 2000; ex-ante estimates place costs at $1.1 billion—$1.8 billion.[7] And, "in the case of the regulation of 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." [8] The last century teaches us that Chicken Little warnings about the costs of the next regulation should be, at the very least, heavily discounted.

Indeed, careful examination of one of the most costly rules issued during the Obama administration—national standards for mercury, arsenic and other toxic air pollutants emitted by power plants, known as the "toxics rule"—shows that it will lead to net job creation.[9]

We are, of course, living in a period of shamefully high unemployment and underemployment, and it is absolutely correct to focus attention on job creation. But excessive regulation is neither the cause of the nation's mass unemployment—actually, to a very considerable extent, the opposite is the case, as discussed below—nor the barrier to job creation. Indeed, not only do business economists not cite regulation as a significant problem for business, they actually say the regulatory environment is "good" for business.[10] The overriding reason why business—including particularly small business—is not hiring is lack of demand.[11]

While the U.S. Chamber of Commerce and industry trade associations regularly complain about regulation and argue that regulation is impeding job creation and injuring small business, that is not what actual small businesses say. They cite lack

[4] Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations on Unfunded Mandates on State, Local, and Tribal Entities.* Retrieved 23 February, 2012, from http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf

[5] Congressional Budget Office. (2011, November 15). *Statement of Douglas Elmendorf: Policies for Increasing Economic Growth and Employment in 2012 and 2013, page 49.* Testimony before the Committee on the Budget, United States Senate. Retrieved 24 February, 2012, from http://budget.senate.gov/democratic/index.cfm/files/serve?File_id=795c2267-9349-4c2c-a488-262dfd346a2c

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[8] Shapiro, I., & Irons, J. (2011). *Regulation, Employment, and the Economy: Fears of job loss are overblown.* Economic Policy Institute. Retrieved 24 February, 2012, from http://www.epi.org/files/2011/BriefingPaper305.pdf

[9] Bivens, J. (2012). *The 'Toxics Rule' and Jobs: The job-creation potential of the EPA's new rule on toxic power-plant emissions.* Economic Policy Institute. Retrieved 24 February, 2012, from http://www.epi.org/files/2012/ib325.pdf

[10] National Association for Business Economics. (2011, August). *Economic Policy Survey.* Retrieved 24 February, 2012, from http://www.nabe.com/publib/pol/11/08/nabepolicy1108.pdf

[11] See the analysis by Treasury Department Assistant Secretary for Economic Policy Janice Eberly. Eberly, J. (2011, October 24). *Is Regulatory Uncertainty a Major Impediment to Job Growth?* U.S. Department of the Treasury. Retrieved 24 February, 2012, from http://www.treasury.gov/connect/blog/Pages/Is-Regulatory-Uncertainty-a-Major-Impediment-to-Job-Growth.aspx ("If regulatory uncertainty was a major impediment to hiring right now, we would expect to see indications of this in one or more of the following: business profits; trends in the workforce, capacity utilization, and business investment; differences between industries undergoing significant regulatory changes and those that are not; differences between the United States and other countries that are not undergoing the same changes; or surveys of business owners and economists. As discussed in a detailed review of the evidence below, none of these data support the claim that regulatory uncertainty is holding back hiring.")

of demand and uncertainty about when demand will pick up as their primary concerns.

Small business owners listed "government regulation" far down their list of concerns in a survey commissioned by the American Sustainable Business Council, Main Street Alliance and Small Business Majority; the number one and number two identified biggest problems facing their businesses are "uncertainty about the future economy" and "rising costs of doing business," both cited more than three times more frequently than "government regulation."[12] In an informal survey, McClatchy/Tribune News Service found no business owners complaining about regulation.[13] The Chamber of Commerce's survey of small business similarly shows a relatively low ranking of concern about regulation.[14] More than half of small businesses in the Chamber rank "economic uncertainty" atop their list of obstacles to hiring new employees; "too much regulation" is ranked fifth.[15] Similarly, a survey by the National Federation of Independent Businesses found small business owners ranking "poor sales" as the number one problem they face, outdistancing worries about "government regulation," although as the economy has started to improve in recent months, small business respondents to the NFIB survey have expressed less concern about poor sales and more about regulation.[16]

Insufficient demand is also the primary reason for layoffs. In extensive survey data collected by the Bureau of Labor Statistics, employers cite lack of demand roughly 100 times more frequently as the reason for mass layoffs than government regulation![17]

Reason for layoff: 2008–2010 [18]

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

Critics of regulation have relied on some muc-touted studies that emphasize the costs of regulation, but these studies are fundamentally flawed and should not inform policy debates. Several studies cite the "cost" of regulation, but neglect to identify correlative benefits. For example, The Heritage Foundation has issued a series of reports on the cost of regulation under the Obama administration. These reports simply ignore the benefits of rules, removing all context from the cost estimate. To take one example, The Heritage Foundation attributes more than a quarter of all costs of regulation issued under the Obama administration to fuel economy standards.[19] Yet Heritage fails to mention that the National Highway Traffic Safety Administration—the source of Heritage's cost estimate—found those rules would confer benefits three times as great as the costs.[20]

Another study that replicates this error of counting costs but not benefits is the report issued by Nicole Crain and W. Mark Crain, consultants to the Small Business Administration Office of Advocacy.[21] This study is thoroughly discredited, but the

[12] Small Business Majority. (2011). *Opinion Survey: Small Business owners Believe National Standards Supporting Energy Innovation Will Increase Prosperity for Small Firms.* Retrieved 24 February, 2012, from http://smallbusinessmajority.org/energy/pdfs/Clean__Energy__Report__092011.pdf

[13] Hall, K. G. (2011, 1 September). *Regulations, taxes aren't killing small business, owners say.* McClatchy Newspapers. Retrieved 24 February, 2012, from http://www.mcclatchydc.com/2011/09/01/122865/regulations-taxes-arent-killing.html

[14] U.S. Chamber of Commerce. (2011, July). *Small Business Outlook Survey.* Retrieved 24 February, 2012, from http://www.uschamber.com/sites/default/files/reports/1107usc__summit%20__harrisnteractive.pdf

[15] Ibid.

[16] Dunkelberg, W., & Wade, H. (2012). *NFIB Small Business Economic Trends.* Retrieved 24 February, 2012 from http://www.nfib.com/Portals/0/PDF/sbet/sbet201202.pdf

[17] 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.* Retrieved 24 February, 2012, from http://www.bls.gov/mls/mlsreport1038.pdf

[18] Ibid.

[19] Gattuso, J., Katz, D., & Keen, S. (2010). *Red Tape Rising: Obama's Torrent of New Regulation.* The Heritage Foundation. Retrieved 24 February, 2012, from http://www.heritage.org/research/reports/2010/10/red-tape-rising-obamas-torrent-of-new-regulation

[20] Public Citizen. (2010). *Junk Math: How Public Interest Protection Opponents Count Costs and Ignore Benefits.* Retrieved 24 February, 2012, from http://www.citizen.org/documents/cafebenefits12222010.pdf

Administration Office of Advocacy.[21] This study is thoroughly discredited, but the study's groundless conclusions (that regulation costs the U.S. economy $1.75 trillion annually, or more than $10,000 per small business employee) continues to be cited too frequently in policy debates, often without attribution to the original, discredited study. Crain and Crain attribute $1.236 trillion in costs to "economic regulation,"[22] a figure that is entirely derived from a regression analysis correlating ratings on a World Bank "regulatory quality index"—which is itself based on nothing more than survey data from businesses and other sources—and national GDP per capita. It is remarkable enough to imagine that such a cross-cultural, international regression analysis would yield such a robust result that it should meaningfully inform U.S. policy; even more so, when it yields a total cost vastly out of line with other careful analysis, as well as such unlikely findings as a correlation between increased education and reduced economic growth. It turns out, as the Economic Policy Institute has shown, that with a more complete set of data than used by Crain and Crain—but still using the same regression equations—no statistical relationship between "regulatory quality" and GDP exists.[23] Crain and Crain also include a cost for tax compliance—not typically considered a "regulatory" cost—which they pin at roughly $160 billion. A number of other fatal flaws bedevil the discredited study.[24]

A more robust system for assessing the impact of regulation on the economy—though significantly imprecise and heavily biased against the benefits of regulation—is not to conjure up a theory to which facts are made to conform, or to invent regression analyses that rely on poor data and far too few inputs and that demonstrate regulation to have an overdetermining impact on the overall economy, but to look at the actual impact of actual regulations. Although the federal government issues thousands of regulations every year, most of these are very limited in impact, and the universe of economically significant regulations—those that would be affected by the Regulatory Freeze act—is relatively small, identifiable and analyzable. Every year, the Office of Management and Budget analyzes the costs and benefits of rules with significant economic benefit. The benefits massively exceed costs.

The principle finding of *OMB's 2011 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, 2000, to September 30, 2010, for which agencies estimated and monetized both benefits and costs, are in the aggregate between $132 billion and $655 billion, while the estimated annual costs are in the aggregate between $44 billion and $62 billion. These ranges reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.[25]

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:

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[21] Crain, N. V., & Crain, W. M. (2010). *The Impact of Regulatory Costs on Small Firms.* Prepared for Small Business Administration, Office of Advocacy. Retrieved 23 February, 2012, from http://archive.sba.gov/advo/research/rs371tot.pdf

[22] This concept as employed by Crain and Crain includes a range of elements that might properly be considered regulation, but which are not typically part of the regulatory policy debate. This includes matters such as tariffs, antitrust policy, complexity of the tax system, and ease of starting a new business. Ibid.

[23] Irons, J., & Green, A. (2011, 19 July). *Flaws Call For Rejecting Crain and Crain Model.* Economic Policy Institute. Retrieved 24 February, 2012, from http://www.epi.org/page/-/EPI__IssueBrief308.pdf

[24] Eisenbrey, R., & Shapiro, I. (2011, August). *Deconstructing Crain and Crain.* Economic Policy Institute. Retrieved 24 February, 2012, from http://web.epi-data.org/temp727/IssueBrief312-2.pdf; Irons, J. and Green, A., *Flaws Call for Rejecting Crain and Crain Model.;* Shapiro, S. A., & Ruttenberg, R. (2011, February). *The Crain and Crain Report on Regulatory Costs.* Center for Progressive Reform. Retrieved 24 February, 2012, from http://www.progressivereform.org/articles/SBA__Regulatory__Costs__Analysis__1103.pdf ; Copeland, C. W. (2011, April 6). *Analysis of an Estimate of the Total Costs of Federal Regulations.* Congressional Research Service. Retrieved 24 February, 2012, from http://www.progressivereform.org/articles/CRS__Crain__and__Crain.pdf

[25] Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations on Unfunded Mandates on State, Local, and Tribal Entities.*

Total Annual Benefits and Costs of Major Rules by Fiscal Year (billions of 2001 dollars) [26]

Fiscal Year	Number of Rules	Benefits	Costs
2001	12	22.5 to 27.8	9.9
2002	2	1.5 to 6.4	0.5 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	3.8 to 6.1
2006	7	6.3 to 44.8	3.7 to 4.3
2007	12	28.6 to 184.2	9.4 to 10.7
2008	11	7.0 to 24.4	1.2 to 1.5
2009	15	8.6 to 28.9	3.7 to 9.5
2010	18	18.8 to 86.1	6.5 to 12.5

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 [27]). Very few major rules are adopted where projected costs exceed projected benefits, and those cases typically involve direct Congressional mandates.

A final point on this topic: Missing from much of the literature on regulation and jobs are the economically systemic, positive impacts of regulation. Proper regulation can avert catastrophic damage not typically captured in prospective cost-benefit analyses, as the BP oil disaster shows.[28] Proper regulation is also essential to enable markets to function efficiently and fairly. As the 2008 Wall Street crash shows, improperly and insufficiently regulated financial markets will fail with devastating consequences for job preservation and the real economy. Regulation also has an important role in promoting innovation and technological dynamism. Environmental and economic realities necessitate the development and deployment of transformative clean energy technologies. Markets alone do not offer sufficient incentive and reward for the timely deployment of such technologies, which promise both great economic savings and very significant job creation.[29]

II. REGULATORY FAILURES HELPED CREATE THE JOBS CRISIS

The present jobs crisis has particular and identifiable causes: the collapse of the housing bubble and the ensuing financial crash. The crisis also has identifiable culprits: The big banks and Wall Street, which fueled the bubble through practices ranging from issuing predatory mortgage loans to creation of esoteric financial in-

[26] 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. Retrieved 23 February, 2012, from http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf

[27] *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), Retrieved 24 February, 2012, 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), Retrieved 24 February, 2012, from http://www.progressivereform.org/articles/2009_CPR_Comments_OMB_Report.pdf; Sinden, A. & Goodwin, J., *CPR Comments on Draft 2008 Report to Congress on the Benefits and Costs of Federal Regulations* 5–8 (2008), Retrieved 24 February, 2012, from http://www.progressivereform.org/articles/2008_Comments_OMB_Report.pdf. For all of the comments on OMB's annual reports to Congress on the benefits and cost of federal regulation produced by CPR Member Scholars and staff, see Ctr. for Progressive Reform, *OMB Reports on the Costs and Benefits of Regulation,* Retrieved 24 February, 2012, from http://www.progressivereform.org/OMBCongress.cfm

[28] In addition to the loss of human life with the explosion of the Deepwater Horizon platform, the oil disaster imposed billions in economic damage. BP has paid more than $6 billion in compensation under the Gulf Coast Claims Facility it established. Many other claims are pending. Gulf Coast Claims Facility. (2012). *Overall Program Statistics: Status Report as of February 23, 2012.* Retrieved 24 February, 2012, from http://www.gulfcoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf Proper regulation could have averted the disaster.

[29] Pollin, R., Wicks-Lin, J., & Garret-Peltier, H. (2009, June). *Green Prosperity: How Clean-Energy Policies Can Fight Poverty and Raise Living Standards in the United States.* Political Economy Research Institute, University of Massachusetts Amherst. Retrieved 24 February, 2012, from http://www.peri.umass.edu/fileadmin/pdf/other_publication_types/green_economics/green_prosperity/Green_Prosperity.pdf

ranging from issuing predatory mortgage loans to creation of esoteric financial instruments that claimed to convert low-quality loans into top-notch investment opportunities. These practices were enabled not by too much regulation, but by too little. To a very considerable extent, the current jobs crisis should be understood as resulting from regulatory failure: deregulation, underregulation and underenforcement. The job loss stemming from this regulatory failure—the 8 million jobs shed following the Wall Street crash—vastly exceed any negative job impacts plausibly linked to regulation.

Recognizing the regulatory failure underpinning the current jobs crisis suggests not only that a regulatory freeze will not contribute to or enable job growth, but that it risks 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.

There is by now a very considerable literature, and a very extensive Congressional hearing record, that 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. "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." [30]

Here I highlight just a few of the regulatory failures that contributed to the financial crash, by way of illuminating the need for a robust financial regulatory system that prevents excessive concentration and interconnection among firms, protects consumers, promotes transparency and facilitates systemic stability.

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." [31]

Unregulated Financial Derivatives. The 2008 crash proved Warren Buffet's warning that financial derivatives represent "weapons of mass financial destruction" to be prescient.[32] Financial derivatives amplified the financial crisis far beyond the unavoidable 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 govern-

[30] The Financial Crisis Inquiry Commission. (2011, January). *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States.* Retrieved 24 February, 2012, from http://www.gpoaccess.gov/fcic/fcic.pdf, p. xviii

[31] Stiglitz, J. (2009). Capitalist fools. *Vanity Fair, 51*(1).

[32] Buffett, W. (2003). *Report to Shareholders, February 21, 2003.* Berkshire Hathaway. Retrieved 24 February, 2012, from http://www.berkshirehathaway.com/letters/2002pdf.pdf

mental 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;[33] 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-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."[34]

Failure to Prevent Predatory Lending. Preventing predatory lending practices would not have prevented the housing bubble and the subsequent financial meltdown, but it would have taken some air out of the bubble and softened the economic crisis—and it would have saved millions of families and communities across the country from economic ruin. Predatory lending was easily avoidable through sound regulation, but regulators failed to act. On the one hand, regulators failed 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.[35] The Office of Comptroller of the Currency, with authority over almost 1,800 banks, took three consumer-protection enforcement actions from 2004 to 2006.[36] On the other hand, federal regulators refused to issue appropriate regulatory rules to stem predatory lending, despite persistent advocacy by consumer groups. By way of contrast, action at the state level showed that predatory lending rules could significantly limit abusive loans.[37]

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 rat-

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[33] 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.* Retrieved 23 February, 2012, from http://www.cftc.gov/opa/speeches/opaborn-35.htm.

[34] Faoila, A., Nakashima, E., & Drew, J. (2008, October 15). *What Went Wrong.* The Washington Post. Retrieved 24 February 2012, from www.washingtonpost.com/wp-dyn/content/story/2008/10/14/ST2008101403344.html

[35] Tyson, J., Torres, C., & Vekshin, A. (2007, March 22). *Fed Says It Could Have Acted Sooner on Subprime Rout.* Bloomberg. Retrieved 24 February, 2012, from http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a1.KbcMbvIiA&refer=home

[36] Torres, C., & Vekshin, A. (2007, March 14). *Fed, OCC Publicly Chastised Few Lenders During boom.* Bloomberg. Retrieved 24 February, 2012, from http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6WTZifUUH7g&refer=us

[37] Li, W., & Ernst, K. (2006). *The Best Value in the Subprime Market: State Predatory Lending Reforms.* Center for Responsible Lending. Retrieved 24 February, 2012 from http://www.responsiblelending.org/mortgage-lending/research-analysis/StateEffectsToolkit.pdf

ings to new instruments because of their complex relationships with issuers,[38] 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.

For purposes of evaluating the Regulatory Freeze and Jobs Act, the details of the regulatory failures that led to financial crash and Great Recession are less important than two overarching points: first, the cause of the current jobs crisis was too little regulation and too little enforcement, not too much regulation; and second, legislation that impedes financial regulators from issuing rules to control an overly complex, centralized and reckless financial sector risks enabling another financial meltdown with the attendant devastating jobs impact.

III. REGULATORY PROTECTIONS MAKE OUR COUNTRY STRONGER, SAFER AND MORE JUST

Health, safety, environmental, financial and other regulatory protections make our country stronger, safer and more just. The Regulatory Freeze and Jobs Act would impede our ability to strengthen our nation, adjust to changing problems and technologies, act on new evidence of harms and threats to public and environmental well-being, and leave our country more vulnerable to economic shocks like the Great Recession.

As discussed above, one underlying premise of the Act that we believe mistaken is that regulation impedes job creation. Another premise that we believe deeply misplaced is that the country can afford a lengthy regulatory moratorium.

Rhetorical debates and cost-benefit abstractions can obscure the dramatic gains our country has made due to regulation. Regulation has:

- Made our food safer.[39]
- Saved tens of thousands of lives by making our cars safer.[40]
- Made it safer to breathe, saving hundreds of thousands of lives annually.[41]

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[38] 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. Retrieved 24 February, 2012, from http://wallstreetwatch.org/reports/sold__out.pdf

[39] American Public Health Association. (2010, November 30). *APHA Commends Senate for Passing Strong Food Safety Legislation.* Retrieved 24 February, 2012, from http://www.makeourfoodsafe.org/tools/assets/files/APHA__Senate-Passage-Food-Act__FINAL2.pdf

[40] NHTSA's vehicle safety standards have reduced the traffic fatality rate from nearly 3.5 fatalities per 100 million vehicles traveled in 1980 to 1.41 fatalities per 100 million vehicles traveled in 2006. Steinzor, R., & Shapiro, S. (2010). *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment:* University of Chicago Press.

[41] Clean Air Act rules saved 164,300 adult lives in 2010. In February 2011, EPA estimated that by 2020 they will save 237,000 lives annually. EPA air pollution controls saved 13 million days of lost work and 3.2 million days of lost school in 2010, and EPA estimates that they will save 17 million work-loss days and 5.4 million school-loss days annually by 2020. *See* U.S. Environmental Protection Agency, Office of Air and Radiation. (2011, March). *The Benefits and Costs of the Clean Air and Radiation Act from 1990 to 2020.* Retrieved 23 February, 2012, from http://www.epa.gov/oar/sect812/feb11/fullreport.pdf.

- Protected children's brain development by phasing out leaded gasoline and dramatically reducing average blood levels.[42]
- Empowered disabled persons by giving them improved access to public facilities and workplace opportunities, through implementation of the Americans with Disabilities Act.[43]
- Guaranteed a minimum wage, ended child labor and established limits on the length of the work week.[44]
- Saved the lives of thousands of workers every year.[45]
- Saved consumers and taxpayers billions of dollars by facilitating generic competition for medicines.[46]
- Protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques.[47]
- For half a century in the mid-twentieth century, and until the onset of financial deregulation, provided financial stability and a right-sized financial sector, helping create the conditions for robust economic growth and shared prosperity.[48]

These are not just the achievements of a bygone era. Regulation continues to improve the quality of life for every American, every day. Ongoing and emerging problems and a rapidly changing economy require the issuance of new rules to ensure that America is strong and safe, healthy and wealthy. Consider a small sampling of rules recently issued, pending, or that are or should be under consideration, but which would likely be (or would have been) blocked for a half a decade or more by the Regulatory Freeze and Jobs Act:

- **Fuel efficiency standards.** Pursuant to the Energy Policy and Conservation Act, the Energy Independence and Security Act and the Clean Air Act, the National Highway Safety and Transportation Agency and the Environmental Protection Agency have proposed new automobile and vehicular fuel efficiency standards. The new rules, on an average industry fleet-wide basis for cars and trucks combined, establish standards of 40.1 miles per gallon (mpg) in model year 2021, and 49.6 mpg in model year 2025. The agencies estimate that fuel savings will far outweigh higher vehicle costs, and that the net benefits to society from 2017–2025 will be in the range of $311 billion to $421 billion. The auto industry was integrally involved in the development of these proposed standards, and supports their promulgation. The Regulatory Freeze moratorium would prevent the adoption of the new fuel efficiency standards.

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[42] EPA regulations phasing out lead in gasoline helped reduce the average blood lead level in U.S. children ages 1 to 5. During the years 1976 to 1980, 88 percent of all U.S. children had blood levels in excess of 10μg/dL; during the years 1991 to 1994, only 4.4 percent of all U.S. children had blood levels in excess of that dangerous amount. 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.* Retrieved 23 February, 2012, from http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf

[43] National Council on Disability. (2007). *The Impact of the Americans with Disabilities Act.* Retrieved 24 February, 2012, from http://www.ncd.gov/publications/2007/07262007

[44] There are important exceptions to the child labor prohibition; significant enforcement failures regarding the minimum wage, child labor and length of work week (before time and a half compensation is mandated). But the quality of improvement in American lives has nonetheless been dramatic. Lardner, J. (2011). *Good Rules: 10 Stories of Successful Regulation.* Demos. Retrieved 24 February, 2012, from http://www.demos.org/sites/default/files/publications/goodrules_1_11.pdf

[45] Deaths on the job have declined from more than 14,000 per year in 1970, when the Occupational Safety and Health Administration was created to under 4,500 at present. *See* AFL–CIO Safety and Health Department. (2011, April). *Death on the Job: The Toll of Neglect.* Retrieved 23 February, 2012, from http://www.aflcio.org/issues/safety/memorial/upload/dotj_2011.pdf Mining deaths fell by half shortly after creation of the Mine Safety and Health Administration. Weeks, J. L., & Fox, M. (1983). Fatality rates and regulatory policies in bituminous coal mining, United States, 1959–1981. *American journal of public health, 73*(11), 1278.

[46] Through regulations facilitating effective implementation of the Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman"), including by limiting the ability of brand-name pharmaceutical companies to extend and maintain government-granted monopolies. Troy, D. E. (2003). *Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Amendments).* Statement before the Senate Committee on the Judiciary. Retrieved 23 February, 2012, from http://www.fda.gov/newsevents/testimony/ucm115033.htm

[47] See 16 CFR 410–460.

[48] See Stiglitz, J. E. (2010). *Freefall: America, free markets, and the sinking of the world economy:* WW Norton & Co Inc.; Kuttner, R. (2008). *The Squandering of America: how the failure of our politics undermines our prosperity:* Vintage.

While industry might adopt some fuel efficiency improvements in the absence of regulation, such a supposition is speculative and not supported by recent decades' history, and it's a virtual certainty that overall fuel efficiency performance will be substantially worse in the absence of new regulation. The costs would be high not just to the environment and human health, but to consumer pocketbooks. Our economy will be more efficient and stronger with the rules in place.

- **Food safety rules.** In 2010, with support from both industry and consumer groups, and in response to a series of food contamination incidents that rocked the nation, Congress passed the Food Safety Modernization Act. The Act should improve the safety of eggs, dairy, seafood, fruits, vegetable and many processed and imported foods, but its effective implementation depends on rulemaking. FDA has proposed a series of implementing rules establishing food safety programs and standards. These are delayed at OMB—a problem in its own right—but would be put on hold for likely half a decade under the Regulatory Freeze legislation. As recent outbreaks of listeria in cantaloupe and other products evidence, such a delay will likely cost lives. Not so incidentally, it will also have major harmful economic impact on the agriculture and food industries and job creation and preservation in those industries.
- **Energy efficiency standards.** Pursuant to the Energy Security and Independence Act, the Department of Energy currently has proposed energy efficiency standards for a range of products, including Department of Energy energy efficiency standards for a range of products, including Metal Halide Lamp Fixtures, Commercial Refrigeration Equipment, and Battery Chargers and External Power Supplies, Walk-In Coolers and Walk-In Freezers, Residential Clothes Washers.[49] Under the Regulatory Freeze act, adoption of all of these standards would be delayed for a half decade. Such a delay would injure the U.S. economy and undermine job creation. The Department of Energy estimates the net savings from implementation of the Energy Security and Independence Act to be $48 billion—$105 billion (in 2007 dollars).[50] Meanwhile, the Federal Trade Commission is undertaking a labeling rulemaking on energy efficiency, to protect consumers from misleading and deceptive claims about energy savings from product purchases.[51] This would likely be caught in the Regulatory Freeze act net, with consumers significantly harmed and no plausible beneficial impact on job creation or maintenance.
- **Rules to avert workplace hazards.** By way of example, consider the case of beryllium, a toxic substance to which workers in the electronics, nuclear, and metalwork sector are exposed. The current OSHA beryllium standard, based on science from the 1950s, allows workers to be exposed at levels that are ten times higher than those allowed by Department of Energy for nuclear power plant workers. Public Citizen petitioned OSHA to update the standard in 2001. In response, the agency began a rulemaking in November 2002. It is a testament to major problems in the regulatory process that OSHA has still not issued appropriate rules. OSHA's estimates show that, if it were enacted nine years ago, the standard would have prevented 4,194 cases of chronic beryllium disease (a potentially fatal respiratory ailment), 5,413 cases of beryllium sensitization (a condition that often leads to chronic beryllium disease) and 216 cases of lung cancer.[52] There is indeed very good reason under the current regime to be skeptical that this rule will be issued in the next five years, even as failure to act causes the loss of hundreds of lives among exposed workers and the long-existing health evidence should compel action. Under the Regulatory Freeze act, however, it is a certainty that the rule would not be issued; workers would needlessly be exposed to dangerous beryllium levels, and many would die or become seriously sick as a result. A

[49] List of Regulatory Actions Currently Under Review. Available at: http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp

[50] U.S. Department of Energy. (2007). *Energy Independence and Security Act of 2007 Prescribed Standards.* Retrieved 23 February, 2012, from http://www1.eere.energy.gov/buildings/appliance_standards/m/eisa2007.html

[51] Federal Trade Commission. (28 November 2011). *Rule Concerning Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Required Under the Energy Policy and Conservation Act ("Appliance Labeling Rule").* Federal Register. Vol. 76, No. 228. Retrieved 23 February, 2012, from http://ftc.gov/os/fedreg/2011/11/111118appliancelabelingfrn.pdf

[52] U.S. Occupational Safety and Health Administration. (2007). *Preliminary Initial Regulatory Flexibility Analysis of the Preliminary Draft Standard for Occupational Exposure to Beryllium.*

number of other needed and pending OSHA rules would meet the same fate, with similar deadly consequences for workers.

- **Controls on Wall Street.** As discussed above, the 2008 financial crash was a direct result of regulatory failures. These failures including inadequate regulation of mortgages and other consumer financial products, on the one hand, and esoteric financial products and the markets on which they trade, on the other. Another critical failure was permitting the rise of too-big-to-fail financial institutions, traceable both to the failure to enforce existing rules and policies, and the repeal and nonissuance of important rules. Few people are entirely satisfied with the Dodd-Frank legislation—Public Citizen is highly critical of a number of important omissions—but the Act does include an array of very important reforms that will make our financial system fairer and more stable—if properly implemented through robust rulemaking. To take three examples:
  - **The Volcker Rule:** While Dodd-Frank failed to revitalize the Glass-Steagall separation between commercial and investment banking, or to break up the too-big-to-fail financial institutions, it does include the consequential Volcker Rule. The Volcker Rule aims to prohibit institutions regulated under the Bank Holding Company Act (now including the largest remaining traditional investment banks, Goldman Sachs and Morgan Stanley) from engaging in proprietary trading—the kind of activity that exposes taxpayer-protected depository institutions to excessive risk, creates institutional complexity and conflicts of interest, and heightens the fragility and riskiness of both individual institutions and the overall financial system. The Volcker Rule is perhaps Dodd-Frank's most important provision to contain the size of too-big-to-fail institutions and reduce systemic complexity and risk. The provision could not be implemented under the Regulatory Freeze act.
  - **Consumer protections:** Dodd-Frank created the Consumer Financial Protection Bureau, charging the agency with the single mission of protecting consumers and empowering it to issue new consumer protection rules. Given the very considerable extent to which the financial industry has constructed a business model around trickery and unjust fees, there are many potential rules that it may issue. These may concern matters including: requiring mortgage lenders to consider borrowers' ability to pay; prohibiting banks from charging excessive overdraft fees or tricking consumers into opting in to unreasonable overdraft fee harvesting schemes; eliminating forced arbitration provisions in consumer financial contracts; banning unfair practices in the payday loan industry; prohibiting kickbacks to auto dealers who steer buyers into overpriced loans; stopping student loan companies from tricking students into taking high-priced private loans before they exhaust cheaper federal loans.[53] Under the Regulatory Freeze act, the CFPB would be shackled from advancing these needed consumer protections.
  - **Position limits in commodities markets:** Consumers are rightfully angry about rising prices for gasoline. There are many factors explaining the rise in price, and some of them cannot be addressed by governmental action. But some can. Speculation on the oil commodity markets is likely responsible for 20 percent or more of the price of oil. Even Goldman Sachs suggests that legal speculation may be adding 65–70 cents to the price of a gallon of gasoline. Speculators, in other words, are imposing a private tax on us, with the proceeds of this Wall Street-imposed tax going to Wall Street interests, giant oil companies and foreign oil interests. Dodd-Frank instructed the Commodity Futures Trading Commission to impose position limits on speculators, limiting the portion of the market that could be controlled by individual traders. The CFTC, unfortunately, has adopted an inadequate rule; and Wall Street interests have sued the agency to block implementation even of this inadequate rule. Under the Regulatory Freeze act, however, we would be forced to accept the Wall Street-imposed private tax for 5 years, at very significant cost to consumers, the overall economy and job creation.

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[53] National Consumer Law Center. (2010). *An Agenda for the Consumer Financial Protection Bureau: Challenges for a New Era in Consumer Protection.* Retrieved 24 February, 2012, from http://www.nclc.org/images/pdf/regulatory__reform/pr-cfpb-agenda.pdf

- **Generic competition for biotech medicines.** An overlooked component of the Affordable Care Act was the creation of a process for the Food and Drug Administration to grant regulatory approval for generic biologic pharmaceutical products—essentially generic versions of biotech medicines. Because the molecular composition of biologic drugs is more complicated than traditional medicines, FDA had adopted the position that, with some exceptions, it could not grant regulatory approval for biologics under its previously existing authority. In an important provision of the Affordable Care Act—supported by the biotech industry—FDA was explicitly granted such authority. The provision wrongly grants extended monopolies to brand-name biologic manufacturers, but belated generic competition is better than none. Implementation of the new regulatory pathway for biogenerics, however, depends on issuance of rules by the FDA. Under the Regulatory Freeze act, FDA would likely be prevented from such action for a half a decade, pointlessly and needlessly costing consumers and taxpayers billions of dollars.
- **Crib safety.** Pursuant to the Consumer Product Safety Improvement Act of 2008, the Consumer Product Safety Commission (CPSC) finalized updated safety standards for cribs that halted the manufacture and sale of traditional drop-side cribs, required stronger mattress supports, more durable hardware and regular safety testing. These new crib safety standards mean "that parents, grandparents, and caregivers can now shop for cribs with more confidence—confidence that the rules put the safety of infants above all else." [54] Under the Regulatory Freeze act, the CPSC would have been prevented from taking such action for half a decade, with the result that some families would have been experienced the preventable tragedy of a lost or seriously injured baby.[55]

In short, the costs of the Regulatory Freeze act would be very high. The act would forestall needed progress across the American panorama. If the legislation were made law, Americans would needlessly be exposed to more dangerous products; we would needlessly be forced to breathe dirtier air; we would needlessly be forced to spend more on gasoline; we would needlessly be subject to financial tricks and rip-offs; we would needlessly be forced to confront more hazardous conditions at work; we would needlessly pay more for biologic pharmaceuticals; we would needlessly be forced to live with a riskier financial system and a greater risk of another financial implosion; and much more. The act, in short, would weaken America.

IV. A REGULATORY FREEZE WOULD IMPEDE EVERYDAY GOVERNMENTAL ACTION, INCLUDING ISSUANCE OF BIRD HUNTING RULES

The Regulatory Freeze for Jobs Act is vast in its scope, with implications perhaps exceeding the intentions of its drafters. A significant portion of the government's work depends on rulemaking and regulation. As drafted, the legislation imposes a moratorium on all "significant regulatory actions" until unemployment drops to 6.0 percent. Significant regulatory action is broadly defined, and the moratorium is subject to very limited exceptions: to combat "an imminent threat to health or safety or other emergency;" to enforce criminal laws; to ensure national security; or to comply with terms of an international trade agreement.

Under this legislative rubric, many regulatory actions that do not fit the popular conception of "regulation" would be halted. Consider this selection of recent and prospective rules that would have been or will be affected:

- **Bird hunting.** Every year, the Fish and Wildlife Service analyzes massive amounts of data and public comments to determine the appropriate bird hunting season for each state. The Migratory Bird Hunting; Late Seasons and Bag and Possession Limits for Certain Migratory Game Birds rule [56] tells

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[54] Consumer Federation of America. (2011, June 28). *Senators, CPSC, Consumer Advocates Applaud Strong Crib Safety Standards to Prevent Infant Deaths and Injuries.* Retrieved 24 February, 2012, from http://www.consumerfed.org/pdfs/crib-standards-press-release-6-28-11.pdf

[55] U.S. Product Safety Commission. (2011, June 27). *Statement of Commissioner Nancy Nord On The Vote To Extend The Compliance Date For The New Crib Standard.* Retrieved 24 February, 2012, from http://www.cpsc.gov/pr/nord06272011.pdf The crib standard is only the second major rule issued by this agency in its entire history. (A major rule has an impact on the economy of over $100 million. The only other CPSC major rule dealt with the flammability of mattresses.)

[56] Fish and Wildlife Service. (24 September 2010). *Migratory Bird Hunting; Late Seasons and Bag and Possession Limits for Certain Migratory Game Birds.* Federal Register. Retrieved 23

Continued

hunters which birds they can hunt, how many of them they can take, where they can do it, and when the season begins. This is a significant regulatory action that would be caught in the Regulatory Freeze net.

- **Stop loss pay for service members.** In 2009, Retroactive Stop Loss Special Pay Compensation[57] rule was implemented to pay back the debt we owe to soldiers who stayed for prolonged periods in Iraq and Afghanistan. This rule pays $500 per month of stop loss, and includes partial months. This is a significant regulatory action that would be caught in the Regulatory Freeze net.
- **Compensation for veterans.** Agent Orange left many returning soldiers returning from Vietnam with lifelong debilitating illnesses. In 2010, the Department of Veterans Affairs (VA) expanded the list of ailments[58] attributable to Agent Orange and for which veterans could receive benefits. The VA also decided that it should create a schedule of back benefits for Vietnam veterans still suffering from these newly added diseases and for widows of sufferers. More than 85,000 Vietnam vets and their families will be eligible for these benefits.[59] The rule written by the VA will give retroactive payments to sufferers of these newly added diseases and will allow 69,957 previously denied living veterans to receive payments that will greatly improve their living conditions. This is a significant regulatory action that would have been caught in the Regulatory Freeze net.
- **Medicare reimbursement rates.** Every year, the Centers for Medicare & Medicaid Services publish new Medicare payment schedules for provision of medical care by physicians, hospitals, home health workers and others. These schedules are significant regulatory actions that would be caught in the Regulatory Freeze net.
- **Immigration visas and fees.** In 2010, the Department of Homeland Security issued a new fee schedule for visas and immigrant benefits[60], and adopted a fee for travel authorizations for nonimmigrant aliens entering the United States under a visa waiver program.[61] This schedule is a significant regulatory action that would have been caught in the Regulatory Freeze net.
- **Pell grants.** In 2009, the Department of Education issued new regulations concerning eligibility and other rules relating to the issuance of Pell, TEACH, Academic Competitiveness and National Science and Mathematics to Retain Talent and other grants. These regulations are significant regulatory actions that would have been caught in the Regulatory Freeze net.[62]
- **Pharmaceutical approval standards.** Every five years, Congress reauthorizes the Prescription Drug and User Fee Act (PDUFA), which establishes the framework for Food and Drug Administration approval of new medicines and for the level of user fees to be paid by industry for FDA review, as well as the Medical Device User Fee Act, which functions similarly for medical devices. Both acts are set to be reauthorized this year. Implementation of the legislation, which historically has been supported by the regulated industries and is formally negotiated with industry, depends on FDA regulation. Such

February, 2012, from: http://www.federalregister.gov/articles/2010/09/24/2010-23754/migratory-bird-hunting-late-seasons-and-bag-and-possession-limits-for-certain-migratory-game-birds

[57] See, for example, U.S. Department of Defense. (16 April 2010). *Retroactive Stop Loss Special Pay Compensation.* Federal Register. Retrieved 23 February, 2012, from: http://www.federalregister.gov/articles/2010/04/16/2010-8739/retroactive-stop-loss-special-pay-compensation#p-29

[58] U.S. Department of Veterans Affairs. *Veterans' Diseases Associated with Agent Orange.* Retrieved 23 February, 2012, from: http://www.publichealth.va.gov/exposures/agentorange/diseases.asp

[59] U.S. Department of Veterans Affairs. (31 August 2010). *Diseases Associated with Exposure to Certain Herbicide Agents.* Federal Register. Retrieved 23 February, 2012, from: http://www.federalregister.gov/articles/2010/08/31/2010-21556/diseases-associated-with-exposure-to-certain-herbicide-agents-hairy-cell-leukemia-and-other-chronic#p-81

[60] U.S Department of Homeland Security. (8 October 2010) *Department of Homeland Security: U.S. Citizenship and Immigration Services Fee Schedule, GAO–11–104R.* Retrieved 23 February, 2012, from: http://www.gao.gov/decisions/majrule/d11104r.htm

[61] U.S Department of Homeland Security. (20 August 2010) *Department of Homeland Security, U.S. Customs and Border Protection: Electronic System for Travel Authorization (ESTA): Travel Promotion Fee and Fee for Use of the System, GAO–10–1010R.* Retrieved 23 February, 2012, from: http://www.gao.gov/decisions/majrule/d101010r.htm

[62] U.S. Department of Education. (23 November 2009). *Student Assistance General Provisions; Teacher Education Assistance for College and Higher Education (TEACH) Grant Program; Federal Pell Grant Program; Academic Competitiveness Grant Program and National Science and Mathematics Access to Retain Talent Grant Program.* Federal Register. Retrieved 23 February 2012, from: http://www.gpo.gov/fdsys/pkg/FR-2009-11-23/pdf/E9-28050.pdf

regulation likely would be a significant regulatory action that would be caught in the Regulatory Freeze net.[63]

- **Preventing prison rape.** Pursuant to the Prison Rape Elimination Act of 2003, the Attorney General has proposed rules that aim to prevent prison rape. This regulation is a significant regulatory action that would be caught in the Regulatory Freeze net (although it might conceivably be subject to a waiver if the president determined it necessary to enforce criminal laws).[64]
- **Medical examiner registry.** Pursuant to the most recent transportation act, the Federal Motor Carrier Safety Administration aims to propose a rule to establish a national registry of certified medical examiners responsible for certifying that truck drivers meet physical qualification standards. This regulation would be a significant regulatory action that would be caught in the Regulatory Freeze net.[65]
- **Family and medical leave for military service personnel.** The Department of Labor is proposing rules to ensure the Family and Medical Leave Act is applied fairly to military service personnel. This regulation would be a significant regulatory action that would be caught in the Regulatory Freeze net.[66]

These examples highlight the overreach of the Regulatory Freeze act. As the regulatory policy debate has heated up, perhaps some of the more textured understanding of how regulation works in practice—and its centrality to government carrying out its core functions—has been lost. As drafted, the Regulatory Freeze act would halt a wide range of governmental programs and initiatives not likely to be the target of the legislation's supporters. However, there is no obvious fix to this problem; it is a direct result of the ill-advised broad brush approach of the legislation.

V. STRENGTHENING THE SYSTEM OF REGULATORY SAFEGUARDS TO STRENGTHEN AMERICA

To say that it would be a grave error to impose a 5-year moratorium on regulation is not to say that all is well with the regulatory system. It is in need of substantial reform to ensure that it serves the broad public interest, not the narrow commercial interests of regulated corporations. Many of the high-profile examples of regulatory failure in recent years—the Wall Street crash, the BP oil disaster, the Massey mine explosion, and others—evidence both the need for stronger rules to limit corporate wrongdoing, and stronger enforcement of existing rules. Those examples of regulatory failure also highlight the very serious problem of regulated industries exerting undue influence over the regulatory process itself.

Congress could meaningfully improve the functioning of the regulatory system by working to ensure stronger enforcement of existing rules. In too many cases, it pays for corporations to violate the law, because penalties for regulatory violations are too small. As one step forward, Congress should act to make it a crime for businesses to recklessly expose consumers or workers to deadly products or working conditions.[67] Congress should also increase the enforcement budgets of regulatory agencies, and hold those agencies accountable for enforcing the law. And citizens should be given some direct authority to enforce regulatory standards, loosely following the model of the False Claims Act.

Congress should also prioritize addressing the problem of regulatory capture and excessive corporate influence over the regulatory process. Too many agencies are too cozy with the industries they are supposed to regulate. These relationships undermine effective rulemaking and enforcement, and fuel public frustration with our government. Progress could be made in addressing regulatory capture and undue in-

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[63] U.S Department of Health and Human Services. (1 August 2011). *Prescription Drug User Fee Rates for Fiscal Year 2012.* Federal Register. Retrieved 24 February, 2012, from http://www.gpo.gov/fdsys/pkg/FR-2011-08-01/pdf/2011-19332.pdf

[64] U.S. Department of Justice. (3 February 2011). *National Standards to Prevent, Detect, and Respond to Prison Rape.* Federal Register. Retrieved 23 February, 2012, from: http://www.gpo.gov/fdsys/pkg/FR-2011-02-03/pdf/2011-1905.pdf

[65] 49 CFR Ch. 111, Part 390 (1 October 2011). *Federal Motor Carrier Safety Regulations; General.* Retrieved 23 February, 2012, from: http://www.gpo.gov/fdsys/pkg/CFR-2011-title49-vol5/pdf/CFR-2011-title49-vol5-part390.pdf

[66] Proposed rule can be found at: U.S. Department of Labor. Wage and Hour Division. (15 February 2012.) *Notice of Proposed Rulemaking, 29 CFR Part 825 RIN 1215—AB76, RIN 1235—AA03. The Family and Medical Leave Act.* Federal Register. Retrieved 23 February, 2012, from: http://www.regulations.gov/#!documentDetail;D=WHD-2012-0001-0001

[67] See, for example, the Dangerous Products Warning Act, H.R. 322, introduced by Rep. John Conyers.

dustry influence with stronger revolving door (and reverse revolving door) rules for regulators. Another positive step would be to prevent regulated parties from meeting with staff at the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) about pending rules, or to adopt new rules relating to such meetings.[68]

It is not the position of Public Citizen that all is well with the regulatory process. But for all its flaws, the regulatory system has made, and continues to make, our country stronger, safer and more prosperous. We need to improve the regulatory system, not bring new rulemaking to a halt.

Mr. COBLE. Thank you, gentlemen, for your testimony. We try to apply the 5-minute rule to ourselves as well. So if you can keep your responses terse, that would help us beat the red-light illumination. The gentleman from Tennessee.

Mr. COHEN. Thank you. Thank you, Mr. Chairman. Let me ask Professor Taylor first. We have had great periods of commercial success, and bullish periods. The Clinton years were very economically robust. Did we have regulations during that time period?

Mr. TAYLOR. Absolutely, we had regulations.

Mr. COHEN. And they didn't impede job growth, did they?

Mr. TAYLOR. Well, I think one thing that is very important about the period of the—I referred to in the early 1980's, was, there was a huge movement there to try to deregulate certain industries. The mode began in the Carter administration, and the airlines, and Fred Kahn. There was an effort to try to rationalize regulations. There was an effort to try to deal with regulatory capture. The important work done by economists like Stigler, who won a Nobel Prize, pointed out this regulatory capture, and that enabled the deregulation movement of many industries to occur.

Mr. COHEN. Do you think that the deregulation of airlines is a good thing? Have you traveled lately?

Mr. TAYLOR. I think that deregulation of airlines is a good thing, because I can travel across the country at a much lower rate than I could at that time, and there is other reasons too.

Mr. COHEN. You don't travel our of Memphis, sir. When you are a hub town, and you are basically a company town, we have got the highest rates of any place in the country. And back when you had Northwest and you had Southern, and you had Republic, and you had Delta, and you had American, and you had TWA, and you had Fly Eastern, and you know, any of those folks, you had competition. That kept prices down. That is America's competition. Deregulation, I would submit, has not been the panacea that some thought it was—during the 1990's, and regulations didn't impede that expansionism, did it not?

Mr. TAYLOR. I think when you have a lack of enforcement of antitrust or a competition policy you are going to get problems like this. And of course, there are some routes now where there is very high prices. So I think the advantage of deregulating, when you don't need deregulations, is you let the markets work and the

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[68] The Center for Progressive Reform has documented that OIRA meets with regulated parties five times more frequently than with public interest representatives; and that rules that were the subject of meetings were 29 percent more likely to be changed during the review than those that were not the subject of meetings. Steinzor, R., Patoka, M., & Goodwin, J. (2011). *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment.* Center for Progressive Reform. Retrieved 24 February, 2012, from http://www.progressivereform.org/articles/OIRA__Meetings__1111.pdf

prices are determined and there the new routes that would not have existed if there had not been the regulation. Now, to answer your question, because I think in some sense, what happened in the 1980's, is an example of what can happen if you try to more rationalize these regulations more than we have been doing recently.

We are now, in my view, moving in the other direction. And the fear that many businesses, economists have, that that moving of the direction is actually holding us back. Again, this recovery——

Mr. COHEN. A great example of what you are promoting or suggesting is that we drop the regulations, we are going to have this business boon, because businesses will be certain, is what you are saying.

Mr. TAYLOR. No, I don't want to drop regulations. Excuse me——

Mr. COHEN. Well, you would until the rates got down to 6 percent, until the unemployment rate gets to 6 percent under this bill, would it not be a moratorium on regulations?

Mr. TAYLOR. Seems to me this bill is a freeze, while we have this terrible problem with recovery. After the freeze, you should put in the kind of reforms that have been discussed by my colleagues. I would believe that is something that you should rule on right now.

Mr. COHEN. And I understand what you are saying, Professor Taylor, and I respect you. I think you have a tremendous background, and you are acclaimed, and I can't compete with you really. But you know, I just had an Aspen Institute seminar on China. China has got this great booming economy. It is unbelievable what they are doing. But they have like no regulations. And children have got insects—or not insects, but some type of substances in their intestines to where they can't absorb their food because they are eating food that is not well-regulated and it is not safe food, and the air is awful, and the conditions in China—so if you had to take away regulations, how do you make up for it when you put all of that in the air, or have those children that don't get any nutrition because you don't have regulations. And we have the same thing here with air quality, and food quality, et cetera.

Mr. TAYLOR. Seems to me that this bill here, allows for a lot of exceptions for things that have been mentioned already. The intent is for this to be temporary, or a period where people can take a breather, a time out, assess whether this is damaging the economy. And the issues you are raising, obviously, everyone wants to have a way to regulate in a sensible way. There is an important role for regulation in an economy. Economists have ways to describe when you should regulate, when you shouldn't. There is a cost-benefit analysis, I think the cost-benefit analysis should be done in a little more independent way than it is now.

Mr. COHEN. I thank you for your testimony. My time is about to run out. Professor Meltzer, I am going to follow up on the question that I think was attempted to ask you. Duke, UCLA? Who do you pull for?

Mr. MELTZER. Pardon me?

Mr. COHEN. Duke, UCLA? Who do you pull for? Who is your basketball team?

Mr. MELTZER. Toss a coin.

Mr. COHEN. Toss a coin. I got you. Thank you, I yield back the balance of my time.

Mr. COBLE. I thank the gentlemen. Mr. Taylor, what do you mean by the uncertainty that arises from new regulatory authority, such as from the Administration's health care and financial reform legislation? How can this uncertainty, as you say, hold back investment and firm expansion and how does this, in turn, affect job creation.

Mr. MELTZER. I think that is to me?

Mr. COBLE. No, Mr. Taylor.

Mr. TAYLOR. So, the financial firm regulations, now they are writing the rules. In normal periods, the Federal Reserve and other regulatory agencies would have a period of time to write rules. Now, they have roughly 200 they have to write. An example is the so-called Volcker rule, which was in the legislation, well-intentioned, to try to reduce the risk-taking of the large financial institutions. But the implementation of those rules, or rulemakings, 300 pages, there is thousands of pages of remarks put in place, so people don't know how that is going to be applied. The banks don't know how it is going to be applied. People who would compete with the banks don't know how it is going to be applied.

So that is a huge degree of uncertainty that that legislation is causing. And of course, the alternatives, simply just to try to raise capital requirements on the financial institutions. So I think that is a big one in terms of giving an example of what you are looking for.

Mr. COBLE. Thank you, Mr. Taylor. Were you finished Mr. Taylor? I didn't mean to cut you off.

Mr. MELTZER. Were you finished?

Mr. TAYLOR. It is off now.

Mr. WEISSMAN. Were you finished with your answer?

Mr. TAYLOR. Yes.

Mr. COBLE. Mr. Melter, you cite housing and the mortgage market as examples of how regulators are undermining recovery. Describe that in a little more detail, if you would.

Mr. MELTZER. Well, on one day, the Administration says we want more mortgages issued. We really want the banks to issue more mortgages. A few days later, or even on the same day, some other agency of government sues the mortgage lenders for some practice that they had in the past. Now, they may have committed some egregious action, but that is not going to get more mortgages. So that creates uncertainty. Are there going to be more mortgages? Are we going to encourage the mortgage lenders to issue mortgages, or are we going to encourage the mortgage lenders to pay for the abuses, alleged abuses that occurred in the past? Is that going to get us more housing? No, it is not. It is going to get us less, fewer mortgages, and less housing. That is an example. Here is another example, if I may.

We have just seen in the last couple of years the uncertainties created by the regulation that says women under 40, or at the age of 40, should not be given breast examinations. Well, the government is deciding that. Many women think that is not a good idea. The same thing is happening with contraceptives. The same thing is going to happen with the regulation, with hundreds of regulations that are going to come down under the Health Care Act. The same thing is happening—the K Street lawyers are descending on the Administration agencies, like the Fed and Treasury, to get them to change the legislation. Even Mr. Volcker has complained about what is happening to the Volcker bill. Those are some of the uncertainties, and there are many, many of them.

Mr. COBLE. I thank you, Professor. Mr. Weissman, some indicate that regulations do not inhibit job creation. And I am not—I probably don't come down on that side. The President, in his State of the Union address, identified himself as a less prolific regulator than was President Bush. Can you square me on that? I mean, on the one hand, folks say that the regulations inhibit job creation, but yet the President claims that he is going to be a less prolific regulator.

Mr. WEISSMAN. Well, as you know, Mr. Chairman, I don't represent the Administration. However, I believe that the President's position is, and I think it may have changed. At the time that he said that, I think that over the same time period he had issued fewer regulations than President Bush had. Be that as it may, I mean, obviously, the goal of issuing regulations is to advance social objectives, including financial protection, but not to issue regulations for regulations sake. And anyone can make up a regulation that would interfere with regular business operations, and I think the President was saying, look, we don't make that. Our regulations are as careful as we can possibly do them. We go out of our way, which I believe to be true, to limit the impact and the complexity that we are imposing on business. There are surely examples where there is failure of that. But I think if you actually look at the regulations that are issued, and look especially at the rationales, the cost-benefit analysis, and so on, that are issued for those regulations, you have to be impressed with the care with which regulators generally put forward those rules.

Mr. COBLE. I thank you, Mr. Cohen. I see that my red light has illuminated. The distinguished gentlemen from Georgia, Mr. Johnson. You are recognized for 5 minutes.

Mr. JOHNSON. Thank you, Professor Meltzer. I see that you have been highly critical of the Federal Reserve's decision to rescue AIG.

Mr. MELTZER. Indeed.

Mr. JOHNSON. And was it—do you think it was because of regulations that AIG failed, or was it because of lack of regulation?

Mr. MELTZER. I don't think that regulation was a central issue.

Mr. JOHNSON. Don't you agree, though, that——

Mr. MELTZER. The regulation was a problem.

Mr. JOHNSON. Well, you must then agree that it was the lack of regulation.

Mr. MELTZER. No, I think that it——

Mr. JOHNSON. Well, what was it then? Either too much regulation, or not enough.

Mr. MELTZER. The core problem was that both Administrations, that is, Republican and Democrat, believed that they were doing good things by encouraging housing for under-housed minorities.

Mr. JOHNSON. Well, let's look at—is it a lack of regulation that——

Mr. MELTZER. No, the regulation——

Mr. JOHNSON [continuing]. That has gotten into problems?

Mr. MELTZER. Mr. Johnson, there is an excellent book which I recommend to you by the—one of the editors of The New York Times, that goes through what happened when Jim Johnson, who had been the campaign chairman for Walter Mondale, became the head of an agency that was, at that time, 50 or 60 years old. The Federal—Fannie Mae. He then expanded Fannie Mae into doing many, many things that it had not done before, and he found——

Mr. JOHNSON. Including, including——

Mr. MELTZER [continuing]. People in the private sector.

Mr. JOHNSON [continuing]. Including taking it out from under the Federal Government.

Mr. MELTZER. Well, that happened in the Johnson administration.

Mr. JOHNSON. Well, I mean, so, now——

Mr. MELTZER. In the Johnson administration.

Mr. JOHNSON. Let's get our facts straight now. Tell me something. Do you still agree that Lehman Brothers should have been allowed to bite the dust?

Mr. MELTZER. I am sorry, that who?

Mr. JOHNSON. Lehman Brothers?

Mr. MELTZER. Lehman. I believe that Lehman, we would have been better off if Lehman had gone into bankruptcy. That was fine. What we shouldn't do——

Mr. JOHNSON. What about GM?

Mr. MELTZER. What was a mistake—the mistake was not letting them go into bankruptcy. The mistake was that it had bailed out Bear Stearns, and that it convinced the people that the game was going to be played the way it usually was, and then suddenly, without any warning, the rules were changed.

Mr. JOHNSON. And there was a failure of regulatory authority basically, is what you are talking about.

Mr. MELTZER. Yes, there was a failure.

Mr. JOHNSON. Lack of regulations, in other words——

Mr. MELTZER. Not lack of regulation. It was the failure of the regulators.

Mr. JOHNSON. Well, and you are not blaming any of that on President Obama, are you?

Mr. MELTZER. No, President Obama had nothing to do with what happened in 2008. He was in the Senate at that time.

Mr. JOHNSON. Okay, well, for 2 years. But Professor Taylor, you have indicted the current Administration, it would seem, for the lack of vitality in the recovery. In fact, you criticized the recovery as being kind of just piddling, I think you would agree to, but you would also agree with me, would you not, that there had been 27 straight quarters of economic growth during the last 27 months? Would you agree with that?

Mr. TAYLOR. We have had 10 quarters of positive economic growth. The problem is the growth rate is only 2.4 percent.

Mr. JOHNSON. Now, is that because of regulations, or is it because of Republican obstruction of the Congress, and the President's initiatives to create a more stimulating environment?

Mr. TAYLOR. The regulations are part of it, I believe. But in addition, you know, the stimulus packages and the cash for clunkers and the first-time home buyers, which were all efforts to stimulate, I don't think stimulated, but, in fact, had——

Mr. JOHNSON. How do you account for the 2.—how do you account for the 10.5 percent unemployment rate that has been reduced now to 8.5 under the Obama administration? How do you account for that?

Mr. TAYLOR. Well, unfortunately, a big part of that is people dropping out of the labor force in unprecedented amounts. And I——

Mr. JOHNSON. It was under President Reagan, as soon as he came into office, that they changed the benchmarks for measuring unemployment insurance. Isn't that—the unemployment rate. Isn't that correct?

Mr. TAYLOR. Well, this recent reduction in the labor force doesn't——

Mr. JOHNSON. No, no, no, no. I am talking about changing the formula to determine who is employed, who is unemployed, and how much that rate is based on a number of different factors. That was changed as soon as President Reagan came into office to make his numbers look better, and now you are going to judge President Obama on the statistics that we have been relying upon since 1980, and that just doesn't seem fair to me.

Mr. TAYLOR. I don't think the issue is measurement of the statistics. I think if you look at the growth rates of GDP. Again, GDP has grown 2.4 percent in this recovery, 5.9 percent in early recovery.

Mr. JOHNSON. We didn't have a obstruction of Congress, though, back then.

Mr. TAYLOR. But I don't think it is a partisan issue. I think it is a policy issue.

Mr. JOHNSON. Well, sometimes it is political.

Mr. TAYLOR. Sometimes policies are good in different Administrations and sometimes they are bad. I do not think it is partisan. I have lots of examples where Republicans don't follow good policy, lots of examples where Democrats follow good policy. And so I do not think this is partisan at all. I think it is a question of resolve to find the good policies. In the late 1990's during the Clinton administration, we didn't have all of these stimulus packages. We were able to reduce the role of the Federal Government in regulatory areas, and for that matter, for example, the welfare reform. I think if you go back into the 1970's, a very poor time with the economy, Republicans, President Nixon, President Ford were there for part of that time. So I think it is a mistake to think of this as partisan. I honestly do. There are differences in the policy which can you learn from, and some work, and some don't.

Mr. COBLE. The gentleman's time is expired. The distinguished gentlemen from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Coble. I would like to review with Attorney Weissman, the five points that he summarized against the conversation and interchange that we have had with our witnesses, and with the Members on the Subcommittee. The whole idea of strengthening the economy, creating jobs, safer—safer conditions for citizens, the unintended impeding of everyday government action, and the strengthening of America.

And the strengthening of America through regulatory safeguards. How has some of our discussion failed to take into consideration much, if not almost all of the points that you have made?

Mr. WEISSMAN. Well, I think that the theory Professor Meltzer and Professor Taylor is that regulatory uncertainty is a significant problem for job creation and preservation. I think that is not true. And I think the best evidence for that is purely theoretical and almost philosophical, and existing empirical evidence doesn't suggest it. And I think the discussion of concrete examples is very helpful for elaborating on that in a variety of ways. If you look at some of the examples that were highlighted, and I know they could point to others as well. The Volcker rule, for example is a very important regulation being proposed. I believe it has flaws too, for some of the reasons that Professors Meltzer and Taylor say. It is overly complicated. It would be much better if it was simpler. But it is a structural remedy for a very serious problem.

It does, for sure, creates some uncertainty in the financial sector, but that doesn't mean there is any connection to job creation. I don't know what the story is about that. The standard for breast examinations, I am not even sure it constitutes a significant regulatory action as defined by the bill. I think one would be very hard placed to say how that has anything to do with economic uncertainty and job creation. The fact that the Justice Department is considering suing mortgage lenders for their rampant criminality in the mortgage market or that State AGs are doing that, first of all, is a positive thing. And it ultimately will be very important, I believe, for reducing principal owed, actually by mortgage borrowers, and expanding the economy. It has nothing to do with uncertainty in the economic market and impeding job creation. That is on the one hand.

On the other hand, there is a failure to address what the bill would actually do. And what the bill would actually do is block for 5 years with almost no relevant exceptions the issuance of new health, safety, environmental, and financial protections. It would also, not so trivially, undermine the ability of the government to do what it does on a day-to-day basis, including revamp the Medicare payment system every year.

So I think there is a philosophy that I disagree with. There is a theoretical construct about what the bill would do and why it should be issued, and I think that is misguided and not supported by the evidence on the one hand.

On the other hand, when you look at the actual details of what is at stake, you are looking at very serious things, both in the health safety environmental financial protection realm, traditionally what we think of regulation, but also a lot of what the government just does. I think it is a huge mistake out of a philosophical commitment to commit that error.

Mr. CONYERS. Mr. Meltzer, I would like to recognize you at this point.

Mr. MELTZER. It isn't what I say about uncertainty, the Harvard Business graduates, they are the people who make these decisions. They say this creates uncertainty, they say it deters hiring, that is their view. They are the people who do the hiring. I don't hire anybody except one secretary. They hire hundreds of thousands of people. They are the leaders of American industry. They say it causes a problem.

Second, I would like to say this bill does not prevent the Administration from doing anything that it believes is in the public interest. All it has to do under the bill is notify the Congress that that is what it is asking and then the Congress has a right as it should have, to make a judgment as to whether it prefers to do what the Administration is asking, or whether it prefers to avoid the regulation. It doesn't hamper regulation. It is wrong to think of the bill as hampering regulation. It may delay regulation, but we have gotten along for hundreds of years without some of these regulations, so it is probable that we can survive very well for another 5 years.

Mr. CONYERS. Could I ask for 2 additional minutes, sir?

Mr. COBLE. The gentleman is allowed 2 additional minutes.

Mr. CONYERS. And I would just like to return to Attorney Weissman because I haven't heard anything about what Harvard said, with all due respect for Harvard, but let me yield to you for the last comments in this hearing.

Mr. WEISSMAN. Well, I will avoid the impulse to make some comment about Jeremy Lin and the basketball team and things like that. I think that Professor Meltzer is misreading the bill. The bill provides for regulatory a regulatory freeze until unemployment hits 6.0, that is it, that is the bill.

Mr. CONYERS. You know——

Mr. WEISSMAN. There are exceptions that are permitted that is relatively routine for implementation of provisions required under international trade—legislation to implement international trade agreements. You could imagine that they would be easily granted in the case of national security as articulated in the legislation. But the requirement, as regards health and safety, is necessary because of an imminent threat to health or safety or other emergency. And there is quite a bit of jurisprudence on this, plus the plain language of the statute. Imminent threat means immediate, right now, something that has to be done to prevent something that is otherwise going to happen in a very near term with a high degree of certainty. That is just not why most regulation takes place. Take the example of food safety, we issue food safety rules usually because there has just been an outbreak of some problem, but not because we think it is about to happen again.

You can go down the case of crib safety or auto safety or environmental protection or preventing another financial crisis, on and on, you go down the list—it will almost never meet the standard of an imminent threat to health or safety or other emergencies. I believe the proper interpretation of this bill is that will be a roughly 5-year moratorium on all health, safety, environmental, financial, et cetera, protections.

Mr. CONYERS. Well, I thank you very much. And I think we need to examine the record as closely as we can, Chairman Coble, because there is a great discrepancy of interpretation about the measures as it has been brought forward. I thank you for the additional time.

Mr. COBLE. I thank the gentleman, without objection I want to enter into the record a letter from the U.S. Chamber of Commerce endorsing this bill.

[The information referred to follows:]

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

February 27, 2012

The Honorable Tim Griffin
U.S. House of Representatives
Washington, DC 20515

Dear Representative Griffin:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, supports H.R. 4078, the "Regulatory Freeze for Jobs Act of 2012," as an important tool to rein in an out of control regulatory bureaucracy. This bill would prevent the largest, most costly new regulations from going final and harming our economy until the national unemployment rate improves significantly, thereby highlighting the inverse relationship between regulatory burden and job creation.

Regulations are a necessary part of a complex society. But an unbalanced federal regulatory process has led to an unprecedented increase in major, economically significant regulations, some of which are harming the economy and inhibiting job creation. These regulations also threaten to erode the carefully calibrated constitutional system of checks and balances that is the foundation for the American system of government. Hastily written regulations coming out in the health care, environmental, and financial arenas are issued with little apparent regard for the dramatic impact they will have on employers, and their ability to grow their businesses and hire more employees. These economically significant rules have a chilling effect on the entire U.S. economy.

The Chamber believes that excessive regulatory burdens are not compatible with economic prosperity or job creation. H.R. 4078 would allow the thousands of minor, non-controversial regulations that "keep the lights on" to move forward, while placing an important check on the relatively small number of economically significant regulations that impact the business community's ability to compete. It would also provide judicial review so that agencies can be held accountable if they fail to comply with the requirements of this bill.

The Chamber supports H.R. 4078, and applauds you for your leadership on this important issue.

Sincerely,

R. Bruce Josten

cc: The Honorable Howard Coble, U.S. House of Representatives

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Mr. COBLE. Gentlemen, thank you all for being with us, we appreciate your testimony today. Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can do so with their answers that may be made a part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record. And with that, again, I thank the witnesses and this hearing stands adjourned.

[Whereupon, at 5:11 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

Today's hearing marks the ninth one held to date during this Congress on the subject of so-called "regulatory reform."

A common argument made by my friends on the other side of the aisle at nearly all of these hearings is that regulations somehow depress job creation.

H.R. 4078, the "Regulatory Freeze for Jobs Act of 2012," clearly attempts to link regulations with employment by preventing agencies from engaging in significant regulatory actions if the average monthly unemployment rate exceeds 6% in any quarter.

Let me explain why H.R. 4078 represents the ultimate in legislative foolhardiness.

First, the bill fails to acknowledge the fact that regulations play a critical role in ensuring the health and safety of Americans as well as to the economic well-being of our Nation.

By imposing a moratorium on significant regulatory action, H.R. 4078 would prevent agencies from fulfilling the job that we in Congress entrusted them to do, namely, to ensure the safety of the foods we eat, the cars we drive, and the places where we work.

As Cass Sunstein, who heads the agency charged with reviewing federal regulations, recently observed:

> "A moratorium would not be a scalpel or a machete, it would be more like a nuclear bomb, in the sense that it would prevent regulations that . . . cost very little, and have very significant economic or public health benefits."

The proponents of this legislation could not possibly be intending to jeopardize the health and safety of Americans in order to pursue an anti-regulatory political agenda, but I'm afraid that would be the exact practical effect of H.R. 4078.

Second, there is absolutely ***no*** credible evidence establishing that regulations have any substantive impact on job creation.

Last year, the Majority's own witness testified before this Subcommittee that the "focus on jobs . . . can lead to confusion in regulatory debates" and that "the employment effects of regulation, while important, are indeterminate."

The truth is that regulations can, in fact, lead to job creation. And, here are just a few examples:

- A pending regulation limiting the amount of airborne mercury will not just reduce the amount of seriously toxic pollutants, but create as many as 45,000 temporary jobs and possibly 8,000 permanent jobs, as the *New York Times* noted last week.

- Heightened vehicle emissions standards have spurred clean vehicle research, development and production efforts that, in turn, have already generated more than 150,000 jobs at 504 facilities in 43 states across the U.S.

It should, therefore, not come as a surprise that Bruce Bartlett, a former senior Republican Advisor in the Reagan and George H.W. Bush Administrations, says that there is "no hard evidence" that regulations stifle job creation and that it's simply being "asserted as self-evident and repeated endlessly throughout the conservative echo chamber."

And, finally, this bill will result in greater, not less, business uncertainty. In fact, it will increase the cost of doing business.

By its own terms, H.R. 4078 makes the regulatory process dependent on the national unemployment rate, which, as we all know, can fluctuate from quarter to quarter for any number of reasons, creating a tremendous amount of regulatory uncertainty for businesses.

Factors that can depress employment include a devastating terrorist attack, a world-wide fuel shortage, or some cataclysmic natural disaster.

So how is a company to plan in a regulatory regime that would start, then stop, and then at some indeterminate point re-start, and then possibly stop all over again, all as a result of outside events?

Even if we were to accept the premise that regulatory uncertainty is currently a problem, there is no evidence that it is a significant problem.

As Minority witness Professor Sidney Shapiro testified before this Subcommittee last year, "All of the available evidence contradicts the claim that regulatory uncertainty is deterring business investment."

This also explains why a July 2011 *Wall Street Journal* survey of business economists found that the "main reason U.S. companies are reluctant to step up hiring is scant demand, rather than uncertainty over government policies."

Similarly, a September 2011 National Federation of Independent Business survey of its members found that "poor sales"—not regulation—is the biggest problem.

Indeed, the Main Street Alliance, an small business organization, observes: "In survey after survey and interview after interview, Main Street small business owners confirm that what we really need is more customers—more demand—not deregulation."

And, we cannot ignore the fact that the lack of regulation can lead to greater costs for industry.

Take, for example, the disastrous BP oil spill that occurred a couple of years ago.

New regulations intended to prevent another such spill will cost the deep water drilling industry about $180 million. But compare that figure with the cost of one well blowout: $16.3 billion.

This bill attempts to deal with a concern that is already being addressed by the current Administration.

The Obama Administration has undertaken a series number of innovative initiatives to ensure that the regulations it approves result in net savings.

For instance, the net benefits of regulations issued by this Administration in three fiscal years exceed $91 billion, which is more than *25 times* the net benefits of regulations issued by the Bush Administration for a comparable period.

Rather than pursuing solutions for problems that don't exist, we should be using the resources of the Judiciary Committee to address real problems, like the ongoing home foreclosure crisis.

And, with respect to the real problem of unemployment, our Committee should be promoting real solutions instead of discussing solutions that are in search of a problem.

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Courts, Commercial and Administrative Law

H.R. 4078, the "Regulatory Freeze for Jobs Act of 2012," is a blunt instrument designed to respond to a mistaken belief—namely, that there is a purported link between regulations and unemployment.

The bill would prohibit agencies from engaging in any significant regulatory action until the average monthly unemployment rate for one quarter reaches 6% or less.

The bill also provides for judicial review of agency action, including presidential determinations that certain circumstances exist that ought to permit significant regulatory action even when it is otherwise prohibited under this bill.

Finally, the bill requires courts to award attorneys fees and costs to small businesses whenever an agency changes its position regarding a significant regulatory action that is a subject of a lawsuit, regardless of whether the change in agency position resulted from the filing of the lawsuit.

H.R. 4078 is premised on the false assertion that regulations undermine job creation. Proponents of anti-regulatory legislation have asserted this again and again in favor of such measures, yet they have never provided *evidence* of such a link. At best, all I have ever heard in support of this assertion are anecdotes, and anecdotes are not evidence.

Indeed, even one of the Majority's own witnesses from a hearing last year testified before us that, at most, the effect of regulations on employment was "indeterminate."

Based on a review of their written statements, the two Majority witnesses today also do not offer evidence of an actual link between unemployment and regulation. At best, they hang their arguments on the unsupported notion that the creation of new rules creates "uncertainty" that causes businesses to hesitate in hiring.

Yet survey after survey of businesses and economists has shown that regulations have little to do with a lack of hiring. Instead, they overwhelmingly point to a lack of demand among consumers as the primary culprit.

For instance, the *Wall Street Journal* surveyed business economists last summer and found that the "main reason U.S. companies are reluctant to step up hiring is scant demand, rather than uncertainty over government policies."

Likewise, the National Federation of Independent Business found from a survey of its members that 45% cited faltering sales as the biggest factor in dampening business confidence. Only 10% of NFIB members identified "regulations" as a factor.

Moreover, regulatory failure is more harmful to the economy than the existence or creation of new regulations.

Proponents of H.R. 4078 and other anti-regulatory measures seem to forget that our current employment troubles can be traced to a ***lack*** of adequate regulation of the financial services and housing industries, which allowed for reckless private sector behavior that, in turn, led to the 2008 financial crisis and the Great Recession, the most severe economic recession since the Great Depression.

In short, there is a far greater economic cost to stopping agencies from regulating than there is to allowing new regulations to take effect.

In addition to problems with its philosophical underpinnings, H.R. 4078 raises a number of troubling questions

First, when could non-exempt significant regulatory actions commence? While economists can take educated guesses as to when the quarterly unemployment rate will reach 6%, at best it would be just that—a guess.

Second, what happens when the quarterly unemployment rate reaches 6% in one quarter, and becomes 6.1% in the next? By H.R. 4078's terms, agencies potentially would have to re-freeze significant regulatory actions after one quarter.

Third, what happens when the quarterly unemployment rate reaches 6.1% in one quarter? Should businesses start preparing for a slew new regulations to go into effect in the next quarter in anticipation of the unemployment rate reaching 6%?

Fourth, with respect to judicial review of presidential waiver determinations, what would be the standard of review that a court should apply? Would the President be required to keep a record of his decisionmaking process, to be reviewed by the court? Does this judicial review provision violate separation of powers and, in certain instances, executive privilege?

Fifth, with respect to the attorney's fee provision, why is there no link between the mandatory award of attorney's fees and costs to small businesses, on the one hand, and the change in agency position with respect to the significant regulatory action? The language of this provision does not require the agency to have changed its position *because of* the filing of the civil action.

I hope the witnesses will address these questions thoroughly. I thank them for being here today and eagerly await their answers.

Letter from the Coalition for Sensible Safeguards

COALITION FOR SENSIBLE SAFEGUARDS

February 27, 2012

The Honorable Lamar Smith, Chairman
House of Representatives Committee on the Judiciary
Washington, DC 20515

The Honorable John Conyers, Ranking Member
House of Representatives Committee on the Judiciary
Washington, DC 20515

Dear Chairman Smith and Ranking Member Conyers:

The Coalition for Sensible Safeguards urges your committee to strongly oppose H.R. 4078, "The Regulatory Freeze for Jobs Act of 2012." This extremely harmful piece of legislation is the latest in a series of bills designed to mislead the public into believing that our country's system of health and safety protections is connected to slower job growth. This deceptive rhetoric ignores the real cause of the financial crash and the ensuing Great Recession: a lack of sound financial standards and clear rules of the road. If the implosion in the financial sector was not enough proof of the inability of large corporate interests to regulate themselves, countless other examples exist, including numerous food and consumer product recalls and the disastrous 2008 toxic coal ash spill in Tennessee.

H.R. 4078 assumes that the economy won't grow without some kind of "freeze" on regulations. This is clearly wrong. The economy is improving. Unemployment claims have fallen for the sixth straight month and are now at a four-year low[1]. Retail sales figures are rising, and the Dow Jones index is at its highest level in almost four years.[2] The economic recovery is far from complete, but this legislation is not the answer. Rather, this bill is a fake solution in search of a problem.

Instead of undermining the standards and rules that ensure everyone in our economy plays by the same rules, we need to make sure we enact commonsense reforms that ensure another financial catastrophe can't happen. We need to break up the banks that are still "too big to fail" and curtail their speculative behavior – reforms that are working their way through our regulatory system. H.R 4078 would stop these reforms dead by placing a moratorium on new rules and on all agency activity leading to those new rules.

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[1] http://www.usatoday.com/money/economy/story/2012-02-23/weekly-unemployment-claims-february-23/53217036/1

[2] http://www.huffingtonpost.com/2012/02/21/dow-jones-industrial-average-financial-crisis_n_1290986.html

The overly broad scope and impact of this legislation would also halt new standards to protect workplace safety, the environment, food safety and consumer product safety. Even reforms requested and welcomed by industry, such as new fuel efficiency standards, would be stopped by this legislation. Government agencies would be unable to respond to emerging crises, such as *Salmonella*-tainted eggs or spinach contaminated with *E. coli*. Cass Sunstein, President Obama's top regulatory official, reacted strongly against the idea of a regulatory moratorium in a recent hearing, stating, "[A] moratorium would not be a scalpel or a machete, it would be more like a nuclear bomb, in the sense that it would prevent regulations that, let's say, cost very little, and have very significant economic or public health benefits."[3]

The current regulatory process is already replete with hurdles and lengthy delays. Three pieces of legislation, H.R. 527, The Regulatory Flexibility Improvements Act, H.R 3010, The Regulatory Accountability Act, and H.R.10, The Regulations in Need of Scrutiny Act, already approved by this committee and passed by the House, would, if enacted, make the situation even worse. The clear effect of these bills would be regulatory paralysis, and H.R. 4078 would exacerbate the problem and put the safety and well-being of the American people at risk.

For these reasons, we strongly urge members of this committee to oppose H.R. 4078.

Sincerely,

Katherine McFate, President and CEO, OMB Watch
Co-chair, Coalition for Sensible Safeguards

Robert Weissman, President, Public Citizen
Co-chair, Coalition for Sensible Safeguards

The Coalition for Sensible Safeguards is an alliance of consumer, labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, as well as concerned individuals, 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.

[3] https://www.politicopro.com/go/?id=5848

Response to Post-Hearing Questions from Robert Weissman, President, Public Citizen

Questions for the Record from Ranking Member Steve Cohen
For the Hearing on H.R. 4078, the "Regulatory Freeze for Jobs Act of 2012"

Questions for Robert Weissman

1. Section 3 of the bill specifically provides that the moratorium applies for "any quarter" where the Bureau of Labor Statistics average of monthly unemployment rates is equal to or less than six percent. For example, the average unemployment rate in 2003 was below six percent for the first quarter, but then exceeded that threshold in the second and third quarters. It then was below six percent in the last quarter of 2003. In light of the fact that unemployment rates can fluctuate from quarter to quarter, this means that agencies would have to stop and restart the promulgation of a rulemaking depending on the average unemployment rate, including the period for public notice and comment.

   What are the practical implications of this potentially chaotic rulemaking process?

ANSWER: The first and most troubling impact of the Regulatory Freeze act is that it would stop significant rulemaking for the foreseeable future – until 2017, according to CBO estimates of when the unemployment rate will drop to 6.0.

However, once the unemployment rate finally dips down in the 6 percent range, a likely ongoing impact of the Regulatory Freeze act will be to introduce bizarre uncertainty into the rulemaking process. One possibility is that the unemployment rate continues to drop, settling at a level considerably below 6.0 (at least until the next shock or recession). In this scenario, there is likely to be a period where the rate is around 6.0. During this time, agencies will be able to work on developing rules if the rate is below 6.0 for a quarter, but not if it is higher. Until the rate finally falls significantly below 6.0, from quarter to quarter, they will be uncertain about whether they can work on -- let alone issue -- rules. This will lead either to bizarre efforts to work on rules in the low unemployment quarters, or simply – and more likely -- to agencies continuing to delay work on rules until the unemployment rate falls clearly below 6.0. Because of course significant agency rulemaking is an elaborate undertaking – for some agencies commonly requiring years and years – the latter outcome is more likely.

A second scenario is that unemployment does not decline comfortably below 6.0, but settles at a rate in the 6.0 vicinity. In that case, the just described story would be repeated, but with an even worse outcome. With unemployment hovering around 6.0 – in some quarters above, in some quarters below – agencies are likely to throw up their hands and just give up on rulemaking altogether. To the extent possible under the Regulatory Freeze act, they would out of necessity rely more on shadow rulemaking (substituting informal opinion letters and enforcement action for rulemaking), far inferior on both democratic and substantive grounds to actual rulemaking. In many cases, however, there would be no effective shadow rulemaking substitute, and rules simply would not issue. The nation would be sicker, dirtier, weaker and less secure as a result.

2. Will H.R. 4078 lead to more business uncertainty?

ANSWER: Yes, HR 4078 will certainly create more business uncertainty. Businesses will have no practical way of foreseeing when rules will be issued – including already statutorily mandated rules. The uncertainty around rulemaking comes not from the issuance of the rules, but delays in issuance – and the Regulatory Freeze act is designed to build in long delays.

For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act mandates the adoption of more than 100 rules. These rules may be good or bad (our judgment is that Dodd-Frank rules are, on balance, very positive though inadequate), but their substantive merit is not what creates uncertainty. What creates uncertainty is the delay in getting them issued, as well as a follow on period where they are interpreted in practice.

3. Section 2 of H.R. 4078 defines "significant regulatory action," but fails to identify who would determine whether a rule or guidance is covered by such definition and how such determination would be made.

> Does the bill explain exactly who would make this determination? If not, would that be problematic?

ANSWER: HR 4078 does not specify exactly who is responsible for making the determination of what constitutes significant regulatory action. That uncertainty, combined with Section 5 provisions that facilitate litigation over any rules that are promulgated, will likely encourage agencies to interpret "significant regulatory action" broadly -- meaning they will be less inclined to work on and issue new rules.

In this regard, it is important to note two things. First, the $100 million threshold in HR 4078 is a low bar. The $100 million refers not to compliance costs, but to cost to the economy; that is why such matters as establishing the bird hunting season constitute significant regulatory action. Second, the $100 million threshold is only one part of the definition of significant regulatory action. Actions that create inconsistencies with actions taken by other parts of the government, or which raise novel legal or political issues, also constitute significant regulatory action, as do measures that meet the other standards elaborated in Section 2(3). These are ambiguous standards.

4. Section 5(e) of the bill requires a court to award reasonable attorneys fees and costs to a "substantially prevailing" business in any civil action arising under this legislation.

> Does H.R. 4078 impose this liability even if the party fails to obtain a final judgment?
>
> Should the attorney's fee provision include an exception for good faith?

ANSWER: Section 5(e) would award fees to "substantially prevailing" small businesses even if they fail to obtain final judgment, so long as "the agency that took the significant regulatory action changes its position after the civil action is filed." This is a very generous attorney's fees provision. First, as the statute is structured, any person[1] affected by a significant regulatory action has standing to challenge a significant regulatory action -- which includes not just final rules, but steps that might lead to final rules. Thus it appears that a party would have standing to challenge not just a final rule, but action taken by an agency that might lead to issuance of a final rule. Second, the bill awards attorney's fees if an agency "changes its position" -- something routine in the early stages of rulemaking. Notably, the bill fails to define the term "changes its position," so that even modest changes by an agency might lead to an award of attorney's fees. Third, the bill does not require that a change in agency position result from or even correlate to a legal challenge from a small business.

These concerns are exacerbated by the fact that the attorney's fee provision in the legislation is, of course, a one-way ratchet. That is, there is in the legislation no provision of attorney's fees for challenges against an agency for failing to regulate adequately. Under existing law, it is much more difficult to obtain attorney's fees.

5. You note that H.R. 4078 could well make our Nation's unemployment rate worse. Please explain.

ANSWER: HR 4078 could make the unemployment situation worse by preventing the issuance of rules designed to stabilize the financial sector and avoid a repeat of the 2008 financial meltdown.

Consider two examples from the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Volcker Rule and Section 956. The Volcker Rule is designed to stop commercial banks from proprietary trading -- in other words, to stop publicly insured financial enterprises from gambling on the markets. It aims to address the conflicts of interest and culture that followed from repeal of Glass-Steagall. As I indicated in my written testimony, these problems stemming from the repeal of Glass-Steagall directly contributed to the 2008 financial crash and the Great Recession. The Volcker Rule would be caught in the Regulatory Freeze net.

Section 956 of Dodd-Frank is a straightforward rule that aims to stop the big banks from providing compensation schemes to top executives that incentivize undue risk taking and thereby threaten financial stability. As with the Volcker Rule, Section 956 is an attempt to deal directly with a problem that we know helped cause the 2008 financial crash and the Great Recession. Section 956 rules are likely to be caught in the Regulatory Freeze net.

[1] Interestingly, "person" is not defined in the legislation. But it appears from the structure of the bill and the provision awarding reasonable attorney's fees to small business that it intends "person" to include business.

Material submitted by the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Courts, Commercial and Administrative Law

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100 YEARS OF JOURNALISTIC EXCELLENCE

Lack of demand, not regulations, holding businesses back

A small business survey indicates there's a disconnect between what politicians say is holding back the economy and what small businesses see as the culprit. From left to right, Sen. Lindsey Graham, R-S.C., Sen. Mike Enzii, R-Wyo., Sen. Lamar Alexander, R-Tenn., Sen. John Barrasso, R-Wyo., and Sen. Rand Paul, R-Ky., attended a media availability to discuss the National Labor Relations Board and regulations hindering job growth in Washington Sept. 14. UPI/Kevin Dietsch

By MARCELLA S. KREITER, United Press International

We've all heard the arguments: Regulations are strangling U.S. businesses. It's been a staple in the Republican playbook for years.

But a funny thing happened last week. The American Sustainable Business Council, the Main Street Alliance and the Small Business Majority released a survey blaming the stagnant economy not on onerous regulations but on weak consumer demand.

"The level of government regulation came in [way below] weak demand. When asked what they believe would do the most to create jobs, the majority cited eliminating incentives for employers to move jobs overseas. Next was cutting taxes and then increasing consumer purchasing power. Reducing regulations ranked fifth on their list, behind improving infrastructure," the survey's executive summary said.

The Club for Growth, which describes itself as a national network of thousands of pro-growth Americans, gives Republican presidential hopeful Mitt Romney high marks for his efforts to reduce regulations in Massachusetts while he was governor, noting the Legislature often quashed his initiatives.

In his recent State of the Union address, President Barack Obama called for "smart regulations to prevent irresponsible behavior. Rules to prevent financial fraud or toxic dumping or faulty medical devices -- these don't destroy the free market. They make the free market work better.

"There's no question that some regulations are outdated, unnecessary, or too costly. In fact, I've approved fewer regulations in the first three years of my presidency than my Republican predecessor did in his. I've ordered every federal agency to eliminate rules that don't make sense."

Eighty-six percent of the 500 small-business owners queried through the Internet Dec. 8 to Jan. 4 by Harris Interactive said they believe "some regulation is necessary for a modern economy" and 93 percent said they can live with "fair and manageable" regulation.

Seventy-eight percent of those queried said they think it's important for the government to level the playing field to allow small businesses to compete against bigger players and a like percentage said health insurance companies should be "held accountable" to eliminate excessive premium increases.

When it comes to clean air and water, 79 percent of respondents said it's important to support clean air and water efforts and 61 percent said they support moves toward energy efficiency and clean energy.

The survey concluded small-business owners "believe regulations should be as tough on large corporations as they are on small businesses and that instead of scrapping regulations already on the books, as some lawmakers have proposed, they should continue to be enforced. Small businesses can help pull the economy out of the doldrums, but they need government to be a partner that works to address their actual economic needs and creates a level playing field for small businesses to thrive."

Frank Knapp Jr., vice chairman of the American Sustainable Business Council and president and chief executive officer of the South Carolina Small Business Chamber of Commerce, likened deregulation, to some extent, to playing football without any rules.

"The winner would come down to which team was bigger or willing to play dirtier," he said. "From our perspective, the effort to kill regulations is big businesses' way of rigging the game in their favor."

Knapp said big business -- especially finance, petroleum and coal -- is invoking the words small business to get what it wants.

"We know that the good name of small business has been co-opted by the big-business community," Knapp said. "That's exactly what our poll results show. Our No. 1 issue is demand. We know and support a lot of regulations."

Knapp said partisan politics has gotten in the way of running the country. He said investing in infrastructure used to be a very traditional, Republican approach to helping the economy, but this time around, because President Obama proposed it, the GOP has been fighting the idea. Ditto eliminating incentives for companies to ship jobs overseas -- one of the key things small business owners said should be done to boost the economy domestically.

"The rhetoric is being driven by big business. ... They really don't care what regulations affect small businesses. It's all about what's in best interests of big business. They're just using small business to get there," Knapp said.

Another interesting aspect of the poll was that small-business owners largely describe themselves as Republicans.

"Over 50 percent identify with the Republican party, 32 percent Democrats and 15 percent independents. Small business owners are by nature conservative," Knapp said. "When you ask them their opinions on specific issues, they make it very clear what they think is in their best interests.

"It's not a partisan thing. It's big business versus small business. Big business interests tell politicians what small businesses want. That's crazy. Small businesses don't like what big business wants."

The survey's margin of error was 4.4 percentage points.

Read more: http://www.upi.com/Business_News/Consumer-Corner/2012/02/05/Consumer-Corner-Lack-of-demand-not-regulations-holding-businesses-back/UPI-11731328434200/#ixzz1mYwqbJb5

COALITION FOR SENSIBLE SAFEGUARDS

October 31, 2011

Multiple Surveys Show Regulations Not Major Concern to Small Business

The current jobs crisis is being used as an excuse for rolling back the nation's public protections. However, most small business owners don't cite regulations as a major problem for their businesses or as a disincentive for hiring. According to recent surveys, the biggest problems facing small business are the current lack of demand for products and services and worries about when demand will pick up.

The Small Business Majority (SBM) recently released a report, "Small Business Owners Believe National Standards Supporting Energy Innovation Will Increase Prosperity for Small Firms," which found only 13 percent of small business owners believe regulation is the biggest problem facing their businesses:

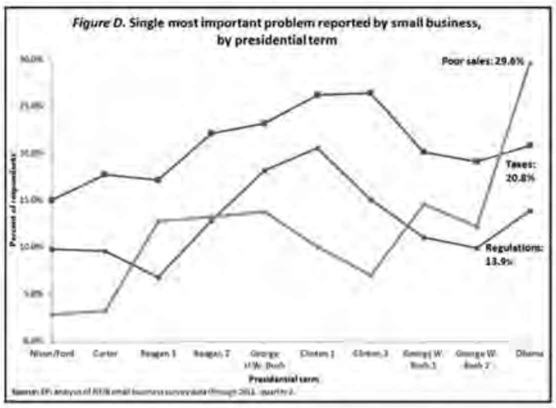
> "When asked which factors most negatively affect business, the results were clear. Contrary to arguments that 'regulation' or 'taxes' are what mostly ail business owners today, economic uncertainty and the rising costs of doing business are ranked by entrepreneurs themselves as the biggest problems facing small business," according to the SBM.

McClatchy/Tribune News Services recently surveyed a random sample of small business owners nationwide and found Big Business rhetoric over regulation to be completely overblown:

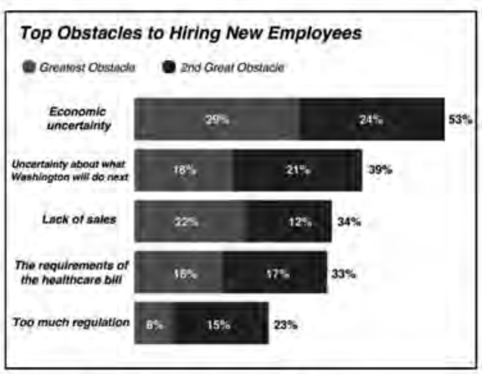
> "McClatchy reached out to owners of small businesses, many of them mom-and-pop operations, to find out whether they indeed were being choked by regulation, whether uncertainty over taxes affected their hiring plans and whether the health care overhaul was helping or hurting their business.
>
> Their response was surprising.
>
> None of the business owners complained about regulation in their particular industries, and most seemed to welcome it."

The National Federation of Independent Business (NFIB) periodically asks its members, "What is the single most important problem your business faces?" During the Obama administration, the number one response – with nearly 30 percent – has been "poor sales." Only 13.9 percent have identified "government regulation" as the most pressing concern.

These figures come from an Economic Policy Institute analysis of NFIB's entire historical series (back to the fourth quarter of 1973) on this survey question; EPI constructed averages for each presidential term. It turns out that small businesses have always identified regulation and taxes as concerns, but this concern has not changed sharply under Obama. The concern about regulation under Obama (13.9 percent) is not substantially higher than under George W. Bush (9.9 percent and 11.0 percent) or Ronald Reagan's second term (12.8 percent). There is also less concern about regulation under Obama than there was under Bill Clinton (when job growth rose sharply) or George H. W. Bush. The distinguishing feature of this historical series is the recent jump in NFIB members identifying poor sales as the single most important problem facing small businesses.



Even the U.S. Chamber's own survey of small business shows small business owners do not name regulations as a major cause holding back job growth:



www.SensibleSafeguards.org

Regulations at Work

Five Rules that Save Workers' Lives and Protect their Health

40YEARS
PUBLICCITIZEN

July 2011

Acknowledgments

This report was written by Justin Feldman and edited by Taylor Lincoln, both of Public Citizen's Congress Watch division.

About Public Citizen

Public Citizen is a national non-profit organization with more than 225,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.

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Lax regulation was a chief culprit in a number of recent disasters in the United States. The financial meltdown, the BP oil spill, and the Upper Big Branch mine explosion each demonstrated the need for government oversight of corporations. But despite these recent lessons, Republicans, small-government conservatives, and even some Democrats have spent much of the past two years denouncing regulations and blaming them for slowing the economic recovery.

These critics often present as an article of faith that "uncertainty" over regulations is preventing businesses from hiring new workers.[1] Since the critics rarely even contemplate the possibility that regulations could have positive effects—such as protecting workers, preventing consumer fraud or improving the environment—they feel quite comfortable calling for moratoriums on new regulations for a year, two years, five years, or even indefinitely.

For example, Rep. John Carter (R-Texas) recently introduced the "Take off the Brakes Act," to ban new regulations for two years. *Wall Street Journal* editorial page editor Paul Gigot proposed "a five year moratorium on regulations."[2] And former Rep. Harold Ford (D-Tenn.) recommended that President Obama "order his department heads and agency chiefs to declare a moratorium on new regulations until further notice."[3]

But the real-world record contradicts the critics' narrative. Contrary to the broadsides against regulations in general, many actual regulations impose minimal costs on industry in proportion to the benefits they yield. This paper looks at five worker-safety regulations that were tremendously successful in reducing employee injuries, illnesses and fatalities.[4]

- A rule requiring the cotton industry to reduce dust in textile factories lowered the prevalence of brown lung among industry employees by 97 percent;

- A rule requiring employers to place locks and warning labels on powered equipment is credited with preventing 50,000 injuries and 120 fatalities per year;

[1] See, *e.g.*, Randall W. Forsyth, *Atlas Didn't Shrug : He's Just Sitting On His Hands While He Confronts Regulatory And Tax Uncertainty*, Barrons, Jul. 27, 2010; Patrick Tyrrell, *Uncertainty From Washington Hampering Job Creation*, The Foundry (blog), Feb. 23, 2010; Jeffry Bartash, *Business Leaders Still Cautious about Economy: Top CEOs Worry that Proposals in Washington Will Harm Job Creation*, Marketwatch, Jun. 23, 2010. Each of the above cited within James Lardner, *Playing the 'Regulatory Uncertainty' Card*, Remapping Debate (blog). Available at http://www.remappingdebate.org/article/playing-regulatory-uncertainty-card.
[2] The Wall Street Journal Editorial Report, Fox News, July 18, 2011.
[3] Harold Ford Jr., *A Little Advice for Obama at the Half*, Fortune, Nov. 18, 2010.
[4] This paper does not report on certain successful regulations, such as the 1974-75 vinyl chloride standard, that Public Citizen intends to address in subsequent reports.

- A rule on excavations at construction sites has reduced the fatality rate from cave-ins by 40 percent;
- A grain-handling facilities standard has reduced the number of fatalities caused by dust-related explosions by 95 percent;
- And a 1969 mine safety law led to a rapid 50 percent decrease in the coal mine fatality rate.

While some of these regulations were controversial at first, they now enjoy nearly universal approbation from the industries they cover. In the case of cotton dust, compliance costs were significantly lower than predicted and provided the industry with a competitive advantage.

1. Cotton Dust Standard Curbs Lung Disease.

Working with cotton fiber used to produce large quantities of dust, which textile workers inhaled for hours on end over the course of their careers. As early as 1705, doctors knew that inhaling cotton dust caused breathing problems in mill workers.[5] Scientists now understand that cotton dust contains toxin-producing bacteria and that long-term exposure often results in chronic wheezing and other breathing difficulties.[6] The resulting disease—referred to as byssinosis or brown lung disease—impairs lung function and debilitates affected workers, often forcing them to retire early. Complications arising from the condition can sometimes be fatal.

Byssinosis was a major problem among textile workers in the United States until OSHA took action to reduce cotton dust exposure. During the early 1970s, more than 50,000 textile workers suffered from the disease at any given time.[7] Depending on the type of factory they worked in, between 7 and 26 percent of workers were affected.[8] In 1978, OSHA issued its first cotton dust regulation, limiting the concentration of the dust allowed in textile factory air.

The rule to combat ambient cotton dust proved remarkably effective in improving worker health. A 1978 Department of Labor report to Congress estimated that there were 51,290 cases of byssinosis in the industry at any given time and estimated that prevalence would decline to 29,245 after the rule was implemented. But the rule was far more effective than predicted. A study conducted in 1983 found that there were only 1,710 cases, a 97 percent decline from just a few years earlier.[9]

[5] Robert E. Botsch, ORGANIZING THE BREATHLESS: COTTON DUST, SOUTHERN POLITICS & THE BROWN LUNG ASSOCIATION 37 (1993).
[6] Xiao-Rong Wang et al., *Respiratory symptoms and cotton dust exposure; results of a 15 year follow up observation*, 60 Occupational and Environmental Medicine, 935 -941.
[7] OSHA, *Regulatory Review of OSHA's Cotton Dust* Standard (2000) at Tables p IX.
[8] *Id.*
[9] *Id.*

The textile industry had long opposed cotton dust regulation. As government attention to byssinosis grew during the 1960s and 1970s, industry groups denied the existence of the disease altogether. During the cotton dust rulemaking process, a spokesman for the American Textile Manufacturers Institute insisted that cotton dust-related health problems affected only 1 percent of textile workers, stating "The problem is grossly exaggerated." He also claimed that "[t]here has not been a known death from byssinosis,"[10] although studies conducted as early as 1910 conclusively demonstrated that the disease was fatal for some workers.[11] In 1981, shortly after the standard took effect, the American Textile Manufacturers Institute unsuccessfully sued OSHA, claiming that the costs of the regulation did not outweigh the benefits.[12]

Complying with the cotton dust regulation ended up costing much less than expected, and offered the added benefit of increasing productivity. OSHA consultants had estimated capital costs to comply with the rule would be $550 million, with annual costs of $171 million (in 1977 dollars).[13] Industry said it would cost more. But a 1983 study found that actual capital costs were $245 million and annual costs were $83 million, both less than half the predicted levels.[14]

Additionally, the regulation spurred textile factories to adopt machinery that was both healthier for workers *and* more efficient for industry. New machines that produced less dust were, on average, seven times faster than the older machines.[15] Resulting productivity increases further offset the cost of complying with the cotton dust regulation by making factories more efficient and competitive.

"Tougher government regulations on workers' health have unexpectedly given the U.S. industry a leg up," *The Economist* wrote in 1980. "Tighter dust control rules for cotton plants caused firms to throw out tons of old, inefficient machinery and replace it with the latest available from the world's leading textile machinery firms in Switzerland and West Germany."[16]

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[10] Margot Hornblower, *Brown-Lung Protection Urged*. Washington Post, Apr. 28, 1977.
[11] RSF Schilling et al., *An Epidemiological Study of Byssinosis among Lancashire Cotton Workers*. 12 British Journal of Industrial Medicine, 217 (1955). Surveillance data from 1977 to 2005 indicate that between 7 and 15 byssinosis-related deaths occur in the US each year. These only represent cases in which byssinosis was listed on the death certificate – actual deaths are likely many times higher. See NIOSH, *Byssinosis Mortality, World Related Lung Disease Surveillance System Vol. 1* (2008).
[12] American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981) .
[13] OSHA, *Regulatory Review of OSHA's Cotton Dust* Standard (2000) at Tables p. 38.
[14] *Id.*, p. 39, quoting Centaur Associates 1983; 48 FR 26962 (Jun. 10, 1983).
[15] *Supra* note 13 at 36.
[16] OSHA, *Regulatory Review of OSHA's Cotton Dust* Standard (2000) quoting, *Textiles Reel off the Ropes*, The Economist, Business Brief, Dec. 6, 1980, pp. 82-83.

2. Lockout/Tagout Standard Prevents Equipment-Related Accidents.

For workers at factories, construction sites, utility plants and shipyards, flipping the wrong switch or pulling the wrong lever can result in injury or worse. A worker repairing a machine that removes bones from chickens, for example, may have her finger cut off if a co-worker inadvertently plugs the machine back in. This type of safety problem fits into a category called "hazardous energy," which includes potential dangers arising from the unexpected movement of machinery as well as the unexpected release of electricity, flammable gas, or water pressure. About three million employees work at sites where hazardous energy is present.[17]

OSHA sought to address injuries and fatalities resulting from hazardous energy when the agency issued the Lockout/Tagout standard in 1989. The term "lockout" refers to the practice of placing locks on switches, circuit breakers, and valves in order to disable equipment that is undergoing maintenance or would be otherwise hazardous if turned on. "Tagout" refers to the use of brightly-colored tags that warn workers against using or turning on potentially hazardous equipment. The standard requires employers to develop a system of hazardous energy control that incorporates locks and tags. Employers must also document their hazardous energy control practices and provide safety training for workers.

Although business groups did not outright oppose the standard during the rulemaking process, they attempted to weaken it. The American Petroleum Institute lobbied for industry exemptions as well as provisions that would favor the use of tagout over more effective lockout procedures.[18] After the rule went into effect, the National Association of Manufacturers (NAM) sued OSHA, unsuccessfully arguing the agency lacked the legal authority to issue safety (as opposed to health) regulations altogether.[19]

The Lockout/Tagout standard has been remarkably successful at improving workplace safety. An analysis of two union databases conducted in 2000 showed that hazardous energy-related fatalities declined, depending on the industry, by between 30 percent and 55 percent in the years following the enactment of the Lockout/Tagout rule.[20] An additional study conducted in Maine sawmills found that workplace injuries were three times less likely to occur for employees of mills that implemented Lockout/Tagout programs.[21] OSHA currently estimates that the regulation prevents a total of 50,000 injuries and 120 fatalities per year.[22]

[17] OSHA, *Review of the Control of Hazardous Energy Sources (Lockout/Tagout) Standard* (2000) at III-2.
[18] Patrick Schmidt, *Pursuing Regulatory Relief: Strategic Participation and Litigation in U.S. OSHA Rulemaking*, 4 Business and Politics, Article 3.
[19] *Id.*
[20] *Supra* note 17.
[21] *Supra* note 17 at III-6.
[22] OSHA, *Control of Hazardous Energy (Lockout/Tagout)* at http://www.osha.gov/SLTC/controlhazardousenergy/index.html (n.d.).

In the years after the Lockout/Tagout standard was published, industry groups came to support the regulation. Even NAM, which had sued OSHA shortly after the standard was finalized, lauded the regulation in comments submitted to the agency in 2000, although without admitting a change in its legal stance. "NAM believes that the principal requirements of the [lockout/tagout] regulation help promote the development of appropriate safety procedures for service and maintenance operations," the trade association wrote.[23]

3. Excavation Standard Prevents Trenches from Becoming Graves.

Underground construction projects such as sewer pipe installation jobs require workers to enter subterranean trenches. If employers do not take protective measures, a trench may collapse on workers, entrapping them in mud and cutting off their access to air. Trench cave-ins are often deadly. Before government action, an average of 90 fatalities related to trench cave-ins occurred each year.[24]

In 1989, OSHA issued the excavation standard, requiring construction sites to use protective methods in order to stop trenches from caving in. The simplest method of protection involves digging trenches with sloped walls, which prevents falling earth from enveloping the workers. Other methods involve creating temporary walls on the trench to prevent a cave-in or placing steel plates inside the trench to create a protected space for workers should a cave-in occur.

Since the excavation standard took effect, fatalities related to trench cave-ins have dropped significantly. An analysis conducted a decade after the rule was enacted found that the average annual number of deaths from cave-ins had fallen from 90 to 70. Adjusting for a 20 percent increase in construction activity during the time period, this represents a 40 percent decrease in the fatality rate.[25] Trenching protection is now standard practice on construction sites that involve excavation. In comments solicited more than a decade after the regulation was enacted, industry groups expressed general support for the regulation.[26]

[23] *Supra* note 17 at III-7.
[24] OSHA, "Regulatory Review of 29 CFR 1926, Subpart P: Excavations" (2007) at 36.
[25] *Id.* The reduction figures reflect growth in construction employment that has occurred since the standard was issued.
[26] *Id.*

4. Grain Handling Facilities Standard Prevents Explosions, Suffocations.

Silos, grain elevators, and mills dot much of rural America's landscape. These facilities, which store and process wheat, barley, corn, and other grains, may pose danger to workers' lives in several ways. Highly flammable grain dust settles on all surfaces of the building and can set off explosions when naturally occurring combustible gases are present. Additionally, workers can literally drown when they enter deep bins filled with tons of grain. Before government action, an average of seven grain workers died each year in explosions and 10 died from suffocation in bins.[27]

After a series of catastrophic grain explosions in the late 1970s left 59 workers dead in just one month, the hazards of grain facilities drew the attention of federal regulators. OSHA began developing its Grain Handling Facilities Standard, which it finalized in 1987. The regulation limited the amount of dust allowed on surfaces within grain facilities and required testing of silos for combustible gases. It also prohibited employees from entering storage bins without a proper harness and a spotter present.

Industry groups and the Reagan administration's Office of Management and Budget voiced opposition to the Grain Handling Facilities Standard during the rulemaking process. A spokesman for the National Grain and Feed Association derided the proposed limits to grain dust levels, saying, "Research shows no one level of dust is more hazardous than another."[28] One official from the Office of Management and Budget referred to OSHA's assessment of grain facility hazards as "substantially overstated."[29]

In the end, the OSHA standard made grain handling facilities much safer places to work. The National Grain and Feed Association (NGFA), which initially opposed the standard, now finds it to be remarkably effective at improving workplace safety, citing a 95 percent drop in explosion-related fatalities for certain facilities.[30] In comments submitted to OSHA in 1998, NGFA stated that in the years following the standard, "there has been an unprecedented decline in explosions, injuries and fatalities at grain handling facilities."[31] OSHA's analysis shows that the standard prevented an average of five suffocation deaths per year.[32] Data presented by industry showed that the standard annually prevents eight injuries and four deaths resulting from explosions in grain elevators.[33]

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[27] OSHA, "Regulatory Review of OSHA's Grain Handling Facilities Standard" (2003) at 35.
[28] Herrin, "Debate Stalls Grain Silo Standards Explosive Dust Killing Dozens in Meantime". Miami Herald (February 8, 1987).
[29] *Id.*
[30] *Supra* note 27 at 31.
[31] Statement of the National Grain and Feed Association at the Occupational Safety and Health Administration Public Meeting to Review the Grain Handling Facilities Standard (29 CFR 1910.272). OSHA Docket No. H-117C (1998).
[32] *Supra* note 27 at 35.
[33] *Supra* note 27 at 31.

5. Inspections Save Coal Miners' Lives.

Coal mines are among the most dangerous workplaces in the United States. Workers, facing the ever-present risks of mine explosion and collapse, must perform their jobs in confined spaces near heavy machinery. Since 1900, over 100,000 miners have been killed on the job.[34] Mining has become dramatically safer, however. The first major decrease in fatality rates began in the late 1940s, as mines began relying less on explosives and more on machinery.[35] But after the early 1950s, progress on mine safety stagnated; the fatality rate remained largely unchanged between 1950 and 1969.[36] It was not until the 1969 passage of the Federal Mine Health and Safety Act that government regulatory efforts spurred another major decrease in coal mining fatality rates, and the results were dramatic. [See Figure 1, below]

Source: Mine Safety and Health Administration.

Regulation of the mining industry increased gradually throughout the 20th century. The federal government first addressed mine safety in 1910 when Congress created the U.S. Bureau of Mines (USBM). USBM was primarily engaged in conducting research and investigating catastrophic mine accidents. The agency had no regulatory authority throughout most of its existence. Even after Congress granted it authority to inspect certain mines in 1952, USBM lacked the power to compel mining operations to make needed changes. In 1969, Congress passed the Federal Mine Health and Safety Act, the first

[34] MSHA, "Coal Fatalities for 1900 through 2010" Accessed July 25, 2011.
[35] NIOSH, "One Hundred Years of Federal Mining Safety and Health Research (2010) at 27 - 28.
[36] Weeks and Maier, "Fatality Rates and Regulatory Efforts in Bituminous Coal Mining, United States, 1959-1981" (1983).

comprehensive mine safety law creating mandatory inspection requirements, enforceable health and safety standards, and civil and criminal penalties for willful violations. The law laid the framework for even stronger protections under the Mine Safety and Health Act of 1977, which established the Mine Safety and Health Administration (MSHA).

In 1969, the year that the Federal Mine Health and Safety Act passed, 152 fatalities occurred for every 100,000 underground coal miners. After the act's passage, these fatality rates dropped off steeply, decreasing by 50 percent in just four years.[37] A 1974 study projected that further increasing the number of MSHA inspections by 25 percent would prevent eight deaths and 1,250 disabling injuries per year.[38]

Conclusion

Amid the current barrage of anti-regulatory rhetoric, it is crucial to remember the important role that government safeguards have in saving lives and protecting public health. These five worker safety regulations were tremendously successful in reducing employee injuries, illnesses, and fatalities. For the most part, industry groups initially opposed each regulation while downplaying the hazard in question. Often, they later came to embrace the regulations, writing supportive comments to government agencies in several cases.

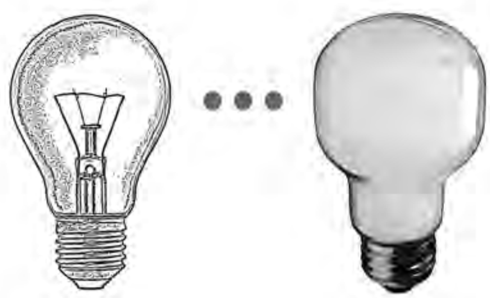
[37] *Id.*

[38] Boden, "Government Regulation and Occupational Safety: Underground Coal Mine Accidents 1973-1975 (1985).

Regulation

The Unsung Hero in American Innovation

September 2011



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Contents

Regulations have a remarkable history of spurring innovation. This report looks at the regulatory attempts to address five serious problems: wasteful light bulbs, emissions of harmful sulfur dioxide from coal plants, workers' exposure to carcinogenic vinyl chloride, releases of ozone-destroying chlorofluorocarbons from aerosol cans, and inefficient home appliances.

Each case presented a challenge to industry: How to continue offering the same products while complying with the federal regulation? Industry officials fiercely resisted most of these regulations, often claiming that they would be put out of business if a rule under consideration was implemented. Yet, as each proposed rule covered in this report took effect, the industries met the standard—typically by developing better systems or products—and their doomsday scenarios were not realized in the least.

Regulations That Spurred Innovation

	Regulation		Innovation
Incandescent Light Bulb 	In 2007, the Energy Independence and Security Act increased the standard of efficiency for traditional incandescent light bulbs.	Politicians protested the regulation. but...	Philip's Lighting invented a new halogen incandescent that emits light that is almost indistinguishable from traditional bulbs, uses 30 percent less energy, and lasts three times longer.
Removal of CFCs 	After the scientific discovery that chlorofluorocarbons (CFCs) harm the ozone layer, government agencies implemented a ban on all non-essential CFC aerosol propellants.	Industry proreated the regulation. but...	A day after the EPA officially implemented the regulation, the inventor of the original aerosol announced the invention of a cheaper aerosol propellant that didn't pose a threat to the ozone layer.
Vinyl Chloride 	In 1974, OSHA virtually banned emissions of carcinogenic vinyl chloride in the manufacturing of PVC.	Industry protested the regulation but...	B.F. Goodrich, the largest PVC manufacturer, soon invented a process that both shielded workers from vinyl chloride exposure and was more efficient.
Removal of SO2 	Beginning with the 1970 Clean Air Act, the federal government began demanding that coal plants reduce emissions of sulfur dioxide, a major air pollutant that causes acid rain and smog.	Industry protested the regulation. but...	In response to the EPA's regulations, industry improved the efficiency of post-combustion sulfur dioxide removal technology, otherwise known as "scrubbing."
Appliance Standards 	During the energy crisis of the 1970s, Congress enacted efficiency standards for consumer appliances being used in residential and commerical buildings.	Industry protested the regulation. but...	The government standards prodded manufacturers to improve the efficiency of their products. These efficiency improvements are projected to save American consumers more than $240 billion by 2030.

I. Increasing Light Bulb Efficiency

The Problem

Traditional incandescent light bulbs are extremely inefficient. They are based on technology invented in 1879 by Thomas Edison. They waste 90 percent of their energy emitting heat, not light, and average just 750 to 2,500 hours of an operating life.[1] Lighting accounts for 30 percent of all electricity used in our country.[2] An average of 82 pounds of coal are burned to produce the amount of electricity that a traditional incandescent bulb consumes in its lifespan.[3]

The Regulatory Response

In 2007, the Energy Independence and Security Act was signed "to move the United States toward greater energy independence and security." The law established a series of efficiency standards for light bulbs. The first phase requires a 25 to 30 percent increase in efficiency over traditional light bulbs by 2012. The second stage requires a 60 percent improvement by 2020.

The Resistance

In 2011, the incandescent light bulb became the *cause celebre* of members of Congress playing to the Tea Party hostility over anything smacking of government regulation. Several bills—including the "Light Bulb Freedom of Choice Act" by Rep. Michele Bachmann (R-Minn.)—were introduced in Congress to eliminate the light bulb efficiency standard. Bachmann also incorporated an attack on the light bulb standards into her campaign for the White House, promising that "President Bachmann will allow you to buy any light bulb you want."[4]

Critics of the efficiency standard either imply or assert outright that it will ban the use of incandescent bulbs, forcing consumers to use compact fluorescent bulbs, which many dislike because they emit a bluish-white hue. For example, a June 2011 *Wall Street Journal* editorial opened by saying that in seven months, "Washington will effectively ban the sale of conventional 100 watt incandescent light bulbs that Americans have used nearly since the days of Thomas Edison. Instead we will all be required to buy compact fluorescent

[1] See, *e.g.*, "Energy Basics," U.S. Department of Energy. Available at http://www.eere.energy.gov/basics/buildings/incandescent.html.
[2] "The Real Deal on Compact Fluorescent Light Bulbs," National Audubon Society Facts Sheet, August 2009.
[3] *Ibid.*
[4] Andrew Restuccia, "President Bachmann Will Allow You to Buy Any Light Bulb You Want," *The Hill*, June 17, 2011.

lights."[5] Watchdog group Media Matters counted 40 times in which conservative news outlets have claimed that rules slated to take effect in 2012 will require consumers to use compact fluorescents.[6]

The Results

The law does not ban incandescent light bulbs.[7] It simply requires that light bulbs sold in 2012 be at least 30 percent more efficient than Edison's 1879 model. Ultimately, the law spurred companies to produce Edison's light with much less waste.

"There's a massive misperception that incandescents are going away quickly," Chris Calwell, a researcher with Ecos Consulting, an energy consulting firm said in 2009. "There have been more incandescent innovations in the last three years than in the last two decades."[8]

In anticipation of the first phase of requirements under the 2007 energy bill, manufacturers began investing in new bulbs that would both meet the new standards and still produce the soft light of incandescent light bulbs. By 2009, Philips Lighting, a Dutch electronics company, brought to market a new halogen incandescent that emits light that is almost indistinguishable from traditional bulbs, is 30 percent more efficient, and lasts three times longer.[9]

In contrast to old incandescents, Philips' halogen bulbs use a reflective coating that captures heat and transforms it into light.[10] Other manufacturers, including General Electric and Osram Sylvania, have also introduced energy-efficient halogen incandescents.

The new bulbs cost more than the traditional bulbs. For example, a Philips 100 watt-equivalent incandescent costs about $4, compared to 25 cents for traditional incandescent light bulbs.[11] But with their increased energy efficiency and longer lifespan, the new bulbs will save consumers money over time, according to the Department of Energy (DOE).[12]

[5] "The Light Bulb Police: Americans Deserve Their Choice of Illumination," *Wall Street Journal* editorial, June 7, 2011.
[6] "Conservative Media Misled Light Bulb Consumers At Least 40 Times In 7 Months," Media Matters, July 18, 2011.
[7] See, *e.g.*, Kevin Drum, "Incandescent Bulbs Not Banned. Repeat: Not Banned," *Mother Jones*, July 15, 2011.
[8] Leora B. Vestel, "Incandescent Bulbs Return to Cutting Edge," *New York Times*, July 5, 2009
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] See, *e.g.*, "Frequently Asked Questions: Lighting Choices to Save You Money," U.S. Department of Energy Web site. Available at www.energysavers.gov/your_home/lighting_daylighting/index.cfm/mytopic=11978?print.

Additional Innovations: LED Bulbs

Concern over energy efficiency and a government incentives program also have inspired the development of bulbs using light emitting diodes (LEDs)—the type of lights often seen on home electronics—that offer efficiency beyond halogen incandescents or even compact fluorescents.

A Philips LED bulb—which was awarded a $10 million prize by the DOE as the best replacement for a traditional 60-watt incandescent—emits light indistinguishable from that of traditional incandescents while using only one-sixth the energy.

If every 60-watt incandescent bulb in the U.S. were replaced with the prize winner, the United States would save about $3.9 billion worth of electricity annnally, enough to power Washington, D.C., for three years.[13] LED bulbs still cost $25 or more, which most consumers would not readily pay even though the bulbs are purported to offer overall savings over their 20-year lives because of their increased energy efficiency. But if history is a guide, the cost of LED bulbs will steadily decline.

II. Reducing Sulfur Dioxide Emissions

The Problem

Sulfur Dioxide, SO2, is a major air pollutant that causes acid rain and smog, and has long been recognized as a serious health hazard. It contributes to thousands of premature deaths annually in the United States.[14] Most infamously, it caused the 1952 smog inversion in London that killed a staggering 4,000 people in one week.[15]

The Regulatory Response

About two-thirds of SO2 emissions come from coal-fired power plants.[16] The Clean Air Act of 1970 instructed the newly formed Environmental Protection Agency (EPA) to set maximum allowable emissions for stationary sources (most importantly, coal plants) and required states to develop federally approved pollution control plans. Nearly all of the resulting state plans called for ongoing reductions in SO2 emissions.[17] The effect

[13] "Department of Energy to Announce Philips Lighting North America Wins L Prize Competition," U.S. Department of Energy, Aug. 2, 2011.
[14] See, *e.g.*, Resignation letter Eric v. Schaeffer, EPA Director Office of Regulatory Enforcement, Feb. 27, 2002. Available at http://www.e2.org/ext/document.jsp?docId=1422.
[15] See, *e.g.*, "The Lethal London Smog Event 5th-9th December 1952." Available at http://www.world-weather-travellers-guide.com/london-smog.html.
[16] Margaret R. Taylor, *et al.*, "Control of SO2 Emissions from Power Plants: A Case of Induced Technological Innovation in the U.S.," Technological Forecasting & Social Change, 2005, p. 354.
[17] *Ibid.*, p. 704.

of these plans was to require utilities operating coal-fired plants to implement "scrubbing" technologies to capture SO2 emissions before they reached the atmosphere.

Subsequently, amendments made in 1977 to the Clean Air Act required installation of scrubbers in new plants and in existing plants undergoing renovations. Additional Clean Air Act amendments passed in 1990 established a cap-and-trade system that required owners of coal-fired power plants that exceeded set amounts of emissions to purchase credits from companies whose emissions were below the established limits.

The Resistance

Industry has fought the implementation of scrubbers all along. It challenged the initial regulations issued under the Clean Air Act of 1970 and lost before the Supreme Court in 1976.[18] Throughout the 1980s, industry opposed the standards that were eventually created by the Clean Air Act of 1990. "Utilities predicted a cost of $1,000 to $1,500 for every ton of sulfur dioxide removed. Some said it could not be done even at that exorbitant price," an op-ed writer recalled years later, noting that the eventual cost ended up being a tenth as much.[19] Meanwhile, coal-fired utilities ignored requirements in the 1977 Clean Air Act to install scrubbers in plants undergoing renovations. The Department of Justice sued nine utilities in 1999 and 2000 for flouting the law.[20]

The Results

There are many ways to reduce SO2 emissions from coal plants, including pre-combustion treatment (in which coal is prepared before its use to improve its burning efficiency) and the use of low-sulfur coal (which naturally emits less SO2). But when the Clean Air Act was passed in 1970, flue gas desulfurization (FGD)—commonly known as "scrubbing technology"—was thought to offer the greatest potential for a comprehensive solution.[21]

The emphasis was on "potential." Although scrubbers were first implemented in London in 1926, they had never worked well. The first scrubbers were not installed in the United States until 1965.[22]

[18] *Ibid.*
[19] Jessica Matthews, "Clean Sweeps: Two Success Stories for the Environment," *Washington Post*, Dec. 18, 1995.
[20] See, *e.g.*, "EPA's Smoke Screen: How Congress Was Given False Information While Campaign Contributions and Political Connections Gutted a Key Clean Air Rule," Public Citizen, October 2003.
[21] Margaret R. Taylor, *et al.*, "Control of SO2 Emissions from Power Plants: A Case of Induced Technological Innovation in the U.S.," Technological Forecasting & Social Change, 2005, p. 704.
[22] Margaret R. Taylor, *et al.*, "Regulation as the Mother of Innovation: The Case of SO2 Control," Environmental Technology, April 2005, p. 371.

In the 1960s, scrubbers caused serious plugging in boilers and air heaters.[23] In 1970, a National Research Council panel on SO2 found that commercially proven technologies for control of sulfur oxides from combustion processes did not exist.[24] But the panel predicted that a feasible solution could be developed in one-to-three years.

The stringency of rules instituted in response to the 1970 Clean Air Act "provided an important incentive for the development of FGD technology," researchers Margaret Taylor and others wrote in 2005.[25]

In other words, the law prompted innovation. Although fewer than 100 patents for SO2 pollution control were issued before 1967 (and none since the mid-1930s), more than 2,500 patents were issued from 1967 through 1997.[26] During the 1970s, the number of scrubber vendors increased from 1 to 16.[27]

In the wake of the Clean Air Act, scrubbers became significantly more effective at capturing SO2 and less costly to install.

- The percentage of SO2 that scrubbers were able to prevent from reaching the atmosphere increased from about 75 percent in the mid-1970s to 95 percent by the mid-1990s.[28]

- Capital costs for scrubber technology were cut in half.[29]

- Costs to maintain plants with scrubbers declined, as operators learned to prevent corrosion and other problems that had previously required plants to be shut down for repairs.[30]

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[23] *Ibid.*, p. 367.
[24] "Environmental Regulation and Technology Innovation: Controlling Mercury Emissions from Coal-Fired Boilers," Northeast States for Coordinated Air Use Management, September 2000.
[25] Margaret R. Taylor, *et al.*, "Regulation as the Mother of Innovation: The Case of SO2 Control," *Environmental Technology*, April 2005.
[26] Margaret R. Taylor, *et al.*, "Control of SO2 Emissions from Power Plants: A Case of Induced Technological Innovation in the U.S.," *Technological Forecasting & Social Change*, 2005, p. 709.
[27] Margaret R. Taylor, *et al.*, "Regulation as the Mother of Innovation: The Case of SO2 Control," *Environmental Technology*, April 2005, p. 356.
[28] Margaret Taylor, *et al.*, "The Effect of Government Actions on Technological Innovation for SO2 Control," Carnegie Institute of Technology, Aug. 1, 2001, p. 2.
[29] *Ibid.*
[30] Margaret R. Taylor, *et al.*, "Control of SO2 Emissions from Power Plants: A Case of Induced Technological Innovation in the U.S.," Technological Forecasting & Social Change, 2005, p. 713.

Meanwhile, the amount of SO2 emitted into the atmosphere decreased significantly. Between 1980 and 2008, the amount of SO2 in the air declined by 71 percent, even though electricity production from coal plants grew by 26 percent.[31]

In 2003, President George W. Bush's Office of Management and Budget determined that the 1990 Clean Air Act program to reduce emissions of SO2 and NOX (another coal plant pollutant) had the largest quantified human health benefits of any federal regulatory program in the previous 10 years—over $70 billion annually. OMB pegged the ratio of benefits to costs at more than 40-to-1.[32]

SO2 emissions remain a major health scourge, not because of the inadequacy of scrubber technology but because of industry's intransigence in implementing it. Even today, the EPA regards SO2 and NOX (which also comes largely from coal plants) as so dangerous that it estimated that the reductions in emissions resulting from just from one new set of standards (issued in 2010) will prevent up to 36,000 premature deaths a year.[33]

III. Protecting Workers from Poisonous Vinyl Chloride

The Problem

In January 1974, a public health emergency crisis arose over the discovery that exposure to vinyl chloride, a substance used to produce polyvinyl chloride (PVC), caused a rare but usually fatal form of liver cancer called angiosarcoma.[34]

Industry had been aware for years of troubling evidence of health risks from workers' exposure to vinyl chloride, in large part because of research it funded. But the general public did not learn about the hazards until January 1974, when B.F. Goodrich, the largest PVC manufacturer, informed the National Institute for Occupational Safety and Health (NIOSH) that three employees at one of its plants had died of angiosarcoma.[35]

Investigations over the next few months revealed additional cases of angiosarcoma among vinyl chloride workers, leaving little doubt over the substance's culpability. Other evidence

[31] David M. Hart and Kadri Kallas, "Alignment and Misalignment of Technology Push and Regulatory Pull: Federal RD&D Support for SO2 and NOX Emissions Control Technology for Coal-Fired Power Plants, 1970-2000," MIT-IPC-Energy Innovation Working Paper 10-002, April 2010, p. 2.
[32] "Cap and Trade: Acid Rain Program Results," Environmental Protection Agency Fact Sheet. (Undated.) Available at http://www.epa.gov/capandtrade/documents/ctresults.pdf.
[33] "Proposed Transport Rule Would Reduce Interstate Transport of Ozone and Fine Particle Pollution," Environmental Protection Agency fact sheet, undated. Available at http://epa.gov/airtransport/pdfs/FactsheetTR7-6-10.pdf.
[34] Paul H. Weaver, "On the Horns of the Vinyl Chloride Dilemma," *Fortune*, October 1974.
[35] *Ibid.*

implicated vinyl chloride in a range of other conditions, including gastrointestinal complications and chromosome damage. But as the health risks became increasingly clear, industry officials expressed doubt over the feasibility of reducing vinyl chloride exposures to assuredly safe levels in a PVC manufacturing environment.

That set up what *Fortune* dubbed "the vinyl chloride dilemma," which the magazine summarized with this chilling subtitle: "If government allows workers to be exposed to [vinyl chloride], some of them may die. If it eliminates all exposure, a valuable industry may disappear."[36]

By 1974, PVC had become ubiquitous in American society. Pipes, floor tile, house siding, wire, cables, packaging materials, furniture, bottles, rain coats, shower curtains, medical tubing, auto upholstery, credit cards, Saran Wrap, and phonograph records were among the products being fashioned from white PVC pellets.[37]

The Regulatory Response

The Occupational Safety and Health Administration (OSHA) responded quickly to the crisis. Less than three months after the health risk was revealed, the agency issued an emergency temporary standard that lowered permissible ambient levels from 500 parts per million (ppm) to 50 ppm. The next month, the agency issued a proposed rule calling for "no detectable level" of vinyl chloride in workplaces—0 ppm.[38]

The Resistance

PVC manufacturers and industries that relied on PVC howled, arguing that the proposed standard could not be met and that they would be put out of business it were enacted.

"If the proposed 'no-detectable-level' standard is adopted, the vinyl chloride and polyvinyl chloride resin producing industries will be forced to close down immediately," said Ralph Harding Jr., president of the Society of the Plastics Industry, the industry's trade association.

A report commissioned by the plastics industry warned that the proposed rule would cause "severe economic dislocation," eliminating 1.7 million to 2.2 million jobs and preventing $65 billion to $90 billion in products from reaching the market. Among the casualties of the

[36] *Ibid.*
[37] Various sources.
[38] *Ibid.*

proposed rule would be the entire automobile industry, which, the report said, "would, in fact, have to shut down."[39]

Firestone, a major PVC manufacturer, said it would be forced out of the plastics business and that it would sue on the basis that the rule was infeasible. To the extent the standard might have been achievable, Firestone said it would have to double its capital costs to meet it.[40]

In written comments submitted to OSHA, MCA Records said if PVC production were halted, "our industry would be forced out of business." The National Association of Home Builders said the proposed rule threatened to put "sorely needed housing . . . beyond the reach of an increasingly large segment of the public."[41]

A company that produced medical tubing warned that curbing supplies of PVC would jeopardize the availability critical equipment used for kidney dialysis and heart surgery.[42]

There were widespread calls for compromise, such as setting the standard at 25 parts per million, which scientists could not affirm to be safe. To the author of *Fortune*'s debate-framing article, the answer was clear: OSHA should compromise, not only to protect the viability of the industry but also to ensure society's continued access to the bounty of PVC products.

"It is clear that [OSHA regulators'] task should be to find the right 'trade offs'—to devise regulations in which the benefit of increased health for workers is balanced against the increased cost to the plastic industry and society as a whole," *Fortune* wrote.[43]

In the end, OSHA barely compromised. Fewer than nine months after news had broken of hazards posed by vinyl chloride, OSHA issued a final rule calling for exposures of no more than 1 part per million, except in sealed-off areas in which workers would be required to wear respirators to ensure that they did not inhale any fumes.[44]

OSHA's small concession did not placate industry. The plastics industry trade association said the standard was unrealistic and would likely be impossible for most to meet.

[39] David T. Cook, "Plastics—Jobs vs. Worker Safety," *Christian Science Monitor*, July 15, 1974.
[40] Paul H. Weaver, "On the Horns of the Vinyl Chloride Dilemma," *Fortune*, October 1974.
[41] Walter Mossburg, "Debating Health vs. Jobs: Plastics Industry Mobilizes To Thwart Tough Rules On Handling Vinyl Chloride," *The Wall Street Journal*, June 25, 1974.
[42] *Ibid.*
[43] Paul H. Weaver, "On the Horns of the Vinyl Chloride Dilemma," *Fortune*, October 1974.
[44] "New Rules Set to Reduce Vinyl Chloride Risk," *The Washington Post*, Oct. 2, 1974.

Firestone said the rule "puts the vinyl plastics industry on a collision course with economic disaster"[45] and would "throw 2 million jobs down the drain."[46]

The Results

What happened next was wholly unexpected.

In August 1975, just 10 months after final rule was issued, B.F. Goodrich announced that it had developed a process that would meet the OSHA standards without requiring respirator use. Its system captured residual vinyl chloride in the manufacturing process without allowing it to come into contact with workers.[47] A few months later, Goodrich touted its new technology in a *Wall Street Journal* display ad in which it said the new system "will be simple to operate [and] will increase raw material efficiency."[48]

In April 1976, Goodrich announced that it had signed licensing agreements for its containment technology with six corporations and that it planned to expand its own vinyl chloride manufacturing capacity at several plants that year.[49] By August, at least three other companies announced they were licensing safety technology or soon intended to.[50]

Shortly thereafter, demand for PVC boomed, prompting the industry to embark on an enormous expansion in manufacturing capacity. "PVC Rolls out of Jeopardy, into Jubilation," headlined a *Chemical Week* article published just 22 months after the final rule was announced.[51]

In addition to Goodrich's expansion plans, *Chemical Week* reported, Borden was building a PVC plant; Diamond Plastics planned to build a very large plant and a small plant; Dow Chemical was building a large plant; Stauffer Chemical was adding capacity to an existing plant; Robintech was increasing an existing plant's capacity by two-thirds; Shintech was expanding a plant by 50 percent; Tenneco was building a mid-size plant; and Continental Oil was adding on to an existing plant.[52]

[45] "Safety Rules Issued for Vinyl Chloride,: *The New York Times*, Oct. 2, 1974.
[46] "New Rules Set to Reduce Vinyl Chloride Risk," *The Washington Post*, Oct. 2, 1974.
[47] "B.F. Goodrich Says New System Reduces PVC Resin Hazards," *The Wall Street Journal*, Aug. 27, 1975.
[48] B.F. Goodrich display ad, *The Wall Street Journal*, Dec. 9, 1975.
[49] "Off To a Good Start," *Chemical Week*, April 28, 1976.
[50] "Getting Out the Last Traces of VCM," *Chemical Week*, Aug. 11, 1976.
[51] "PVC Rolls Out of Jeopardy, Into Jubilation," *Chemical Week*, Sept. 15, 1976.
[52] *Ibid.*

Even Firestone, which less than two years earlier had said the OSHA rule would force it out of the plastics industry, announced plans to bring a new PVC plant online by mid-1979, tripling its overall capacity."[53]

"Clearly, those actions signify U.S. vinyl producers' confidence that they have solved the 'OSHA problem' that threatened the viability of their industry less than two years ago," *Chemical Week* wrote.[54]

The planned increases in capacity would supplement an already booming business. PVC shipments in the first half of 1976 were up nearly 52 percent over the previous year, according to the plastic industry's trade association.[55]

Even in the late-1970s, as a recession loomed, the PVC industry continued to roar. "Producers of polyvinyl chloride are so convinced of the plastic resin's potential that they're scurrying with expansion plans, at the onset of a recession," began an August 1979 *Wall Street Journal* article.[56]

The *Journal* article ticked off a series of recently annonnced expansion plans, inclnding industry-leader B.F. Goodrich's announcement of plans to double its company-wide 7 billion lbs./year PVC capacity over the ensuing six years. As demand for PVC was leveling off in some markets, new uses for the product were being developed, such as making window frames and creating automobile coatings.[57]

A 1995 report on OSHA rnles by Congress's Office of Technology Management found that actual costs to implement the vinyl chloride rule were at most $278 million, compared to OSHA's $1 billion forecast. But, OTA wrote, the technological advances the rule inspired "enhanced manufacturing productivity, allowed better rationalization of material inputs, largely eliminated the need for manual reactor cleaning (a prime source of high exposures for the workforce), and provided a new source of income to the technology's developers through licensing arrangements."[58]

[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid.*
[56] Margaret Yao, "Producers of Vinyl Chloride Scurry With Expansion At the Onset of Recession," *Wall Street Journal*, Aug. 15, 1979.
[57] *Ibid.*
[58] Office of Technology Management, Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health: An Appraisal of OSHA's Analytic Approach," September 1995, p. 67-68.

In 1997, the Centers for Disease control reported that the 1 ppm standard for exposure to vinyl chloride in the workplace was "readily achieved" and that "new cases of hepatic angiosarcoma in vinyl chloride polymerization workers have been virtually eliminated."[59]

IV. Preventing Ozone-Destroying CFC Emissions from Aerosols

The Problem

First developed in the 1920s by the U.S Department of Agriculture for use as a refrigerant, chlorofluorocarbons (CFCs) became the preferred substance for use in aerosol cans due to their ability to convert easily between liquid and gas states.[60]

But a groundbreaking 1974 study demonstrated the ability of CFCs to break down ozone. Evidence showed that CFCs were diffusing slowly into the stratosphere and depleting the ozone layer, exposing people to more ultra-violet (UV) radiation, increasing the risk of skin cancer. Excessive UV radiation also contributes to the greenhouse effect and harms the earth's vegetation and animal life.[61] About half of CFC emissions in the United States in the early 1970s came from aerosols.[62]

The Regulatory Response

In 1977, the EPA, the Consumer Product Safety Commission (CPSC) and the Food and Drug Administration called for phasing out almost all use of CFCs in aerosol propellants.[62]

The Resistance

Industry preferred to use CFC aerosol propellants because they were non-flammable and produced a fine spray.[62] After 1974, with public concern growing over CFCs and industry anticipating a CFC ban, aerosol manufacturers began looking for alternatives.[63] Still, industry denied the scientific premise for the CFC ban. DuPont Corp., the world's largest mannfacturer of CFCs, spent an average of nearly $1 million a year from 1972 to 1982, to challenge the findings that CFCs were depleting the ozone layer.[64]

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[59] "Epidemiologic Notes And Reports Angiosarcoma Of The Liver Among Polyvinyl Chloride Workers – Kentucky," Centers for Disease Control, Feb. 7, 1997.
[60] "F. Sherwood Rowland on Origin and Uses of Chlorofluorocarbons," See interview with Sherwood. Available at: http://www.youtube.com/watch?v=1xflHukUQKE.
[61] "Are Aerosols Environmentally Friendly Now That CFC's Have Been Banned?" NHPR. Available at http://www.nhpr.org/node/17307.
[62] EPA Final Rule, See "Chapter 1: Environmental Protection Agency , Subchapter: Toxic Substances Control Act: Parts 712, 762, Fully Halogenated Chlorofluorocarbons," March 17, 1978.
[63] "Are Aerosols Environmentally Friendly Now That CFC's Have Been Banned?" NHPR. Available at http://www.nhpr.org/node/17307.
[64] Bridgette Smith, "Ethics of Du Pont CFC Strategy 1975-1995," *Journal of Business Ethics*, 1998.

DuPont, with funding from the Chemical Manufacturers Association (CMA), also created the Fluorocarbon Program Panel and, later, the Alliance for Responsible CFC Policy to dispute theories that CFCs harmed the environment. A separate industry group hired Dr. Joyce Brothers, a well-known psychologist, to lead a campaign against anti-CFC news.[65] *Aerosol Age*, an industry trade publication, argued "the chlorine-ozone hypothesis is purely speculative at this time with no concrete evidence having been developed to support it."[66]

Industry also criticized the EPA's proposed timeline for phasing out aerosols. "Finding a substitute for chlorofluorocarbons has not been easy," *Newsweek* wrote in summary of industry's comments. "No single alternative possesses their combination of chemical inertness, non-flammability, fast-drying spray and efficiency in ejecting the entire contents of a can,"[67].

In 1976, *Chemical Week* asked, "will consumers abandon the aerosol package completely, or will alternative propellant systems be acceptable?"

The Results

On May 14, 1977, just one day after the issuance of a federal regulation declaring CFC propellants an environment hazard and ordering them to be phased out, the inventor of the original aerosol valve announced that he had the solved the problem. Robert H. Abplanalp said he had developed an aerosol system with a non-CFC propellant that worked better than existing systems.

"Had the controversy not arisen, and this development had come along, it would have wiped out fluorocarbons anyway," said Abplanalp.[68]

While the new system "was perhaps developed in response to government regulation," said Abplanalp, a skeptic of the allegations surrounding CFCs, "this is one of the few times that consumers won't have to foot the bill." Abplanalp's innovation was advantageous because it used a 6:1 product-to-propellant ratio, in contrast to the 1:1 ratio in conventional aerosol

[65] John H. Sheridan, "Hydrocarbons Spur Aerosols' Comeback," *Industry Week*, September 1978, p. 140.
[66] "Ozone Controversy Reaches Congress," *Aerosol Age*, January 1975, p. 6.
[67] Peter Gwynne & Henry McGee, "Psst! Aerosol Alternatives," *Newsweek*, May 9, 1977.
[68] *Ibid.*

applications.[69] It also included a new valve that did not clog as easily and permitted users to fine-tune the spray.

Within two years of the announcement of the rule to ban CFCs in aerosols, CFCs were being used in less than 3 percent of all aerosols.[70] The industry, having suffered from a wave of bad publicity in the middle of the decade, experienced a resurgence.

"Doomsayers were ready to write their obituary, and many consumers think they have been banned. But far from being dead or banned, aerosols are making a comeback," *Chemical Week* wrote.[71]

"Marketers are talking about new-product introductions," said the aerosols development director at Phillips Chemicals. "Aerosols in the homes are no longer hidden under the sink. People do not feel guilty when they buy aerosols."[72]

The crackdown on CFCs, both worldwide and in the United States, continued with increasing urgency, especially with the discovery in the mid-1980s of a substantial hole in ozone layer over Antarctica, for which CFCs were blamed. Eventually, a worldwide ban was imposed against CFC use in air conditioners, refrigerators, and electrical cleaning supplies. By 2005, scientists reported that the ozone layer was recovering.[73]

V. Improving Home Appliance Efficiency

The Problem

Residential buildings account for more than 20 percent of the nation's energy consumption.[74] Historically, the refrigerators, air conditioners, furnaces and other appliances that burn all of that energy were not nearly as efficient as possible. Their waste has cost consumers billions of dollars in increased energy bills, while saddling the atmosphere was extra pollution from unnecessary energy generation.

The Regulatory Response

The Energy Policy and Conservation Act of 1975 established test procedures, targets and labeling requirements for household appliances. The National Energy Act of 1978 instructed the DOE to set efficiency standards for 13 appliances. But President Reagan

[69] "Aerosol Spray Without Fluorocarbons," *Popular Science*, September 1977.
[70] "Aerosols Stage Comeback After Several Lean Years," *Chemical Week*, May 23, 1979.
[71] *Ibid.*
[72] *Ibid.*
[73] See, *e.g.*, Marsha Walton, "Ozone Layer Making a Recovery," CNN, Sept. 2, 2005.
[74] "Multi-Year Program Plan: Building Regulatory Programs," U.S. Department of Energy Efficiency and Renewable Energy Building Technologies Program, October 2010, p. 28.

halted the drafting of regulations shortly after his inauguration in 1981,[75] putting the federal appliance efficiency program on hold for the better part of a decade.

Amid the Reagan administration's hands-off approach to efficiency standards, many states issued their own rules. This eventually convinced industry to lobby for uniform federal standards.[76]

After being rebuffed by a presidential veto in 1986, Congress in 1987 assembled a veto-proof majority to pass a law setting deadlines to enact efficiency standards for most new home appliances.[77] Subsequent energy laws required creation of standards for commercial and industrial products. The energy efficiency program now covers products responsible for 82 percent of residential building energy use, 67 percent of commercial building energy use, and about of half of industrial energy use.[78]

The Resistance

When the first standards were being drafted in the late 1970s and early 1980s, small businesses predicted that they would suffer dire consequences. "What our competitors have been unable to do—namely, put us out of business—it now appears that our government will do," the president of air conditioner maker Marvair Co. said in 1981. One early 1980s report estimated that requirements to verify that appliances met the standards would put 65 percent of small-businesses manufacturers at risk of bankruptcy.[79]

Meanwhile, larger manufacturers and their trade associations expressed general opposition to the program and warned that instituting efficiency standards might spell the end of familiar products such as self-cleaning ovens, automatically defrosting refrigerators and portable air conditioners.[80] But the manufacturers' opposition began to wane by the mid-1980s.

Much of the strident opposition to federal efficiency standards came from the political sector. For example the Reagan administration said the initial wave of proposed standards "would impose massive regulatory burdens on the private sector."[81] Later, in a statement

[75] "U.S. to Ease Some Energy-Saving Rules," *The New York Times*, Feb. 19, 1981.
[76] See, *e.g.*, Martin Tolchin, "An Industry Asks for Regulation," *The New York Times*, Feb. 17, 1987.
[77] Sandy Johnson, "Reagan Expected to Sign Energy Efficiency Bill He Once Vetoed," Associated Press, March 4, 1987. (Only two House members opposed the bill, future House Majority Leader Tom DeLay (R-Texas) and future House Energy and Commerce Committee Joe Barton (R-Texas).)
[78] "Multi-Year Program Plan: Building Regulatory Programs," U.S. Department of Energy Efficiency and Renewable Energy Building Technologies Program, October 2010, p. 6-7.
[79] Michael Reese and Jerry Buckley, "A Tale of Regulation," *Newsweek*, March 2, 1981.
[80] "Appliance Makers Predict Problems for Energy Saving Standards," *The Washington Post*, May 17, 1980.
[81] "U.S. to Ease Some Energy-Saving Rules," *The New York Times*, Feb. 19, 1981.

accompanying his veto of the 1986 standards-setting bill, Reagan said the "bill intrudes unduly on the free market, limits the freedom of choice available to consumers who would be denied the opportunity to purchase low-cost appliances and constitutes a substantial intrusion into traditional state responsibilities and prerogatives."[82]

In the mid-1990s, the newly elected Republican Congress targeted efficiency standards as part of an overall assault of federal regulations.[83] President George W. Bush's administration also slowed the issuance of new standards, prompting a lawsuit from 14 states and other parties. The DOE settled the case in 2006 by entering into a consent decree in which it agreed to publish standards for 22 product categories.[84]

The Results

Despite the halting progress of the program, federal energy efficiency standards have been a success by almost any measure. Appliances have become dramatically more efficient, their costs have steadily dropped, and industry now stands in alliance with the DOE and consumer environmental groups in touting the accomplishments of the standards—and in pressing for new ones.

Consider refrigerators, which consume about one-sixth of the electricity in a typical house, more than any other item.[85] An averaged-sized refrigerator from the 1980s would cost about $190 a year to run at today's electricity prices. Refrigerators purchased today—which employ high efficiency motors and compressors, and improved heat exchangers—cost about $75 a year to operate. Standards slated to take effect in 2014 will improve refrigerator efficiency by additional 15 percent.[86]

If refrigerator energy use had continued on the trajectory it was on when the first efficiency standards were implemented, the nation would be consuming an extra 160 gigawatts a year just to keep its refrigerators running, according to David Goldstein, who in 2002 received a MacArthur fellowship for spearheading the effort to develop super-efficient

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[82] Elizabeth Tucker, "Energy-Standard Veto: No One Won, Groups Say; Business, Consumer Advocates, Utilities Upset," *Washington Post*, Nov. 5, 1986.
[83] Dan Morgan, "House Conservatives Step Up Assault on Regulations," *Washington Post*, July 19, 1995.
[84] Memorandum from President Obama to Energy Secretary Chu, "Appliance Efficiency Standards," Feb. 5, 2009.
[85] See, *e.g.*, California Energy Commission, Consumer Energy Center. Available at www.consumerenergycenter.org/home/appliances/refrigerators.html.
[86] "DOE Standards Will Cut Energy Usage by 25 Percent," American Council for an Energy-Efficient Economy, Aug. 26, 2011.

refrigerators. The annual savings from efficient refrigerators alone exceeds the entire amount of electricity generated by the United States' nuclear power plants.[87]

But the tremendous advances in refrigerator efficiency have not driven up prices. In January 1987, before standards took effect, an 18 cubic foot Kenmore refrigerator cost just under $500,[88] or $994 in 2011 dollars.[89] In August 2011, Sears was selling an 18.2 cubic foot Kenmore refrigerator for $424, less than half the inflation-adjusted cost of a comparable model from the pre-standards era.[90]

Likewise, clothes washers' energy consumption declined 63 percent from just 2000 to 2006, while dishwashers' water and electricity consumption were both down by about 30 percent over the same time period, according to the Association of Home Appliance Manufactures.[91] The DOE reports that central air conditioners are 30 percent to 50 percent more efficient than in the mid-1970s, and 20 to 40 percent more efficient than models sold just 10 years ago.[92] Window-unit air conditioners use only half as much energy as those made in the 1970s.[93]

As with refrigerators, most appliances regulated by federal standards cost mnch less than they did when before the standards were implemented. For example, a 2005 study published by the DOE's Lawrence Berkeley National Laboratories found that the inflation-adjusted prices of freezers, room air conditioners and clothes washers all dropped by well over 40 percent between 1985 and 2002.[94]

More advances are on the way. Appliance manufacturers have agreed to standards to reduce front-loading washers' water and energy use by about 50 percent by 2015; room air

[87] David Goldstein, "Some Dilemma: Efficient Appliances Use Less Energy, Produce the Same Level of Service with Less Pollution and Provide Consumers with Greater Savings. What's Not to Like?" NRDC Switchboard Blog, Dec. 17, 2010.
[88] Sears Ad, *Chicago Tribune*, Section 1, p. 16, Jan. 2, 1987.
[89] Bureau of Labor Statistics CPI Inflation Calculator. Available at www.bls.gov/data/inflation_calculator.htm.
[90] Sears Web site. Viewed on Aug. 29, 2011.
[91] "Home Appliance Energy Savings Quantified," press release of the Association of Home Appliance Manufacturers (AHAM), June 4, 2008.
[92] U.S. Department of Energy, Energy Efficiency and Renewable Energy, "Central Air Conditioners" Web site. Available at www.energysavers.gov/your_home/space_heating_cooling/index.cfm/mytopic=12440.
[93] U.S. Department of Energy, Energy Efficiency and Renewable Energy, "Room Air Conditioners" Web site. Available at www.energysavers.gov/your_home/space_heating_cooling/index.cfm/mytopic=12420.
[94] Stephen Meyers, James McMahon, Michael McNeil, "Realized And Prospective Impacts Of U.S. Energy Efficiency Standards For Residential Appliances: 2004 Update," Lawrence Berkeley National Laboratory, June 24, 2005, p. 24.

conditioners will be at least 10 percent more efficient by 2014; and dishwashers will use nearly 15 percent less electricity and 25 percent less water by 2015.[95]

Standards do not deserve all of the credit for improving efficiency. Product performance generally improves over time, and the energy crisis of the 1970s enhanced demand for more efficient products. Complimentary government programs—such as research and development investments, the mandatory placement of energy consumption labels on appliances, and the incentives in the DOE's voluntary Energy Star program—all have contributed to improving the efficiency of appliances.

But standards have played a key role, both in prodding manufacturers to continue to improve the efficiency of their products and in ensuring that developers install highly efficient products in new buildings. For example, air conditioner maker Carrier Corp. once pointed out that contractors usually choose to install cheaper, less energy-efficient systems, leaving the buyer with the high utility bills.[96] Federal regulation ensures that inefficient products are not available for sale—to consumers or contractors.

The DOE's Lawrence Berkeley National Laboratories, which estimates the share of efficiency improvements resulting specifically from standards (as opposed to other baseline trends), credits efficiency standards with saving American consumers $64 billion from 1987 to 2005, and forecasts that the standards will save consumers $241 billion through 2030.[97]

Meanwhile, Marvair Co., the air conditioner maker that once claimed federal energy standards would push it out of business, proudly boasts on the front page of its Web site that the U.S. Patent and Trademark Office has accepted its patent application for an air conditioning system that achieves "substantial energy savings."

[95] "Major Home Appliance Efficiency Gains to Deliver Huge National Energy and Water Savings and Help to Jump Start the Smart Grid," joint press release of American Council for an Energy-Efficient Economy and Association of Home Appliance Manufacturers, Aug. 3, 2010.
[96] Michael Reese and Jerry Buckley, "A Tale of Regulation," *Newsweek*, March 2, 1981.
[97] Stephen Meyers, James McMahon, Barbara Atkinson, "Realized and Projected Impacts of U.S. Energy Efficiency Standards for Residential and Commercial Appliances," Lawrence Berkeley National Laboratory, March 2008, p. 26.

VI. Conclusion

This report illustrates a common cycle surrounding regulation. Industry typically first says that proposed solutions to generally recognized problems are too expensive—or even impossible—to meet. After the regulation takes effect, industry invariably develops a solution at far less cost than expected. By then, the once-heated controversy is all but forgotten, the public enjoys better protection, and, often, industry enjoys improved products or processes.

The cycle is instructive in light of the philosophical debate over regulations that permeates American politics today. If today's anti-regulatory ideologues prevailed when the issues in this report were being discussed, industries would not have been pushed to develop the solutions that they eventually achieved.

The promise of innovation should not be viewed as a requirement to justify necessary rules to protect workers, the public and the environment any more than football referees should be expected to help drive up television ratings. What the case studies in this report indicate is that regulations often bring out the best and the worst from the leaders of American industry: A reflexive opposition to public sector demands to solve problems and an unparalleled ability to develop solutions when they put their minds to it.

Policy Memorandum

EPI ECONOMIC POLICY INSTITUTE • NOVEMBER 22, 2011 • POLICY MEMORANDUM #190

A QUICK GUIDE TO THE EVIDENCE ON REGULATIONS AND JOBS

ISAAC SHAPIRO

A version of this paper was originally published October 24, 2011, as an EPI commentary. EPI also has released a companion piece, A quick guide to EPI's research on the costs and benefits of regulations.

The intense debate this year over the effects of regulatory efforts on jobs and the economy, driven (inaccurately) from the start by the mantra of "job-killing" regulations, has become even more heated in recent weeks. Anti-regulatory efforts have passed the House, been proposed in the Senate, and been embraced by Republican presidential candidates. EPI has issued a series of reports on this topic this year, including reports which underscore three key points. A huge shortfall in demand, not regulatory uncertainty, is what ails the economy.

EPI President Lawrence Mishel goes through the evidence in *Regulatory uncertainty: A phony explanation for our jobs problem*, published in September. He finds that while data depicting a lack of demand are clear (even using conservative assumptions, per capita demand is "8.5 percent lower than we would expect" at this point in the recovery), data suggesting a significant role for regulatory uncertainty are altogether absent. Investment and employment trends are in line with, or by some comparisons more favorable than, trends in other recent recoveries. In this recovery, investment in equipment and software has grown faster than during the previous three recoveries, and private sector employment has grown much faster than during the last recovery. There are no mysterious lags that might be explained by regulatory uncertainty.

Further, the lack of demand means companies already have at their fingertips substantial resources that they do not have to use; presumably, they would use these resources before they would increase investment or hiring, and substantial unused capacity (not regulatory uncertainty) explains why job growth has not been faster. Companies are not fully using their capital stock; Josh Bivens' October post on EPI's *Working Economics* blog, "The bad economy is not just a state of mind," finds that the capacity utilization rate (the degree to which current factories and equipment are being used) is still well below its average from 1979 to 2007. Similarly, companies are not fully utilizing their current employees, with the average number of hours employed individuals are working each week still below the pre-recession level.

In his September report, Mishel also reviews a range of surveys of businesses on their perceived regulatory burden. The survey results from the leading small business association (National Federation of Independent Business) are also inconsistent with the story that regulations are now the main or a new factor holding back the economy and job creation. Summarizing the results from nine presidential terms, he finds that during the Obama administration the percent of small businesses reporting that regulations are the single most important problem they face has been within its historical range; for instance, the proportion reporting this concern is lower than it was during the Clinton years, when employment growth was rapid. What is unusual now is that the most common problem cited by far is "poor sales" (an indicator of the lack of demand); during the Obama administration, the average share of small businesses citing "poor sales" as the most important problem they face is more than double the average cited during any other presidential term examined.

Mishel's paper has prompted several exchanges with those who claim a damaging role for regulatory uncertainty; see his *Working Economics* blog posts "Clive, don't change the subject," "Really, that's all you got?" and "Regulatory uncertainty not to blame for our jobs problem." My blog post, "Business economists differ from House orthodoxy on regulation, uncertainty, and tax hikes," reports that 80 percent of business economists think the current regulatory environment is good for the economy and businesses.

New EPA regulations, in particular, can be expected to have a negligible effect on the overall economy. The largest EPA regulation proposed so far (the 'air toxics' rule) would, in fact, likely create a modest number of jobs

Perhaps no regulatory agency has been criticized more this year than the Environmental Protection Agency; hearing after hearing, now followed by bill after bill and Republican presidential candidate after Republican presidential candidate, have targeted EPA on the grounds that its rules are damaging the economy and employment. To investigate this claim, my September report *The combined effect of the Obama EPA rules* and a companion blog post, "EPA and the economy: Much ado about 0.1 percent," tallies the compliance costs of all the major EPA rules that have either been finalized or proposed during the Obama administration.

The results are striking. Not only would the benefits of these rules dramatically outweigh their costs, with tens of thousands of lives saved and even more serious illnesses prevented, their total compliance costs are negligible relative to the size of the economy. Once the rules are fully in effect, the compliance costs would amount to only about 0.1 percent of gross national product. This is an amount that the overall economy can absorb without great difficulty, especially since implementation of the new rules can take several years or more and since the figure does not take into account the frequently considerable offsetting economic benefits, such as fuel savings for consumers from new fuel mileage standards or increased work days because diminished pollution means adults are healthier (see my November blog post, "Economic benefits from two fuel standard rules alone offset much of modest compliance cost of all Obama EPA rules."

Individual EPA rules have also been criticized on the grounds that they will eliminate large numbers of jobs; these claims do not hold up to scrutiny. In *A lifesaver, not a job killer: EPA's proposed 'air toxics rule' is no threat to job growth*, Bivens conducts a comprehensive analysis of the proposed EPA rule that has the largest compliance costs, the proposed "air toxics" rule. He concludes that the "jobs-impact of the rule will be modest, but it will be *positive*," with a central estimate that the rule will create 92,000 jobs. The gain reflects the fact that compliance expenditures create jobs when the economy has large numbers of unemployed workers, and the jobs gained outweigh any jobs that might be lost due to the modest increase in energy prices produced by the rule. The broader point about the positive effects of compliance expenditures when there are substantial numbers of workers sidelined has been made by others as well, as Bivens blogged in "Famous economists agreeing with us—the first in an occasional series."

Academic studies of and data on the relationship between employment and regulations generally find that regulations have a modestly positive or neutral effect on employment

This spring, EPI Research and Policy Director John Irons and I completed a comprehensive review of the academic and other research on the relationship between regulation, the economy, and jobs (see *Regulation, employment, and the economy: Fears of job loss are overblown*). Our examination of studies of economy-wide effects of regulations finds that:

> *The most common general studies are of environmental regulations, and these have consistently failed to find significant negative employment effects. Moreover, studies suggesting that regulations have broad negative effects on the economy offer little persuasive evidence.*

We also examine studies of the effects of particular regulations on particular industries, finding that:

> *A surprising number of such studies actually show that regulations have a small positive net effect on employment; these include studies of environmental regulations on industries generating significant pollution. Some well-executed studies have found that certain regulations led to job losses in particular areas, but most studies of various industries suggest that regulations had either a close to neutral or small positive effect on employment levels.*

Our report also analyzes the federal government survey of employers' reasons for "extended mass layoffs" of their workers. Only a tiny fraction of these layoffs are due to regulation, according to the employers themselves. In October, Bruce Bartlett wrote about this same data in his *Economix* blog "Misrepresentations, Regulations, and Jobs." He notes that only 0.2 percent of such layoffs are due to regulation, and that, "Lack of demand for business products and services is vastly more important."

Our report also underscores how the narrative that regulations thwart job creation is not only inaccurate, but is fundamentally incomplete. Such a frame not only ignores the benefits of the regulations, it also fails to consider how fundamental certain sensible regulations are to the functioning of local economies (extraordinarily lax regulation of oil drilling in the Gulf of Mexico meant that an accident such as the BP oil spill was inevitable, according to the commission set up to investigate the spill) and to particular industries (in 2010 the Food Safety Modernization Act was adopted with widespread support from the food industry, which believed the regulatory and safety improvements in the bill would boost consumer confidence in the industry's products).

Further, certain sensible regulations are essential to the national economy, and thereby to a healthy national labor market. As discussed in our report and elsewhere, the financial collapse that led to the Great Recession and the loss of eight million jobs came in the wake of deregulation of financial markets and of regulatory failure. Our report, for instance, quotes 2008 congressional testimony from Christopher Cox, then the director of the Securities and Exchange Commission and prior to that a leading Republican member of Congress: "We have learned that voluntary regulation does not work… The lessons of the credit crisis all point to the need for strong and effective regulation."

It is unfortunate that those lessons are often forgotten today.

ISSUE BRIEF

EPI ECONOMIC POLICY INSTITUTE ISSUE BRIEF #308 JULY 19, 2011

FLAWS CALL FOR REJECTING CRAIN AND CRAIN MODEL

Cited $1.75 trillion cost of regulations is not worth repeating

BY JOHN IRONS AND ANDREW GREEN

Executive summary

Among the talking points used by critics of regulations is the alleged $1.75 trillion cost of regulations in 2008. This estimate comes from a study written by Nicole V. Crain and W. Mark Crain for the Small Business Administration's Office of Advocacy. A substantial majority of these costs—$1.2 trillion or 70 percent—are based on the author's use of an econometric regression analysis to determine the costs of "economic" regulations, such as those rules affecting the financial industry.

This paper examines the econometric regression analysis that Crain and Crain used to determine the costs of economic regulations. We conclude that the regression model is so conceptually flawed and statistically fragile that its findings should be rejected.

Flawed methodology

More specifically, the Crain and Crain methodology for determining the cost of economic regulations contains the following fundamental errors:

- It fails to capture the timing between changes in the determinants of economic growth and the amount of ensuing growth. The estimation does not properly take into account time-series dynamics.
- It misses the potential reverse causality between factors associated with economic growth and the growth itself. For example, the Crain and Crain model considers only how such factors as education, the extent of broadband use, and regulations affect economic growth without considering how economic growth can affect education, broadband use, and regulations.

- It uses a composite World Bank measure of "regulatory quality" that may capture a range of factors that could lead to higher levels of economic activity but have nothing to do with the stringency of regulations in a country. Indeed, one of the authors of the World Bank's "Index of Regulatory Quality" disputes the way it is used in the Crain and Crain study.

As broad evidence of its conceptual flaws, the Crain and Crain regression analysis finds that a country's economy shrinks as the level of education of its population grows. To unquestioningly accept the finding that economic regulations cost $1.2 trillion, one must also believe that more education somehow undermines economic growth.

Flawed data

The results of the Crain and Crain study, even aside from flawed methodology, appear to be a result of a flawed data set. In particular:

- The Crain and Crain data set is missing close to half of the potential observations. The study purports to use data describing various indicators in Organization for Economic Cooperation and Development countries from 2002–2008 in order to determine the relationship between regulation and GDP. This implies a potential total of 210 (seven years times 30 countries) "observations." Yet so much information is missing that 92 (44%) of the observations had to be dropped from the regression model.
- Missing data is primarily due to the education measure used, namely primary school completion rates.
- Among the observations dropped are all observations from five countries and one entire year (2008). Countries such as Austria are retained, but only partially represented due to incomplete data. For example, while Austria's information for 2002, 2004, and 2007 are used, information for 2003, 2005, 2006, and 2008 had to be dropped out of the data set.

Econometric regressions of this type relying on time-series or panel data sets with large numbers of missing observations are prone to yielding peculiar results. In short, one cannot confidently describe a relationship between regulation and GDP when the countries and years used to determine that relationship are only sporadically represented.

As broad evidence of its statistical fragility, an improved application of Crain and Crain's still-flawed conceptual method yields a far different finding from Crain and Crain's application. We update the Crain and Crain study with data for 2008 and fill in nearly all of the missing data points for earlier years by generating a more complete education variable.

We find that in this more complete data set there is no statistically significant relationship between regulatory quality and GDP, meaning that even Crain and Crain's own flawed model does not provide reliable evidence of an impact on economic activity. (While this use of updated and more complete information yields sounder estimates than the Crain and Crain analysis, it still contains the other conceptual flaws with the model, and still yields the unsupportable finding that more education leads to smaller economies.)

Because the Crain and Crain results are driven by a combination of poor data and a flawed empirical approach, the report should not be used either as a valid measure of the economic costs of regulation or as a guide for policy.

Introduction

One of the most widely used studies purporting to show extraordinarily large economic costs of regulation was prepared by Nicole V. Crain and W. Mark Crain (Crain and Crain 2010) for the Small Business Administration's Office of Advocacy. Many policymakers cite one of the study findings that federal regulations cost more than $1.75 trillion in 2008. The large majority (70%) of the cost is based on a regression analysis that sought to determine the costs of "economic" regulations, such as financial regulations.

The overall approach employed by Crain and Crain contains a series of conceptual and empirical problems as identified by the Center for Progressive Reform (Shapiro, Ruttenberg, and Goodwin 2011), the Congressional Research Service (2011), and the Economic Policy Institute (Shapiro and Irons 2011).[1] The Obama administration recently disavowed the Crain and Crain study, stating that it "wildly overstates the cost of regulation" and has "very serious methodological problems and is out of step with mainstream economists" (Obama administration 2011). The administration's Council of Economic Advisers found the $1.75 trillion figure to be "utterly erroneous" (Goolsbee, 2011).

This issue brief examines the conceptual and empirical problems of the Crain and Crain regression analysis and the bottom-line results which make up the bulk of the costs identified by the authors.[2]

Problems with methodology

Crain and Crain (equation 1) summarizes the relationship between GDP per capita and so-called regulatory quality. Specifically, equation 1 is the econometric specification in which GDP per capita is explained by the World Bank's "Index of Regulatory Quality" and other variables.[3]

$$(1) \quad \text{GDP per Capita}_{it} = \beta\,(\text{World Bank Index of Regulatory Quality})_{it} + \phi(X)_{it} + \alpha_i + \varepsilon_{it}$$

The regulatory quality index ranges in value from -2.5 to 2.5 and is based on a combination of surveys and expert-based judgment measures (Kaufmann, Kraay, and Mastruzzi 2010).

The regulatory index is meant to capture "perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development."[4] The index includes sub-indexes from other organizations, including from *The Economist* magazine and the Heritage Foundation, as well as indexes derived from surveys.[5] Questions have been raised about the meaning and interpretation of the index, for example, CRS (2011) notes that "one of the authors of the regulatory quality index said that Crain and Crain misinterpreted and misused the index, resulting in an erroneous and overstated cost estimate." Of interest, Denmark, Finland, Netherlands, and Sweden—countries not typically associated with a lack of regulation—all scored higher on the index of regulatory quality than did the United States over the seven-year period; that is, this index of regulatory quality is not necessarily a fully accurate measure of regulatory stringency (though Crain and Crain use it as such).

The core Crain and Crain finding on economic costs come from a positive, statistically significant coefficient on the regulatory quality index (see Table 3 for full estimation results); this is interpreted as an indication that the higher a country's score on the regulatory quality index, then the higher its GDP per capita.

The econometric specification includes additional explanatory variables (X) that would determine economic growth. In the Crain and Crain specification, these consist of the (natural log of) country population, school completion rates as a share of the eligible population,[6] fixed broadband subscribers per 100 people, and foreign trade as a share of GDP. The regression also contains country fixed effects, and a dummy time variable for 2007.

TABLE 1

OECD countries included in Crain and Crain data and regression

Included in Crain and Crain regression model (25)

Austria	Finland	Ireland	Netherlands	Spain
Belgium	Germany	Italy	Norway	Sweden
Canada	Greece	Korea, Rep.	Poland	Switzerland
Czech Republic	Hungary	Luxembourg	Portugal	Turkey
Denmark	Iceland	Mexico	Slovak Republic	United States

Included in inital Crain and Crain data set, but dropped from regression model (5)

Australia	France	Japan	New Zealand	United Kingdom

OECD countries not in data set or regression model (4)

Chile	Estonia	Israel	Slovenia

SOURCE: Author's analysis of Crain and Crain (2010), and OECD.

Sample

Crain and Crain indicate that they examine data from OECD countries from 2002 to 2008. As **Table 1** indicates, of the 34 countries that are now part of the OECD, four were not OECD members at the time of the study, and five were dropped because they were missing data values in each of their seven yearly observations. The five countries dropped from the regression analysis due to data limitations are Australia, France, Japan, New Zealand, and the United Kingdom.

Possible misspecification

The specification in equation 1 raises several conceptual and data issues. First, the specification lacks a realistic specification of time-series dynamics. For example, this specification assumes a *contemporaneous* causal link between school completion rates or regulation and GDP per capita. Lagged variables or start-of-period measures are not considered. In contrast, standard models of cross-country growth allow for the time that it takes for various factors (such as education, investment, etc.) to impact the economy, by, for example, relating economic *growth* to the value of the determinants at the start of the period under consideration (Barro 1991). (Also, because the GDP measure is likely to be non-stationary, the specification in equation 1 is likely to pick up spurious correlations with other time-trending variables.)

It is also important to remember that because the model contains country fixed effects, the relation between education and GDP is determined by within-country variation over time for only six years, meaning that it is essential to properly specify the time-series dynamics in order to get meaningful results.[7]

This overall dynamic misspecification might be responsible for the fact that Crain and Crain find a *negative* coefficient on their measure of education. According to their analysis, higher levels of primary school completion lead to *lower* levels of GDP in that same year; a finding that stands in stark contrast to the established literature on economic growth.

Second, the specification in equation 1 mischaracterizes as one-way the causal direction of GDP and the explanatory variables (or "covariates"). For example, the specification implicitly assumes that broadband penetration causes higher levels of GDP, which could be true, but it also assumes that higher GDP is not a causal factor in determining broadband use, a highly dubious assumption. The same is true for other variables, if GDP levels in part cause differences in regulation, education, trade, etc., then the Crain and Crain specification would not yield valid results.

Third, the regulatory index could be correlated with a variety of other factors that might impact GDP, such as environmental factors, federal investment policies, workforce policies, etc. As such, the regulatory measure in this analysis would capture a variety of impacts outside of regulatory policy per se.

It is unclear how to interpret the core result in light of the likely dynamic model misspecification, causality issues, and the vagueness of the regulatory index discussed above. Compounding this uncertainty, the particular Crain and Crain findings result from a data sample that is missing a large number of data points.

Problems with the data

At noted earlier, Crain and Crain's initial data set included 30 countries and spanned seven years, yielding a total potential sample of 210 observations. Of these potential country-year observations, 92 observations (44%) were missing at least one piece of data and were therefore dropped from the data sample for the regression analysis, leaving just 118 observations in the Crain and Crain estimation. As a result, five countries (Australia, France, Japan, New Zealand, and the United Kingdom) and one entire year (2008) were dropped from the sample, producing a sample that is a patchwork of country-years (see **Table 2**).

A closer look at the data reveals that the choice of education variable, primary school *completion* rate, is to blame for most of the missing data. Additional missing values arise from missing country-years in the trade/GDP measure.

This patchwork of observations is disconcerting, in part, because the empirical specification uses the within-country variation to identify the impact of the regulatory index. It is also troubling that an entire year, 2008, is missing since there was a very small sample to begin with.

To correct for this problem, we recalculated equation 1 with two changes. First, we updated the trade variable as a share of GDP data from the same source as Crain and Crain (World Bank, World Development Indicators, online database), which allowed us to add in data from 2008.

Second, we generated a more complete school-completion rate data set. Using data on school enrollment, we estimated equation 2 (with country fixed effects) to predict school completion for the missing observations.

$$(2) \quad \ln(\text{school completion})_{it} = \beta\,(\ln \text{school enrollment})_{it} + t + \alpha_i + \varepsilon_{it}$$

As in the original Crain and Crain regression, we include country fixed effects. We also include a linear time trend to better fit the data.[8] Using the more complete data set (205 total observations out of a possible 210), we re-estimated Crain and Crain's equation 1. The results are shown in **Table 3**. The results are qualitatively similar, except that the coefficient on the regulatory index is statistically insignificant at the 5% level, with a substantially smaller point estimate.

The results strongly suggest that the finding of a significant impact of the regulation quality index on GDP is driven by the particular pattern of missing data in the initial data set: The same analysis with a more complete data set yields no significant impact of the regulatory index on GDP. And while using the more complete data set yields empirically more reliable results, it does not correct for the other methodological flaws with the Crain and Crain approach, underscored by the fact that even when the more complete data set is used, more education is still associated with smaller economies.

TABLE 2

Matrix of all possible (210) observations in regression model

If 1, at least one variable has a missing value; else 0

Country	2002	2003	2004	2005	2006	2007	2008	Total dropped observations
Australia	1	1	1	1	1	1	1	7
Austria	0	1	0	1	1	0	1	4
Belgium	1	1	1	1	0	0	1	5
Canada	1	1	1	1	0	1	1	6
Czech Republic	0	0	0	0	0	0	1	1
Denmark	0	1	0	0	0	0	1	2
Finland	0	0	0	0	0	0	1	1
France	1	1	1	1	1	1	1	7
Germany	0	0	0	0	0	0	1	1
Greece	1	0	0	0	0	0	1	2
Hungary	0	0	0	0	0	0	1	1
Iceland	0	0	1	0	0	0	1	2
Ireland	0	0	0	0	0	1	1	2
Italy	0	0	0	0	0	0	1	1
Japan	1	1	1	1	1	1	1	7
Korea, Rep.	0	0	0	0	0	0	1	1
Luxembourg	0	0	0	0	0	0	1	1
Mexico	0	0	0	0	0	0	1	1
Netherlands	0	0	1	1	1	1	1	5
New Zealand	1	1	1	1	1	1	1	7
Norway	0	0	0	0	0	0	1	1
Poland	0	0	0	0	0	0	1	1
Portugal	1	1	0	1	1	1	1	6
Slovak Republic	0	0	0	0	0	0	1	1
Spain	1	1	0	0	0	1	1	4
Sweden	0	0	0	0	0	0	1	1
Switzerland	0	0	0	0	0	1	1	2
Turkey	1	1	0	0	0	0	1	3
United Kingdom	1	1	1	1	1	1	1	7
United States	0	0	0	0	0	1	1	2
Total	11	12	9	10	8	12	30	92

SOURCE: Author's analysis of Crain and Crain (2010).

TABLE 3

Estimation of Equation 1 with Crain and Crain sample data, and more complete data

	Dependant variable: Ln (GDP per capita)	
	Crain and Crain	*Augmented data*
Number of observations/total possible	118/210	205/210
Number of countries	25	30
Independent variable		
Regulatory Quality Index	0.094*	0.036
	(0.034)	(0.021)
Ln(population)	0.085	-0.060
	(0.228)	(0.144)
Ln (trade/GDP)	0.241*	
	(0.049)	
Ln (trade/GDP) updated		0.194*
		(0.029)
Ln (primary school completion rate)	-0.282*	
	(0.098)	
Ln (primary school completion rate) Actual+predicted		-0.161*
		(0.070)
Ln (fixed broadband / 100 people)	0.033*	0.039*
	(0.004)	(0.003)
Constant	8.39*	10.59*
	(3.80)	(2.41)
R^2 Within	0.855	0.814
R^2 Between	0.031	0.088
R^2 Overall	0.015	0.089

* Significant at 5% level. Number in parentheses are standard errors. Each model includes country fixed effects and a dummy for 2007.

SOURCE: Author's analysis.

Conclusion

These findings suggest that the original Crain and Crain results are driven by a combination of poor data, and a flawed empirical approach. In short, Crain and Crain found that economic regulations cost $1.2 trillion in 2008 because missing data in the initial data set and a misspecification of the relationship between the variables led to a spurious correlation between their chosen measure of regulatory quality and GDP. As such, the report's headline $1.75 trillion estimate should not be used either as a valid measure of the costs of regulation or as a guide for policy.

Endnotes

1. These and other analysts had reported problems replicating the precise data analysis used to generate the broader economic costs (specifically the regression as reported in Table 2, page 23 of the Crain and Crain report). Subsequently, EPI was able to obtain the original data used in the analysis and to closely match the regression results (see the appendix).
2. Other aspects of the paper have been explored elsewhere, including in Shapiro, Ruttenberg, and Goodwin (2011).
3. Further details on replicating the precise estimates in Crain and Crain are available in Irons and Green (2011) "Memorandum re: Crain and Crain (2010) Results Replication" available at http://www.epi.org/page/-/Crain%20and%20CrainMemo_FINAL.docx
4. See information at http://info.worldbank.org/governance/wgi/pdf/rq.pdf
5. See CRS (2011) for a fuller discussion.
6. The Crain and Crain paper cites only school enrollment as a variable; however, their data set as obtained by the authors contains school completion data. In a response to our earlier analysis, Crain and Crain claim this is just a typo "in one place in the text." However, school "completion" was never cited anywhere else in the paper.
7. The sample is only six years, not seven, because there is no data on school completion in 2008, effectively dropping that year from the sample.
8. The estimated equation is Ln (completion) = 1.46 + 0.68 (ln enrollment) - 0.0048t + α_i , with all coefficients statistically significant at the 5% level or better.

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