Written Testimony of

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before the

The House Oversight Committee
Subcommittee on Intergovernmental Affairs

on

"Regulatory Divergence:
Failure of the Administrative State"

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Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on regulatory policy issues. I am Robert Weissman, president of Public Citizen. Public Citizen is a national public interest organization with more than 400,000 members and supporters. For more than 45 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 chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 100 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. My testimony today, however, is solely on behalf of Public Citizen.

Over the last century, and up to the present, regulations have made our country stronger, better, safer, cleaner, healthier and more fair and just. Regulation is one of the greatest public policy success stories in terms of benefits to the public and is a testament to the power of Congress in protecting the public through passage of critical, foundational laws such as the Clean Air Act, the Clean Water Act, the Occupational Safety and Health Act, the Consumer Product Safety Act, the Civil Rights Act, various food safety laws, and many more. Strong and effective public health and safety regulations are a reflection of Congress' desire to protect everyday Americans through laws that are still among the most popular and cherished by the public.

Unfortunately, this Administration has sought to roll back regulatory safeguards in radical and unprecedented fashion. Two recent Public Citizen reports, "Sacrificing Public Protections on the Altar of Deregulation" and "Deregulatory Frenzy," based on detailed empirical analysis of data disclosed in the first three Unified Regulatory Agendas of the Trump administration, present a full accounting of hundreds of regulatory protections that were unilaterally withdrawn by agencies under the Trump Administration.[1] In addition, Congress has resorted to the Congressional Review Act, which bypasses normal legislative procedures, in order to repeal more than a dozen critical regulatory protections[2] that were issued near the end of the previous administration, plus a crucial consumer protection measure from the Consumer Financial Protection Bureau. Finally, agencies have begun the process of repealing rules finalized under the last administration and delaying others indefinitely by categorizing them as "long term" actions in the most recent Unified Regulatory Agenda.[3]

[1] Michael Tanglis, *Sacrificing Public Protections on the Altar of Deregulation*, Public Citizen, November 28, 2017. Available at: https://www.citizen.org/sites/default/files/trump-withdrawn-regs-report.pdf; and Michael Tanglis, *Deregulatory Frenzy*, Public Citizen, June 5, 2018. Available at: https://www.citizen.org/sites/default/files/deregulatory_frenzy_final.pdf

[2] Coalition for Sensible Safeguards, Rules at Risk, Public Citizen, 2018. Available at: https://rulesatrisk.org/

[3] Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions, Office of Information and Regulatory Affairs. Available at: https://www.reginfo.gov/public/do/eAgendaMain

President Trump's Executive Order on regulations, 13771,[4] is a key driver of deregulatory activity at all agencies. EO 13771 restricts an agency from issuing the most important and beneficial new regulations (i.e. significant regulations) unless the agency is first able to identify and remove at least two existing regulations and unless repealing those existing regulations results in costs savings that fully offset costs imposed by the new regulation. In other words, agencies are only allowed to protect the public to the extent that it imposes no new costs on corporations. Further, the EO places pressure on each agency to ensure that any regulatory protections the agency seeks to adopt must be fashioned in a way that minimizes costs in order to comply with regulatory budgets imposed under the EO, rather than in a way that maximizes the effectiveness and benefits of the regulatory protection to the public. Agencies have identified hundreds of crucial public protections that are subject to EO 13771[5] and, thus, that cannot be issued unless offset by deregulatory actions. Among those protections are new lead in drinking water standards, new gun control measures, new car, truck, and train safety standards, new environmental protections including restrictions on toxic chemicals, safety standards for tobacco products like e-cigarettes, numerous workplace safety protections, and updates to energy efficiency standards.

President Trump has justified his deregulatory agenda as a means to create economic growth. After one year, the evidence is clear that deregulation is causing no such economic growth. Both GDP and jobs figures show that there has been no greater economic growth under this administration than the last.[6] A January 2017 report by Goldman Sachs studied whether job growth and capital spending have been stronger in sectors and companies that were more highly regulated before the most recent election. According to the report, "[W]e find no evidence that employment or capital spending accelerated more after the election in areas where regulatory burdens are higher." Overall, Goldman found, "Our results suggest that non-financial deregulation has had a limited impact on the economy to date." These results are "not that surprising," including because "the estimated costs of regulation are not that high."[7]

By contrast, as we have seen in recent years, the cost of regulatory failure — lack of regulatory enforcement, regulations delayed or rolled back, and insufficient regulatory standards and protections in place — is often immense, whether measured in lives lost, injuries incurred, environmental damage inflicted, families and communities disrupted and national economic loss. Most notably, regulatory failure was significantly responsible for the Great Recession, which imposed far greater costs on the economy and cost far more jobs than regulations ever could.

The first section of this testimony provides a quick overview of how regulations strengthen

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[4] Executive Order 13771, January 30, 2017. Available at: https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs

[5] In the most recent Unified Regulatory Agenda of Fall 2017, agencies have begun identifying regulatory actions listed on the Agenda as "regulatory," "deregulatory"]," or otherwise "exempt" for purposes of EO 13771.

[6] Jennifer Rubin, President Trump's Deregulation Flop, The Washington Post, February 13, 2018. Available at: https://www.washingtonpost.com/blogs/right-turn/wp/2018/02/13/president-trumps-deregulation-flop/?utm_term=.a97ce3cff3ae

[7] James Pethokoukis, What's been the economic impact of Trump's deregulation push? American Enterprise Institute, February 12, 2018. Available at: http://www.aei.org/publication/whats-been-the-economic-impact-of-trumps-deregulation-push/

America. The second section explains that regulations are economically smart, by examining relevant aggregate data. It also debunks empirically starved and groundless claims about enormous regulatory cost, and recounts the history of regulated industry's Chicken Little claims about the devastating impact of proposed rules. The third section offers case studies to show that regulations are economically smart. It reviews how regulatory failure led to the Great Recession with its horrific human and economic toll; examines ongoing problems in the financial sector through the examples of Wells Fargo and Equifax; explains how the Clean Car rule now facing roll back would both protect the planet and save consumers hundreds of billions of dollars; and reports on the detrimental impact of the administration's effort to block and replace the Department of Education's Borrower Defense rule. The fourth section looks at sectoral issues related to purported regulatory duplication, in the areas of cybersecurity, financial regulation and health care regulation. The final section briefly concludes with a call for a new turn in the regulatory policy debate.

I. Regulations Strengthen America

This hearing is unfortunately framed around the purported "failure of the administrative state." It makes little sense to consider costs of regulation, however, without recognizing regulatory benefits.

Our country has made dramatic gains through regulation, making the country safer, healthier, more just, cleaner, more equitable and more financially secure. Regulation has made all of our lives better. It has:

- Made our food safer.[8]
- Saved tens of thousands of lives by making our cars safer. 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. [9]
- Made it safer to breathe, saving hundreds of thousands of lives annually. 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. [10]
- Protected children's brain development by phasing out leaded gasoline. 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

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[8] In addition to the historic advances through food safety regulation, implementation of the 2011 Food Safety Modernization Act will have tremendous benefits, eliminating most of the annual toll of 48 million illnesses, 128,000 hospitalizations, and 3,000 deaths that the Centers for Disease Control and Prevention estimates occur each year from contaminated food. Taylor, M. (February 5, 2014). I*mplementing the FDA Food Safety Modernization Act*, available at: http://www.fda.gov/NewsEvents/Testimony/ucm384687.htm.

[9] 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.

[10] *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*. Available at: http://www.epa.gov/oar/sect812/feb11/fullreport.pdf..

levels in excess of 10 micrograms/deciliter; during the years 1991 to 1994, only 4.4 percent of all U.S. children had blood levels in excess of that dangerous amount. [11]

- Empowered disabled persons by giving them improved access to public facilities and workplace opportunities, through implementation of the Americans with Disabilities Act.[12]
- Guaranteed a minimum wage, ended child labor and established limits on the length of the work week.[13]
- Saved the lives of thousands of workers every year. 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. [14]
- Protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques.[15]
- 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.[16]

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.

II. Regulations are Economically Smart: Aggregate Data

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

While regulators commonly do not have economic growth and job creation as a mission priority, they are mindful of regulatory cost, and by statutory directive or on their own initiative typically

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[11] 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*. Available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

[12] National Council on Disability. (2007). *The Impact of the Americans with Disabilities Act*. Available at: http://www.ncd.gov/publications/2007/07262007.

[13] 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. Available at: http://www.demos.org/sites/default/files/publications/goodrules_1_11.pdf.

[14] *See* AFL-CIO. (2015, April.) *Death on the Job: The Toll of Neglect*. p. 1. Available at: http://www.aflcio.org/content/download/154671/3868441/DOTJ2015Finalnobug.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.

[15] See 16 CFR 410-460.

[16] 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.

seek to minimize costs; relatedly, the rulemaking process gives affected industries ample opportunity to communicate with regulators over cost concerns, and these concerns are taken into account. To review the regulations actually proposed and adopted is to see how much attention regulators pay to reducing cost and detrimental impact on employment. And to assess the very extended rulemaking process is to see how substantial industry influence is over the rules ultimately adopted — or discarded.

In trying to get a handle on actual costs and benefits of regulation, much more informative than theoretical work, anecdotes and allegations is a review of the actual costs and benefits of regulations — though even this methodology is significantly imprecise and heavily biased against the benefits of regulation. Every year, the Office of Management and Budget analyzes the costs and benefits of rules with significant economic impact. While the Trump administration released the most recent report well past the deadline imposed by Congress and with little publicity, it one again showed that the benefits massively exceed costs.

The principle finding of *OMB's draft 2017 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, 2006, to September 30, 2016, for which agencies estimated and monetized both benefits and costs, are in the aggregate between $219 billion and $695 billion, while the estimated annual costs are in the aggregate between $59 billion and $88 billion, reported in 2001 dollars. In 2015 dollars, aggregate annual benefits are estimated to be between $287 and $911 billion and costs between $78 and $115 billion. These ranges reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.[17]

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 12.

These results are consistent year-to-year as the following table shows.

[17] Office of Management and Budget, Office of Information and Regulatory Affairs. (2015). Draft *2015 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities*. p*p.1-2.* Available at: https://www.whitehouse.gov/wp-content/uploads/2017/12/draft_2017_cost_benefit_report.pdf .

Total Annual Benefits and Costs of Major Rules by Fiscal Year (billions of 2001 dollars)[18]

Fiscal Year	Number of Rules	Benefits	Costs
2001	12	22.5 to 27.8	9.9
2002	2	1.5 to 6.4	0.6 to 2.2
2003	6	1.6 to 4.5	1.9 to 2.0
2004	10	8.8 to 69.8	3.0 to 3.2
2005	12	27.9 to 178.1	4.3 to 6.2
2006	7	2.5 to 5.0	1.1 to 1.4
2007	12	28.6 to 184.2	9.4 to 10.7
2008	11	8.6 to 39.4	7.9 to 9.2
2009	15	8.6 to 28.9	3.7 to 9.5
2010	18	18.6 to 85.9	6.4 to 12.4
2011	13	34.3 to 98.5	5.0 to 10.2
2012	14	53.2 to 114.6	14.8 to 19.5
2013	7	25.6 to 67.3	2.0 to 2.5
2014	13	8.1 to 18.9	2.5 to 3.7
2015	21	19.6 to 36.9	4.2 to 5.3
2016	16	13.6 to 27.3	3.3 to 4.9

The reason for the consistency is that regulators pay a great deal of concern to comparative costs and benefits (even though there is, we believe, a built-in bias of formal cost-benefit analysis against regulatory initiative[19]). Very few major rules are adopted where projected costs exceed projected benefits, and those very few cases typically involve direct Congressional mandates.

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

Moreover, the empirical evidence also fails to support claims that regulation causes significant job loss. Insufficient demand is the primary reason for layoffs. In extensive survey data collected by the Bureau of Labor Statistics, employers cited lack of demand roughly 100 times more

[18] Office of Management and Budget, Office of Information and Regulatory Affairs. (2017). *Draft 2017 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities*. *Table 1-4,* pp. 19-20. Available at: https://www.whitehouse.gov/wp-content/uploads/2017/12/draft_2017_cost_benefit_report.pdf; 2001-2006 data from: Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities*. *Table 1-3,* p. 19-20. Available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

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

frequently than government regulation as the reason for mass layoffs![20] (Unfortunately, in response to budget cuts, the BLS ceased producing its mass layoff report in 2013.)

Reason for layoff: 2008-2012[21]

	2008	2009	2010	2011	2012
Business Demand	516,919	824,834	384,564	366,629	461,328
Governmental regulations/intervention	5,505	4,854	2,971	2,736	3,300

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

There is, to be sure, a large body of theoretical and non-empirical work on the cost of regulation, some of which yields utterly implausible cost estimates. Most prominent in this regard is the report issued by Nicole Crain and W. Mark Crain, consultants to the Small Business Administration Office of Advocacy.[23] 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." 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,[24] 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.

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[20] U.S. Department of Labor, Bureau of Labor Statistics. (2012, November). *Extended Mass Layoffs in 2011. Table 5. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2009-2011.* Available at: http://www.bls.gov/mls/mlsreport1039.pdf.

[21] U.S. Department of Labor, Bureau of Labor Statistics. (2012, November). *Extended Mass Layoffs in 2011. Table 5. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2010-2012.* Available at: http://www.bls.gov/mls/mlsreport1043.pdf. U.S. Department of Labor, Bureau of Labor Statistics. (2013, September). *Extended Mass Layoffs in 2011. Table 4. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2009-2011.* Available at: http://www.bls.gov/mls/mlsreport1039.pdf ; U.S. Department of Labor, Bureau of Labor Statistics. (2011, November). *Extended Mass Layoffs in 2010. Table 6. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2008-2010.* Available at: http://www.bls.gov/mls/mlsreport1038.pdf.

[22] Mouzoon, N., & Lincoln, T. (2011). *Regulation: The Unsung Hero in American Innovation*. Public Citizen. Available at: http://www.citizen.org/documents/regulation-innovation.pdf.

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

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

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.[25] 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.[26] The Crain and Crain study is characteristic of other poorly constructed anti-regulatory studies, which purport to tally costs of regulation but ignore benefits.

There is also a long history of business complaining about the cost of regulation — and predicting that the next regulation will impose unbearable burdens:

- Bankers and business leaders described the New Deal financial regulatory reforms in foreboding language, warning that the Federal Deposit Insurance Commission and related agencies constituted "monstrous systems," that registration of publicly traded securities constituted an "impossible degree of regulation," and that the New Deal reforms would "cripple" the economy and set the country on a course toward socialism.[27] In fact, those New Deal reforms prevented a major financial crisis for more than half a century — until they were progressively scaled back.
- Chemical industry leaders said that rules requiring removal of lead from gasoline would "threaten the jobs of 14 million Americans directly dependent and the 29 million Americans indirectly dependent on the petrochemical industry for employment." In fact, while banning lead from gasoline is one of the single greatest public policy public health accomplishments, the petrochemical industry has continued to thrive. The World Bank finds that removing lead from gasoline has a ten times economic payback.[28]
- Big Tobacco long convinced restaurants, bars and small business owners that smokefree rules would dramatically diminish their revenue — by as much as 30 percent, according to industry-sponsored surveys. The genuine opposition from small business owners — based on the manipulations of Big Tobacco — delayed the implementation of smokefree rules and cost countless lives. Eventually, the Big Tobacco-generated opposition was overcome, and smokefree rules have spread throughout the country — significantly lowering tobacco consumption. Dozens of studies have found that smokefree rules have had a positive or neutral economic impact on restaurants, bars and small business.[29]

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[25] 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.

[26] 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.

[27] Lincoln, T. (2011). *Industry Repeats Itself: The Financial Reform Fight*. Public Citizen. Available at: http://www.citizen.org/documents/Industry-Repeats-Itself.pdf.

[28] Crowther, A. (2013). *Regulation Issue: Industry's Complaints About New Rules Are Predictable — and Wrong. p*.8. Available at: http://www.citizen.org/documents/regulation-issue-industry-complaints-report.pdf.

[29] *Regulation Issue: Industry's Complaints About New Rules Are Predictable — and Wrong.* p.10.

- Rules to confront acid rain have reduced the stress on our rivers, streams and lakes, fish and forests.[30] Industry projected costs of complying with acid rain rules of $5.5 billion initially, rising to $7.1 billion in 2000; ex-ante estimates place costs at $1.1 billion - $1.8 billion.[31]
- In the case of the regulation of carcinogenic benzene emissions, "control costs were estimated at $350,000 per plant by the chemical industry, but soon thereafter the plants developed a new process in which more benign chemicals could be substituted for benzene, thereby reducing control costs to essentially zero."[32]
- The auto industry long resisted rules requiring the installation of air bags, publicly claiming that costs would be more than $1000-plus for each car. Internal cost estimates actually showed the projected cost would be $206.[33] The cost has now dropped significantly below that. The National Highway Traffic Safety Administration estimates that air bags saved 2,300 lives in 2010, and more than 30,000 lives from 1987 to 2010.[34]
- Similarly, the auto industry threatened doom if forced to adopt catalytic converter technology, saying that as a result of such a mandate, "the prospect of unreasonable risk of business catastrophe and massive difficulties with these vehicles in the hands of the public may be faced. It is conceivable that complete stoppage of the entire production could occur, with the obvious tremendous loss to the company, shareholders, employees, suppliers, and communities."[35]

There is a long list of other examples from the last century — including child labor prohibitions, the Family Medical Leave Act, the CFC phase out, asbestos rules, coke oven emissions, cotton dust controls, strip mining, vinyl chloride[36] — that teach us to be wary of Chicken Little warnings about the costs of the next regulation.

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

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[30] Environmental Protection Agency. *Acid Rain in New England: Trends.* Available at: http://www.epa.gov/region1/eco/acidrain/trends.html.

[31] The Pew Environment Group. (2010, October). *Industry Opposition to Government Regulation*. Available at: http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Fact_Sheet/Industry%20Clean%20Energy%20Factsheet.pdf.

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

[33] Behr, P. (August 13, 1981). U.S. Memo on Air Bags in Dispute. Washington Post.

[34] National Highway Traffic Safety Administration. (2012). *Traffic Safety Facts: Occupant Protection*. Available at: http://www-nrd.nhtsa.dot.gov/Pubs/811619.pdf.

[35] April 11, 1973, hearing transcript cited in Clarence Ditlow, Federal Regulation of Motor Vehicle Emissions under the Clean Air Act Amendments of 1970, Ecological Law Journal. 1975, pp. 495-504

[36] *Regulation Issue: Industry's Complaints About New Rules Are Predictable — and Wrong*; Hodges, H. (1997). Falling Prices: Cost of Complying With Environmental Regulations Almost Always Less Than Advertised. Economic Policy Institute. Available at: http://www.epi.org/publication/bp69 ; Shapiro, I., & Irons, J. (2011). *Regulation, Employment, and the Economy: Fears of job loss are overblown*. Economic Policy Institute. Available at: http://www.epi.org/files/2011/BriefingPaper305.pdf.

III. Regulations Are Economically Smart: Case Studies

A. Job-destroying regulatory failure and the Great Recession

Missing from much of the current policy debate on jobs and regulation is a crucial, overriding fact: The Great Recession and ongoing weakness in wage growth and the still-pervasive sense of economic insecurity are a direct result of too little regulation and too little regulatory enforcement. The costs of this set of regulatory failures are staggeringly high, and far outdistance any plausible story about the "cost" of regulation.

A very considerable literature, and a very extensive Congressional hearing record, documents in granular detail the ways in which regulatory failure led to financial crash and the onset of the Great Recession. "Widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets," concluded the Financial Crisis Inquiry Commission.[37] "Deregulation went beyond dismantling regulations," notes the Financial Crisis Inquiry Commission. "[I]ts supporters were also disinclined to adopt new regulations or challenge industry on the risks of innovations."[38]

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

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

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

> **Failure to stop toxic and predatory mortgage lending that blew up the housing bubble.** Concludes the Financial Crisis Inquiry Commission: "The prime example is the Federal Reserve's pivotal failure to stem the flow of toxic mortgages, which it could have done by setting prudent mortgage-lending standards. The Federal Reserve was the one entity empowered to do so and it did not."[39] Regulators failed almost completely to use then-existing authority to crack down on abusive lending practices. The Federal Reserve

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[37] Financial Crisis Inquiry Commission. (2011). *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*. Washington, D.C.: Government Printing Office. p. 30.
[38] *The Financial Crisis Inquiry Report.* p. 53.
[39] *The Financial Crisis Inquiry Report.* p. xvii.

took three formal actions against subprime lenders from 2002 to 2007.[40] The Office of Comptroller of the Currency, with authority over almost 1,800 banks, took three consumer-protection enforcement actions from 2004 to 2006.[41]

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."[42]

Unregulated Financial Derivatives. The 2008 crash proved Warren Buffet's warning that financial derivatives represent "weapons of mass financial destruction" to be prescient.[43] Financial derivatives amplified the financial crisis far beyond the troubles connected to the popping of the housing bubble. AIG made aggressive bets on credit default swaps (CDSs) that went bad with the housing bust, and led to a taxpayer-financed rescue of more than $130 billion. AIG was able to put itself at such risk because its CDS business was effectively subject to no governmental regulation or even oversight. That was because first, high officials in the Clinton administration and the Federal Reserve, including SEC Chair Arthur Levitt, Treasury Secretary Robert Rubin, Deputy Treasury Secretary Lawrence Summers and Federal Reserve Chair Alan Greenspan, blocked the Commodity Futures Trading Commission (CFTC) from regulating financial derivatives;[44]

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

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

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

[43] Buffett, W. (2003). *Report to Shareholders, February 21, 2003*. Berkshire Hathaway. Available at: http://www.berkshirehathaway.com/letters/2002pdf.pdf.

[44] 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*

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."[45]

Poorly Regulated Credit Ratings Firms. The credit rating firms enabled pension funds and other institutional investors to enter the securitized asset game, by attaching high ratings to securities that actually were high risk, as subsequent events revealed. The credit ratings firms have a bias toward offering favorable ratings to new instruments because of their complex relationships with issuers,[46] and their desire to maintain and obtain other

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Concerning Long-Term Capital Management Before the U.S. House of Representatives Committee on Banking and Financial Services. Available at: http://www.cftc.gov/opa/speeches/opaborn-35.htm.

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

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

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

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

> business dealings from issuers. This institutional failure and conflict of interest might and should have been forestalled by the SEC, but the Credit Rating Agencies Reform Act of 2006 gave the SEC insufficient oversight authority. In fact, under the Act, the SEC was required to give an approval rating to credit ratings agencies if they adhered to their own standards — even if the SEC knew those standards to be flawed.

The regulatory failure story can perhaps be summarized as follows: Financial deregulation and non-regulation created a vicious cycle that helped inflate the housing bubble and an interconnected financial bubble. Weak mortgage regulation enabled the spread of toxic and predatory mortgages that helped fuel the housing bubble. Deregulated Wall Street firms and big banks exhibited an insatiable appetite for mortgage loans, irrespective of quality, thanks to insufficiently regulated securitization, off-the-books accounting, the spread of shadow banking techniques, dangerous compensation incentives and inadequate capital standards. Reckless financial practices were ratified by credit ratings firms, paving the way for institutional funders to pour billions into mortgage-related markets; and an unregulated derivatives trade offered the illusion of systemic insurance but actually exacerbated the crisis when the housing bubble popped and Wall Street crashed.

To prevent the collapse of the financial system, the federal government provided incomprehensibly huge financial supports, far beyond the $700 billion in the much-maligned Troubled Assets Relief Program (TARP). The Special Inspector General for the Troubled Assets Relief Program (SIGTARP) estimated that "though a huge sum in its own right, the $700 billion in TARP funding represents only a portion of a much larger sum — estimated to be as large as $23.7 trillion — of potential Federal Government support to the financial system."[47] Much of this sum was never allocated, and most of the TARP funds were paid back. However, the regulatory reform policy debate should acknowledge that such unfathomable sums were put at risk thanks to regulatory failure.

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

A GAO study found that "[t]he 2007-2009 financial crisis, like past financial crises, was associated with not only a steep decline in output but also the most severe economic downturn since the Great Depression of the 1930s."[48] Reviewing estimates of lost economic output, GAO reported that the present value of cumulative output losses could exceed $13 trillion.[49] Additionally, GAO found that "households collectively lost about $9.1 trillion (in constant 2011

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

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

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

dollars) in national home equity between 2005 and 2011, in part because of the decline in home prices."[50]

The recession threw millions out of work, and left millions still jobless or underemployed. "The monthly unemployment rate peaked at around 10 percent in October 2009 and remained above 8 percent for over 3 years, making this the longest stretch of unemployment above 8 percent in the United States since the Great Depression," GAO noted.[51]

The economic impact on families is crushing, even leaving aside social and psychological consequences. "Displaced workers — those who permanently lose their jobs through no fault of their own — often suffer an initial decline in earnings and also can suffer longer-term losses in earnings," reports GAO. For example, one study found that workers displaced during the 1982 recession earned 20 percent less, on average, than their non-displaced peers 15 to 20 years later.[52] Thanks to lost income and especially collapsed housing prices, families have seen their net worth plummet. According to the Federal Reserve's Survey of Consumer Finances, median household net worth fell by $49,100 per family, or by nearly 39 percent, between 2007 and 2010.[53]

The foreclosure crisis stemming from the toxic brew of collapsing housing prices, exploding and other unsustainable mortgages and high unemployment has devastated families and communities across the nation.[54]

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

The dissent explained that "we … reject as too simplistic the hypothesis that too little regulation caused the Crisis,"[55] arguing that the *amount* of regulation is an imprecise and perhaps irrelevant metric. This is a reasonable position (and it applies equally to those who complain about "too much" regulation); what matters is the quality of regulation — both the rules and standards of enforcement.

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[50] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 21. There is necessarily a significant amount of uncertainty around such analyses. Other estimates have placed the loss somewhat lower. A recent Congressional Budget Office study estimates the cumulative loss from the recession and slow recovery at $5.7 trillion." (Congressional Budget Office. 2012. *The Budget and Economic Outlook: Fiscal Years 2012 to 2022*. p. 26.) One complicating issue is determining which losses should be attributed to the recession and which to other issues. For example, GAO notes, "analyzing the peak-to-trough changes in certain measures, such as home prices, can overstate the impacts associated with the crisis, as valuations before the crisis may have been inflated and unsustainable.[50] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 17.
[51] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 17-18.
[52] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 18-19.
[53] Cited in *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 16.
[54] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 23-24.
[55] *The Financial Crisis Inquiry Report.* (Dissenting Views By Keith Hennessey, Douglas Holtz-Eakin, and Bill Thomas.) p. 414.

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

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

The Congressional response to the financial crisis, of course, was passage of the Dodd-Frank Act. 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.

Rolling back or diluting those measures – as Wall Street now seeks to do, away from the glare of public attention — is to invite yet another financial meltdown.

B. The Ongoing Need for Regulation in the Financial Sector

Although the 2008 financial crash and Great Recession was (hopefully) a once-in-a-lifetime event, abuses in the financial sector remain rampant, illustrating the need for stronger regulation and tougher regulatory enforcement. Two recent, notable debacles – Wells Fargo's fake account scandal and a series of other serious abuses, and the Equifax data breach – should put to rest the notion that the financial sector is overburdened with duplicative or unfair rules.

Wells Fargo: In September 2016, the Consumer Financial Protection Bureau (CFPB), [56] the Office of the Comptroller of the Currency (OCC),[57] and the Los Angeles (LA) City Attorney[58] fined Wells Fargo $185 million for engaging in fraudulent cross-selling practices.[59] Wells Fargo neither admitted nor denied wrongdoing.

In August 2017, a year after the initial penalty announcement, a review of Wells Fargo activities going back to 2009 found additional fraudulent accounts, bringing the total number of reported

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[56] Wells Fargo consent order, U.S. Consumer Financial Protection Bureau (Sept. 8, 2016), available at: https://files.consumerfinance.gov/f/documents/092016_cfpb_WFBconsentorder.pdf.
[57] Wells Fargo consent order, U.S. Office of the Comptroller of the Currency, (Sept. 8, 2016), available at: https://occ.gov/news-issuances/news-releases/2016/nr-occ-2016-106b.pdf.
[58] Press release, "Los Angeles City Attorney Mike Feuer Achieves Historic Result in Consumer Action Against Wells Fargo; Bank to Make Restitution to Customers, Pay $50-million in Penalties; Unprecedented Coordination with Federal Regulators to Benefit Consumers Nationwide," Los Angeles City Attorney (Sept. 8, 2016), available at: https://www.lacityattorney.org/single-post/2016/09/08/Los-Angeles-City-Attorney-Mike-Feuer-Achieves-Historic-Result-in-Consumer-Action-Against-Wells-Fargo-Bank-to-Make-Restitution-to-Customers-Pay-50-million-in-Penalties-Unprecedented-Coordination-with-Federal-Regulators-to-Benefit-Consumers-Nationwide.
[59] Michael Tanglis, "The "King of Cross-Sell" and the Race to Eight," Public Citizen (Sept. 29, 2016), available at: https://www.citizen.org/sites/default/files/wells-fargo-king-of-cross-sell.pdf.

fake accounts up to 3.5 million.[60] As a result, 190,000 related accounts incurred fees. Wells Fargo pledged to refund consumers a total of $6.1 million in wrongful charges plus interest.[61] Wells Fargo also paid $3.7 million to address further complaints and settled a $142 million class action lawsuit brought on behalf of wronged consumers.[62]

5,300 employees were fired for the alleged wrongdoing.[63] Fallout from the scandal included allegations the bank fired whistleblowers; OSHA ordered the bank to pay one whistleblower $5.4 million and required that he be rehired.[64] (About 2,000 were later hired back.)[65] The board ousted CEO John Stumpf in the fallout and executive Carrie Tolstedt was retroactively terminated after her retirement. Each lost over $60 million in compensation and clawbacks.[66]

Then-CFPB Director Richard Cordray said, “Today’s enforcement actions against Wells Fargo likely could have been prevented if the bank had a stronger compliance risk management program that fostered a more healthy culture, in which incentives aligned behaviors properly.”[67] Stumpf reportedly was aware of problems with the bank’s cross-selling practices as far back as 2002.[68] A detailed report by Wells Fargo’s board of directors identifies executive failures and the bank’s “decentralized”[69] structure as factors that permitted the crisis to occur.

Among the report’s principal findings:[70]

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[60] Press release, "Wells Fargo Reports Completion of Expanded Third-Party Review of Retail Banking Accounts, Paving Way to Complete Remediation Effort," Wells Fargo (Aug. 31, 2017), available at: https://newsroom.wf.com/press-release/wells-fargo-reports-completion-expanded-third-party-review-retail-banking-accounts.

[61] *Ibid.*

[62] James Rufus Koren, "Wells Fargo's $142-million sham accounts settlement: What you need to know," Los Angeles Times (July 11, 2017), available at: http://www.latimes.com/business/la-fi-wells-fargo-settlement-20170710-htmlstory.html.

[63] Renae Merle, "Wells Fargo boots 5,300 employees for creating accounts its customers didn’t ask for," The Washington Post (Sept. 8, 2016), available at: https://www.washingtonpost.com/news/business/wp/2016/09/08/wells-fargo-fined-185-million-for-creating-accounts-its-customers-didnt-ask-for.

[64] Stacy Cowley, "Wells Fargo Whistle-Blower Wins $5.4 Million and His Job Back," The New York Times (April 3, 2017), available at: https://www.nytimes.com/2017/04/03/business/04-wells-fargo-whistleblower-fired-osha.html.

[65] Patrick Rucker, "Wells Fargo rehires workers pushed aside in accounts scandal," Reuters (Oct. 2, 2017), available at: https://www.reuters.com/article/us-wells-fargo-accounts-sloan/wells-fargo-rehires-workers-pushed-aside-in-accounts-scandal-idUSKCN1C721S.

[66] Wilfred Frost and Dawn Giel, "Wells Fargo board slams former CEO Stumpf and Tolstedt, claws back $75 million," CNBC (April 10, 2017), available at: https://www.cnbc.com/2017/04/10/wells-fargo-board-slams-stumpf-and-tolstedt-claws-back-millions.html.

[67] Renae Merle, "Wells Fargo boots 5,300 employees for creating accounts its customers didn’t ask for," The Washington Post (Sept. 8, 2016), available at: https://www.washingtonpost.com/news/business/wp/2016/09/08/wells-fargo-fined-185-million-for-creating-accounts-its-customers-didnt-ask-for.

[68] Wilfred Frost and Dawn Giel, "Wells Fargo board slams former CEO Stumpf and Tolstedt, claws back $75 million," CNBC (April 10, 2017), available at: https://www.cnbc.com/2017/04/10/wells-fargo-board-slams-stumpf-and-tolstedt-claws-back-millions.html.

[69] Independent Directors of the Board of Wells Fargo & Company, "Sales Practices Investigation Report," Wells Fargo (April 10, 2017), available at: https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf.

[70] *Ibid.*

> Corporate control functions were constrained by the decentralized organizational structure and a culture of substantial deference to the business units. In addition, a transactional approach to problem-solving obscured their view of the broader context. As a result, they missed opportunities to analyze, size and escalate sales practice issues. Sales practices were not identified to the Board as a noteworthy risk until 2014. By early 2015, management reported that corrective action was working. Throughout 2015 and 2016, the Board was regularly engaged on the issue; however, management reports did not accurately convey the scope of the problem. The Board only learned that approximately 5,300 employees had been terminated for sales practices violations through the September 2016 settlements with the Los Angeles City Attorney, the OCC and the CFPB.

As a result of Wells Fargo's compliance failures, the bank has been subsequently penalized for multiple regulatory violations,[71] including the remarkable sanction of having its growth capped by the Federal Reserve[72] because of its consumer failures and a $1 billion penalty from the CFPB and OCC for overcharging consumers with mortgage fees and charging about 2 million consumers for "duplicative or unnecessary" insurance policies.[73]

Equifax: In 2017, hackers accessed and stole sensitive data held by Equifax about more than 146.6 million Americans.[74] The data Equifax accessed includes individuals' full names, birth dates, Social Security numbers, driver's license numbers and credit card information. It was the second-largest hack of this kind, second only to Yahoo.[75]

It bears reminding that ordinary Americans are not Equifax's customers – individuals' information is Equifax's product, which they collect and sell to banks.

The Equifax attack occurred on May 13. Six weeks lapsed between Equifax becoming aware of the attack and the attack being made public on September 7.[76] For months, the credit-rating company failed to disclose the full extent of the breach.[77]

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[71] "Wells Fargo," Violation Tracker database (accessed July 6, 2018), available at: https://violationtracker.goodjobsfirst.org/parent/wells-fargo.

[72] "Responding to widespread consumer abuses and compliance breakdowns by Wells Fargo, Federal Reserve restricts Wells' growth until firm improves governance and controls. Concurrent with Fed action, Wells to replace three directors by April, one by year end," Board of Governors of the Federal Reserve System (Feb, 2, 2018), available at: https://www.federalreserve.gov/newsevents/pressreleases/enforcement20180202a.htm.

[73] Wells Fargo consent order, U.S. Consumer Financial Protection Bureau (April 20, 2018), available at: https://files.consumerfinance.gov/f/documents/cfpb_wells-fargo-bank-na_consent-order_2018-04.pdf.

[74] "Equifax's Statement for the Record Regarding the Extent of the Cybersecurity Incident Announced on September 7, 2017," U.S. Securities and Exchange Commission form EX-99.1 (May 8, 2018), available at: https://www.sec.gov/Archives/edgar/data/33185/000119312518154706/d583804dex991.htm.

[75] AnnaMaria Androitis, "Equifax Customer Complaints Continue to Pile Up," Fox Business (Sept. 10, 2017), available at: https://www.foxbusiness.com/features/equifax-customer-complaints-continue-to-pile-up.

[76] Michael Rapoport and AnnaMaria Andriotis, "States Push Equifax to Explain Why It Took 6 Weeks to Disclose Hack," Fox Business (Sept. 10, 2017), available at: https://www.wsj.com/articles/states-push-equifax-to-explain-why-it-took-6-weeks-to-disclose-hack-1509196933.

[77] AnnaMaria Andriotis, "Equifax Hack Might Be Worse Than You Think," The Wall Street Journal (Feb. 9, 2018), available at: https://www.wsj.com/articles/equifax-hack-might-be-worse-than-you-think-1518191370.

CEO Richard Smith was aware of the attack for three weeks before it was made public.[78] A report by the office of Senator Elizabeth Warren (D-Mass.) notes that, "By failing to provide adequate information in a timely fashion, Equifax robbed consumers of the ability to take precautionary measures to protect themselves."[79]

Equifax bungled the immediate fallout of the hack disclosure – customer help lines and websites were unresponsive to the massive demand for assistance,[80] and the company for a time required consumers to agree to a forced arbitration clause that would deny their right to hold it accountable in court.[81] Public outrage forced the company to drop its rip-off clause for remedial services provided.[82]

For months, the credit-rating company failed to disclose the full extent of the breach.[83]
So far, an executive and a software engineering manager have been charged with insider trading on information about the hack before the news was public.[84] State regulatory agencies have imposed new data security requirements on Equifax, but no penalties have been levied.[85] Reuters has reported that acting CFPB director Mick Mulvaney has so far declined to investigate Equifax.[86] The FTC is investigating, and a class-action lawsuit against the company is being pursued by all 50 states and the District of Columbia.[87] The IRS temporarily suspended its $7.2 million contract with Equifax to verify taxpayer identities.[88]

However, the combination of the Trump administration's hostility to regulatory enforcement and the completely inadequate privacy protection regulatory framework means that Equifax may

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[78] Chris Arnold, "Equifax CEO Richard Smith Resigns After Backlash Over Massive Data Breach," National Public Radio (Sept. 26, 2017), available at: https://www.npr.org/2017/09/26/553799200/equifax-ceo-richard-smith-resigns-after-backlash-over-massive-data-breach.
[79] "Bad Credit: Uncovering Equifax's Failure to Protect Americans' Personal Information," Office of Senator Elizabeth Warren (Feb. 2018), available at: https://www.warren.senate.gov/files/documents/2018_2_7_%20Equifax_Report.pdf.
[80] AnnaMaria Androitis, "Equifax Customer Complaints Continue to Pile Up," Fox Business (Sept. 10, 2017), available at: https://www.foxbusiness.com/features/equifax-customer-complaints-continue-to-pile-up.
[81] Mahita Gajanan, "Equifax Says You Won't Surrender Your Right to Sue by Asking for Help After Massive Hack," TIME (Sept. 11, 2017), available at: http://time.com/4936081/equifax-data-breach-hack.
[82] Press release, "Equifax Removes Rip-Off Clause, Backing Down Under Pressure From Consumers," Public Citizen (Sept. 11, 2017), available at: https://www.citizen.org/media/press-releases/equifax-removes-rip-clause-backing-down-under-pressure-consumers.
[83] AnnaMaria Andriotis, "Equifax Hack Might Be Worse Than You Think," The Wall Street Journal (Feb. 9, 2018), available at: https://www.wsj.com/articles/equifax-hack-might-be-worse-than-you-think-1518191370.
[84] Tara Siegel Bernard, "Another Equifax Employee Faces Charge of Insider Trading After Big Breach," The New York Times (June 28, 2018), available at: https://www.nytimes.com/2018/06/28/business/equifax-insider-trading-sec.html.
[85] Kate Fazzini, "Equifax gets new to-do list, but no fines or penalties," CNBC (June 27, 2018), available at: https://www.cnbc.com/2018/06/27/equifax-breach-consent-order-issued.html.
[86] Patrick Rucker, "Exclusive: U.S. consumer protection official puts Equifax probe on ice - sources," Reuters (Feb. 5, 2018), available: https://www.reuters.com/article/us-usa-equifax-cfpb/exclusive-u-s-consumer-protection-official-puts-equifax-probe-on-ice-sources-idUSKBN1FP0IZ.
[87] Tara Swaminatha, "Equifax now hit with a rare 50-state class-action lawsuit," CSO Online (Nov. 22, 2017), available at: https://www.csoonline.com/article/3238076/data-breach/equifax-now-hit-with-a-rare-50-state-class-action-lawsuit.html.
[88] Steven Overly, "IRS temporarily suspends contract with Equifax," Politico (Oct. 12, 2017), available at: https://www.politico.com/story/2017/10/12/irs-equifax-contract-suspended-243732.

escape full accountability – an accountability failure that will encourage rather than deter other companies from the same lax security, reporting sloth and inadequate remedies that Equifax displayed.

C. Deregulation Injuring Consumers and the Planet: Clean Car Standards

The Trump administration's roll back of vehicle fuel efficiency standards is one of the worst deregulatory decisions in history. Where other deregulatory disasters could at least be justified at the decision point based on fanciful claims that they would create no undue risk and generate economic savings, the roll back of the clean car standard fails utterly and totally on both accounts. It will dramatically worsen climate pollution, speeding our rush to climate catastrophe. At the same time, not only will it introduce massive regulatory uncertainty for auto makers, it will cost consumers, and the national economy, hundreds of billions of dollars. It's not easy to make a decision this bad.

In 2011, automakers, labor groups and environmentalists stood in the Rose Garden beside President Barack Obama as he announced national clean car standards. The standards were the product of a negotiation among the National Highway Traffic Safety Administration (NHTSA), the Environmental Protection Agency (EPA), the California Air Resources Board (CARB), the auto makers and others. Together, they agreed that the auto industry could catapult forward to meet "One National Program," making much more efficient vehicles, aiding the industry, protecting the planet and providing dramatic savings to consumers.[89]

The joint standards were issued in phases. In 2010, standards were finalized for model years (MY) 2012-2016. In 2012, standards were promulgated for MY 2017-2025.[90] The clean car regulations finalized in 2012 provided for a "midterm review" of the appropriateness of standards established for model years 2022-25. In January 2017, the EPA issued a final determination that the standards were appropriate and would remain unchanged: "At every step in the process the analysis has shown that the greenhouse gas emissions standards for cars and light trucks remain affordable and effective through 2025, and will save American drivers billions of dollars at the pump while protecting our health and the environment."[91]

Those gains now are threatened because, since President Donald Trump's election and despite having helped craft the clean car standards, automakers have pushed to roll them back. In April 2018, the EPA reversed the January 2017 final determination, requiring the agency to promulgate new standards for MY 2021-2025. Public Citizen and other organizations have petitioned to reverse that decision, as have numerous states.[92] The EPA and NHTSA are

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[89] https://obamawhitehouse.archives.gov/the-press-office/2012/08/28/obama-administration-finalizes-historic-545-mpg-fuel-efficiency-standard

[90] The standards require the fleet average for each manufacturer to be 163 grams CO2e emitted per mile, or 54.5 mpg when translated into fuel economy

[91] Midterm Evaluation of Light-Duty Vehicle Greenhouse Gas Emissions Standards for Model Years 2022-2025, U.S. Environmental Protection Agency. Available at: https://www.epa.gov/regulations-emissions-vehicles-and-engines/midterm-evaluation-light-duty-vehicle-greenhouse-gas

[92] Center for Biological Diversity; Conservation Law Foundation; Environmental Defense Fund; Natural Resources Defense Council; Public Citizen, Inc.; Sierra Club, and Union of Conerned Scientists v. United States

expected to introduce alternative standards, vastly inferior to those already agreed upon, and likely eviscerating California's historic right to establish fuel efficiency standards more aggressive than federal rules require.

According to leaked documents, the rollback would result in:[93]

- Emission of an additional 2.2 billion metric tons of global warming pollution that would have been avoided by 2040.
- Burning 200 billion more gallons of fuel by 2040, the equivalent of 1.5 years of U.S. oil production.
- Consumers wasting hundreds of billions of dollars in excess spending at the pump.

The EPA and NHTSA's decision is a reflexive, ideological and industry-driven maneuver, not supported by scientific evidence, [94] cost accounting, industry's long-term interest, respect for the agency's public health and environmental mission or consideration of consumers' economic interest.

In stark contrast to the industry's expressed and real desire for regulatory certainty and a single national standard, the EPA and NHTSA's deregulatory action will launch years of confusion for the industry. If the EPA and NHTSA undermine the federal program, California and the states that follow California's standard – making up one third of the new vehicle market – will maintain their own higher standards, upsetting the goal of a single national standard.[95] If EPA and NHTSA seek to override California's historic right to establish a stronger standard, its action will be tied up in court for years. Indeed, the revocation of the clean car standards itself is likely to be tied up in litigation for years – leaving auto makers uncertain of future requirements and, more importantly, without the incentive to invest quickly in fuel efficient cars that would advance public health, save consumers and help avert catastrophic climate change.

What makes the EPA and NHTSA's move so startling is not just that it ignores environmental imperatives, but that this is a case where environmental protection is perfectly aligned with consumer and national economic interest. The fuel efficiency standards that the administration aims to cancel would generate dramatic savings for consumers. With the existing EPA standards, when compared to a typical vehicle on the road today, a new car buyer will save about $3,200-$5,700 over the lifetime of a new 2025 car, even after considering the cost of more fuel-efficient technology and lower gasoline prices. New truck buyers will save even more — about $4,800-

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Environmental Protection Agency, Petition for Review. Available at: https://www.citizen.org/sites/default/files/ngo_petition_for_review_of_revised_fd_final_5-15-18.pdf

[93] Tom Carper, Letter to Elaine Chao and Scott Pruitt, May 1, 2018. Available at: https://www.epw.senate.gov/public/_cache/files/7/2/72b2d596-d456-483a-8c8a-ba4bfea4a145/BE7A29D9A17B01162A7DA6FEE7C2A0BA.05012018-carper-letter-chao-pruitt-draft-fuel-economy-tailpipe-emissions.pdf

[94] Dave Cooke, "EPA Pulls Back Sound Policy Judgment at Behest of Auto Industry", Union of Concerned Scientists, March 15, 2017. Available at: https://blog.ucsusa.org/dave-cooke/epa-pulls-back-sound-policy-judgment-at-behest-of-auto-industry

[95] Timothy Gardner, U.S. States Vow to Defend Auto Fuel Efficiency Standards, Reuters, April 3, 2018, available at: https://www.reuters.com/article/us-usa-epa-autos/u-s-states-vow-to-defend-auto-fuel-efficiency-standards-idUSKCN1HA2DI

$8,200 over the lifetime of a new 2025 truck.[96] With Americans buying roughly 17 million cars a year, the savings will quickly total in the hundreds of billions of dollars. These are savings both to consumers and the national economy — lost if the Trump administration has its way.

D. Deregulation Striking at the American Dream: Protections for Victims of Predatory Student Loans

Student debt is a national crisis, with students owing more than $1.5 trillion in total.[97] Some of this debt is surely unpayable, including debt held by students who borrowed heavily from the federal government to receive inadequate post-secondary education, overwhelmingly from for-profit schools. The Trump administration's deregulation in this area will leave tens of thousands of students in debt for decades or more and at the mercy of unchecked private student loan servicers. This will shamefully and needlessly damage borrowers' life prospects – a disgraceful regulatory failure to benefit politically connected rip-off institutions at the expense of young (and not-so-young) adults whose only sin was investing in what they believed to be a legitimate educational pathway to achieve the American Dream.

The Higher Education Act of 1965 establishes that student loan borrowers can have their federal Direct Loans discharged (through a process known as "borrower defense") if their schools have engaged in certain types of unlawful conduct with respect to the borrowers' education. However, the first set of debt-relief regulations implementing this statutory provision were not established until 1995 and those rules did not set out a clear process for students to submit claims for debt relief. As a result, only five borrowers submitted claims from the mid-1990s until an unprecedented wave of debt-relief claims began in 2015 after the collapse of some for-profit colleges.[98]

Under the Obama administration, the Education Department attempted to improve and clarify the debt-relief process, finalizing new rules in November 2016. Those rules also imposed accountability and other measures designed to discourage school misconduct and protect students. They provided, for example, for a clearer process by which the federal government could recoup from predatory schools the cost of loan discharges through the borrower defense process. They also prohibited the flow of some federal loan assistance to schools that use or enforce forced arbitration clauses with their students to evade liability when the schools break the law.

However, Secretary of Education Betsy DeVos, has blocked this 2016 rule from going into effect, presumably reflecting her view that it would be unfair to for-profit schools ripping off young adults seeking educational opportunity. "While students should have protections from predatory practices, schools and taxpayers should also be treated fairly as well," DeVos has said.

[96] Comings, A., A. Allison and F. Ackerman. 2016. Fueling savings: Higher fuel economy standards result in big savings for consumers. Available at: consumersunion.org/wp-content/uploads/2016/09/Fueling-Saving-Consumer-Savings-from-CAFE-2025.pdf,

[97] Jillian Berman, Student Debt Just Hit $1.5 Trillion, May 12, 2018, Marketwatch, available at: https://www.marketwatch.com/story/student-debt-just-hit-15-trillion-2018-05-08.

[98] Laura Feiveson, Alvaro Mezza, and Kamila Sommer, Student Loan Debt and Aggregate Consumption Growth, March 1, 2018, Federal Reserve, available at: https://www.federalreserve.gov/econres/notes/feds-notes/student-loan-debt-and-aggregate-consumption-growth-20180221.htm.

She claims the borrower defense process provided by the 2016 rule would wrongly give "free money" to victimized students.[99]

Public Citizen and the Project on Predatory Student Lending are suing the Department of Education to force implementation of the 2016 rule.[100] We represent two former students misled by a for-profit college who are seeking relief from their federal loans and the ability to sue their school in court despite the school's use of forced arbitration clauses.[101] Democratic attorneys general have also sued to prevent the 2016 borrower defense regulation from being delayed.[102] The Department of Education is expected to propose a far weaker, alternative rule this summer.

For-profit colleges prey upon disadvantaged populations. To a considerable extent, it is working students — veterans, single moms and minorities – who attend and are defrauded by for-profit colleges, as seen in stories of shoddy educational programs collected by U.S. Senate Democrats in a report published in November 2017.[103] Some examples:

> *"I wasted two years and a half of my life. They didn't even say that I will be in debt after graduation. At the beginning they told me not to worry about having a loan because I was eligible for the highest financial aid. The whole thing was just a blur... The two years and a half of my life were all lies."*
>
> — Nino, ITT Technical Institute

> *"I took out loans for a quality education and that is not what I got…the closest I worked [to interior design] was an internship for a guy who ended up being a druggie who had a cabinet shop."*
>
> — Heather Drattlo, The Art Institute of Indianapolis

> *"I was excited, breaking my back, staying up late, and carrying all these books around, taking notes, for what? For nothing. At the end of the day all we end up with is debt."*
>
> — Erika C., Everest College

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[99] Jaqueline Thomsen, *DeVos: Victims of for-profit colleges just had to raise hands to get 'free money*', The Hill, Sept. 25, 2017, http://thehill.com/homenews/administration/352264-devos-students-defrauded-by-for-profit-colleges-just-had-to-raise.

[100] *Bauer v. DeVos*, Available at: https://www.citizen.org/our-work/litigation/cases/bauer-v-devos.

[101] Public Citizen, Public Citizen and Project on Predatory Student Lending Represent Students Suing to Stop Education Department's Illegal Delay (July 6, 2017), http://bit.ly/2u2cnQP; Public Citizen, Public Citizen and Project on Predatory Student Lending Intervene in Suit To Protect Students Victimized by Predatory Schools (June 15, 2017), http://bit.ly/2tO5zGh.

[102] Michael Martin, 19 Attorneys General Sue DeVos over Delay of Borrower Defense Rule, NPR, All Things Considered, July 8, 2017, Available at: https://www.npr.org/2017/07/08/536197364/19-attorneys-general-sue-devos-over-delay-of-borrower-defense-rule

[103] Elizabeth Warren and Richard J. Durbin, "Insult to Injury: How the DeVos Department of Education is Failing Defrauded Students", United States Senate, November 2017. Available at: https://www.warren.senate.gov/files/documents/2017_11_Warren_Durbin_Borrower_Defense_Report.pdf

According to data obtained through a Freedom of Information Act request by the Century Foundation, more than 98 percent of the 128,000 borrower defense claims filed since 2015 involve for-profit colleges, with nearly 70 percent coming from Corinthian Colleges.[104] During the Obama administration, the Education Department approved nearly 32,000 borrower defense applications, even before the clearer borrower defense process set out in the 2016 rule was scheduled to take effect.

Although thousands more claims remained, under DeVos, the Education Department cut the number of workers processing borrower defense claims.[105] The Washington Post reported that top Education Department official James Manning directed staffers to stop sorting through students' debt relief claims and slashed the number of contractors working on those claims even as submissions kept piling up.[106] The Trump administration halted approvals until December 2017. That month, an inspector general's report called for the debt-relief process to resume[107] and four state attorneys general sued DeVos over the stalled relief claims.[108]

Shortly thereafter, the Education Department approved nearly 12,900 claims from Corinthian Colleges students but denied 8,600 claims.[109]

DeVos also shifted the Education Department's policy away from giving full debt relief to defrauded students. Instead, she granted partial debt relief to Corinthian Colleges students depending on student's average earnings.[110] Under this "partial relief" plan, borrowers who earn more money – even at low-wage retail jobs outside their field of study – would get less relief, while students with lower earnings or no income would get more help. Under this "tiered" debt relief system, Corinthian Colleges students have received relief levels as low as 10 percent rather than full relief.[111] Consumer lawyers are challenging the legality of the government's plan in court, arguing that students are entitled to full relief, and that the Education Department's tiered relief system would treat Corinthian students far worse than students from that schools who

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[104] Yan Cao, Tariq Habash, "College Fraud Claims Up 29 Percent Since August 2017", The Century Foundation, May 20, 2018, Available at: https://tcf.org/content/commentary/college-fraud-claims-29-percent-since-august-2017/
[105] Danielle Douglas-Gabriel, *Trump administration undermined student debt relief unit while claims mounted, watchdog finds*," Wash. Post (June 14, 2018), https://wapo.st/2NoH2kA.
[106] Danielle Douglas-Gabriel, "Trump administration undermined student debt relief unit while claims mounted, watchdog finds" Washington Post (June 14, 2018) https://wapo.st/2NoH2kA.
[107] Office of Inspector General, "Federal Student Aid's Borrower Defense to Repayment Loan Discharge Process", U.S. Department of Education, December 8, 2017, Available at: https://www2.ed.gov/about/offices/list/oig/auditreports/fy2018/i04r0003.pdf.
[108] Danielle Douglas-Gabriel, Grade Point Betsy DeVos hit with two lawsuits in one day over backlog of student debt relief claims, The Washington Post, December 14, 2017. Available at: https://www.washingtonpost.com/news/grade-point/wp/2017/12/14/betsy-devos-hit-with-two-lawsuits-in-one-day-over-backlog-of-student-debt-relief-claims/?utm_term=.b624a8904c866
[109] Katie Lobosco, Betsy DeVos limits debt relief for defrauded students, CNN, December 21, 2017. Available at: http://money.cnn.com/2017/12/21/pf/college/devos-borrower-defense-debt-relief/index.html
[110] Erica L. Green, *For Students Swindled by Predatory Colleges, Relief May Only Be Partial*, N.Y. Times (Dec. 21, 2017), https://nyti.ms/2JffomE.
[111] U.S. Department of Education, "Borrower Defense Relief Methodology for CCI claims", U.S. Department of Education, December 15, 2017. Available at: https://www2.ed.gov/documents/press-releases/borrower-defense-relief-methodology-cci.pdf

already received relief under Obama.[112] Thankfully, the court has now ruled that the Education Department's partial relief plan violated federal privacy law.[113]

DeVos and the Trump administration also have made several other decisions that will hurt student loan borrowers:

- In response to state efforts to address student loan servicer abuses, the Education Department has advanced an interpretation of the Higher Education Act that would broadly preempt state consumer-protection measures.[114]
- The Trump administration decided to no longer protect student loan borrowers from collection fees if they enter into an agreement to repay their loans within two months of receiving a notice of default.[115] Trump's Education Department ended an agreement[116] to share consumer complaints about student loans and information about student loan payment collectors with the CFPB,[117] an arrangement that had benefited consumers by allowing both agencies to crack down on predatory institutions and to compensate students.
- The Education Department has sought to withdraw[118] an Obama administration decision to evaluate student-loan debt collectors' track records — including customer service standards — when deciding whether to award new contracts. This move may benefit problematic servicers who are trying to obtain lucrative government contracts.[119]

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[112] Danielle Douglas-Gabriel, "Consumer lawyers want to end Education Department student debt relief plan", Washington Post, March 19, 2018. Available at: https://www.washingtonpost.com/news/grade-point/wp/2018/03/19/consumer-attorneys-want-to-put-an-end-to-education-dept-partial-student-debt-relief-plan/?utm_term=.51c844f72b10

[113] *Manriques v. Devos*, available at: https://predatorystudentlending.org/wp-content/uploads/2018/05/PI-Order.pdf.

[114] See Nate Raymond, "U.S. backs student loan servicer in lawsuit by Massachusetts", Reuters, January 10, 2018, Available at: https://www.reuters.com/article/us-massachusetts-education-lawsuit/u-s-backs-student-loan-servicer-in-lawsuit-by-massachusetts-idUSKBN1EZ210; Betsy DeVos, "Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Services", Department of Education, March 1, 2018. Available at: https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-04924.pdf.

[115] Lynn Mahaffie, Withdrawal of Dear Colleague Letter, United States Department of Education, March 16, 2017, Available at: https://ifap.ed.gov/dpcletters/attachments/GEN1702.pdf

[116] Sylvan Lane, "DeVos ends agreement to work on student loan fraud", The Hill, September 5, 2017. Available at: http://thehill.com/policy/finance/349223-education-dept-ends-agreement-to-work-with-consumer-bureau-on-student-loan

[117] Public disclosure that the information-sharing agreement had broken downtriggered a call by labor unions for a probe of potential insider-trading. See Pete Schroeder, AFL-CIO Wants SEC to Probe Trading in Shares of Loan Servicer Navient, October 10, 2017, available at: https://www.reuters.com/article/us-usa-sec-navient/afl-cio-wants-sec-to-probe-trading-in-shares-of-loan-servicer-navient-idUSKBN1CF2UV.

[118] Id.; Andrew Kreighbaum, "Student Aid And Loans Trump Administration Backs Off Reshuffling of Student Debt Collection", July 9, 2018. Available at: https://www.insidehighered.com/news/2018/07/09/after-rebuke-congress-education-department-suspends-reshuffling-defaulted-student

[119] Memo from Ted Mitchell, Under Secretary, U.S. Department of Education to James Runcie, Chief Operating Officer, Federal Student Aid, Re: Policy Direction on Federal Student Loan Servicing (July 20, 2016), http://bit.ly/2tKjDSV.

- The student loan giant Navient has been pressuring the Consumer Financial Protection Bureau (CFPB) to drop a lawsuit alleging mistreatment of student borrowers.[120] Given the CFPB's new leadership, it's fair to assume that these arguments are getting a receptive audience.

IV. Sectoral Issues Regarding Regulatory Duplication

In a complicated economy, with a vast federal bureaucracy, there will surely be regulatory overlap. A lot of this overlap will be purposeful and desirable, as different agencies advance different public purposes and protect diverse interests. There may be some instances where unnecessary regulatory duplication, or possibly even conflicting standards apply. However, despite Big Business assertions that such regulatory duplication is widespread, costly and wasteful, there is no evidence to support such claims. Some of what corporations are complaining about are purposeful overlapping regulatory standards; but it seems that claims of regulatory duplication primarily are dressed up complaints about regulation itself.

A. Cybersecurity and Privacy Protections

The United States is not adequately addressing cybersecurity issues. This is true of both the U.S. government and large corporate actors. If federal agencies are making overlapping demands of states or other entities, it may well reflect a patchwork problem – the absence of an overarching regulatory framework. On the other hand, some overlapping demands may well be justified – as consideration of the differential standards and requirements to protect election security, medical records and critical infrastructure illustrates.

If there are issues with duplicative or competing cybersecurity demands, most are likely best managed through an overarching, federal cybersecurity and internet privacy framework. Indeed, there is an urgent need for such a regulatory framework with the rise of the Internet of Things. The increasing connectivity of a wide range of products and devices – from automobiles to toasters – may offer consumer benefits from energy savings to product performance to safety. But in this new world, data breaches and lack of privacy safeguards pose new risks, threatening frightening automobile accidents, identity theft, improper marketing, racially discriminatory practices and much more.[121] The Equifax data breach – and the company's epic mishandling of the breach – provides only a tiny insight into the scope of the nascent threats.

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[120] Michael Stratford, "Kennedy resignation could spark changes to affirmative action", Politico, June 28, 2018. Available at: https://www.politico.com/newsletters/morning-education/2018/06/28/kennedy-resignation-could-spark-changes-to-affirmative-action-266608

[121] Federal Trade Commission, Internet of Things, Privacy & Security in a Connected World, January 2015, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf; Seeta Pena Gangadharan, ed., Data and Discrimination, Open Technology Institute/New America Foundation, 2014, available at: https://www.newamerica.org/oti/policy-papers/data-and-discrimination; Consumer Reports and Consumer Federation of America, Comments on Cybersecurity Best Practices for Modern Vehicles, November 28, 2016, available at: < https://consumersunion.org/wp-content/uploads/2016/11/CR-CU-comments-to-NHTSA-on-Cybersecurity-Best-Practices-11-28-2016.pdf>.

Against this backdrop, as well as the revelations of Cambridge Analytica's misuse of Facebook data – albeit in ways that reflect contemporary "Big Data" commercial targeting practices used by most large businesses – it is distressing that neither the Congress nor the administration have taken any significant steps toward adopting meaningful data and privacy protections. Indeed, the most consequential action has been Congress's misguided repeal of Federal Communication Commission rules that would have proposed minimal privacy standards on broadband providers. The rules had required Internet Service Providers to obtain affirmative consent before collecting consumers' personal information – including browser history – and making it available to third parties, something few consumers would voluntarily assent to.[122]

Key elements of a unified cybersecurity and privacy framework should include:

- Strong privacy protections modeled on those contained in the European Union's General data Protection Regulation (GDPR). These rules give individuals control over their personal data, prohibiting the excessive compilation of data without individual's affirmative consent, establishing remedies for violations, setting a process to curb unfair practices and providing businesses regulatory certainty and a level playing field.[123]
- Mandated built-in security for online products and connected devices.
- Rules that impose duties on manufacturers and service providers to proactively prevent data breaches, make timely reports of breaches to consumers and law enforcement authorities, and, at a minimum, hold them liable for failing to comply with established standards.[124]
- Guarantees that states may require and enforce their own heightened cybersecurity and data protection standards.[125]

This final point – that federal rules should not preempt stronger state standards – is absolutely essential. The business desire for uniformity and harmonization must not run roughshod over the rights of states to maintain and enforce stronger standards. In this particular area, states have been far more protective of consumer and privacy interests than the federal government, and there is every reason to expect them to remain more nimble and responsive to consumer imperatives in the years ahead.

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[122] Kimberly Kindy, "How Congress Dismantled Federal Internet Privacy Rules," Washington Post, May 30, 2017, available at: https://www.washingtonpost.com/politics/how-congress-dismantled-federal-internet-privacy-rules/2017/05/29/7ad06e14-2f5b-11e7-8674-437ddb6e813e_story.html?noredirect=on&utm_term=.4254a345f6c7.

[123] European Commission, 2018 Reform of EU Data Protection Rules, available at: https://ec.europa.eu/commission/priorities/justice-and-fundamental-rights/data-protection/2018-reform-eu-data-protection-rules_en.

[124] See, for example, Rep. Cicilline's Consumer Privacy Protection Act, H.R.4081 (and companion introduced by Senator Leahy, S. 2124).

[125] See Laura Moy, hearing on "Protecting Consumers: Financial Data Security in the Age of Computer Hackers," House Financial Services Committee, May 14, 2015, available at: https://financialservices.house.gov/uploadedfiles/hhrg-114-ba00-wstate-lmoy-20150514.pdf and Edmund Mierzwinski, hearing on "Data Security: Vulnerabilities and Opportunities for Improvement," House Committee on Financial Services Subcommittee on Financial Institutions and Consumer Credit, November 1, 2017, available at: https://financialservices.house.gov/uploadedfiles/hhrg-115-ba15-wstate-emierzwinski-20171101.pdf.

B. Financial Regulation

As argued above, inadequate financial regulation and regulatory enforcement led directly to the Great Recession and its massive damaging impact on America. Recent, ongoing and pervasive financial sector abuses, including but definitely not limited to Wells Fargo and Equifax, conclusively demonstrate the need for tougher, not weaker, regulatory standards.

Wall Street continues to complain about excessive regulation and, occasionally, about regulatory duplication. The division of federal responsibility for prudential regulation of financial institutions certainly leads to some regulatory fragmentation, which has resisted reform, including during consideration and passage of the Dodd-Frank Act. Historically, and until creation of the Consumer Financial Protection Bureau, the worst consequence of that fragmentation was the failure to protect consumer interests. Secondary impacts, perhaps now modified by Dodd-Frank reforms, were regulator failure to adequately protect against systemic risks and extreme events, and problems – such as the AIG credit default swaps – falling through the cracks. It is unclear how consequential the current fragmentation is. What is clear is that some calls for eliminating duplication are disguised efforts to eliminate agencies and regulations opposed by Wall Street that advance important public interests (e.g., the call to fold the Office of Financial Research, currently an independent office to support the Financial Stability Oversight Council, into the Department of Treasury).[126]

But the most important point about financial regulatory complexity is this: That complexity is necessitated by the complexity of the financial corporations and financial markets. It absolutely would be ideal to lessen regulatory complexity, especially prudential regulation and measures designed to reduce systemic risk. The only responsible way to achieve this objective is to reduce the complexity of financial corporations, which means to adopt simple rules to split them up into smaller businesses with narrower focuses. The 21st Century Glass Steagall Act is an exemplar of how to achieve that objective; Public Citizen proposed a fuller agenda to achieve this objective in *Too Big: The Mega-banks are Too Big to Fail, Too Big to Jail, and Too Big to Manage*.[127]

C. Health Care Regulation

Like the financial industry, health care companies have also complained about "regulatory overload," notably in an October 2017 report from the American Hospital Association (AHA).[128] The AHA study purports to show administrative compliance costs of $39 billion annually, for 629 discrete regulatory requirements pertinent to hospitals and post-acute care providers, and claims that "many requirements are redundant, contradictory and provide little or no value."

Yet as is typical with such complaints, the evidence of regulatory duplication is minimal, the basis for purported regulatory cost claims is murky at best, and benefits are completely ignored.

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[126] See Department of Treasury, A Financial System that Creates Economic Opportunities, June 2017, available at: https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf.
[127] Bartlett Collins Naylor, *Too Big: The Mega-banks are Too Big to Fail, Too Big to Jail, and Too Big to Manage,* Public Citizen, 2016, available at: https://www.citizen.org/sites/default/files/toobig.pdf.
[128] American Hospital Association, Regulatory Overload: Assessing the Regulatory Burden on Health Systems, Hospitals and Post-Acute Care Providers, October 2017, available at: https://www.aha.org/system/files/2018-02/regulatory-overload-report.pdf.

These brief comments can be made about the AHA study, which of course was conducted by an industry trade association with a self-interest in inflating cost estimates:

- The report completely fails to document the benefits of the regulatory standards it analyzes. These are acknowledged, but no monetary or health accounting is done of their benefits. (More on this point below.)
- The study methodology cannot be adequately assessed given the lack of details about the limited "convenience" sample of hospitals surveyed and how the survey was conducted and framed. There is no discussion of how the survey was developed and validated before being implemented, nor a clear discussion of how cost estimates were derived by surveyed institutions.
- Although the report claims to identify rules to eliminate that will not diminish patient outcomes, it does not analyze or explain how its reforms will safeguard patient interests.
- Similarly, the report does not identify the redundant requirements that it claims are commonplace and which should be eliminated. For example, it complains about 80 Centers for Medicare and Medicaid Services quality measures, but does not provide examples of how these well-vetted measures are "duplicative and misaligned."
- It correctly complains about the huge administrative costs associated with the American health care system, but fails to note that this cost is due primarily to the role of multiple, private payers. Indeed, it is notable that the AHA focuses on regulation while avoiding the extraordinary amount of time and resources allocated to billing.
- Many of the report's recommendations do not appear to stem from the underlying study.

None of this is to say that current health care regulations get everything right or provide all the right incentives. They plainly do not. But they are intended to address profound flaws in health care delivery and widespread fraud – problems of the private sector that demand regulation.

Health care quality in the United States is dramatically below standards in other rich nations, ranking last or nearly last in almost every key metric: care process, access, administrative efficiency, equity and health are outcomes. We have the highest rate of mortality amenable to health care; the second highest patient reported rate of medical, medication and lab mistakes; and the worst infant mortality rates.[129]

Medical malpractice is a nationwide scourge, with the best estimates now conservatively suggesting that malpractice kills 250,000 patients a year, making it the third highest cause of death in the nation.[130] A pre-Affordable Care Act HHS Inspector General survey found that almost one-in-six Medicare beneficiaries experienced an adverse event during their hospital stay.[131] The New York Times reports that, since 2013, 40 percent of the nation's nursing homes

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[129] Eric C. Schneider, et. al., Mirror, Mirror 2017: International Comparison Reflects Flaws and Opportunities for Better U.S. Health Care, Commonwealth Fund, July 2017, available at: https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_fund_report_2017_jul_schneider_mirror_mirror_2017.pdf.

[130] Martin Makary and Michael Daniel, Medical Error – the Third Leading Cause of Death in the US, May 3, 2016, *BMJ 2016; 353* available at: https://doi.org/10.1136/bmj.i2139.

[131] Daniel Levinson, Inspector General, Department of Health and Human Services, Adverse Events in Hospitals: National Incidence Among Medicare Beneficiaries, November 2010, available at: https://oig.hhs.gov/oei/reports/oei-06-09-00090.pdf.

have been cited for a serious violation, resulting in fines two-thirds of the time (the Trump administration is radically diminishing the use of penalties for such violations).[132]

Along with profoundly troubling quality of care issues, our health care system is bedeviled by massive fraud. The FBI estimates the cost of health care fraud as between 3 and 10 percent of overall health care spending — $82 billion to as much as $272 billion annually.[133] Along with billing fraud, improper prescription drug marketing, sales and rebate schemes are commonplace.[134]

The extensive regulation in the health care sector is designed primarily to address these twin problems: low-quality care and widespread fraud. Existing regulation is obviously inadequate to address these issues, but the problems would be dramatically worse in the absence of the rules on the books.

V. Conclusion

While opportunities for better regulatory coordination, more rigorous regulatory frameworks, an improved rulemaking process and enhanced regulatory standards abound, the evidence of widespread and consequential problems with regulatory duplication is weak. Much of what is touted as duplication appears to be camouflaged complaints about regulation itself. Yet corporate concerns about costs of regulation frequently fail even to acknowledge the benefits of regulation. And the best evidence on the costs and benefits of regulation shows that benefits vastly exceed costs, even by corporate-friendly accounting metrics.

There should be a bipartisan pathway forward on regulatory reform, focusing on:

- Increased transparency, focusing especially on the operations and influence of the Office of Information and Regulatory Affairs;
- An expedited rulemaking process not subject to manipulation by corporate insiders;
- Strong limits on the revolving door problem at regulatory agencies – one of the worst manifestations of the rigged system that partisans on all sides denounce;
- Respect for states' rights to establish more protective standards for their citizens than required by the federal government;
- Affirmative legislative and regulatory action to address everyday concerns of all Americans, including issues such as online privacy, excessive drug prices and concentrated and poorly functioning markets in sectors such as telecommunications, as well as to address unfair treatment of small businesses by large corporations; and
- Stronger rules and more resources for robust regulatory enforcement, to ensure that large corporations as well as small businesses play by the rules.

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[132] https://www.nytimes.com/2017/12/24/business/trump-administration-nursing-home-penalties.html

[133] Federal Bureau of Investigation, Financial Crimes Report to the Public, Fiscal Years 2010-2011, available at: https://www.fbi.gov/file-repository/stats-services-publications-financial-crimes-report-2010-2011-financial-crimes-report-2010-2011.pdf/view.

[134] See Sammy Almashat, et. al., Twenty-Seven years of Pharmaceutical Industry Criminal and Civil Penalties: 1991 Through 2017, Public Citizen, March 14, 2018, available at: https://www.citizen.org/sites/default/files/2408.pdf.

Thank you for the opportunity to testify today, and we look forward to working with the committee on a shared agenda for the American people.