Written Testimony of

Robert Weissman
President, Public Citizen

before the

The House Judiciary Committee
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

on

"Triple Threat to Workers and Households:
Impacts of Federal Regulations on Jobs, Wages, and Startups"

February 24, 2016

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 40 years, we have advocated with some considerable success for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

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

It is a mistake to view regulations as a "triple threat." As this testimony argues, regulations make our economy stronger and more stable, not weaker; create jobs and increase wages; and accommodate and benefit small business.

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

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

We have also seen in recent years with great clarity the impact of regulatory failure—lack of regulatory enforcement, regulations delayed or rolled back, and insufficient regulatory standards and protections in place. 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 America, including with a case study of the Occupational Safety and Health Administration's

new silica rule. 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 numerous regulations offering dramatic cost savings to consumers, including for energy efficiency, generic drugs and the proposed Clean Power plan; and explains how regulations can boost wages, by example through the Department of Labor's proposed overtime rule. The fourth section explores a number of areas where new regulatory initiatives could benefit small business and start-ups, by addressing anti-competitive market practices. 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 economic harms of regulation. 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.[1]
- 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. [2]
- 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. [3]
- 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

[1] 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.

[2] 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.

[3] *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. [4]

- Empowered disabled persons by giving them improved access to public facilities and workplace opportunities, through implementation of the Americans with Disabilities Act.[5]
- Guaranteed a minimum wage, ended child labor and established limits on the length of the work week.[6]
- 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. [7]
- Protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques.[8]
- 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.[9]

These are not just the achievements of a bygone era. Regulation continues to improve the quality of life for every American, every day. Ongoing and emerging problems and a rapidly changing economy require the issuance of new rules to ensure that America is strong and safe, healthy and wealthy.

Consider just one such rule: the Occupational Safety and Health Administration's proposed life-saving silica dust standard. Regulated industry has harshly complained about this rule, and succeeded in delaying it for more than a decade; and it may well be criticized at this hearing. When finally adopted, however, the rule will annually save hundreds of lives and billions in net costs.

After more than a dozen years of delay, OSHA's life-saving silica dust standard is finally set to take effect this year. More than two million workers in the United States are exposed to silica

---

[4] Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations 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.

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

[6] 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.

[7] *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.

[8] See 16 CFR 410-460.

[9] 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.

dust, especially construction workers and others who operate jackhammers, cut bricks or use sandblasters. Inhaling the dust causes a variety of harmful effects, including lung cancer, tuberculosis, and silicosis (a potentially fatal respiratory disease). The rule will reduce the permissible exposure limit for silica to 50 micrograms per cubic meter (from the currently allowed 100) over an 8-hour workday. "OSHA estimates that the proposed rule would prevent between 579 and 796 fatalities annually—375 from non-malignant respiratory disease, 151 from end-stage renal disease, and between 53 and 271 from lung cancer—and an additional 1,585 cases of moderate-to-severe silicosis annually."[10]

The new standard requires employers to measure exposures, conduct medical exams for workers with high exposures and train workers about the hazards of silica. It requires effective measures to reduce silica exposure, which "can generally be accomplished by using common dust control methods, such as wetting down work operations to keep silica-containing dust from getting into the air, enclosing an operation ('process isolation'), or using a vacuum to collect dust at the point where it is created before workers can inhale it,"[11] while giving businesses flexibility in choosing appropriate control methods.

OSHA has long acknowledged that its current silica dust standard, adopted in 1971, is obsolete.[12] The first concrete action it took to update the standard was in October 2003, when it convened a small business panel to review its proposed rule. In 2011, OSHA submitted to Office of Information and Regulatory Affairs (OIRA) a draft proposed rule to reduce exposure to deadly silica dust. Although OIRA is supposed to complete reviews in three months, it took years for OIRA to complete the review. No explanation for this delay ever emerged. After OIRA finally released the rule, the rule remained stuck at OSHA. This inexcusable delay translates into the needless deaths of roughly 12,000 people.

Silica-related disease is not evenly distributed across the U.S. population. As a result, the benefits of the new rule most strongly will be felt among working class communities and communities of color. In Michigan, studies show the incidence of silicosis in African Americans is almost 6 times greater than that of Caucasians.[13] Latino workers now constitute 24 percent of the workforce in foundries, and almost 26 percent of the workforce in construction, are especially at risk for working jobs where silica dust exposure is paired with a lack of protection.

Industry has vociferously opposed the new silica standard, but costs to the average workplace will be modest: about $1,200 for the average workplace and $550 for businesses with fewer than 20 employees. There is no question that the new standard is feasible: Japan and some Canadian provinces have exposure limits half the level of the new OSHA standard.

---

[10] OSHA. (2013). *Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis: Supporting document for the Notice of Proposed Rulemaking for Occupational Exposure to Crystalline Silica*. Available at: https://www.osha.gov/silica/Silica_PEA.pdf.

[11] OSHA, OSHA's Proposed Crystalline Silica Rule: Overview, available at: https://www.osha.gov/silica/factsheets/OSHA_FS-3683_Silica_Overview.html.

[12] OSHA *Occupational Exposure to Crystalline Silica*, 75 Fed. Reg. 79.603 (2010, Dec. 20).

[13] Rosenman, K. and Reilly, M.J. (2014, July 1). 2012 *Annual Report Tracking Silicosis and Other Work-Related Lung Diseases in Michigan*, Michigan State University, available at: http://www.oem.msu.edu/userfiles/file/Annual%20Reports/Silica/2012Silicosis_OccLungDiseaseAnnRpt.pdf.

OSHA estimates the rule will provide average net benefits of about $2.8 to $4.7 billion annually over the next 60 years (benefits calculated by assigning a dollar value to each anticipated life saved and illness avoided).

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

There is a large body of theoretical and non-empirical work on the cost of regulation, some of which yields utterly implausible cost estimates. 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.[14] 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,[15] a figure that is entirely derived from a regression analysis correlating ratings on a World Bank "regulatory quality index" — which is itself based on nothing more than survey data from businesses and other sources — and national GDP per capita. It is remarkable enough to imagine that such a cross-cultural, international regression analysis would yield such a robust result that it should meaningfully inform U.S. policy; even more so, when it yields a total cost vastly out of line with other careful analysis, as well as such unlikely findings as a correlation between increased education and reduced economic growth. It turns out, as the Economic Policy Institute has shown, that with a more complete set of data than used by Crain and Crain — but still using the same regression equations — no statistical relationship between "regulatory quality" and GDP exists.[16] 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

---

[14] 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.
[15] Crain and Crain.
[16] 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.

study.[17] 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.[18] 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.[19]
- 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.[20]
- Rules to confront acid rain have reduced the stress on our rivers, streams and lakes, fish and forests.[21] 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.[22]

---

[17] 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.

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

[19] 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.

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

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

[22] 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.

- 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."[23]
- 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.[24] 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.[25]

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[26] — 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.

In trying to get a handle on actual costs and benefits of regulation, much more informative than the theoretical work, anecdotes and allegations is a review of the actual costs and benefits of regulations — though even this methodology is significantly imprecise and heavily biased against the benefits of regulation. Every year, the Office of Management and Budget analyzes the costs and benefits of rules with significant economic impact. The benefits massively exceed costs.

The principle finding of *OMB's draft 2015 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, 2004, to September 30, 2014, for which agencies estimated and monetized both benefits and costs, are in the aggregate between $216 billion and $812 billion, while the estimated annual costs are in the aggregate between $57 billion and $85 billion. These

[23] 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.
[24] Behr, P. (August 13, 1981). U.S. Memo on Air Bags in Dispute. Washington Post.
[25] National Highway Traffic Safety Administration. (2012). *Traffic Safety Facts: Occupant Protection*. Available at: http://www-nrd.nhtsa.dot.gov/Pubs/811619.pdf.
[26] *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.

ranges are reported in 2001 dollars and reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.[27]

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 15.

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

Total Annual Benefits and Costs of Major Rules by Fiscal Year (billions of 2001 dollars)[28]

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

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

---

[27] 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*. pp*.1-2.* Available at: https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/draft_2015_cost_benefit_report.pdf.

[28] 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*. *Table 1-4,* pp. 20-21. Available at: https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/draft_2015_cost_benefit_report.pdf.. ; 2001-2004 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.

[29] *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*

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 cite lack of demand roughly 100 times more frequently than government regulation as the reason for mass layoffs![30] (Unfortunately, in response to budget cuts, the BLS ceased producing its mass layoff report in 2013.)

Reason for layoff: 2008-2012[31]

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

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 the jobs market and national economy 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.

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.

[30] 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.

[31] 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.

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

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.[33] "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."[34]

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."[35] Regulators failed almost completely to use then-existing authority to crack down on abusive lending practices. The Federal Reserve took three formal actions against subprime lenders from 2002 to 2007.[36] The Office of Comptroller of the Currency, with authority over almost 1,800 banks, took three consumer-protection enforcement actions from 2004 to 2006.[37]
>
> **Repeal of the Glass-Steagall Act.** The Financial Services Modernization Act of 1999

[33] 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.
[34] *The Financial Crisis Inquiry Report.* p. 53.
[35] *The Financial Crisis Inquiry Report.* p. xvii.
[36] 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.
[37] 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.

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.”[38]

Unregulated Financial Derivatives. The 2008 crash proved Warren Buffet's warning that financial derivatives represent “weapons of mass financial destruction” to be prescient.[39] 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;[40] 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

[38] Stiglitz, J. (2009). Capitalist fools. *Vanity Fair, 51*(1).
[39] Buffett, W. (2003). *Report to Shareholders, February 21, 2003*. Berkshire Hathaway. Available at: http://www.berkshirehathaway.com/letters/2002pdf.pdf.
[40] After the collapse of Long-Term Capital Management, Born issued a new call to regulate financial derivatives. “This episode should serve as a wake-up call about the unknown risks that the over-the-counter derivatives market may pose to the U.S. economy and to financial stability around the world,” Born told the House Banking Committee two days later. “It has highlighted an immediate and pressing need to address whether there are unacceptable regulatory gaps relating to hedge funds and other large OTC derivatives market participants.” But what should have been a moment of vindication for Born was swept aside by her adversaries, and Congress enacted a six-month moratorium on any CFTC action regarding derivatives or the swaps market. In May 1999, Born resigned in frustration. Born, B. (1998). *Testimony of Brooksley Born, Chairperson, Commodity Futures Trading Commission Concerning Long-Term Capital Management Before the U.S. House of Representatives Committee on Banking and Financial Services.* Available at: http://www.cftc.gov/opa/speeches/opaborn-35.htm.

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."[41]

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

The regulatory failure story can perhaps be summarized as follows: Financial deregulation and non-regulation created a vicious cycle that helped inflate the housing bubble and an interconnected financial bubble. Weak mortgage regulation enabled the spread of toxic and predatory mortgages that helped fuel the housing bubble. Deregulated Wall Street firms and big

---

[41] 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.

[42] 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.

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.

The regulatory failure-enabled Great Recession cost the U.S. economy a staggering amount, on the order of $20 trillion.

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."[43] 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."[44] Reviewing estimates of lost economic output, GAO reported that the present value of cumulative output losses could exceed $13 trillion.[45] Additionally, GAO found that "households collectively lost about $9.1 trillion (in constant 2011 dollars) in national home equity between 2005 and 2011, in part because of the decline in home prices."[46]

---

[43] 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.

[44] 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.

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

[46] *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.[46] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 17.

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.[47]

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.[48] 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.[49]

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.[50]

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

> From the end of 2007 to the end of 2010, federal debt held by the public increased from roughly 36 percent of GDP to roughly 62 percent. Key factors contributing to increased deficit and debt levels following the crisis included (1) reduced tax revenues, in part driven by declines in taxable income for consumers and businesses; (2) increased spending on unemployment insurance and other nondiscretionary programs that provide assistance to individuals impacted by the recession; (3) fiscal stimulus programs enacted by Congress to mitigate the recession, such as the American Recovery and Reinvestment Act of 2009 (Recovery Act); and (4) increased government assistance to stabilize financial institutions and markets.[51]

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,"[52] 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

[47] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 17-18.
[48] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 18-19.
[49] Cited in *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 16.
[50] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 23-24.
[51] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 26.
[52] *The Financial Crisis Inquiry Report.* (Dissenting Views By Keith Hennessey, Douglas Holtz-Eakin, and Bill Thomas.) p. 414.

much" regulation); what matters is the quality of regulation—both the rules and standards of enforcement.

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.

B. Consumer Savings from Regulation

Many significant rules obtain dramatic savings for society and consumers. Some of these prevent consumer rip-offs; others introduce economic efficiencies that benefit consumers.

Examples include:

Fuel and energy efficiency standards. Forcing car and equipment makers to adopt more energy efficient technologies yields enormous savings for consumers, including small business and industrial consumers. Pursuant to the Energy Policy and Conservation Act, the Energy Independence and Security Act and the Clean Air Act, the National Highway Safety and Transportation Agency and the Environmental Protection Agency have proposed new automobile and vehicular fuel efficiency standards. The new rules, on an average industry fleet-wide basis for cars and trucks combined, establish standards of 40.1 miles per gallon (mpg) in model year 2021, and 49.6 mpg in model year 2025. The agencies estimate that fuel savings will far outweigh higher vehicle costs, and that the net benefits to society from 2017-2025 will be in the range of $311 billion to $421 billion. The auto industry was integrally involved in the development of these proposed standards, and supports their promulgation.

Similarly, pursuant to the Energy Security and Independence Act, the Department of Energy has proposed energy efficiency standards for a range of products, including Metal Halide Lamp Fixtures, Commercial Refrigeration Equipment, and Battery Chargers and External Power Supplies, Walk-In Coolers and Walk-In Freezers, Residential Clothes Washers.[53] The

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

Department of Energy estimates the net savings from implementation of the Energy Security and Independence Act to be $48 billion - $105 billion (in 2007 dollars).[54]

Generic competition for prescription medicines. Regulations facilitating effective implementation of the Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman") have saved money for consumers by facilitating generic competition for medicines.[55] Generics now make up approximately 85 percent of the pharmaceutical market by volume, and save hundreds of billions of dollars annually as compared to brand-name costs; savings over the last 10 years total more than $1.6 trillion as compared to brand-name costs.[56]

New regulations to promote generic competition could save consumers still more. An overlooked component of the Affordable Care Act was the creation of a process for the Food and Drug Administration to grant regulatory approval for generic biologic pharmaceutical products—essentially generic versions of biotech medicines. Because the molecular composition of biologic drugs is more complicated than traditional medicines, FDA had adopted the position that, with some exceptions, it could not grant regulatory approval for biologics under its previously existing authority. In an important provision of the Affordable Care Act—supported by the biotech industry—FDA was explicitly granted such authority. The provision wrongly grants extended monopolies to brand-name biologic manufacturers, but belated generic competition is better than none. Implementation of the new regulatory pathway for biogenerics, however, depends on issuance of rules by the FDA. Biogeneric competition will save consumers and the government billions of dollars annually.[57]

The Clean Power Plan. In August 2015, the EPA finalized its first-ever rule to curb carbon pollution, known as the Clean Power Plan.[58]

Climate change is already harming consumers, and particularly vulnerable populations,[59] and its effects will worsen without prompt, assertive action. One type of damage involves infrastructure, property, and the economy:

- More extreme weather, such as hurricanes, heavy precipitation and flooding, threatens critical infrastructure. All consumers will bear the cost of repairs through higher taxes and market prices.[60]

---

[54] U.S. Department of Energy. (2007). *Energy Independence and Security Act of 2007 Prescribed Standards*. Available at: http://www1.eere.energy.gov/buildings/appliance_standards/m/eisa2007.html.

[55], D. E. (2003). *Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Amendments)*. Statement before the Senate Committee on the Judiciary. Available at: http://www.fda.gov/newsevents/testimony/ucm115033.htm.

[56] , Generic Pharmaceutical Association. (2015). *Generic Drug Savings in the United States.* Available at: http://www.gphaonline.org/media/wysiwyg/PDF/GPhA_Savings_Report_2015.pdf.

[57] See Weissman, R. and Brennan, H. (2014, December 18) *Competition Inhibitors: How Biologics Makers are Leveraging Political Power to Maintain Monopolies and Keep Prices Sky-High*. Available at: http://www.citizen.org/documents/report-biologics-industry-leverages-political-power-to-maintain-monopolies-and-inflate-prices.pdf.

[58] EPA, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Proposed Rule*, 80 FED. REG. 64,661 (Oct. 23, 2015).

[59] U.S. Global Change Research Program, *Highlights of Climate Change Impacts in the United States: The Third National Climate Assessment*, 34, 39 (2014).

- Droughts and downpours are diminishing water supply and water quality.[61]
- Extreme weather, increased weeds, pests and disease, and increased demand for energy and water threaten agriculture, decreasing food security and raising food prices.[62]

Climate change also endangers human health:

- Extreme heat events cause spikes in deaths from heat stroke and cardiovascular and respiratory disease.[63]
- Reduced air quality increases respiratory problems like allergies and asthma, leading to more emergency room visits and premature deaths.[64]
- Higher temperatures result in more diseases transmitted by insects, food and water.[65]

The Clean Power Plan will help avert all of these threats, albeit insufficiently.

Moreover, because the EPA plan curbs electric generation from the country's dirtiest power plants, it will reduce emissions of not just carbon dioxide, but also pollutants like sulfur dioxide, nitrogen oxides, mercury and hydrogen chloride.[66] For this reason, it will also provide significant health benefits. A recent study of a scenario similar to the EPA plan found that each year it would prevent 3,500 premature deaths.[67]

Climate change is a global challenge, and the Clean Power Plan does far too little even to reduce U.S. greenhouse gas emissions. But the Clean Power Plan makes progress. The EPA estimates that the Clean Power Plan will cost just $5.5 to $8.8 billion per year, in exchange for $32 to $93 billion in benefits.[68] In other words, the rule will *contribute* $26 billion to $84 billion to the economy per year—or $260 billion to $840 billion over 10 years. After 10 years, the vast majority of the rule's costs will have been incurred, but many of its benefits will continue in perpetuity.

But the benefits of the Clean Power Plan are not limited to reducing harm from climate change. The Clean Power Plan will affirmatively lower consumer energy costs. Detractors often argue

---

[60] U.S. Global Change Research Program, *Highlights of Climate Change Impacts in the United States: The Third National Climate Assessment,* 12-13, 38-41 (2014).
[61] U.S. Global Change Research Program, *Highlights of Climate Change Impacts in the United States: The Third National Climate Assessment*, 13, 42-45 (2014).
[62] U.S. Global Change Research Program, *Highlights of Climate Change Impacts in the United States: The Third National Climate Assessment*, 13, 42-45 (2014).
[63] U.S. Global Change Research Program, *Highlights of Climate Change Impacts in the United States: The Third National Climate Assessment,* 9, 36 (2014).
[64] U.S. Global Change Research Program, *Highlights of Climate Change Impacts in the United States: The Third National Climate Assessment,* 34-36 (2014).
[65] U.S. Global Change Research Program, *Highlights of Climate Change Impacts in the United States: The Third National Climate Assessment,* 34, 36-37 (2014).
[66] EPA, *Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants*, ES-9-10 (2014).
[67] Schwartz, J. et. al. *Health Co-Benefits of Carbon Standards for Existing Power Plants*, 3 (2014), available at: http://pubc.it/1rnbw2J.
[68] Environmental Protection Agency, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units;* Proposed Rule, June 18, 2014, 79 Fed. Reg. at 34,943-44.

that the EPA proposal will raise electricity rates. That claim focuses on the wrong question from the standpoint of electricity customers. For consumers focused on costs, the key question is what effect the Clean Power Plan will have on what they actually pay, which means their electricity *bills*. Although the retail price of electricity will rise modestly under the Clean Power Plan compared to a business-as-usual scenario, at least according to the EPA's excessively conservative assumptions, the rule also will spur improvements in energy efficiency so that people use less electricity. The net result is that electricity bills will fall, not rise.

The EPA estimates that, in addition to mitigating climate change and boosting public health, the Clean Power Plan will lower electricity bills nationwide by 7.0 to 7.7 percent by 2030 compared to a business-as-usual scenario, again using conservative assumptions.[69] A Public Citizen analysis shows that consumer electricity bills will fall in every state by 2030, again using the same overly conservative assumptions adopted by the EPA.[70]

C. Boosting Wages through Regulation

Through implementation of the Fair Labor Standards Act (FLSA), anti-discrimination law and other statutes, regulation has long played a key role in raising workers' wages and ensuring workplace fairness.

Two new regulatory initiatives illustrate how regulations continue to play a key role in raising American workers' wages.

Overtime Rule. The Labor Department's proposed overtime rule would modernize outdated standards related to overtime pay. Pursuant to the FLSA, it has long been a central tenet of American workplaces that employees are entitled to time-and-a-half pay for overtime – more than 40 hours of work in a single week. This rule has ensured workers are fairly compensated when required to work long hours; protected workers from unreasonably long work weeks by providing premium payments for overtime; and increased employment levels by spreading available work. Its purpose and effect is summed up by the notion "a fair day's pay for a fair day's work."

The time-and-a-half requirement does not apply to executive, administrative and professional ("white collar") employees who meet certain minimum tests, including a salary level test. The current salary level threshold for an exempt determination, established in 2004, is $23,660, a level that leaves the vast number of white collar employees in the non-exempt category, excluding many low-level white-collar employees from vital overtime protections, and forcing many to toil extended hours for what amounts to very low hourly wages.

The new overtime rule proposed to set the salary test at the 40th percentile of earnings for full-time salaried workers ($47,892 in 2013). The Labor Department estimates its new rule will expand the universe of non-exempt employees – those entitled to overtime pay – by 4.1 million in its first year of implementation, and between 5.1 and 5.6 million workers in the tenth year of

---

[69] EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule*. 3-40 (2015)
[70] Arkush, D. (2015, November). *Clean Power, Clean Savings,* Public Citizen. Available at: http://www.citizen.org/documents/Clean-Power-Clear-Savings-Report-November-2015.pdf.

implementation. This translates into increased worker wages of roughly $1.2 billion a year – not a net cost to the economy, simply a transfer from employers to workers.[71]

Pay Data Reporting. To make progress in reducing the ongoing pay gap between women and men workers, the Equal Employment Opportunity Commission (EEOC) is proposing to expand its data collection on wages paid by gender, race and ethnicity. Firms with fewer than 100 employees would be exempt from the new data reporting requirement, which merely requires reporting of data that employers typically already collect.

The EEOC proposal imposes no new substantive requirements on employers, but the simple act of data reporting is expected to reduce discrimination, making workplaces fairer and raising wages especially for women workers. As the EEOC notes, "The new pay data would provide EEOC and the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor with insight into pay disparities across industries and occupations and strengthen federal efforts to combat discrimination. This pay data would allow EEOC to compile and publish aggregated data that will help employers in conducting their own analysis of their pay practices to facilitate voluntary compliance. The agencies would use this pay data to assess complaints of discrimination, focus agency investigations, and identify existing pay disparities that may warrant further examination."[72]

IV. Regulation to assist small business and promote competitive markets

Much of the regulatory policy debate in recent years has misleadingly focused on the impact of regulation on small business, with regulation critics claiming that regulation poses unreasonable burdens on small business. In surveys and poll data, small businesses generally do not agree with their purported advocates. They cite inadequate demand and economic uncertainty as their biggest problems.[73] And regulatory law is replete with special and intentional protections for smaller firms, which are exempt from many rules, including in many of the cases noted in this testimony.

What has been missing from the regulatory policy debate is a focus on the ways that regulation does—or should—assist small business and start-ups in creating a level playing field.

First, as a preliminary matter in this area, policymakers concerned about aiding small business might fruitfully focus on the issue of regulatory compliance. Small firms may on occasion have difficulty discerning what standards apply to them and what they must do to meet their obligations under various rules. There may be value in legislation encouraging agencies to

---

[71] Department of Labor. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees: Proposed Rule*. Available at: http://www.dol.gov/whd/overtime/nprm2015/ot-nprm.pdf.

[72] Equal Employment Opportunity Commission. (2016, January 29). *EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports*. Available at: http://www.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm.

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

conduct more outreach, education and compliance assistance to small businesses on their regulatory obligations. Agencies with Small Business Ombudsman offices could be tasked with ensuring that those offices are conducting effective regulatory outreach and education to small businesses. "Best practices" guidelines for federal agencies could be established, including those with Small Business Ombudsman offices, to follow when working to ease regulatory compliance for small businesses.

A larger area of Congressional focus should aim to address the problem that leading sectors of the economy are highly concentrated, and that widespread anti-competitive conduct unfairly disadvantages small business and start-ups, while also hurting consumers and overall economic efficiency.

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

- Large banks receive a massive implicit government subsidy thanks to the widespread market perception that these institutions are "too big to fail"—in other words, that protestations to the contrary, the government will in times of crisis bail out these giant banks to prevent a financial system meltdown. Because the market judges these institutions too big to fail, the giant banks are able to access capital at costs significantly below that are available to regular banks, as well as obtain other implicit subsidies. Various analysts place this benefit as ranging from tens of billions of dollars annually to more than $100 billion, with the scale of the subsidy varying over time.[74]

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

- Patent enforcement by patent acquiring entities—often known colloquially as "patent trolls"—imposes a significant tax on innovation, especially by small business. Enforcement actions and license fees by these entities are skyrocketing, now costing almost $30 billion a year, with researchers finding only a quarter of this total flowing back to innovation.[75]

---

[74] See Federal Reserve of Minneapolis. (2013, November 18-19). *Workshop: Quantifying the Too Big to Fail Subsidy*. Available at: https://www.minneapolisfed.org/publications/special-studies/too-big-to-fail/quantifying-the-too-big-to-fail-subsidy. Bloomberg. (2013, Feb 20.) *Why Should Taxpayers Give Big Banks $83 Billion a Year*. Available at: http://www.bloomberg.com/news/2013-02-20/why-should-taxpayers-give-big-banks-83-billion-a-year-.html.

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

Remedies: Stronger rules should protect small business innovators, and innovative large corporations as well, from improper patent enforcement actions.

- Anticompetitive practices are widespread in the energy industry, including in electricity markets. "Anticompetitive agreements between sellers in regional wholesale electricity markets have forced consumers to pay hundreds of millions of dollars more for electricity than they would have in the absence of such conduct," notes the America Antitrust Institute's Diana Moss. "In these markets, which are structurally vulnerable to the exercise of market power, anticompetitive agreements spanning even a short time can result in large wealth transfers from consumers to suppliers."[76] Those consumers include small business.

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

  Public Citizen has filed several complaints at FERC alleging energy market manipulation. In one instance, we alleged[77] – and FERC has made preliminary rulings that suggest it agrees[78] — that Houston-based Dynegy, Inc. may have intentionally withheld several of its power plants from a power auction conducted by the Midcontinent Independent System Operator (MISO), the results of which were announced on April 14, 2015. The auction was intended to procure adequate supplies through 2016 for most of downstate and midstate Illinois. The bidding strategies of Dynegy and other suppliers, combined with the rules under which the auction was conducted, pushed auction prices up for much of Illinois from $16.75 per megawatt-day last year to $150 this year, an increase of 800 percent. Even if illegal manipulation did not occur, the dramatic spike—resulting in a rate for Illinois that is more than 40 times that in neighboring states despite abundant generating capacity in Illinois—indicates a violation of the Federal Power Act's fundamental requirement that rates be just and reasonable. These are the sort of market abuses that impact small business and demand a regulatory response.

  Remedies: New rules should be created to ensure transparency standards apply to the non-governmental agencies, known as Regional Transmission Organizations, charged with running deregulated electricity markets. New rules should be established to ensure consumer, small business and state government representation in their decision-making

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

[77] *Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc.. Emergency Section 206 Complaint of Public Citizen, Inc. And Request For Fast Track Processing*. (2015, May 28). Available at: http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=5533.

[78] Reuters. (2016, January 4, 2016). Available at: http://www.reuters.com/article/utilities-dynegy-illinois-idUSL1N14O24220160104.

processes. Additionally, legislation or perhaps new regulation is needed to overturn the "filed rate doctrine," which can immunize electricity traders from antitrust liability where conduct involves regulated, filed rates.

- Private antitrust enforcement—an important tool for small firms victimized by unfair practices from larger competitors—has become increasingly difficult. One notable obstacle to effective private enforcement are unreasonably high pleading standards, which require victimized plaintiffs to make evidentiary showings that they frequently cannot make before undertaking discovery.

  Remedies: Congress should act to overturn the ruling in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), as well as *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

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

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

  The Supreme Court's 2013 decision in *American Express v. Italian Colors Restaurant* illustrates the potential stakes for small business.[79] In this case, American Express sought to enforce an arbitration agreement that prohibits merchants that accept its charge cards from filing class actions or otherwise sharing the cost of legal proceedings against it. The merchants aimed to hold American Express liable for a tying arrangement that allegedly violated antitrust laws (American Express insists merchants accept its unpopular credit cards if they want to accept its popular charge cards), but because expensive expert testimony was required to prove the claims, the cost of arbitrating an individual case would dwarf any possible recovery. Even in this case, where the arbitration agreement and class action ban concededly made it impossible for a small business to bring an antitrust lawsuit against a large company, the Supreme Court held that the arbitration agreement was controlling. It did not matter to the Court that this was a case where a large company used its market power to force on small business a provision that prevents them from seeking a remedy to an abuse of market power.

[79] *American Express v. Italian Colors Restaurant*, 570 U. S. ____ (2013).

Remedies: Congressional remedies to these problems should include a prohibition on forced arbitration provisions in consumer, employment and civil rights cases[80] and a restoration of states' authority to enforce their contract and consumer protection laws.

V. Conclusion: Strengthening the System of Regulatory Protections to Strengthen America

There is much to celebrate in our nation's system of regulatory protections. It has tamed marketplace abuses and advanced the values we hold most dear: freedom, safety, security, justice, competition and sustainability. It's time to abandon ideological and non-empirical attacks on regulation and celebrate the actual achievements of regulatory protections.

But in its current form, the regulatory system is failing to meet its promise. We need a regulatory policy conversation that moves past the debate on the merits of regulations generally and proposals to hinder the rule-making process. Instead, Congress on a bipartisan basis should: look to reforms to strengthen regulatory enforcement, stiffen penalties for corporate wrongdoing, speed the rulemaking process, and adopt pro-competitive rules to level the playing field for small business and improve the economy and consumer well-being. The point should not be to have more – or less – regulation, but to make our country better and stronger.

[80] See the Arbitration Fairness Act, H.R. 2087, introduced by Representative Hank Johnson.