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BEFORE THE  
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HEARING ON  
REGULATORY IMPEDIMENTS TO JOB CREATION  
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Mr. Chairman and Members of the Committee, thank you for inviting me here today to share with you my views on regulatory impediments to job creation. I am the University Distinguished Professor of Law and an Associate Dean at the Wake Forest School of Law. I am also a Member Scholar and Vice-President of the Center for Progressive Reform (CPR) (<http://www.progressivereform.org/>). Founded in 2002, CPR is a 501(c)(3) nonprofit research and educational organization comprising a network of sixty scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. My work on regulation and administrative law includes six books, seven book chapters, and over fifty articles (as author or coauthor). My most recent book, published by the University of Chicago Press, is *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment*, coauthored with Professor Rena Steinzor of the University of Maryland. I have served as consultant to government agencies and have testified previously before Congress on regulatory subjects.

The long history of regulation – airbags, unleaded gasoline, cleaner air and water, food safety protections, market safeguards and more – demonstrates that it saves lives, prevents serious injuries, and protects the economic livelihood of millions of Americans. And it was a lack of regulation, not too much regulation that was responsible for the collapse of the financial sector, which precipitated the economic recession from which we now suffer. Likewise, it has been too little regulation and enforcement that has led to the Gulf Oil Spill, the West Virginia mine collapse, and the almost yearly outbreaks of food poisoning that have killed many

and injured thousands more.

This historical record suggests that regulation has brought important benefits to the country and the lack of regulation can create significant risks for Americans, including even the onset of a financial recession. When it comes to regulatory reform, it is important for Congress to look before it leaps. While reasonable regulatory oversight is a necessity in a democracy, care must be taken not to rollback or impede necessary and reasonable regulation.

Regulatory critics contend the cost of regulation has kept the U.S. business community from participating more fully in our nation's economic recovery. Based on this argument, this committee is considering how regulation might be reduced in order to lighten the burden on the business community. Upon examination, however, it turns out that a focus on regulatory costs alone is a flawed way to examine the usefulness and necessity of government regulation, or to determine whether or not regulatory costs are hindering the country's economic recovery.

Specifically, the focus on regulatory costs is misguided because:

- The cost of regulation in isolation proves nothing because it ignores the benefits that regulation brings to the public and the economy. OMB recently estimated that over the last 10 years major federal regulations with quantified and monetized costs and benefits produced total of between \$128 and \$616 billion—a staggering return on the total \$43-\$55 billion cost of these investments.
- Retrospective studies show that industry estimates of regulatory costs, submitted to agencies for purposes of rulemaking, are often too high. This result should not be surprising. Regulated entities have a strong incentive to overstate potential costs to regulators and to Congress.
- A recent study on regulatory costs, authored by Nicole and Mark Crain for the SBA Office of Advocacy, which claims regulation has an annual cost of \$1.75 trillion in 2008, is unreliable evidence concerning regulatory costs for reasons I'll describe in a moment.

- Much of the cost of regulation discussion seems to assume that regulatory costs are a drag on the economy, as if regulation produces no economic benefit. Like any spending, the costs of regulation generate economic activity, because the money is spent on goods and services, thereby generating jobs. It is difficult to tally the ultimate economic impact of this spending, but the literature does not support the conclusion that regulation retards economic recovery. It might make good politics, but there's no real evidence.

### **REGULATORY COSTS AND BENEFITS**

A discussion of regulation is inherently incomplete—and distorted—if it focuses on costs without also considering benefits. Indeed, according to this one-sided focus, practically any economic transaction—from the purchase of a loaf of bread to the construction of a manufacturing plant—would be counted as a drain on the economy, because they only include the costs not the benefits.

On balance, regulations have made a net positive contribution to our society. The 2009 OMB report on aggregate costs and benefits completed for Congress finds that significant regulations adopted in the last 10 years produced total benefits of between \$128 and \$616 billion and total costs of \$43-\$55 billion.<sup>1</sup> This finding refers to total aggregate net benefits, which means that some individual regulations may not have benefits that exceed costs. But, this result usually arises from the difficulty of monetizing regulatory benefits, rather than the lack of actual benefits.<sup>2</sup> OMB's methodology does not account very well for items that defy monetization – the value of keeping people healthy rather than simply treating their pollution-caused illnesses, or the value of a great view from the top of a mountain that hasn't been shorn clean by mountaintop mining. Even allowing for those shortcomings, all

of which accrue to the anti-regulation side of the ledger, almost all regulations have greater economic benefit than cost.

### **COSTS ARE OVERSTATED**

To generate cost estimates for cost-benefit analyses, agencies rely primarily on surveys of representative companies that the regulation will likely affect. Because companies know the purpose of the surveys, they have a strong incentive to overstate costs in order to skew the final cost-benefit analysis toward weaker regulatory standards.<sup>3</sup> Agencies must also fill in any data gaps they encounter by making various assumptions. Due to fear of litigation over the regulation, they tend to adopt conservative assumptions about regulatory costs, such that the cost assessment ends up reflecting the maximum possible cost, rather than the mean.<sup>4</sup>

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

in any event. Given these co-benefits, only a portion of the innovative technology's costs can fairly be counted as compliance costs.<sup>5</sup>

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

<i>Retrospective Studies of Regulatory Costs</i>		
Study	Subject of Cost Estimates	Results
PHB, 1980 <sup>6</sup>	Sector level capital expenditures for pollution controls	– EPA overestimated capital costs more than it underestimated them, with forecasts ranging 26 to 126% above reported expenditures
OTA, 1995 <sup>7</sup>	Total, annual, or capital expenditures for occupational safety & health regulations	– OSHA overestimated costs for 4 of 5 health regulations, with forecasts ranging from \$5.4 million to \$722 million above reported expenditures
Goodstein & Hedges, 1997 <sup>8</sup>	Various measures of cost for pollution prevention	– Agency and industry overestimated costs for 24 of 24 OSHA & EPA regulations, by at least 30% and generally by more than 100%
Resources for the Future, 1999 <sup>9</sup>	Various measures of cost for environmental regulations	– Agency overestimated costs for 12 of 25 rules, and underestimated costs for 2 rules

### **THE CRAIN AND CRAIN REPORT**

A recent study on regulatory costs, authored by Nicole and Mark Crain for the SBA Office of Advocacy, which claims that regulation cost the U.S. economy \$1.75 trillion in 2008 is unreliable evidence concerning regulatory costs.<sup>10</sup> Crain and Crain's \$1.75 trillion estimate is far larger than the estimate generated by the Office of Management and Budget (\$62 billion to \$73 billion). Crain and Crain attribute this massive difference to the fact that their report considers many more rules than do the annual OMB reports, including rules with estimated costs less than \$100 million, rules that were put on the books more than 10 years ago, and rules issued by independent regulatory agencies.

A CPR Report, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs*,<sup>11</sup> shows that much more is at work than that. I have attached a copy of the CPR report as an appendix to this testimony.

In areas where the OMB and Crain and Crain calculations overlap, Crain and Crain use the same cost data as OMB, but, unlike OMB, which presents regulatory costs as a range, Crain and Crain always adopt the upper end of the range for inclusion in their calculations. More significantly, Crain and Crain's calculations for the regulations not covered by OMB's report appear to be based largely on a decidedly unusual data source for economists – public opinion polling, the results of which Crain and Crain massage into a massive, but unsupported estimate of the costs of “economic” regulations. Because Crain and Crain have refused to make their underlying data or calculations public – apparently even withholding them from the Small Business Administration office that contracted for the study – it is difficult to know precisely how they arrived at the result that economic regulation has a cost of \$1.2 trillion dollars, comprising more than 70 percent of the total costs in their report.

Nevertheless, their calculations inspire great skepticism. For one thing, as stated, their estimate of economic regulatory costs is based on the results of public opinion polling, specifically a poll concerning the business climate of countries that has been collected in a World Bank report. The authors of the World Bank report warn that its results should not be used for exactly the type of extrapolations made by Crain and Crain, because their underlying data are too crude.

## LACK OF EVIDENCE LINKING REGULATION AND JOB LOSS

Regulatory critics contend that environmental, health and safety, and other regulation of industries slow economic growth and leads to job losses, but as with any type of spending, regulatory compliance generates economic activity. It is difficult to measure whether on balance job gains from this spending offset any job losses, but existing studies do not support the conclusion that regulation retards economic recovery.<sup>12</sup> Since time is short, I'll focus on one area of regulation that has been a particular target of late – environmental regulation.

In his book, *The Trade-off Myth: Fact and Fiction About Jobs and the Environment*, economist Eban Goodstein of Bard College found no evidence that significant numbers of jobs or businesses have been lost because of environmental regulations, principally because regulation leads to job increases which can offset any job losses in regulated industries.<sup>13</sup> He found there were “well over two million people” who worked directly or indirectly in environmentally related jobs in 1999.<sup>14</sup> In many cases, these were relatively high-paying jobs requiring specialized skills.<sup>15</sup> Goodstein notes that from 1977 to 1991, employment in these areas increased fifty-five percent, making this area of work “one of the most dynamic growth sectors in the US economy.”<sup>16</sup>

Similarly, Stephen Meyer of MIT found no link between strong environmental policies and weak economic growth. Meyer compared the economic performance of states with strong environmental regulation to states with weaker regulations. After examining five primary indicators of economic growth and prosperity, he

found that there was no evidence that the states with stronger environmental standards fared less well than those with weaker environmental standards.<sup>17</sup> When he updated his earlier study, considering specifically the 1990-91 recession, the results were the same: “stronger environmental standards have not limited the relative pace of economic growth and development among the states over the past twenty years.”<sup>18</sup> In particular, he notes:

Environmentally stronger states do not experience more precipitous declines in employment during the recession. Nor do they demonstrate a higher rate of business failure. Thus, contrary to what many argue *environmentally stronger states are not more vulnerable to economic decline.*<sup>19</sup>

Meyer stresses his work does not prove environmental regulation causes economic prosperity, but it does suggest that regulation did not get in the way of economic prosperity.

Another study tested the likely impacts of environmental regulations at the industry level for four heavily polluting industries: pulp and paper mills, plastic manufacturers, petroleum refiners, and iron and steel mills.<sup>20</sup> The authors found that “environmental spending generally does *not* cause a significant change in industry-level employment.”<sup>21</sup> On average for all four industries, there was a net gain of 1.5 jobs for each \$1 million in additional environmental spending, with a standard error of 2.2 jobs, which is an insignificant effect. Evaluating the results, and taking into account several caveats, the authors concluded, “[W]hile environmental spending clearly has consequences for business and labor, the hypothesis that such spending significantly reduces employment in heavily polluting industries is not supported by the data.”<sup>22</sup>

## CONCLUSION

The fact that regulated entities do not like regulation does not mean that it is the cause or even a contributor to our economic and unemployment woes. The evidence to back up these claims is not there.

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<sup>1</sup> OFFICE OF MGMT & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 3 (converted from 2001 to 2009 dollars), *available at* [http://www.whitehouse.gov/sites/default/files/omb/assets/legislative\\_reports/2009\\_final\\_BC\\_Report\\_01272010.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/2009_final_BC_Report_01272010.pdf) [hereinafter 2009 OMB Report]. The Regulatory Right-to-Know Act requires OMB to produce a report every year that, among other things, calculates the annual cost of major regulations. Treasury and General Government Appropriations Act of 2001 §624, Pub. L. 106-554, 31 U.S.C. §1105 note.

<sup>2</sup> See e.g., Sidney Shapiro 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](http://www.progressivereform.org/articles/2010_CPR_Comments_OMB_Report.pdf); Rena Steinzor 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](http://www.progressivereform.org/articles/2009_CPR_Comments_OMB_Report.pdf); Amy Sinden & James Goodwin, CPR Comments on Draft 2008 Report to Congress on the Benefits and Costs of Federal Regulations 5-8 (2008), *available at* [http://www.progressivereform.org/articles/2008\\_Comments\\_OMB\\_Report.pdf](http://www.progressivereform.org/articles/2008_Comments_OMB_Report.pdf). see also Rena Steinzor et al., A Return to Common Sense: Protecting Health, Safety, and the Environment Through “Pragmatic Regulatory Impact Analysis” (Ctr. for Progressive Reform, White Paper 909, 2009), *available at* [http://www.progressivereform.org/articles/PRIA\\_909.pdf](http://www.progressivereform.org/articles/PRIA_909.pdf); John Applegate et al., Reinvigorating Protection of Health, Safety, and the Environment: The Choices Facing Cass Sunstein (Ctr. for Progressive Reform, White Paper 901, 2009), *available at* <http://www.progressivereform.org/articles/SunsteinOIRA901.pdf>; Frank Ackerman et al., Applying Cost Benefit Analysis to Past Decisions: Was Protecting the Environment Ever a Good Idea? (Ctr. for Progressive Reform, White Paper 401, 2004), *available at* [http://www.progressivereform.org/articles/Wrong\\_401.pdf](http://www.progressivereform.org/articles/Wrong_401.pdf).

<sup>3</sup> Thomas O. McGarity & Ruth Ruttenger, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2011, 2044-45 (2002).

<sup>4</sup> *Id.* at 2046.

<sup>5</sup> *Id.* at 2049-50. Studies of OSHA's vinyl chloride and cotton dust standards concluded that actual compliance costs were much lower than predicted costs in part because of overall productivity gains achieved by regulatees. When company scientists and engineers were forced to concentrate on cost-effective compliance techniques, they also identified ways to improve the overall productivity of an industrial process, or even an entire industry. See OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, OFFICE OF PROGRAM EVALUATION, REGULATORY REVIEW OF OSHA'S COTTON DUST STANDARD (2000) (identifying extensive technological improvements and increased productivity in the textile industry spurred by OSHA's cotton dust standard); RUTH RUTTENBERG, REGULATION IS THE MOTHER OF INVENTION

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42, 44-45 (Working Papers for a New Society, May/June 1981), (identifying six regulation-induced changes in the vinyl chloride industry that resulted in increased productivity).

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

<sup>7</sup> OFFICE OF TECHNOLOGY ASSESSMENT, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH 58 (1995).

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

<sup>9</sup> Harrington, Morgenstern, & Nelson, *supra* endnote 27. The Resources for the Future study notes that actual compliance costs can also be less than an agency estimates because there can be less regulatory compliance than the agency anticipates. If an agency overestimates the extent of pollution cases, the original agency estimate might have been accurate, but it turns out to be wrong because the regulatory industry does not obey the regulation to the extent that the agency predicted. *Id.* at 14-15.

<sup>10</sup> Sidney A. Shapiro, Ruth Ruttenberg, & James Goodwin, Setting The Record Straight: The Crain and Crain Report on Regulatory Costs (Feb. 8, 2011), available at [http://www.progressivereform.org/articles/SBA\\_Regulatory\\_Costs\\_Analysis\\_1103.pdf](http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> See Frank Ackerman and Rachel Massey, *Prospering With Precaution: Employment, Economics, and the Precautionary Principle* (Aug. 2002), available at [http://www.precaution.org/lib/prospering\\_with\\_precaution.20020801.pdf](http://www.precaution.org/lib/prospering_with_precaution.20020801.pdf).

<sup>13</sup> Eban Goodstein, *The Trade-off Myth: Fact and Fiction About Jobs and the Environment* 41-67 (1999).

<sup>14</sup> *Id.* at 4.

<sup>15</sup> Ackerman and Massey, *supra* n. , at 2.

<sup>16</sup> Goodstein, *supra* n. , at 18.

<sup>17</sup> Stephen M. Meyer, *Environmentalism and Economic Prosperity: Testing the Environmental Impact Hypothesis* (1992), available at <http://web.mit.edu/polisci/mpepp/Reports/eep.pdf>.

<sup>18</sup> Stephen M. Meyer, *Environmentalism and Economic Prosperity: An Update* (Feb. 1993), available at <http://web.mit.edu/polisci/mpepp/Reports/eepup.PDF>.

<sup>19</sup> *Id.* 9 (emphasis in original).

<sup>20</sup> Richard D. Morgenstern, William A. Pizer, and Jhih-Shyang Shih, *Jobs versus the Environment: An Industry-level Perspective* (June 2000), Discussion paper 99-01-REV, Washington, DC: Resources for the Future, available at [http://www.globalurban.org/Jobs\\_vs\\_the\\_Environment.pdf](http://www.globalurban.org/Jobs_vs_the_Environment.pdf).

<sup>21</sup> *Id.* at 1.

<sup>22</sup> *Id.* at 25.