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# THE IMPACT OF REGULATION ON U.S. MANUFACTURING: SPOTLIGHT ON DEPARTMENT OF LABOR AND DEPARTMENT OF TRANSPORTATION

## HEARING

BEFORE THE

SUBCOMMITTEE ON REGULATORY AFFAIRS

OF THE

COMMITTEE ON
GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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# THE IMPACT OF REGULATION ON U.S. MANUFACTURING: SPOTLIGHT ON DEPARTMENT OF LABOR AND DEPARTMENT OF TRANSPORTATION

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**TUESDAY, JUNE 28, 2005**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENT REFORM
*Washington, DC.*

The subcommittee met, pursuant to notice, at 2 p.m., in room 2003, Rayburn House Office Building, Hon. Candice S. Miller (chairman of the subcommittee) presiding.

Present: Representatives Miller and Lynch.

Staff present: Rosario Palmieri, deputy staff director; Dena Kozanas, counsel; Erik Glavich and Joe Santiago, professional staff members; Alex Cooper, clerk; Alexandria Teitz, minority counsel; Krista Boyd, minority professional staff member; and Teresa Coufal, minority assistant clerk.

Ms. MILLER. I would like to call the hearing to order.

Good afternoon, everyone. We are here today to discuss the overall progress that the Department of Labor and the Department of Transportation have made in responding to the public's reform nominations that were included in the Office of Management and Budget's 2005 Report on Regulatory Reform of the U.S. manufacturing sector. This is the second in a series of hearings discussing those regulations and guidance documents that merits priority consideration because of the impact on domestic manufacturing.

For many years it has been widely acknowledged that the very foundation of a nation's economy is manufacturing. It is certainly a critical component. It is a backbone of America, because manufacturing actually creates goods. But it also creates progress, innovation, it creates economic and human prosperity. The manufacturing industry also helps employers and employees which plays a role in creating.

For many years, the government has understood that we do not actually create jobs; rather, the private sector actually creates jobs. The role of the government has been to generate an environment that attracts business investments and encourages job creation. However, the manufacturing industry has come under attack lately by the very government that once helped to hold it together.

Even though manufacturing provides 14 million Americans with jobs and accounts actually for 62 percent of all the imports, domestic manufacturing has lost 2.8 million jobs between 2000 and 2003.

These are jobs that have provided a high quality of life for Americans because of salaries and benefits. In manufacturing of course, they are about 18 percent higher than the rest of the private sector.

More than any other sector, manufacturers bear the highest share of the cost of complying with regulation. At $8,000 per employee, domestic manufacturers assume almost twice the average cost for all the other U.S. industries. Workplace regulations alone cost manufacturers over $2 million per firm per year, roughly about $1,700 per employee.

Our global competitors do not have this large of a burden. Regulatory compliance has become so burdensome that those costs are now the equivalent of a 12 percent excise tax on manufacturing. Such domestically imposed costs are harming manufacturing and adding over 22 percent to the cost of doing business in the United States. And we are not the only developed nation with high structural costs, of course, but these costs are higher here in almost every category. And that 22 or 23 percent is an enormous drag on economic growth and on job creation.

The high cost of regulation, the increase in costs of health care and the often-unwarranted tort litigation have all altered the dynamics of domestic manufacturing. These new dynamics have hindered the international competitiveness of manufacturers and have constrained the demand for workers in U.S. facilities.

Make no mistake, I certainly am a defender of regulations that protect worker health and safety. I am a defender of regulations that watch over consumers and safeguard our natural resources. In fact, I have spent about three decades in public service, and I have always thought of myself as a principal advocate of our environment. But I do think that the common standard must always be what is actually reasonable. And that is the purpose of our hearing today. I am eager to have a dialog about how best to improve Federal regulations for the benefit of all Americans. In particular, I am hopeful that this hearing will have a positive impact on those regulations flagged by OMB for priority review that are still outstanding.

I am extremely troubled by the adverse effects some of these regulations could have on our ability to remain competitive with our key trading partners around the globe. By acting on the combined 16 rules and guidance documents from the Department of Labor and the Department of Transportation, I do believe that we could be one step closer to reducing the cost and burden on domestic manufacturing firms. The savings accrued by reducing the regulatory burden on U.S. manufacturers could be redirected into hiring new workers, investing in new equipment and protecting American jobs.

Streamlining all of the unnecessary regulatory burdens on the manufacturing sector is a powerful antidote for reinvigorating the economy, for helping our small businesses and certainly for the competitiveness agenda that we have here in the United States of America, as we recognize that all of our manufacturers are facing much different dynamics in the global marketplace as well.

[The prepared statement of Hon. Candice S. Miller follows:]

**Statement of Chairman Candice S. Miller**
**Chairman**
**Subcommittee on Regulatory Affairs**
**Committee on Government Reform**
**Washington, DC**
**June 28, 2005**

Good afternoon, ladies and gentlemen.

We are here today to discuss the overall progress of the Department of Labor and Department of Transportation in responding to the public's reform nominations that were included in the Office of Management and Budget's 2005 report on *Regulatory Reform of the U.S. Manufacturing Sector*. This is the second in a series of hearings discussing those regulations and guidance documents that merit priority consideration because of the impact on domestic manufacturing.

For many years it has been widely acknowledged that the very foundation of a nation's economy is manufacturing. Manufacturing has been widely acknowledged as a critical component of the backbone of America because it helps create. Manufacturing creates goods but it also creates progress, innovation, and economic and human prosperity. The manufacturing industry also helps employers and employees play a role in creating – what the President has labeled as a goal of his second-term agenda – an ownership society.

And for many years the Government has understood that it does not create jobs; rather the private sector creates jobs. The role of government has been to generate an environment that attracts business investments and encourages job creation.

However, the manufacturing industry has come under attack lately -- by the very Government that it once held together.

Even though manufacturing provides 14 million Americans with jobs and accounts for 62% of all imports, domestic manufacturing has lost 2.8 million jobs between 2000 and 2003. These are jobs that have provided a high-quality of life for Americans because salaries and benefits in manufacturing are 18% higher than the rest of the private sector.

More than any other sector, manufacturers bear the highest share of the cost of regulation. At $8,000 per employee, domestic manufacturers assume almost twice the average cost for all U.S. industries. Workplace regulations alone cost manufacturers $2.2 million per firm per year, roughly $1,700 per employee. Our global competitors do not have this large of a burden.

Regulatory compliance has become so burdensome that those costs are now the equivalent of a 12% excise tax on manufacturing. Such domestically imposed costs are harming manufacturing and adding 22.4% to the cost of doing business in the United States. We are not the only developed nation with high structural costs, but these costs are higher here in every category, and that 22.4% is an enormous drag on economic growth and job creation.

The high cost of regulation, the increase in costs of health care, and the often unwarranted tort litigation have all altered the dynamics of domestic manufacturing. These new dynamics have hindered the international competitiveness of manufacturers and have constrained the demand for workers in U.S. facilities.

Make no mistake, I am a defender of regulations that protect worker health and safety. I am a defender of regulations that watch over consumers and safeguard our natural resources. I have spent almost 3 decades in public office as a principal advocate of our environment. But, I think the common standard must always be to do what is reasonable.

That is the purpose of our hearing today. I am eager to have a dialogue about how best to improve federal regulations for the benefit of all Americans. In particular, I am hopeful that this hearing will have a positive impact on those regulations flagged by OMB for priority review that are still outstanding. I am extremely troubled by the adverse affect some of these regulations could have on our ability to remain competitive with our key trading partners.

By acting on the combined 16 rules and guidance documents from Department of Labor and Department of Transportation, I believe we will be one step closer to reducing the cost and burden on domestic manufacturing firms. The savings accrued by reducing the regulatory burden on U.S. manufacturers could be redirected into hiring new workers, investing in new equipment, and protecting American jobs.

Streamlining all the unnecessary regulatory burdens on the manufacturing sector is a powerful antidote to reinvigorating the economy, small businesses, and our competitiveness on the international stage.

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**MEMORANDUM FOR MEMBERS OF THE GOVERNMENT REFORM SUBCOMMITTEE ON REGULATORY AFFAIRS**

FROM: Candice S. Miller, Chairman /s/

DATE: June 20, 2005

SUBJECT: Briefing for June 28, 2005 Hearing, "The Impact of Regulation on U.S. Manufacturing: Spotlight on Department of Labor & Department of Transportation"

On Tuesday, June 28, 2005, at 2:00 p.m., in Room 2203 Rayburn House Office Building, the Government Reform Subcommittee on Regulatory Affairs will hold a hearing to consider the overall progress of the Department of Labor (DOL) and Department of Transportation (DOT) in responding to the public's reform nominations that were included in the Office of Management and Budget's (OMB) 2005 report on *Regulatory Reform of the U.S. Manufacturing Sector*.

More than any other sector, manufacturers bear the highest share of the cost of regulation. At $8,000 per employee, domestic manufacturers assume almost twice the average cost for all U.S. industries. Workplace regulations alone cost manufacturers $2.2 million per firm per year, or roughly $1,700 per employee. Regulatory compliance costs are the equivalent of a 12% excise tax on manufacturing. Such domestically imposed costs are harming manufacturing and adding 22.4% to the cost of doing business in the United States.

Though manufacturing in the United States provides employment to 14 million people and accounts for 62% of all exports, domestic manufacturing lost 2.8 million jobs between 2000 and 2003. The high cost of regulations, juxtaposed with a recovering economy and rising costs in health care benefits and tort litigation, hinder the international competitiveness of manufacturers and constrain the demand for workers in U.S. facilities.

In February 2004, OMB requested public nominations of rules and guidance documents that could be reformed to reduce the regulatory burden on the domestic manufacturing sector. In December 2004, OMB released a list of 189 reform nominations that were submitted by 41 industry and non-profit groups. Of these 189 nominations, 76 were selected by OMB for priority consideration and action by the Administration. Agencies were requested to review their respective nominations and prepare responses to OMB by January 24, 2005. In March 2005, OMB released a final report, *Regulatory Reform of the U.S. Manufacturing Sector*, summarizing each of the 76 nominations and the time-specified steps Federal agencies will take to address them. Recommended actions range from gathering and reporting additional information to issuing modernized regulations. Of these 76 nominations, 11 are attributed to DOL and 5 are attributed to DOT.

Within the 11 nominations ascribed to DOL, 9 refer to rules or guidance documents within the Occupational Safety and Health Administration (OSHA). A few of these nominations demonstrate that OSHA is undertaking a project to review and update obsolete rules. For example, OSHA currently cites the National Fire Protection Association standards set in 1969 for spray application of flammable and combustible liquids. Other reviewable outdated rules include OSHA's sling standard for companies in the lifting, rigging, and loading industries and coke oven emission standards that apply to the control of employee exposure to coke oven emissions. Review of these rules will consider whether they should be updated to reflect current technology. Additionally, other DOL nominations illustrate that OSHA is reviewing certain rules that, if modified, can minimize the impact on the small business community by proving relevant the examination of scientific data, costs, and economic impact, such as with the permissible exposure limit of hexavalent chromium rule. Should this particular proposed rule become the final rule, it could potentially cost the affected industries between $223 million and $1 billion per year.

Within the 5 nominations ascribed to DOT, many of the rules or guidance documents have reached the final stages of regulatory process but nonetheless merit review. For example, the Federal Motor Carrier Safety Administration's hours of service rule is proposed to be published at the end of September 2005. However, due to the unusual circumstances in which this rule was promulgated, it is reasonable to inspect the procedural process in which it was fashioned, particularly since studies indicate that the rule would impose a 10-12% cost increase on the short-haul trucking industry. Other DOT nominations include rules regarding motor vehicle brake rules, lighting and reflective devices, occupant ejection safety standards, and a vehicle compatibility standard.

By acting on these 76 nominations to reform Federal regulations, Federal agencies will be taking practical steps to reduce the cost and burden on domestic manufacturing firms. And, by reducing the structural costs of operating businesses in the United States, Federal agencies will be instrumental in helping manufacturers be more competitive. The savings accrued by reducing the regulatory burden on U.S. manufacturers could be redirected into hiring new workers, investing in new equipment, and protecting American jobs. These reforms can be undertaken in a manner that also protects the benefits of regulation to consumers, workers, and the environment. Given the competitive pressures of international markets and the continuous rise in structural costs imposed by Federal regulation on domestic manufacturers, the Department of Labor and Department of Transportation should streamline efforts in reducing unnecessary regulatory burdens on the economy, manufacturing sector, and small businesses.

The invited witnesses for the June 28, 2005 hearing are: Veronica Stidvent, Assistant Secretary for Policy, Department of Labor; Jeffrey A. Rosen, General Counsel, Department of Transportation; Stuart Lunsford Sessions, Vice President, Environomics, Inc., on behalf of Surface Finishing Industry Council and Specialty Steel Industry of North America; Jeff Melby, Vice President, Environment & Safety, Genmar Holdings, Inc., on behalf of National Marine Manufacturers Association; and Joan Claybrook, President, Public Citizen.

Ms. MILLER. At this time I would like to yield to the ranking minority member for his opening statement.

Mr. LYNCH. Thank you, Madam Chair.

Again, I want to thank you for leading this whole process and reviewing our regulatory framework in an effort to remove unnecessary burdens on industry.

The manufacturing industry provides over 14 million American jobs, which are critical to our economy. But as someone who has worked in auto plants and steel mills and oil refineries across this country, I can tell you that manufacturing jobs can also be very tough and dangerous. But there are significantly fewer injuries and deaths today than just 30 years ago, because of our Federal and health safety requirements.

Based on my own experience, I know how important the health of the manufacturing industry is to the economy and to the workers it employs. While I am committed to the growth of the American manufacturing industry, I honestly believe that exposing more workers to disease and injury will not accomplish that goal. I must admit, as a threshold matter, that I am concerned about OMB's approach and their activities in this area. In reviewing the conduct of OMB, it is apparent that OMB has created a regulatory hit list to focus on weakening or gutting many existing health, safety and environmental protections. This raises a lot of questions in my mind, and I hope that we can explore them here today.

As a factual matter, I am concerned that weakening many of these regulations will hurt workers and their families. I don't believe that is necessary. We can have strong health, safety and environmental protections while at the same time growing manufacturing and the economy.

Now, I will concede that there are some regulations that we can reform and eliminate. But I remain concerned about how OMB and the agencies selected the regulations which we have targeted. There seems to be a lack of transparency in OMB's process for developing this list, and OMB solicited public comments last year on agency regulations that should be reformed.

But it is unclear how the relevant agencies and OMB got from a list of 189 nominations to OMB's list of 76 priority nominations. Accordingly, I am looking forward to hearing from the representatives that are with us today from DOL and the Department of Transportation about the selection process and how they will respond to the nomination on OMB's list.

Finally, I hope we can carefully consider what weakening each of these targeted regulations would mean to real Americans. Two areas that I am particularly interested in: the Department of Transportation's plan to issue proposed changes to the hours of service rules pertaining to commercial drivers; and the Department of Labor's plan to propose changes to the Family and Medical Leave Act. Previous DOT rules limited the amount of time that commercial drivers could be on the road to 10 consecutive hours with 8 hours off duty. In 2003, however, the Department issued a new rule that actually increased the number of permitted driving hours from 10 to 11, with a required 10-hour break between shifts.

Madam Chair, in July 2004, the U.S. Court of Appeals for the D.C. Circuit vacated the Department of Transportation's rule, find-

ing that the Department amazingly enough had not considered the effect of their rule on driver health. Now, you would think that would be a good place to start.

Specifically, the court deemed the final rule to be arbitrary and capricious, because the agency neglected to consider the driver's health as a statutorily mandated factor. I find this unbelievable. It is my understanding that despite this ruling, the Department recently reissued notice of proposed rulemaking and comments and concerns—the same rule that had been vacated by the Federal Appeals Court. Accordingly, I am interested in whether DOT has in fact addressed the court's primary concern and taken driver health into account this time around.

In addition, I hope the Department of Labor will not weaken the Federal Family Medical Leave Act. It is my understanding that there is interest in modifying certain definitions of serious illness and also extending the amount of time that a person must be in recovery or disabled before an event is eligible for FMLA consideration or inclusion.

It is an important law that protects the rights of workers to take unpaid leave when they are suffering from a serious health condition or when they need time off to care for a new child or a sick family member. Under current regulations, a serious health condition is defined in part as a condition that requires more than 3 consecutive days of treatment and recovery.

According to a May 26, 2005 USA Today article, one of the proposed changes to FMLA would amend the statute's coverage to only those illnesses that are serious enough to require 10 or more days off. The current definition protects workers who suffer from illnesses such as appendicitis or kidney stones or are severe enough to require time off for treatment but do not last for 10 days. Accordingly, the rollback to these protections would cause employees who miss work because of a serious illness to lose their jobs.

Madam Chair, I would like to submit for the record a letter signed by over 200 groups, such as the National Partnership for Women and Families, the Epilepsy Foundation, the Communication Workers of America, the Children's Alliance of New Hampshire, there are also some religious groups that have signed on as well, urging the Department of Labor not to make any regulatory changes that would undercut the protections of the Family Medical Leave Act.

Ms. MILLER. Without objection, that will be entered.

[The information referred to follows:]

April 12, 2005

Elaine L. Chao, Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Secretary Chao,

We are writing on behalf of millions of American families who have benefited from the Family and Medical Leave Act (FMLA) and the millions more who will benefit in the years to come. We urge you not to make any regulatory changes that would undercut the critical protections it provides to working women and men and their families.

More than 50 million Americans have taken job-protected leave to bond with a new baby, care for a seriously ill family member, or recuperate from their own serious illness since the enactment of the FMLA just twelve years ago. As a result, fewer people have had to choose between a job and family when medical crises strike or babies are born.

We are very concerned that, despite the law's great success, important provisions of the FMLA are threatened. Opponents of the FMLA are calling for changes to the law that would rollback many of the protections that it provides to America's workers by changing the definition of a *serious health condition* and restricting the use of *intermittent leave*.

One suggestion is to change the definition of a serious health condition to deny job protected, unpaid leave to workers unless their condition, or the condition of the person they are caring for, lasts ten or more days. Current regulations define a serious health condition, in part, as a condition that requires more than three consecutive days of treatment and recovery.

Altering the definition will leave out numerous serious conditions. For example, an employee with acute appendicitis may not be covered. This employee, with medical treatment, can be back at work in less than 10 days. Untreated, acute appendicitis is life threatening. Of the 50 million Americans who have taken job-protected leave under the FMLA, *half* have taken leave for serious illness, whether their own or a family member's, for 10 days or less. We are concerned that altering the definition of a *serious health condition* will remove much needed job protection for millions of Americans when they need it most.

FMLA opponents are also pushing for changes that could force employees to take leave for no less than a half-day at a time. This change would force many employees to take unnecessary leave without pay. Employees who require frequent, short treatments, such as radiation

1875 Connecticut Avenue, NW / Suite 650 / Washington, DC 20009 / 202.986.2600 / Fax: 202.986.2539 / Web site: http://www.nationalpartnership.org

treatment for cancer or pre-natal visits, will be forced to exhaust their FMLA leave sooner than necessary, leaving them without adequate job-protection for medically necessary treatments and recovery time they require. The current law aims to *minimize* employers' administrative burdens by offering leave in the smallest units that employers *already* use to track employee leave while ensuring that workers are not absent from work any longer than necessary.

Research shows that the FMLA has been beneficial to business. United States Department of Labor employer surveys, released in 2000, found that 9 in 10 covered employers report that the FMLA has a positive or neutral effect on productivity and growth. Another nationally representative employer survey found that 3 in 4 private-sector employers say the FMLA's benefits outweigh or offset its costs. The Department of Labor survey also found that, for the vast majority of employers, intermittent leave has no impact on productivity (81%) or profitability (94%).

As a nation, we can do a better job of helping our nation's families be responsible employees and parents. Working Americans need the Department of Labor and Congress to provide *more* solutions as they struggle to balance work and family. We hope that we can work with you to develop programs that help meet the needs of our nation's families and ensure the security of the Family and Medical Leave Act. Thank you.

Sincerely,

National Partnership for Women & Families
9to5 Colorado
9to5, National Association of Working Women
9to5 Poverty Network Initiative – Wisconsin
AARP
ACORN
ADA-OHIO (The Americans with Disabilities Act)
AFL-CIO
Aging Resources of Central Iowa
All Families Deserve a Chance (AFDC) Coalition - Colorado
Alpha-1 Association
Alpha-1 Foundation
American Association of People with Disabilities (AAPD)
American Association of University Women (AAUW)
American Association on Mental Retardation
American Autoimmune Related Diseases Association
American Civil Liberties Union (ACLU)
American Civil Liberties Union Women's Rights Project
American Federation of Government Employees (AFGE)
American Federation of State, County, and Muncipal Employees (AFSCME)
American Federation of Teachers (AFT)
American Society on Aging (ASA)
Asian Law Caucus, CA
Association for Women in Science (AWIS-WVU), West Virginia University Student Chapter

Association of Flight Attendants - CWA
Association of University Centers on Disabilities (AUCD)
Atlanta/North Georgia Labor Council, GA
Atlanta 9to5, GA
Atlanta Women's Foundation, GA
Bay Area & Western Paralyzed Veterans of America
Black Women's Health Imperative
Business and Professional Women (BPW), USA
California Commission on the Status of Women
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California Nurses Association (CNA)
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Candlelighters Childhood Cancer Foundation of the Inland Empire, Inc., CA
Candlelighters of Southwest Florida
Center for Community Change (CCC)
Center for Independent Living of Jasper, Alabama
Center for Law and Social Policy (CLASP)
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City of Boston Women's Commission, MA
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Colorado AFL-CIO
Colorado Center on Law and Policy
Colorado Fiscal Policy Institute
Colorado Progressive Coalition
Colorado Women's Agenda
Communications Workers of America (CWA)
Communications Workers of America (CWA), Local 1034, NJ
Cook County Department of Human Rights, Ethics and Women's Issues, IL
Cumberland County Commission for Women, PA
Communications Workers of Americaa (CWA), Local 3204, GA
Dads and Daughters
DC Employment Justice Center
Delaware Commission for Women
Denver Area Labor Federation, CO
Early Childhood Policy Research
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Equal Rights Advocates (ERA), CA

Equality State Policy Center, WY
Faith Voices for the Common Good, CA
Families USA
Families of Spinal Muscular Atrophy (SMA)
Family Caregiver Alliance (FCA)/National Center on Caregiving
Family Caregiver Coalition of New England
Family Voices New Jersey
Gateway/Midwest Paralyzed Veterans of America
Georgia AFL-CIO
Greater Boston Legal Services, MA
Great Plains Chapter Paralyzed Veterans of America
Illinois Maternal and Child Health Coalition
International Association of Machinists Aerospace Workers (IAMAW)
International Federation of Professional and Technical Engineers (IFPTE)
International Union of Bricklayers and Allied Craftworkers
Iowa Commission on the Status of Women
Iowa Annual Conference of The United Methodist Church
Labor Project for Working Families, CA
Leadership Conference on Civil Rights (LCCR)
Legal Aid Society-Employment Law Center (LAS-ELC), CA
Legal Momentum
LIUNA (Laborers' International Union of North America)
LIUNA Women's Caucus
Lutheran Office of Governmental Ministry in New Jersey
Maine Civil Liberties Union
Maine Women's Lobby
Massachusetts AFL-CIO
Massachusetts Paid Leave Coalition
Paralyzed Veterans of America, Michigan Chapter
MOTHERS (Mothers Ought To Have Equal Rights)
Montgomery County Commission for Women, MD
Ms. Foundation for Women
NARAL Pro-Choice America
NARAL Pro-Choice Arizona
NARAL Pro-Choice Colorado
NARAL Pro-Choice Massachusetts
NARAL Pro-Choice New Hampshire
NARAL Pro-Choice New York
NARAL Pro-Choice North Carolina
NARAL Pro-Choice Ohio
NARAL Pro-Choice South Dakota
NARAL Pro-Choice Wisconsin
National Association for the Education of Young Children (NAEYC)
National Association of Commissions for Women (NACW)
National Association of Social Workers (NASW)
National Association of Social Workers (NASW), Colorado Chapter

National Association of Social Workers (NASW), Iowa Chapter
National Association of Social Workers (NASW), Metro Chapter
National Association of Social Workers (NASW), Oregon Chapter
National Coalition for Cancer Survivorship
National Council of Churches (NCCCUSA)
National Council of Jewish Women (NCJW)
National Council of La Raza (NCLR)
National Council of Women's Organizations (NCWO)
National Council on Independent Living
National Education Association (NEA)
National Employment Law Project (NELP)
National Employment Lawyers Association (NELA)
National Family Caregivers Association (NFCA)
National Mental Health Association
National Multiple Sclerosis Society
National Organization for Women (NOW)
California National Organization for Women (NOW)
Connecticut National Organization for Women (NOW)
National Psoriasis Foundation
National Respite Coalition
National Women's Health Network
National Women's Law Center (NWLC)
NETWORK: A National Catholic Social Justice Lobby
New Hampshire AFL-CIO
New Hampshire Commission on the Status of Women
New Jersey Citizen Action
New Jersey Time To Care Coalition
New Mexico Association of Community Action Agencies
New Mexico Commission on the Status of Women
New Mexico Conference of Churches
New Mexico Voices for Children
North Carolina Justice & Community Development Center
Paralyzed Veterans of America, North Central Chapter, SD
Older Women's League (OWL)
Padres Unidos – Colorado
PA Family Economic Self-Sufficiency Project, PathWaysPA
Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE)
Paralyzed Veterans of America
Parent to Parent of Colorado
Parents' Action for Children
ParentsWork, IL
Pax Christi
Pennsylvania Council of the Blind (PCB)
Philadelphia Citizens for Children and Youth, PA
Planned Parenthood Federation of America (PPFA)
Program on WorkLife Law, American University Washington College of Law, DC

PROJECT! OUTREACH: Early Breast Care, Education, Screening & Education, Inc.
Project WISE, CO
Protestants for the Common Good
Public Justice Center, MD
RESULTS
Seattle Women's Commission, WA
Service Employees International Union (SEIU)
South Dakota Coalition of Citizens with Disabilities
South Plains Post Polio Support Network, TX
Statewide California Coalition for Battered Women
Statewide Parent Advocacy Network (SPAN), NJ
Take Back Your Time Day
Take Care Net
The Arc of the United States
UAW Massachusetts CAP Counsel
United American Nurses
Unitarian Universalist Association of Congregations
United Auto Workers (UAW)
United Cerebral Palsy
United Electrical, Radio and Machine Workers of America (UE)
United Food and Commercial Workers (UFCW), Women's Network
United Steelworkers of America (USWA)
USAction
Utility Workers Union of America
Vaughan Chapter Paralyzed Veterans of America, IL
Veteran Feminists of America
Virginia Interfaith Center for Public Policy
Voices for Children of Greater Cleveland, OH
Voices for America's Children
Wider Opportunities for Women (WOW)
Wisconsin Council on Children and Families
Wisconsin Paralyzed Veterans of America
Women Employed, IL
Women's Employment Rights Clinic, Golden Gate University School of Law, CA
Women's Law Center of Maryland
Women's Law Project, PA
Women's Lobby of Colorado
Women's Policy Group, GA
Women's Way, PA
Women Work! The National Network for Women's Employment
WomenVotePA
YWCA Greater Portland, ME
YWCA USA

Mr. LYNCH. Thank you, Madam Chairman.

The Family Medical Leave Act is just one of the important protections that should be addressed today. It is not perfect, and it could use some adjustment, some tweaking to make it better and fairer to employers, understandably so. But I am hoping to hear from Mr. Rosen and Ms. Stidvent more about the status of all the Department of Labor and DOT nominations.

I want to thank you, Madam Chairman, again, you have been a great leader on this issue and this whole process. I thank you for your willingness to work with me and with the Democratic party on this. I look forward to hearing all the testimony here today, and I thank you, Madam Chairman, and I yield the remainder of my time.

[The prepared statement of Hon. Stephen F. Lynch follows:]

**STATEMENT OF**
**REP. STEPHEN LYNCH, RANKING MINORITY MEMBER**
**SUBCOMMITTEE ON REGULATORY AFFAIRS**
**HEARING ON**
**THE IMPACT OF REGULATIONS ON U.S. MANUFACTURING**
**JUNE 28, 2005**

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MADAM CHAIR:

The manufacturing industry provides over 14 million American jobs, which are critical to our economy. As someone who has worked in steel mills, auto-plants, and oil refineries across the country, I can tell you that manufacturing jobs can also be tough and dangerous. But there are significantly fewer injuries and deaths today than just 30 years ago because of federal health and safety requirements.

Based on my experience, I know how important the health of the manufacturing industry is to the economy and the workers who hold these jobs. While I am committed to the growth of the American manufacturing industry, I believe that exposing more workers to disease and injury on the job won't accomplish that goal.

I must admit I'm concerned about OMB's activities in this area. In reviewing the conduct of OMB, it is apparent that OMB has created a regulatory "hit list" that proposes to weaken or gut many existing health, safety, and environmental protections. This raises a lot of questions that I hope we will explore today.

As a factual matter, I'm concerned that weakening many of these regulations will hurt workers and their families. That's simply not necessary. We can have strong health,

safety, and environmental protections, while at the same time growing manufacturing and the economy.

Now, I will concede that there are some regulations that we can reform and/or eliminate but I remain concerned about how OMB and the agencies selected the regulations to target. There seems to be a lack of transparency in OMB's process for developing its list. OMB solicited public comments last year on agency regulations that should be reformed. But it is unclear how the relevant agencies, and OMB, got from that list of 189 nominations to OMB's list of 76 priority nominations.

Accordingly, I am looking forward to hearing from the representatives that are with us today from the Department of Labor and the Department of Transportation about the selection process and how they will respond to the nominations on OMB's list.

Finally, I hope we carefully consider what weakening each of the targeted regulations would mean to real Americans. Two areas I am particularly interested are the department of transportation's plan to issue proposed changes to hours of service rules as pertaining to commercial drivers and the Department of Labor's plan to issue proposed changes to the Family and Medical Leave Act.

Now, previous DOT rules limited the amount of time that commercial drivers could be on the road to ten consecutive hours with eight hours off-duty. In 2003,

however, the department issued a new rule that actually increased the number of permitted driving hours from ten to eleven, with a required ten-hour break between shifts.

Madam chair, in July of 2004, the U.S. Court of Appeals for the D.C. Circuit vacated DOT's rule, finding that the department had not considered the effect of this rule on driver health. Specifically, the court deemed the final rule to be "arbitrary and capricious because the agency neglected to consider" this "statutorily mandated factor."

It is my understanding that despite this ruling, the department's recently-issued notice of proposed rulemaking and comments concerns the same rule vacated by the federal appeals court. Accordingly, I'm interested in whether DOT has in fact addressed the court's primary concern and taken driver health into account this time around.

In addition, I hope that Department of Labor will not weaken the federal Family and Medical Leave Act, an important law that protects the rights of workers to take unpaid leave when they are suffering from a serious health condition or when they need time off to care for a new child or a sick family member.

Under current regulations, a serious health condition is defined, in part, as a condition that requires more than three consecutive days of treatment and recovery.

According to a May 26, 2005 *USA Today* article, one of the proposed changes to FMLA would amend the statute's coverage to only those illnesses that are serious enough to require ten or more days off.

The current definition protects workers who suffer from illnesses, such as appendicitis or kidney stones that are severe and require time off for treatment but do not last for 10 days. Accordingly, rolling back FMLA protections could cause employees who miss work because of a serious illness to lose their jobs.

Madam Chair, I would like to submit for the record a letter signed by over 200 groups such as the National Partnership for Women and Families, the Epilepsy Foundation, the Paralyzed Veterans of America, and the YWCA, urging the Department of Labor not to make any regulatory changes that would undercut the protections of the Family and Medical Leave Act.

The Family and Medical Leave Act is just one of the important protections that should be addressed today. I am hoping to hear from Mr. Rosen and Ms. Stidvent more about the status of all of the Department of Labor and Department of Transportation nominations.

Thank you to all of the witnesses for being here today. I look forward to hearing your testimony. Thank you, Madam Chair.

Ms. MILLER. Thank you.

It is a practice of the Government Reform Committee to swear in all our witnesses, so the second panel as well, if you would also rise and then we can dispense with at the next panel.

[Witnesses sworn.]

Ms. MILLER. Thank you.

Just in the interest of moving things along, you will see the little boxes in front of you for the witnesses there. We ask you to try to keep your oral testimony to about 5 minutes. If you have other testimony you want to submit for the record, we certainly will take that of course. When you see the yellow light, that means you have 1 minute remaining, to just give you an idea to wrap it up and try to stay within the 5 minutes.

Our first panelist today is Secretary Veronica Stidvent. She is the Assistant Secretary for Policy in the Department of Labor, and she was confirmed by the Senate on December 8, 2004. On a daily basis, some of Ms. Stidvent's responsibilities include management and implementation of policy development, oversight of regulations and compliance assistance strategies, among other duties as well. Prior to joining the Department of Labor, Ms. Stidvent joined the White House Chief of Staff's Office, and before her White House job, she was a special assistant to the OMB Office of Information and Regulatory Affairs.

We welcome you to the committee today and look forward to your testimony.

## STATEMENTS OF VERONICA VARGAS STIDVENT, ASSISTANT SECRETARY FOR POLICY, U.S. DEPARTMENT OF LABOR; AND JEFFREY A. ROSEN, GENERAL COUNSEL, U.S. DEPARTMENT OF TRANSPORTATION

### STATEMENT OF VERONICA VARGAS STIDVENT

Ms. STIDVENT. Thank you. Chairman Miller and distinguished members of the subcommittee, thank you for the opportunity to appear before you today to discuss the Department of Labor's progress in responding to the 11 reform nominations that were included in OMB's 2005 Report on Regulatory Reform of the U.S. Manufacturing Sector.

My written testimony addresses the Department's progress on each of the 11 reform nominations. I would like to highlight just a few of those for you now.

Regarding permanent labor certification, one commenter was critical of the current process for certifying the unavailability of U.S. workers for positions for which foreign nationals are sponsored, and recommended the Department publish final regulations that used a broader approach and streamlined the certification process. The Department's Employment and Training Administration published the final permanent labor certification rule on December 27, 2004, and has implemented the re-engineered permanent labor certification program. The new process includes an e-filing capability and through the utilization of technology, has reduced processing times from as long as several years to approximately 60 days for those applications not identified for audit.

Regarding the coke oven emission standard, two commenters recommended that OSHA update its coke oven emission standard. In January of this year, OSHA published Phase II of its Standards Improvement Project, which streamlined several provisions of the coke oven emissions standard. For example, OSHA reduced the frequency of medical monitoring for certain employees from semi-annually to annually after determining that medical evidence did not support the need for semi-annual monitoring.

The next reform suggestion pertains to hazard communication/material safety data sheets. Several commenters stated that these MSDSs should be prepared using a consistent format and that the quality of information needed to be improved. OSHA is preparing proposed guidance for the preparation of MSDSs that will be posted on the agency's Web site for comment in 2005 and will be completed in 2006.

In addition, OSHA has added to the spring 2005 regulatory agenda the possible modification of the Hazards Communication Standard to be consistent with the Globally Harmonized System of Classification and Labeling of Chemicals.

Regarding OSHA's annual training requirements for separate standards, one commenter observed that OSHA has separate annual training requirements for a number of these standards, and the commenter pointed out that EPA includes training requirements for a number of regulations that are not always compatible with OSHA requirements. The comment recommended that the agency develop a single integrated training program.

The Department's May 2005 report to OMB on this referral noted that OSHA does not actually require separate training programs for each standard that requires such training. Rather, employers are permitted to organize and present training in whatever manner is most effective for the workplace involved. The report also noted that OSHA has sought to avoid duplication of EPA's training requirements on subjects where both agencies have jurisdiction.

In order to further clarify training requirements and to assist employers, OSHA plans to revise and update its publication, Training Requirements in OSHA Standards and Training Guidelines, before the end of 2005. These guidelines help employers to design, implement and evaluate their training programs to ensure that they are effective.

Regarding hazard communication training, one commenter stated that OSHA's 2004 draft guidance on training requirements under the Hazard Communication Standard was too complicated for small businesses and recommended that OSHA develop a simplified approach. OSHA anticipates finalizing the draft guidance in 2005 and expects to include a simplified approach as recommended.

Furthermore, on hexavalent chromium, two commenters urged OSHA to minimize the impact of its final hexavalent chromium standard on small business. The agency is very much aware of the concerns of small business and other stakeholders. OSHA conducted a SBREFA panel review to focus on small business concerns prior to publishing the proposed rule, and received comments from many small business representatives at public hearings held this past February.

Although under a court-ordered deadline to complete this final rule by January 18, 2006, I can assure this committee that OSHA will observe all the requirements applicable to the regulatory process and will consider the issues raised by all commenters as it develops this final rule.

Finally, there are the OSHA sling standards. Two commenters recommended that OSHA update the sling standard to reflect the American Society of Mechanical Engineers consensus standard. OSHA does plan to update this sling standard as part of its regulatory project to update standards based on national consensus standards. OSHA is developing a guidance document on the selection and use of slings which it plans to issue by February 2006. This document will make it clear that slings meeting the newer ANSI/ASME standard are acceptable.

Madam Chairman, I ask that my written testimony be submitted for the record. I would be happy to respond to any questions you may have.

Thank you.

[The prepared statement of Ms. Stidvent follows:]

**STATEMENT OF VERONICA VARGAS STIDVENT**
**ASSISTANT SECRETARY FOR POLICY**

**U.S. DEPARTMENT OF LABOR**

**BEFORE THE**

**SUBCOMMITTEE ON REGULATORY AFFAIRS**
**COMMITTEE ON GOVERNMENT REFORM**

**U.S. HOUSE OF REPRESENTATIVES**

**June 28, 2005**

Chairman Miller and distinguished Members of the Subcommittee:

Thank you for the opportunity to appear before you today to discuss the Department of Labor's progress in responding to the public's reform nominations that were included in the Office of Management and Budget's (OMB) 2005 report on *Regulatory Reform of the U.S. Manufacturing Sector*.

The Department takes seriously its responsibility to protect worker safety and health, retirement security, pay, and equal access to jobs and promotions. Over the years, advances in safety, health, science, and technology -- as well as changes in the law -- have rendered a number of the Department's regulations outdated or even unnecessary. As a result, these advances have required us to revise or eliminate regulations and to consider and adopt new rules and new approaches that ensure strong protections for workers without imposing unnecessary and costly burdens on the economy.

The Mine Safety and Health Administration (MSHA) and the Occupational Safety and Health Administration (OSHA) each have continuing rulemakings to identify regulations or provisions of regulations that are outdated, redundant, or unnecessary. For example, this past January OSHA published Phase II of its Standards Improvement

Project, which revised or removed a number of health provisions in its standards. OSHA expects these revisions to reduce regulatory requirements for employers without reducing employee protection. As mentioned in OMB's Report on regulatory reform, the Agency is now beginning Phase III, which will address both safety and health topics. OSHA will initiate the project by publishing an Advance Notice of Proposed Rulemaking in the *Federal Register* later this year soliciting input from the public on rules that should be addressed.

The Department recognizes the costs that regulations place on the regulated community, particularly the small business community and small manufacturers. We have pursued alternatives to rulemaking whenever feasible and have attempted to minimize the costs of regulations while ensuring that strong worker protections are in place. For instance, rather than issue a new regulation, OSHA addressed the hazards of metalworking fluids by developing a best-practices guide and making it available on its website. Metalworking fluids are used extensively in manufacturing industries such as automotive, aircraft, farm equipment, marine, industrial engine, heavy machinery, and hardware manufacturing, as well as in machine shops.

The Department also recognizes that employers often need help understanding their rights and responsibilities under federal labor laws and regulations. That's why Secretary Chao launched the Compliance Assistance Initiative in June of 2002. The Initiative aims to provide businesses, employees, unions, and other regulated entities with the knowledge and tools they need to comply with DOL's rules. We understand that before anyone can comply with regulations, the regulations have to be communicated clearly and understood.

Our multi-faceted approach to regulatory reform, compliance assistance, and vigorous enforcement is working. Due in part to these activities, both the rates of workplace fatalities - four deaths per 100,000 workers - and the injury and illness rate - five per 100 workers - are at the lowest levels in OSHA history. In 2003, there were 300,000 fewer injuries and illnesses than the previous year, a decrease of 7.1 percent. In addition, a drop in fatalities among Hispanic workers during each of the two most recent years is particularly encouraging because deaths among this group had been rising every year since 1995. We also are encouraged by the fact that fatal work injuries among foreign-born Hispanic workers declined in 2003 for the first time since the National Census of Fatal Occupational Injuries began. Also due in part to the Department's focus on regulatory reform, compliance assistance, and enforcement, in 2004, MSHA reported the fewest number of fatalities (55) since 1910, when records were first kept. Since 2000, the mining industry has seen a 35 percent decrease in fatal accidents nationwide.

Furthermore, the Employee Benefits Security Administration (EBSA) had its best year ever in FY2004, with a record breaking 121 percent increase in enforcement results that protected $3.1 billion in retirement, health, and other benefits for American workers and their families. In short, the Department's approach to regulatory reform, compliance assistance, and strong enforcement is clearly working.

As this Subcommittee recognizes, one important regulatory tool is the process for addressing the public's reform nominations that are included in OMB's annual Reports to Congress on the Costs and Benefits of Federal Regulations. In considering regulations to promulgate, revise, or withdraw, we evaluate many factors, including input that is received from the public through the OMB nominations process, stakeholder meetings,

industry experience, experience with previous regulatory initiatives in a given area, and alternatives to regulation.

Beginning with its 2001 Report to Congress, OMB solicited suggestions from the public on specific regulations that could be rescinded or changed that would increase net benefits to the public by either reducing costs or increasing benefits. In 2002, OMB expanded its request for reform suggestions to include agency guidance documents and paperwork requirements. In 2004, OMB requested nominations of "regulations, guidance documents or paperwork requirements that, if reformed, would result in substantive reductions in regulatory burden and result in true savings by reducing unnecessary costs, increasing effectiveness, enhancing competitiveness, reducing uncertainty and increasing flexibility." OMB was particularly interested in reforms addressing burdens on small and medium-sized manufacturers.

OMB's 2004 final Report to Congress listed 189 reform nominations from 41 commenters and requested that agencies review and prepare responses for OMB by January 24, 2005. The Department of Labor accounted for 39 nominations. Following discussions with the agencies, including the Department of Labor, and input from the Small Business Administration's Office of Advocacy, OMB published a document in March, *Regulatory Reform of the U.S. Manufacturing Sector*, which included 76 nominations that OMB and the agencies determined have potential merit and justify further action. The Department of Labor accounted for 11 of these reform nominations. (Note that the Family and Medical Leave Act (FMLA) nomination in OMB's March report combined 9 separate nominations addressing FMLA in the 2004 OMB report.)

In addition to FMLA, the 11 Department of Labor reform nominations include recommendations addressing Permanent Labor Certification, and 9 OSHA regulations and guidance documents. In keeping with the subcommittee's request, I will now discuss the Department's progress on each of the nominations.

Permanent Labor Certification. One commenter was critical of the current process for certifying the unavailability of U.S. workers for positions for which foreign nationals are sponsored, stating that the "process is time-consuming, expensive, and creates uncertainty." The commenter recommended the Department publish final regulations that use a broader approach and streamline the certification process.

The Department's Employment and Training Administration (ETA) published the final Permanent Labor Certification rule on December 27, 2004, with an effective date of March 28, 2005, and has implemented the re-engineered Permanent Labor Certification Program. The new process includes an e-filing capability and through the utilization of technology, has reduced processing times from as long as several years to approximately 60 days for "clean" applications, i.e., those not identified for audit. In addition, ETA has implemented uniform times for recruitment and other notification requirements, thus making the employer application process straightforward, less expensive, and more customer friendly.

Coke Oven Emissions Standard. Two commenters recommended that OSHA update its coke oven emission standard.

In January of this year OSHA published Phase II of its Standards Improvement Project, which streamlined several provisions of the coke oven emissions standard. For example, OSHA reduced the frequency of medical monitoring for certain employees

from semi-annually to annually after determining that medical evidence did not support the need for semi-annual monitoring. As I mentioned earlier, OSHA has added a third phase of the Standards Improvement Project to its regulatory agenda, and expects to publish an advance notice of proposed rulemaking later this year to solicit input from the public on other provisions that may be appropriate to address in this process.

Hazard Communication/Material Safety Data Sheets (MSDS). Several commenters stated that MSDSs should be prepared using a consistent format and that the quality of information needed to be improved.

OSHA is preparing proposed guidance for the preparation of MSDSs that will be posted on the Agency's Web site for comment in 2005 and will be completed in 2006. In addition, OSHA has added to the spring 2005 regulatory agenda the possible modification of the Hazard Communication Standard to be consistent with the Globally Harmonized System of Classification and Labeling of Chemicals. This global approach to hazard communication includes a format for safety data sheets as well as standardized label requirements. OSHA also is preparing an enforcement initiative to address MSDS accuracy issues.

Annual Training Requirements for Separate Standards. One commenter observed that OSHA has separate annual training requirements for a number of standards. The comment also pointed out that the Environmental Protection Agency (EPA) includes training requirements for a number of regulations that are not always compatible with OSHA requirements. The comment recommended that the Agency develop a single integrated training program.

As required in OMB's 2005 report, the Department provided OMB with a report on training requirements in May 2005. The report noted that OSHA does not require separate training programs for each standard that requires such training. The report also noted that OSHA has sought to avoid duplication of EPA's training requirements on subjects where both agencies have jurisdiction. Employers are permitted to organize and present training in whatever manner is most effective for the workplace involved. In order to further clarify training requirements and assist employers, OSHA plans to revise and update its publication, *Training Requirements in OSHA Standards and Training Guidelines*, before the end of 2005. This publication summarizes the major provisions for training and includes the Agency's voluntary training guidelines. These guidelines help employers design, implement, and evaluate their training programs to ensure they are effective.

Hazard Communication Training. One commenter stated that draft guidance OSHA made available for comment in 2004 on information and training requirements under the Hazard Communication Standard was too complicated for small businesses. The commenter recommended that OSHA develop a simplified approach.

OSHA anticipates finalizing the draft guidance in 2005, and expects to include a simplified approach as recommended.

Hexavalent Chromium. Two commenters urged OSHA to minimize the impact of its final Hexavalent Chromium standard on small business.

OSHA was first petitioned to revise its Hexavalent Chromium standard in 1993. The Agency was subsequently sued for unreasonable delay. In 2002, the U.S. Court of Appeals ordered OSHA to proceed expeditiously with rulemaking, and established a

timeline for publication of a proposed rule and a final rule. In accordance with the court order, OSHA published a proposed rule on October 4, 2004. The Agency must meet a court-ordered deadline of January 18, 2006 for publication of the final standard.

The Hexavalent Chromium rulemaking is very complex, involving significant data collection efforts, a major risk analysis and a comprehensive economic analysis. The Agency is very much aware of the concerns of small business and other stakeholders. OSHA conducted a SBREFA (Small Business Regulatory Enforcement Fairness Act) panel review to focus on small business concerns prior to publishing the proposed rule and received comments from many small business representatives at public hearings held this past February.

Although under a tight deadline to complete the final rule, I can assure the committee that OSHA will observe all of the requirements applicable to the regulatory process, and will consider the issues raised by all commenters as it develops the final rule.

Sling Standard. Two commenters recommended that OSHA update the sling standard to reflect the American Society of Mechanical Engineers consensus standard. OSHA has studied this issue and concluded that most types of slings that meet the most recent edition of the American Society of Mechanical Engineers national consensus standard on slings are in full compliance with the existing OSHA sling standards. Current OSHA policy treats any deviation from the Agency's sling standards as a *de minimis* violation if the sling otherwise meets the current consensus standard and is at least as effective in protecting workers. In fact, OSHA does not assess penalties for *de*

*minimis* violations. Thus, newer types of slings not addressed by the Agency's standard are effectively compliant if they meet the national consensus standard.

OSHA plans to update the sling standard as part of its regulatory project to update standards that are based on national consensus standards. The sling standard will be part of a later phase of the project, for which the Agency has not yet projected completion dates. OSHA is developing a guidance document on the selection and use of slings, which it plans to issue by February 2006. This document would make it clear, without rulemaking, that slings meeting the newer ANSI/ASME standard are acceptable.

Guardrails Around Stacks of Steel. One commenter objected to OSHA's requirement to provide either guardrails or tie-off protections to workers who must perform their duties 48 inches or more above the ground. The commenter asserted that the requirement is infeasible for operations that exist in steel and steel product companies where individuals need to stand on "stacks" of product to rig bundles for crane lifts.

As required in OMB's 2005 manufacturing report, the Department provided OMB with a report on this item in May 2005. OSHA is currently conducting a rulemaking on its Walking and Working Surfaces standard, and will consider the guardrail requirement as part of that rulemaking.

Walking and Working Surfaces. One commenter stated that OSHA regulations under some circumstances require the use of fixed ladders when spiral stairways or ship stairs would be safer.

As required in the 2005 OMB manufacturing report, the Department provided OMB with a report on this item in May 2005. This issue also will be considered as part of OSHA's rulemaking on the Walking and Working Surfaces standard.

OSHA Flammable Liquids. Two commenters recommended that OSHA update the current rule, which cites the 1969 National Fire Protection Associations standards for spray application of flammable and combustible liquids, to reflect current technology.

OSHA intends to include the flammable liquids standard in its ongoing regulatory project to update standards that are based on national consensus standards. However, the Agency has not yet determined when flammable liquids will be considered.

Family and Medical Leave Act. Many commenters recommended changes to the FMLA regulations.

The final FMLA regulations were published in 1995. Since then, as employers have attempted to implement the regulations and employees have attempted to utilize FMLA benefits, the Department has received feedback suggesting possible revisions to the regulations, including the nominations for reform submitted to OMB in 2004. The FMLA regulations were also the subject of many reform recommendations in OMB's previous rounds of public nominations for reform in 2001 and 2002. In addition, Congress has held a number of hearings over the years at which stakeholders identified the positive attributes as well as possible difficulties with these regulations. Furthermore, federal courts - including the United States Supreme Court - have invalidated several provisions of the FMLA regulations.[1]

[1] For instance, the U.S. Supreme Court invalidated an FMLA regulation that required an employer to designate the leave taken by employees as FMLA leave or else be prohibited from counting it against an employee's 12-week FMLA entitlement. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). In addition, a number of appellate courts have stricken another FMLA regulation that requires employers to

The Department intends to consider carefully the court decisions, the public's views, and the Agency's experience administering the regulations before deciding what action, if any, is appropriate to take.

Madame Chairman, the Department is proud of its achievements in streamlining its regulations since 2001. In doing so, we have provided clarity for employers, workers, and the public at large. We value the important input we received from the public during the rulemaking process, OMB's reform nominations process, and through other outreach efforts. While progress has been made, we recognize more needs to be done. We are dedicated to reducing the regulatory costs and burdens for employers, which will help employers to create jobs, while at the same time continuing our commitment to strengthen protections for the American workforce.

Madame Chairman, this concludes my testimony. I would be glad to respond to any questions you may have.

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treat certain employees as eligible for FMLA leave, even though they do not meet the FMLA's eligibility definition. *See, e.g., Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579 (7th Cir. 2000).

Ms. MILLER. Thank you, Ms. Stidvent.

Our next witness is Jeffrey A. Rosen. He is the General Counsel at the Department of Transportation. Mr. Rosen was sworn in on December 15, 2003, and as the chief legal officer, he has final authority over all legal questions within his department and oversees the activities of over 400 attorneys in the Department as well.

In the 21 years prior to his swearing in, Mr. Rosen was a private practice attorney with Kirkland and Ellis, where he built up extensive experience with matters pertaining to government enforcement actions, business torts, and anti-trust, among others. Until he joined the Department of Transportation, he was also a professor at Georgetown University Law Center.

We certainly appreciate your attending today, and we look forward to your testimony as well.

**STATEMENT OF JEFFREY A. ROSEN**

Mr. ROSEN. Thank you. I am Jeffrey Rosen, General Counsel of the U.S. Department of Transportation. I am pleased to have the opportunity to speak with you this morning about the regulatory review and reform efforts of the Department.

To fully appreciate DOT's regulatory review and reform efforts and our response to the specific nominations of DOT rules in the OMB report, it is useful to understand both the scope of our responsibilities and the many steps we already take to improve them or to eliminate them if no longer needed. We take that responsibility seriously. And among other things, DOT has been an active participant in OMB's regulatory review efforts.

In OMB's review of the manufacturing sector, OMB asked DOT to focus on five items. Two of those involved our Federal Motor Carrier Safety Administration, which has among other things responsibility for safety in the trucking area, and three of the nominations dealt with the National Highway Traffic Safety Administration's [NHTSA] responsibilities. NHTSA primarily regulates automotive safety.

So let me give you a quick update on those five areas that were the subject of the OMB nominations. I will start with the two from the Federal Motor Carrier Safety Administration. The first one concerned an existing rule on motor vehicle brakes. The National Association of Manufacturers and the National Marine Manufacturers Association have proposed that our Motor Carrier Safety Administration consider allowing commercial motor vehicles to use a certain type of brake, sometimes called surge brakes, that is now authorized for consumer uses but not for commercial uses.

The status of that is that our agency is currently planning to publish a proposed rule on this subject in September 2005. So we are working on the proposed rule and we will be responsive to the OMB nomination with a Federal Register notice that should be expected in September 2005.

With regard to the other FMCSA rule, the Small Business Administration's Office of Advocacy raised a question with regard to the hours of service regulation. The hours of service regulation is a somewhat lengthy and complex regulation dealing with the rules on how many hours truck drivers, for example, can work, dealing with fatigue and other kinds of requirements. SBA had asked that

for drivers who deliver goods locally, short haul, that they be permitted to drive more than 11 hours.

What I can say about that regulation is a couple of things. FMCSA published a Federal Register notice last February 4, 2005, asking for public comment in response to the earlier rule from 2003 having been partially invalidated by the court of appeals. And it has been collecting input and is considering, among other things, how to handle short haul and other effects on small entities.

This is a rule that Congress, in the last extension on the highway bill, provided an additional year of it being in effect, notwithstanding the court's decision. So the rule remains in effect, but unless Congress acts again, the congressional extension of the rule would expire at the end of this fiscal year.

So FMCSA is currently working on a final rule that we anticipate would likely be published this August. The resolution of the SBA issue will be a part of that, but I can't tell you today what the resolution will be.

Switching over to the three NHTSA items that were on the nominations list, and I see I am actually going to run over time, so I will try to cover all three of them very quickly.

Ms. MILLER. That is fine.

Mr. ROSEN. The one on lighting, we expect to publish a proposed rule in December of this year. The one on occupant ejection, NHTSA has published two proposed rules dealing with side impact protection and door latch strength in May of this year and in December of last year. And with regard to vehicle compatibility standards, NHTSA will soon be submitting a report to OMB on the status of research that has been conducted in that area, which may address whether a rule is appropriate.

Since I see my time is coming to an end, I will stop there, other than to just emphasize that regulatory review and improvement is a very important priority for the Department of Transportation and will continue to have our efforts and attention going forward.

[The prepared statement of Mr. Rosen follows:]

**Testimony of Jeffrey A. Rosen**
**General Counsel**
**U.S. Department of Transportation**
**Before the**
**Subcommittee on Regulatory Affairs**
**Committee on Government Reform**
**U.S. House of Representatives**
**June 28, 2005**

Good morning, Chairman Miller, and members of the Committee. I am Jeffrey Rosen, General Counsel of the U.S. Department of Transportation (DOT or the Department). I am pleased to have the opportunity to speak with you this morning about the regulatory review and reform efforts of the Department.

Your specific interest today involves the Department's overall progress in response to the request of the Office of Management and Budget (OMB) for "public nominations of specific regulations, guidance documents and paperwork requirements that, if reformed, could result in lower costs, greater effectiveness, enhanced competitiveness, more regulatory certainty and increased flexibility." OMB noted its particular interest in addressing the burdens on small and medium-sized manufacturers. The five DOT reform nominations you are interested in were included in OMB's 2005 Report on *Regulatory Reform of the U.S. Manufacturing Sector.*

Scope of DOT Regulations

To fully appreciate DOT's regulatory review and reform efforts and our response to the specific nominations of DOT rules in the OMB Report, it is useful to understand both the scope of our responsibilities and the many steps we already take to address the possible need to reform our regulations.

The Department of Transportation must remain vigilant in the oversight and review of its regulatory activities. The various components of the Department of Transportation -- ten operating administrations and the Office of the Secretary -- have important statutory responsibility for a wide range of regulations. DOT has, by some measures, one of the largest rulemaking responsibilities in the Federal Government. Those responsibilities involve a broad range of matters that include safety, security, the environment, and economic development.

For example, DOT regulates safety in the aviation, motor carrier, railroad, mass transit, motor vehicle, commercial space, and pipeline transportation areas. We regulate consumer and economic issues in aviation and trucking, and provide financial assistance and rules necessary to implement programs for highways, airports, mass transit, maritime, railroads, and motor vehicle safety. And we issue regulations carrying out such disparate statutes as the Americans with Disabilities Act and the Uniform Time Act.

In addition, DOT has responsibility for developing policies that implement a range of regulations that deal with internal programs, such as acquisitions and grants, access for the disabled, environmental protection, energy conservation, information technology, property asset management, seismic safety, and the use of aircraft and vehicles.

We currently have over 200 ongoing rulemaking entries on our regulatory agenda. Of these, over 80 are deemed significant under Executive Order 12866 (E.O. 12866) ("Regulatory Planning and Review"), meaning that they are either costly or they have some other important public interest component. Of these, 10

are economically significant rulemakings, meaning they generally have an economic effect of at least $100 million per year. In the last 12 months of the Regulatory Agenda cycle, DOT issued 28 significant rules and 110 nonsignificant rules (not including routine and frequent rules, such as Federal Aviation Administration (FAA) airspace actions).

DOT's Periodic Regulatory Reviews

DOT and the industries we regulate have made significant achievements in terms of our regulatory objectives, perhaps best highlighted by the gains in safety statistics in recent years. DOT is constantly aware of the extraordinary risks faced in industries that annually transport millions of people, tons of hazardous materials, and all forms of raw materials and industrial and consumer goods. We are also responsible for ensuring that the billions of dollars we provide in financial assistance are used in accordance with statutory objectives and mandates. At the same time, we are also aware of the burdens our rules can impose, and in our rulemakings we consider the costs and benefits and determine whether those benefits justify the costs. In addition, we continuously review our existing rules, including any problems the regulated entities are having in complying with a particular rule, to determine whether changes are necessary.

Indeed, given our wide range of regulatory responsibilities and heavy regulatory docket, it is significant that the Department has a long-standing institutional commitment to regulatory review and improvement. Since 1979, DOT has had in place a formal DOT order on its "Regulatory Policies and Procedures" that requires significant rulemakings to be approved by the Secretary

of Transportation before they can be issued. This oversight and approval process is one that is managed by and is the responsibilities of the General Counsel.

Simply issuing high-quality rules, which we regard as essential, is not our sole goal. We also want to ensure that we periodically review rules that the Department has issued previously. We want to assess whether our existing rules are still necessary, whether they still work well, and whether they can be improved; and we want to examine our overall agenda of planned rulemakings to ensure that we are moving in the right direction, that we have the right priorities in terms of achieving our statutory objectives, and that we are mindful of the costs and burdens involved, so unnecessary costs and burdens can be avoided.

As far back as our 1979 "Regulatory Policies and Procedures," the Department required its component agencies to have a program for reviewing existing regulations and revoking or revising those that are not achieving their intended purpose. This process identifies rules for review by considering such things as whether a rule overlaps or duplicates other regulations, involves internal inconsistencies or conflicts, addresses a problem that continues to exist, involves heavy or unnecessary burdens on regulated parties, is responsive to technological or other changes, or is the subject of numerous complaints or requests for clarification or exemption.

An important aspect of the Department's commitment to reviewing existing regulations involves a program DOT established in 1998 for a ten-year "rolling" review of our rules to respond to our responsibilities under our "Regulatory Policies and Procedures," E.O. 12866, section 610 of the Regulatory

Flexibility Act, and a Presidential directive on plain language. The current schedule, status, and results of the review program are included in each publication of the Department's semiannual Regulatory Agenda. The FAA conducts its reviews, other than those required by Section 610, in a different manner. The FAA reviews its rules on a three-year cycle. Its last one was initiated on February 25, 2004, (69 Fed. Reg. 8575), with a request for comments. I have submitted for the Subcommittee's information Appendix D to our May 2005 Regulatory Agenda, which lists the current review status and activity.

In appropriate situations, the various agencies of the Department have also undertaken special reviews of their existing regulations, often limited to specific subject areas. In addition, we recently decided to supplement our existing review program with a special opportunity for informal discussions between -- or written comments from -- those affected by DOT's rules and senior DOT officials. I would like to give you a little background on that effort.

Current Regulatory Review Efforts

DOT's long-term commitment to regulatory review and reform meshes well with the Bush Administration's strong emphasis on avoiding and reducing *unnecessary* burdens on the public. As part of the President's agenda, President Bush established a plan to build an environment that encourages innovation, lowers the cost of doing business, and promotes economic growth. One part of that plan includes encouraging investment and economic expansion by reducing

unnecessary regulation. In a recent speech the President said: "People are more likely to find work if the resources of business are not spent complying with endless and unreasonable government regulation from Washington, D.C. We will meet our duty to enforce laws whether it be environmental protection laws or worker safety laws. But we want to simplify regulations in this Administration and we are working hard to do so."

Secretary Mineta has taken this goal to heart as well. In recent public remarks he gave at the FAA's Forecast Conference, Secretary Mineta emphasized that "President Bush has made reducing unnecessary costs associated with Federal regulations a priority. In keeping with the President's goal, I have directed our General Counsel to conduct a far-reaching review of the Department's regulations. This could mean simplifying regulations, or even eliminating those that are no longer necessary, to come up with the least costly, most effective way of carrying out our responsibilities."

We began this DOT-wide review with a January 26, 2005, *Federal Register* notice, which I have also submitted for the Subcommittee's information. In response, we received 66 written comments from groups and individuals. We also held a public meeting on April 12, 2005, over which I had the opportunity to preside, and at which 14 commenters discussed their thoughts on DOT rules with me and other senior DOT officials. The Department is now in the process of reviewing all the submissions and deciding what action to take in response to the comments.

DOT Participation in OMB Government-Wide Regulatory Reviews

The Department has also been a very active participant in government-wide regulatory review and reform efforts led by OMB. In the most recent OMB review of the manufacturing sector of the economy, commenters identified 15 DOT regulations, and OMB asked the Department to focus on action on the following five items:

Federal Motor Carrier Safety Administration (FMCSA) rule on motor vehicle brakes. The National Association of Manufacturers and the National Marine Manufacturers Association asked FMCSA to consider letting commercial motor vehicles use a certain type of brake (called a "surge brake") which is now authorized for consumer uses but not commercial uses. FMCSA is currently planning to publish a proposed rule on the subject in September 2005, with a final rule published by September 2006. Any amendments would be to Part 393 of Title 49 of the Code of Federal Regulations (49 CFR Part 393). To keep up with this rulemaking, interested persons can review the public rulemaking docket, which is designated number FMCSA-2005-21323; it can be found in the Department's internet-accessible docket at dms.dot.gov. The public can sign up on a list serve at this site to get notification with links to copies of any future documents that a DOT agency places in any docket (e.g., a notice of proposed rulemaking). The Regulation Identifier Number (RIN)

is 2126-AA91, which will help identify the rulemaking in the *Federal Register*, the DOT semi-annual Regulatory Agenda, and other places.

FMCSA rule on hours of service. The Small Business Administration Office of Advocacy asked that these rules permit drivers who deliver goods locally to operate for more than 11 hours to reduce costs. FMCSA published a proposed rule February 4, 2005, to revise its entire hours of service rule, with a final rule expected to be published in August 2005. Any rule on this subject would affect 49 CFR Parts, 385, 390, and 395. The public rulemaking docket is FMCSA-2004-19608. The RIN for the rulemaking is 2126-AA90.

National Highway Traffic Safety Administration (NHTSA) rule on lighting and reflective devices. The National Association of Manufacturers and the Motor and Equipment Manufacturers Association asked for clarification and simplification of the existing rule, which is 30 years old and has been amended numerous times. NHTSA is planning to publish a proposed rule in December 2005, with a final rule published in October 2007. Any rule would amend 49 CFR 571.108. There is currently no Docket or RIN for this rulemaking

NHTSA rule on occupant ejection standard. Public Citizen asked NHTSA to address such issues as window glazing, side curtain and side impact airbags, and increases in strength of door locks and latches. NHTSA

published a proposed rule on side impact protection on May 17, 2004. Final action is currently planned for early 2006. Any rule would amend 49 CFR 571.214. Its docket number is NHTSA-2004-17694. The RIN is 2127-AJ10. NHTSA also plans to publish a proposed rule establishing occupant containment performance requirements by December 2006. Final action is anticipated in 2007. No docket, RIN, or CFR sections have yet been created. Finally, NHTSA published a proposed rule to increase door latch strength requirements, implementing the first United Nations global technical regulation, on December 15, 2004. Final action is expected in early 2006. Any final rule would amend 49 CFR 571.206. The docket is NHTSA-2004-19840 and the RIN is 2127-AH34.

NHTSA rule on vehicle compatibility standards. Public Citizen urged NHTSA to include a standard metric rating to evaluate vehicle mismatch, establish compatible bumper heights, and mitigate harm done by "aggressive design." NHTSA is currently finalizing a report to OMB on the status of research in this area, which we will soon submit to OMB. Note that NHTSA published a report in June 2003 on "Initiatives to Address Compatibility," identifying a number of initiatives to improve vehicle compatibility. To improve side impact compatibility, in May 2004, the agency published a notice of proposed rulemaking to upgrade existing Federal Motor Vehicle Safety Standard No. 214, "Side impact protection." A final rule is currently planned for February 2006. It also initiated a crash test program following the 2003 report to assess the viability of

several potential frontal crash compatibility metrics. The testing to date has not been successful in identifying metrics that could be measured in crash tests and correlated to real-world safety. Further research and development, both by NHTSA and internationally, is being conducted in an attempt to identify viable compatibility metrics. Results from these tests will not be available until 2006. Subsequently, a decision will be made on whether there is sufficient scientific basis to pursue a regulatory requirement for compatibility.

These items, and the Department's responses, give a flavor both of the variety of the often technical subjects that DOT rules address and the ability of the Department to respond – and often to anticipate – the concerns of the public.

DOT's Use of Sunset Provisions in Regulations

In addition, I would mention one innovative approach that the Department has taken in recent years to ensure review of specific regulations. On some, limited occasions when we issue a new rule, we include in the text of the rule itself a provision mandating such review. For example, in 1992, we issued a rule on airline computer reservation systems (CRS) that contained a sunset date. Before the sunset date, we initiated a review of the rule. After determining that the on-going changes in the airline distribution and CRS businesses, such as the increasing importance of the Internet, made the rules unnecessary, we decided to allow most of the rules to expire on January 31, 2004, except for two provisions that expired on July 31, 2004. We also added a sunset date to a 1998 final rule under the Americans for

Disabilities Act concerning over-the-road buses. We are beginning this review in October of this year. More recently, in the rule revising our disadvantaged business enterprise program for airport concessions, published in March 2005, we included another sunset provision. This rule will go out of effect in April 2010 unless the Department renews it. We will conduct a review in 2008 - 2009 to help us determine whether to extend the rule, modify it, or allow it to go out of effect. I anticipate that we will expand the use of this sunset review process as we go forward.

Other Avenues of Regulatory Review

It is very important to keep in mind that formal regulatory review programs are not the only way that we determine the need to revise or revoke existing regulations. Through such actions as our regular review of accident and incident data, the inspections conducted by our field personnel, the concerns we hear through our daily involvement with those affected by our rules, our review of changing technology, and our review of petitions for rulemaking that members of the public may submit to us, we identify rules that need fixing.

Regulatory review is a very important priority at the Department of Transportation, which gets the personal attention of high level officials. As General Counsel, I have overall supervision of the entire regulatory process, including reviewing and making recommendations to the Secretary on all significant rules. In addition, we have weekly regulatory review meetings with the Deputy Secretary and the Secretary's Chief of Staff. Each week, we meet

with a different operating administration usually including the agency Administrator. At those meetings, we discuss every rulemaking action on the operating administration's agenda. The discussions generally cover the need for the rulemaking, our priorities, and our progress in meeting schedules for each project; these meetings often involve discussions among the senior DOT officials present on important substantive issues. These regulatory review meetings played an important role in the Department's decisions during the last five years to terminate or withdraw almost 180 potential rulemakings that were deemed unnecessary or unproductive, and a similarly important role in ensuring that useful and necessary rules were issued in a timely way.

DOT's Use of Technology to Enhance Public Participation

It is also worthwhile to note that DOT is a leader in the use of electronic technology to increase and improve the opportunities for public participation in our programs for reviewing our existing rules as well as in the rulemaking process in general. The use of this technology is especially valuable for small entities that do not always have easy access to governmental processes and records. Our efforts include creating the first internet-accessible electronic rulemaking docket (dms.dot.gov) in the government, which also offers a list-serve; creating a web page (regs.dot.gov) that provides a monthly update on the substance and status of all of our ongoing significant rulemaking projects; providing detailed guidance, interpretations, question-and-answer sites, and other

information on various web sites; and working with researchers to develop even better tools for understanding our proposed and final rules.

Conclusion

Thank you again for the opportunity to discuss with you the Department's regulatory review program and the specific nominations affecting DOT in the OMB Report. We expect to take some form of action on all five nominations in the OMB report in calendar year 2005. As I know you appreciate, it would be inappropriate for me to discuss specific actions we might take concerning ongoing rulemakings, but, I would be pleased to answer any questions you have about our overall regulatory program or the many positive steps we have taken to ensure the effective, regular review of our regulations.

**Appendix D - Review Plans for Section 610 and Other Requirements**

**Part I - The Plan**

*General*

The Department of Transportation has long recognized the importance of regularly reviewing its existing regulations to determine whether they need to be revised or revoked. Our 1979 Regulatory Policies and Procedures require such reviews. We also have responsibilities under Executive Order 12866 (Regulatory Planning and Review) and section 610 of the Regulatory Flexibility Act to conduct such reviews. This will include the use of plain language techniques in new rules and to consider rewriting existing rules when we have the opportunity and resources permit. The Department is currently conducting a number of reviews of existing rules and is engaged in rulemaking actions resulting from these reviews.

*Section 610 Review Plan*

Section 610 requires that we conduct reviews of rules that (1) have been published within the last ten years and (2) have a "significant economic impact on a substantial number of small entities" (SEIOSNOSE). It also requires that we publish in the **Federal Register** each year a list of any such rules that we will review during the next year. The Office of the Secretary and each of the Department's Operating Administrations have a 10-year review plan. These reviews are in accordance with section 610 of the Regulatory Flexibility Act.

*Other Review Plan(s)*

All elements of the Department, except for Federal Aviation Administration (FAA), have also elected to use this 10-year plan process to comply with the review requirements of the Department's Regulatory Policies and Procedures, and Executive Order 12866. FAA is using a different approach, which is described in part II to this Appendix.

*Changes to the Review Plan*

Some reviews may be conducted earlier than scheduled. For example, to the extent resources permit, the plain language reviews will be conducted more quickly. Other events, such as accidents, may result in the need to conduct earlier reviews of some rules. Other factors may also result in the need to make changes; for example, we may make changes in response to public comment on this plan or in response to a Presidentially mandated review. If there is any change to the review plan, we will note the change in the following Unified Agenda. For any section 610 review, we will provide the required notice prior to the review.

**Part II - The Review Process**

*The Analysis*

Generally, the agencies have divided their rules into 10 different groups and plan to analyze one group each year. For purposes of these reviews, a year will coincide with the fall-to-fall schedule for publication of the Agenda. Thus, Year 1 (1998) began in the fall of 1998 and ends in the fall of 1999; Year 2 (1999) begins in the fall of 1999 and ends in the fall of 2000; and so on. We request public comment on the timing of the reviews. For example, is there a reason for scheduling an analysis and review for a particular rule earlier than we have? Any comments concerning the plan or particular analyses can be submitted to the regulatory contacts listed in Appendix B, General Rulemaking Contact Persons.

*Section 610 Review*

The agency will analyze each of the rules in a given year's group to determine whether any rule has a SEIOSNOSE and, thus, requires review in accordance with section 610 of the Regulatory Flexibility Act. The level of analysis will, of course, depend on the nature of the rule and its applicability.

Publication of agencies' section 610 analyses list each fall in this Agenda provides the public with notice and an opportunity to comment consistent with the requirements of the Regulatory

Flexibility Act. We request that public comments be submitted to us early in the analysis year concerning the small entity impact of the rules to help us in making our determinations.

In each fall Agenda, the agency will publish the results of the analyses it has completed during the previous year. For rules that had a negative finding on SEIOSNOSE, we will give a short explanation (e.g., "these rules only establish petition processes that have no cost impact" or "these rules do not apply to any small entities"). For parts, subparts, or other discrete sections of rules that do have a SEIOSNOSE, we will announce that we will be conducting a formal section 610 review during the following 12 months. At this stage, we will add an entry to the Agenda in the prerulemaking section describing the review in more detail. We also will seek public comment on how best to lessen the impact of these rules and provide a name or docket to which public comments can be submitted. In some cases, the section 610 review may be part of another unrelated review of the rule. In such a case, we plan to clearly indicate which parts of the review are being conducted under section 610.

*Other Reviews*

The agency will also examine the specified rules to determine whether any other reasons exist for revising or revoking the rule or for rewriting the rule in plain language. In each Fall Agenda, the agency will also publish information on the results of the examinations completed during the previous year.

*FAA*

The Federal Aviation Administration, in addition to reviewing its rules in accordance with the schedule below, has established a process by which the public is asked for its comments on which rules need review the most. Any information that the FAA receives in connection with its annual section 610 analyses would, of course, also be reviewed in the spirit of E.O. 12866. In addition, in response to a recommendation of the White House Commission on Aviation Safety and Security, the FAA has completed a review of all its existing regulations to identify those in need of rewriting as performance-based or plain language regulations. The agency also reviewed ongoing regulatory projects and proposals to identify additional candidates for revision. In all, the agency reviewed 68 parts of the CFR, containing 3,884 sections, appendices, and Special Federal Aviation Regulations. In addition to using plain language in its current and future regulations, the FAA intends to revise those regulations identified in its study when it has the opportunity and resources to do so.

*FMCSA*

As noted in the Fall 2003 Semiannual Regulatory Agenda, FMCSA has begun a 5-year analysis and review of its regulations to eliminate duplication and unnecessary requirements and to clarify rules to help small businesses comply. The agency's 5-year review plan coincides with the Department's 10-year schedule for meeting Section 610 requirements.

*FTA*

FTA will undertake an analysis and review of its regulations to eliminate duplication and unnecessary requirements, to update and clarify its rules, and to bring them into conformity with the next statutory reauthorization.

**Part III- List of Pending Section 610 Reviews**

The Agenda identifies the pending DOT Section 610 Reviews by inserting (Section 610 Review) after the title for the specific entry. Also, a Government-wide list of section 610 reviews can be located in an index at the end of the Agenda. For further information on the pending reviews, see the Agenda entries.

**OFFICE OF THE SECRETARY**

**SECTION 610 AND OTHER REVIEWS**

| Year | Regulations To Be Reviewed | Analysis Year | Review Year |
|---|---|---|---|

| | | | |
|---|---|---|---|
| 1 | 14 CFR parts 200 through 212 | 1998 | 1999 |
| 2 | 14 CFR parts 213 through 232 | 1999 | 2000 |
| 3 | 14 CFR parts 234 through 254 | 2000 | 2001 |
| 4 | 14 CFR parts 255 through 298 and 49 CFR part 40 | 2001 | 2002 |
| 5 | 14 CFR parts 300 through 373 | 2002 | 2003 |
| 6 | 14 CFR parts 374 through 398 | 2003 | 2004 |
| 7 | 14 CFR part 399 and 49 CFR parts 1 through 11 | 2004 | 2005 |
| 8 | 49 CFR parts 17 through 28 | 2005 | 2006 |
| 9 | 49 CFR parts 29 through 39 and parts 41 through 89 | 2006 | 2007 |
| 10 | 49 CFR parts 91 through 99, 48 CFR parts 1201 through 1253, and new parts and subparts | 2007 | 2008 |

**Year 3 (2000) List of rules analyzed and a summary of the results**

14 CFR part 240 – Inspection of accounts and property

- Section 610: There is no SEIOSNOSE. The rule does not have any independent impact on small entities and primarily deals with internal agency procedure.
- Plain Language: OST's plain language review of this rule indicates a need for substantial revision because of out-of-date references to the Civil Aeronautics Board, its offices, and related statutes.
- General: This rule deals with the credentials used by "special agents" and auditors," who have authority under statute to inspect accounts and property of air carriers, foreign air carriers and ticket agents. The rule has not been substantially updated since 1975.

**Year 5 (2002) List of rules analyzed and a summary of the results**

14 CFR part 300 -- Rules of conduct in DOT proceedings under this chapter

- Section 610: This rule applies to small entities, but does not result in a substantial economic impact because it is procedural in nature.
- Plain Language: OST's plain language review of this rule indicates no need for substantial revision. The rule was last substantially revised in 2000.
- General: This rule sets for the rules of conduct for parties and DOT officials in aviation economic and enforcement proceedings.

14 CFR part 314 -- Employee protection program

- Section 610: There is no SEIOSNOSE. This rule does not apply to a significant number of small entities.
- Plain Language: DOT plans to remove this part to reflect the elimination of the underlying statutory authority for the program.
- General: This rule implements a provision of the Airline Deregulation Act of 1978 that established an employee protection program. The rule sets forth procedures for DOT to determine whether a qualifying bankruptcy or a major contraction of an air carriers has occurred as a result of the Airline Deregulation Act. Congress repealed the program effective August 7, 1998. Since then, DOT has lacked a statutory basis for action in this area.

14 CFR part 330 -- Procedures for compensation of air carriers

- Section 610: This rule has had a SEIOSNOSE. Under the rule, many small air carriers received compensation for losses incurred as a result of the terrorist attacks of September 11, 2001. DOT created a small carrier set-aside to provide expedited procedures and compensation for small air carriers.
- Plain Language: OST's plain language review of this rule indicates no need for substantial revision. The rule was last revised in 2002.
- General: This rule establishes procedures to compensate air carriers for specified losses incurred as a result of the terrorist attacks of September 11, 2001.

**Year 6 (2003) List of rules analyzed and a summary of the results**

14 CFR part 374 -- Implementation of the consumer credit protection act with respect to air carriers and foreign air carriers

- Section 610: There is no SEIOSNOSE. This rule does not apply to a significant number of small entities.
- Plain Language: OST's plain language review of this rule indicates no need for substantial revision. The rule was last substantially updated in 1997.
- General: This rule states DOT's responsibility to enforce air carrier and foreign air carrier compliance with specified provision of the Consumer Credit Protection Act and Regulations B and Z of the Board of Governors of the Federal Reserve System. As a result, air carriers and foreign air carriers must meet certain standards when engaging in consumer credit transactions or be subject to civil penalties.

14 CFR part 374a -- Extension of credit by airlines to Federal political candidates

- Section 610: There is no SEIOSNOSE. This rule does not apply to a significant number of small entities.
- Plain Language: OST's plain language review of this rule indicates a need for revision to eliminate some outdated references to the Civil Aeronautics Board and to clarify the rule generally. The rule was last revised in 1995.
- General: This rule regulates the extension of credit by air carriers to candidates for Federal office, or to any person on behalf of such a candidate, for goods furnished or services rendered in connection with the campaign of such candidate for nomination for election, or election to office.

14 CFR part 375 - Navigation of foreign civil aircraft within the United States

- Section 610: No SEIOSNOSE. The rule does not have a significant impact on a substantial number of small entities.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.
- General: This rule was last revised in 1986. We are currently in the process of proposing revisions to streamline certain aspects of the rule.

14 CFR part 377 - Continuance of expired authorizations by operation of law pending final determination of applications for renewal thereof

- Section 610: No SEIOSNOSE. The rule does not have a significant impact on a substantial number of small entities.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.
- General: This rule was last revised in 2000. If additional updates become desirable, changes will be proposed

14 CFR part 380 - Public Charters

- Section 610: No SEIOSNSE. This regulation does not have a significant impact on a substantial number of small entities.

- Plain Language: This regulation was totally revised in 1998 to simplify wording and reduce requirements for the applicants.
- General: This regulation requires Public Charter applicants to provide protection for their participant's funds and expectations.

14 CFR part 381 - Special Event Tours

- Section 610: No SEIOSNSE. This regulation does not have a significant impact on the substantial number of small entities.
- Plain Language: This regulation was revised in 1994, was written in plain language and contains no confusing or wordy language.
- General: This Part provides addition protection for participants attending sporting, social, religious, cultural or political events as Public Charters.

14 CFR part 389 - Fees and charges for special services

- Section 610: No SEIOSNOSE. The rule does not have a significant economic impact on a substantial number of small entities.
- Plain Language: We are reviewing this section to identify wordy or confusing language and will make appropriate revisions.
- General: Since this part has not been revised for a number of years, we will be eliminating some outdated and unnecessary sections and updating others.

14 CFR part 398 - Guidelines for individual determinations of basic essential air service

- Section 610: No SEIOSNOSE. The rule does not have an economic impact on a substantial number of small communities.
- Plain language: Where confusing or wordy language is identified, we will make revisions
- General: This section has not been revised since 1995. We will update consistent with current practice and propose streamlining by eliminating some outdated and unnecessary sections.

**Year 6 (2003) List of rules continuing to be analyzed**

14 CFR part 382 – Nondiscrimination on the basis of disability in air travel

14 CFR part 383 – Civil penalties

14 CFR part 385 -- Staff assignments and review of action under assignment

**Year 7 (Fall 2004) List of rules that will be analyzed during the next year**

14 CFR part 399 -- Statements of general policy

49 CFR part 1 -- Organization and delegation of powers and duties

49 CFR part 3 -- Official seal

49 CFR part 5 -- Rulemaking procedures

49 CFR part 6 -- Implementation of Equal Access to Justice Act in agency proceedings

49 CFR part 7 -- Public availability of information

49 CFR part 8 -- Classified information: Classification/declassification/access

49 CFR part 9 -- Testimony of employees of the Department and production of records in legal proceedings

49 CFR part 10 -- Maintenance of and access to records pertaining to individuals

49 CFR part 11 -- Protection of human subjects

**FEDERAL AVIATION ADMINISTRATION**

**SECTION 610 REVIEW PLAN**

| Year | Regulations To Be Reviewed | Analysis Year | Review Year |
|---|---|---|---|
| 1 | 14 CFR parts 1 through 21 | 1998 | 1999 |
| 2 | 14 CFR parts 23 through 34 | 1999 | 2000 |
| 3 | 14 CFR parts 35 through 49 | 2000 | 2001 |
| 4 * | 14 CFR parts 61 through 77 | 2001 | 2002 |
| 5 | 14 CFR parts 91 through 105 | 2002 | 2003 |
| 6 | 14 CFR parts 107 through 133 | 2003 | 2004 |
| 7 | 14 CFR parts 135 through 147 | 2004 | 2005 |
| 8 | 14 CFR parts 150 through 169 | 2005 | 2006 |
| 9 | 14 CFR parts 170 through 198 | 2006 | 2007 |
| 10 | 14 CFR parts 400 through 415 | 2007 | 2008 |

*** FAA will also review all other rules dealing with alcohol and drugs**

**Year 6 (Fall 2003) List of rules continuing to be analyzed**

14 CFR part 91 -- General operating and flight rules

14 CFR part 93 -- Special air traffic rules and airport traffic patterns

14 CFR part 95 -- IFR altitudes

14 CFR part 99 -- Security control of air traffic

14 CFR part 101 -- Moored balloons, kites, unmanned rockets and unmanned free balloons

14 CFR part 103 -- Ultralight vehicles

14 CFR part 105 -- Parachute operations

The agency was unable to perform these analyses during review year 6 due to the need to perform other high priority safety regulatory actions designed to further reduce the air carrier and general aviation accident rate. Addressing these issues required a level of agency resources that precluded carrying out the above planned analyses. The FAA recognizes the importance of reviewing the impact of existing rules on small entities and has taken action to assure that reviews will occur in year seven. The agency will also develop a schedule to assure that all FAA regulations are reviewed within the 10 year plan.

**Year 7 (Fall 2004) List of rules scheduled to be analyzed during the next year (Due to limited resources the analysis of these rules will be delayed)**

14 CFR part 141 -- Pilot schools

14 CFR part 142 -- Training centers

14 CFR part 145 -- Repair stations

14 CFR part 147 -- Aviation maintenance technician schools

## FEDERAL HIGHWAY ADMINISTRATION

*Federal-Aid Highway Program*

The FHWA has adopted regulations in title 23 of the CFR, chapter I, related to the Federal-aid highway program. These regulations implement and carry out the provisions of Federal law relating to the administration of Federal aid for highways. The primary law authorizing Federal aid for highways is chapter I of title 23 of the USC. Section 145 of title 23 expressly provides for a federally assisted State program. For this reason, the regulations adopted by the FHWA in title 23 of the CFR primarily relate to the requirements that States must meet to receive Federal funds for the construction and other work related to highways. Because the regulations in title 23 primarily relate to States, which are not defined as small entities under the Regulatory Flexibility Act, the FHWA believes that its regulations in title 23 do not have a significant economic impact on a substantial number of small entities. The FHWA solicits public comment on this preliminary conclusion.

### SECTION 610 AND OTHER REVIEWS

| Year | Regulations To Be Reviewed | Analysis Year | Review Year |
|---|---|---|---|
| 1 | None | 1998 | 1999 |
| 2 | None | 1999 | 2000 |
| 3 | 23 CFR parts 450, 657 and 771 | 2000 | 2001 |
| 4 | 23 CFR parts 1-260 | 2001 | 2002 |
| 5 | 23 CFR parts 420, 460-480 | 2002 | 2003 |
| 6 | 23 CFR part 500 | 2003 | 2004 |
| 7 | 23 CFR parts 600-656, 658-669 | 2004 | 2005 |
| 8 | 23 CFR parts 710-924 | 2005 | 2006 |
| 9 | 23 CFR parts 1200-1252 | 2006 | 2007 |
| 10 | New parts and subparts | 2007 | 2008 |

**Year 6 (Fall 2003) List of Rules analyzed and summary of the results**

23 CFR part 500 – Management and Monitoring Systems

- Section 610: No SEIOSNOSE. These rules apply primarily to State transportation agencies and have no significant impact on small entities.
- Plain Language: While FHWA's plain language review of this regulation indicates no need for substantial revision, the statutory basis for this regulation has been amended and, as such, the FHWA is considering revising the regulation.

**Year 7 (Fall 2004) List of Rule(s) that will be analyzed during the next year**

23 CFR part 620 – Engineering

23 CFR part 625 – Design Standards for Highways

23 CFR part 626 – Pavement Policy

23 CFR part 627 – Value Engineering

23 CFR part 630 – Preconstruction Procedures

23 CFR part 633 – Required Contract Provisions

23 CFR part 635 – Construction and Maintenance

23 CFR part 636 – Design-Build Contracting

23 CFR part 637 – Construction Inspection and Approval

23 CFR part 640 – Certification acceptance

23 CFR part 645 – Utilities

23 CFR part 646 – Railroads

23 CFR part 650 – Bridges, Structures, and Hydraulics

23 CFR part 652 – Pedestrian and Bicycle Accommodations and Projects

23 CFR part 655 – Traffic Operations

23 CFR part 656 – Carpool and Vanpool Projects

23 CFR part 658 – Truck size and weight, route designations—length, width and weight limitations

23 CFR part 660 – Special Programs (Direct Federal)

23 CFR part 661 – Indian Reservation Roads

23 CFR part 668 – Emergency Relief Program

23 CFR part 669 – Enforcement of Heavy Vehicle Use Tax

**FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**SECTION 610 AND OTHER REVIEWS**

| Year | Regulations To Be Reviewed | Analysis Year | Review Year |
|---|---|---|---|
| 1 | None | 1998 | 1999 |
| 2 | None | 1999 | 2000 |
| 3 | None | 2000 | 2001 |
| 4 | None | 2001 | 2002 |
| 5 | None | 2002 | 2003 |
| 6 | 49 CFR parts 372 subpart A, 381, 386, and 388-389 | 2003 | 2004 |
| 7 | 49 CFR parts 325, 350, 355, 382-385, 390-393, and 396-399 | 2004 | 2005 |
| 8 | 49 CFR parts 356, 367, 370- | 2005 | 2006 |

| | | | |
|---|---|---|---|
| | 371, 372 subparts B-C, 373-374, 376, and 379 | | |
| 9 | 49 CFR parts 360, 365-366, 368, 377-378, and 387 | 2006 | 2007 |
| 10 | 49 CFR 375, 395, and new parts and subparts | 2007 | 2008 |

**Year 6 (Fall 2004) List of rules analyzed and a summary of the results**

49 CFR part 372 - Subpart A – Exemptions

- Section 610: No SEIOSNOSE. These rules have no significant economic impact on a substantial number of small entities because they identify certain transportation exempt from economic regulation.
- Plain Language: This subpart is easy to read and understand; therefore, no rewrite is currently planned.
- General: This subpart contains provisions designed to reduce the economic impact on small entities.

49 CFR part 381 – Waivers, Exemptions and Pilot Programs

- Section 610: No SEIOSNOSE. These rules have no significant economic impact on a substantial number of small entities because they explain the requirements and procedures for submitting and handling requests for waivers and applications for exemptions and the initiation and administration of pilot programs.
- Plain Language: These rules were very clearly written.
- General: FMCSA adopted as final interim regulations in part 381 in 2004.

49 CFR part 386 – Rules of Practice for Motor Carrier, Broker, Freight Forwarder, and Hazardous Materials Proceedings

- Section 610: No SEIOSNOSE. These rules have no significant economic impact on a substantial number of small entities because they are procedural rules that apply in agency administrative enforcement proceedings for violations of the motor carrier safety regulations and the economic regulations.
- Plain Language: Where confusing or wordy language is identified, we will make revisions.
- General: FMCSA published a supplemental NPRM proposing revisions to part 386 in 2004.

49 CFR part 388 – Cooperative Agreements with States

- Section 610: No SEIOSNOSE. These regulations have no significant economic impact on a substantial number of small entities because they apply to States that are not small entities and govern how the agency enters into cooperative agreements with States.
- Plain Language: The text is clear and well organized; therefore, no rewrite is currently planned.
- General: Participation in these procedures is voluntary.

49 CFR part 389 – Rulemaking Procedures—Federal Motor Carrier Safety Regulations

- Section 610: No SEIOSNOSE. These regulations have no significant economic impact on a substantial number of small entities because they merely describe the agency's rulemaking procedures. Participation in these agency procedures is voluntary.
- Plain Language: The text is clear and well organized; therefore, no rewrite is currently planned.

- General: Participation in these procedures is voluntary.

**Year 7 (Fall 2005) List of rules to be analyzed during the next year**

49 CFR part 325 – Compliance with interstate motor carrier noise emission standards

49 CFR part 350 – Commercial motor carrier safety assistance program

49 CFR part 355 – Compatibility of State laws and regulations affecting interstate motor carrier operations

49 CFR part 382 – Controlled substances and alcohol use and testing

49 CFR part 383 – Commercial driver's license standards; requirements and penalties

49 CFR part 384 – State compliance with commercial driver's license program

49 CFR part 385 – Safety Fitness Procedures

49 CFR part 390 – Federal motor carrier safety regulations; general

49 CFR part 391 – Qualifications of drivers

49 CFR part 392 – Driving of commercial motor vehicles

49 CFR part 393 – Parts and accessories necessary for safety operation

49 CFR part 396 – Inspection, repair, and maintenance

49 CFR part 397 – Transportation of hazardous materials; driving and parking rules

49 CFR part 398 – Transportation of migrant workers

49 CFR part 399 – Employee safety and health standards

**NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION**

**SECTION 610 AND OTHER REVIEWS**

| Year | Regulations To Be Reviewed | Analysis Year | Review Year |
|---|---|---|---|
| 1 | 49 CFR parts 501 through 526 and 571.213 | 1998 | 1999 |
| 2 | 49 CFR parts 571.131, 571.217, 571.220-571.222 | 1999 | 2000 |
| 3 | 49 CFR parts 571.101-571.110, and 571.135 | 2000 | 2001 |
| 4 | 49 CFR parts 529-579, except 571 | 2001 | 2002 |
| 5 | 49 CFR parts 571.111-571.129, and 580-590 | 2002 | 2003 |
| 6 | 49 CFR part 571.201-571.212 | 2003 | 2004 |
| 7 | 49 CFR parts 571.214-571.219, except 571.217 | 2004 | 2005 |
| 8 | 49 CFR parts 591-594 | 2005 | 2006 |
| 9 | 49 CFR parts 571.223-571.304, 500, and new parts and subparts under 49 CFR | 2006 | 2007 |
| 10 | 23 CFR parts 1200-1300, and new parts and subparts | 2007 | 2008 |

**Year 5 (Fall 2002) List of rules analyzed and a summary of the results**

49 CFR part 571.111 – Rearview mirrors

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.112 – [Reserved]

49 CFR part 571.113 – Hood latch system

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.114 – Theft protection

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.115 – [Reserved]

49 CFR part 571.116 – Motor vehicle brake fluids

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.117 – Retreaded pneumatic tires

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.118 – Power-operated window, partition, and roof panel systems

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.119 – New pneumatic tires for motor vehicles with a GVWR of more than 4,536 kilograms (10,000 pounds) and motorcycles

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: This rule is being amended using plain language techniques. Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.120 – Tire selection and rims for motor vehicles with a GVWR of more than 4,536 kilograms (10,000 pounds)

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.121 – Air brake systems

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.122 – Motorcycle brake systems

Section 610: No SEIOSNOSE. No small entities are affected.

- Plain Language: This rule is being amended using plain language techniques. Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.123 – Motorcycle controls and displays

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.124 – Accelerator control systems

- Section 610: No SEIOSNOSE. No small entities are affected.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.125 – Warning devices

- Section 610: No SEIOSNOSE. No small entities are affected.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.126 – 571.128 – [Reserved]

49 CFR part 571.129 – New non-pneumatic tires for passenger cars

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: This rule is revised using plain language techniques. Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 580 – Odometer disclosure requirements

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 581 – Bumper standards

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: This rule is being amended using plain language techniques. Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 582 – Insurance cost information regulation

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make

revisions.

49 CFR part 583 – Automobile parts content labeling

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 585 – Advanced air bag phase-in reporting requirements

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 586 – Side impact phase-in reporting requirements

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 587 – Deformable barriers

- Section 610: No SEIOSNOSE. The rule does not have a significant economic impact on a substantial number of small entities.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 588 – Child restraint systems recordkeeping requirements

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

**Year 6 (Fall 2003) List of rules analyzed and a summary of the results**

49 CFR part 571.201 – Occupant protection in interior impact

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.202 – Head restraints

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.203 – Impact protection for the driver from the steering control system

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.204 – Steering control rearward displacement

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.205 – Glazing materials

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.206 – Door locks and door retention components

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.207 – Seating systems

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: This rule is being amended using plain language techniques. Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.208 – Occupant crash protection

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.209 – Seat belt assemblies

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.210 – Seat belt assembly anchorages

- Section 610: No SEIOSNOSE. No small entities are affected.
- Plain Language: This rule is being amended using plain language techniques. Where confusing or wordy language has been identified, we will make revisions.

49 CFR part 571.211 – [Reserved]

49 CFR part 571.212 – Windshield mounting

- Section 610: No SEIOSNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.

**Year 7 (Fall 2004) List of Rules that will be analyzed during the next year**

49 CFR parts 571.214 – Side impact protection

49 CFR parts 571.215 – [Reserved]

49 CFR parts 571.216 – Roof crush resistance

49 CFR parts 571.218 – Motorcycle helmets

49 CFR parts 571.219 – Windshield zone intrusion

**FEDERAL RAILROAD ADMINISTRATION**

**SECTION 610 AND OTHER REVIEWS**

| Year | Regulations To Be Reviewed | Analysis Year | Review Year |
|---|---|---|---|
| 1 | 49 CFR parts 200 through 201 | 1998 | 1999 |
| 2 | 49 CFR parts 207, 209, 211, 215, and 256 | 1999 | 2000 |
| 3 | 49 CFR parts 210, 212, 214, and 217 | 2000 | 2001 |
| 4 | 49 CFR part 219 | 2001 | 2002 |
| 5 | 49 CFR parts 218 and 221 | 2002 | 2003 |
| 6 | 49 CFR parts 216 and 228 through 229 | 2003 | 2004 |
| 7 | 49 CFR parts 223 and 233 | 2004 | 2005 |
| 8 | 49 CFR parts 225, 231, and 234 | 2005 | 2006 |
| 9 | 49 CFR parts 235 through 236, 250, 260, and 266 | 2006 | 2007 |
| 10 | 49 CFR parts 213, 220, 230, 232, 239, 240, and 265 | 2007 | 2008 |

**Year 6 (Fall 2003) List of Rules analyzed and a summary of the results**

49 CFR part 216 – Special Notice and Emergency Order Procedures: Railroad Track, Locomotive and Equipment

- Section 610: There is no SEIOSNOSE. The rule only applies when a railroad freight car is not in conformity with the FRA Freight Car Safety Standards; when a locomotive is not safe to operate; when railroad passenger equipment is not in conformity with the FRA Passenger Equipment Safety Standards; or when track does not comply with the requirements for the class at which it is being operated. Since the promulgation of the rule in 1976, a total of 23 Emergency Orders to remove track from service have been issued, only two of which were for small railroads. After making the necessary repairs and receiving FRA's certification of safety, these railroads resumed operations. Also, since the smaller railroads normally do not operate in speed ranges above what is established by the FRA for Class I track, small railroads rarely receive Special Notices for Repairs related to track class.
- Plain Language: FRA's plain language review of this rule indicates no need for substantial revision.
- General: Since the rule deals with Special Notices for Repairs of railroad freight cars, locomotives, passenger equipment and track class, and provides for the issuance and review of Emergency Orders for removing dangerously substandard track from service, it provides safety and protection for railroad employees and the public.

49 CFR part 228 – Hours of Service of Railroad Employees

- Section 610: There is no SEIOSNOSE. Since small railroads may extend their employee service hours, on a limited basis, up to a total of 16 hours worked in any 24-hour period, this rule will not create any disproportionate economic burden.
- Plain Language: FRA's plain language review of this rule indicates no need for substantial revision.
- General: Since the rule prescribes reporting and record keeping requirements with respect to the hours of service of each railroad employee and establishes standards and procedures concerning the construction or reconstruction of employee sleeping quarters, it promotes the safety of railroad operations and employees.

49 CFR part 229 – Railroad Locomotive Safety Standards

- Section 610: There is a SEIOSNOSE. These are minimum Federal standards for railroad locomotive safety. The FRA will conduct a formal review to identify whether opportunities exist to reduce the burden on small railroads without compromising safety standards.
- Plain Language: FRA's plain language review of this rule indicates that there is no need for substantial revision.
- General: Since the rule prescribes minimum Federal safety standards for all locomotives except those propelled by steam power, these regulations are necessary to achieve effective and improved compliance with railroad locomotive safety standards, and to minimize casualties.

**Year 7 (Fall 2004) List of Rules that will be analyzed during the next year**

49 CFR part 223 – Safety glazing regulations

49 CFR part 233 – Signal system reporting regulations

**FEDERAL TRANSIT ADMINISTRATION**

**SECTION 610 AND OTHER REVIEWS**

| Year | Regulations To Be Reviewed | Analysis Year | Review Year |
|---|---|---|---|
| 1 | None | 1998 | 1999 |
| 2 | None | 1999 | 2000 |
| 3 | None | 2000 | 2001 |
| 4 | 49 CFR parts 661 and 665 | 2001 | 2002 |
| 5 | None | 2002 | 2003 |
| 6 | None | 2003 | 2004 |
| 7 | 49 CFR parts 601 and 659 | 2004 | 2005 |
| 8 | 49 CFR parts 604 and 605 | 2005 | 2006 |
| 9 | 49 CFR parts 661 and 665 | 2006 | 2007 |
| 10 | 49 CFR parts 624 and 633 | 2007 | 2008 |

**Year 7 (Fall 2004) List of Rules that will be analyzed during the next year**

49 CFR part 601 -- Organization, Function, and Procedures

49 CFR part 659 -- Rail Fixed Guideway Systems; State Safety Oversight

**MARITIME ADMINISTRATION**

**SECTION 610 AND OTHER REVIEWS**

| Year | Regulations To Be Reviewed | Analysis Year | Review Year |
|---|---|---|---|
| 1 | 46 CFR parts 201 through 207 | 1998 | 1999 |
| 2 | 46 CFR parts 221 through 232 | 1999 | 2000 |
| 3 | 46 CFR parts 249 through 295 | 2000 | 2001 |
| 4 | 46 CFR part 298 | 2001 | 2002 |
| 5 | 46 CFR parts 307 through 310 | 2002 | 2003 |
| 6 | 46 CFR parts 315 through 339 | 2003 | 2004 |
| 7 | 46 CFR parts 340 and 347 | 2004 | 2005 |
| 8 | 46 CFR parts 349 through 380 | 2005 | 2006 |
| 9 | 46 CFR parts 381 through 387 | 2006 | 2007 |
| 10 | 46 CFR parts 390 through 391 | 2007 | 2008 |

**Year 6 (Fall 2003) List of rules analyzed and a summary of the results.**

46 CFR part 315 -- Agency agreements and appointment of agents

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 317 -- Bonding of ship's personnel

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 324 -- Procedural rules for financial transactions under Agency agreements

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: MARAD will rewrite the regulation using plain language techniques when the opportunity and resources become available.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 325 -- Procedure to be followed by general agents in preparation of invoices and payment of compensation pursuant to provisions of NSA Order No. 47

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 326 -- Marine protection and indemnity insurance under agreements with agents

- Section 610: No SEISNOSE. The rule does not have a significant economic impact on a substantial number of small entities.
- Plain Language: MARAD will rewrite the regulation using plain language techniques when the opportunity and resources become available.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 327 -- Seamen's claims; administrative action and litigation

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 328 -- Slop chests

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 329 -- Voyage data

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: MARAD will rewrite the regulation using plain language techniques when the opportunity and resources become available.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 330 -- Launch services

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: MARAD will rewrite the regulation using plain language techniques when the opportunity and resources become available.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 332 -- Repatriation of seamen

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: MARAD will rewrite the regulation using plain language techniques when the opportunity and resources become available.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 335 -- Authority and responsibility of general agents to undertake emergency repairs

in foreign ports

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: MARAD will rewrite the regulation using plain language techniques when the opportunity and resources become available.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 336 -- Authority and responsibility of general agents to undertake in continental United States ports voyage repairs and service equipment of vessels operated for the account of the National Shipping Authority under general agency agreement

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: MARAD will rewrite the regulation using plain language techniques when the opportunity and resources become available.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 337 -- General agent's responsibility in connection with foreign repair custom's entries

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: MARAD will rewrite the regulation using plain language techniques when the opportunity and resources become available.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 338 -- Procedure for accomplishment of vessel repairs under National Shipping Authority master lump sum repair contract - NSA-LUMPSUMREP

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: MARAD will rewrite the regulation using plain language techniques when the opportunity and resources become available.
- General: We will continue to review these regulations and make changes when necessary.

46 CFR part 339 -- Procedure for accomplishment of ship repairs under National Shipping Authority individual contract for minor repairs – NSA-WORKSMALREP

- Section 610: No SEISNOSE. Some small entities may be affected, but the economic impact on small entities will not be significant.
- Plain Language: Where confusing or wordy language has been identified, we will make revisions.
- General: We will continue to review these regulations and make changes when necessary.

**Year 7 (Fall 2004) List of rules that will be analyzed during the next year**

46 CFR part 340 -- Priority use and allocation of shipping services, containers and chassis, and port facilities and services for national security and national defense related operations

46 CFR part 345 -- Restrictions upon the transfer or change in use or in terms governing utilization of port facilities

46 CFR part 346 -- Federal port controllers

46 CFR part 347 -- Operating contract

**PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION (PHMSA)**

**SECTION 610 AND OTHER REVIEWS**

| Year | Regulations To Be Reviewed | Analysis Year | Review Year |
|---|---|---|---|
| 1 | 49 CFR sections 171.15, 171.16 (incident reports) | 1998 | 1999 |
| 2 | 49 CFR parts 106 and 107 (hazardous materials safety procedures), 171 (general hazmat requirements), 190 (pipeline safety procedures), and 195 (hazardous liquid pipeline corrosion control) | 1999 | 2000 |
| 3 | 49 CFR parts 174, 177 (rail and highway carriage), 191 (gas pipeline transportation reports), and 192 (gas pipeline corrosion control) | 2000 | 2001 |
| 4 | 49 CFR parts 176 (vessel carriage) and 199 (pipeline employee drug and alcohol testing) | 2001 | 2002 |
| 5 | 49 CFR parts 172, 173, 174, 175, 176, 177, and 178 (radioactive material) | 2002 | 2003 |
| 6 | 49 CFR parts 172, 173, 174, 176, and 178 (explosives), and 193 (liquefied natural gas facilities), and parts 172, 173, 178, and 180 (cylinders) | 2003 | 2004 |
| 7 | 49 CFR 173 (shipper requirements) and 194 (onshore oil pipeline response plans) | 2004 | 2005 |
| 8 | 49 CFR parts 110 (training and planning grants), 178 (non-bulk packaging) and 195 (hazardous liquid pipeline transportation) | 2005 | 2006 |
| 9 | 49 CFR parts 178 through 180 (bulk packaging) and 198 (State pipeline safety grants) | 2006 | 2007 |
| 10 | 49 CFR parts 172 (communications, emergency response, training and hazmat table) and 175 (air carriage) | 2007 | 2008 |

**Year 6 (Fall 2003) List of rules analyzed and a summary of results**

***Note 1: Those sections of the following parts that pertain to the transportation of explosives only***

49 CFR part 172 - Hazardous Materials Table, Special Provisions, Hazardous Materials Communications, Emergency Response Information, and Training Requirements

- Section 610: No SEIOSNOSE. The requirements apply to persons who offer for transportation or transport explosive materials in commerce. While the regulations apply to a substantial number of small entities, they do not have a significant economic impact on those entities. The requirements have little or no impact on entry to or exit from the industry. Moreover, requirements generally are consistent with international transportation standards, thereby facilitating international transportation and trade, and the regulations permit shippers to take advantage of exceptions for certain types and

amounts of material shipped.

- Plain language: As resources permit, PHMSA will rewrite regulations using plain language techniques.
- General: PHMSA will consider comments provided by industry.

49 CFR part 173 - Shippers – General Requirements for Shipments and Packagings

- Section 610: No SEIOSNOSE. The requirements apply to persons who offer for transportation or transport explosive materials in commerce. While the regulations apply to a substantial number of small entities, they do not have a significant economic impact on those entities. The requirements have little or no impact on entry to or exit from the industry. Moreover, requirements generally are consistent with international transportation standards, thereby facilitating international transportation and trade, and the regulations permit shippers to take advantage of exceptions for certain types and amounts of material shipped.
- Plain language: As resources permit, PHMSA will rewrite regulations using plain language techniques.
- General: PHMSA will consider comments provided by industry.

49 CFR part 174 - Carriage by Rail

- Section 610: No SEIOSNOSE. The requirements apply to persons who offer for transportation or transport explosive materials in commerce. While the regulations apply to a substantial number of small entities, they do not have a significant economic impact on those entities. The requirements have little or no impact on entry to or exit from the industry. Moreover, requirements generally are consistent with international transportation standards, thereby facilitating international transportation and trade, and the regulations permit shippers to take advantage of exceptions for certain types and amounts of material shipped.
- Plain language: As resources permit, PHMSA will rewrite regulations using plain language techniques.
- General: PHMSA will consider comments provided by industry.

49 CFR part 175 - Carriage by Aircraft

- Section 610: No SEIOSNOSE. The requirements apply to persons who offer for transportation or transport explosive materials in commerce. While the regulations apply to a substantial number of small entities, they do not have a significant economic impact on those entities. The requirements have little or no impact on entry to or exit from the industry. Moreover, requirements generally are consistent with international transportation standards, thereby facilitating international transportation and trade, and the regulations permit shippers to take advantage of exceptions for certain types and amounts of material shipped.
- Plain language: As resources permit, PHMSA will rewrite regulations using plain language techniques.
- General: PHMSA will consider comments provided by industry.

49 CFR part 176 - Carriage by Vessel

- Section 610: No SEIOSNOSE. The requirements apply to persons who offer for transportation or transport explosive materials in commerce. While the regulations apply to a substantial number of small entities, they do not have a significant economic impact on those entities. The requirements have little or no impact on entry to or exit from the industry. Moreover, requirements generally are consistent with international transportation standards, thereby facilitating international transportation and trade, and the regulations permit shippers to take advantage of exceptions for certain types and amounts of material shipped.
- Plain language: As resources permit, PHMSA will rewrite regulations using plain language techniques.
- General: PHMSA will consider comments provided by industry.

49 CFR part 178 - Specifications for Packagings

- Section 610: No SEIOSNOSE. The requirements apply to persons who offer for transportation or transport explosive materials in commerce. While the regulations apply to a substantial number of small entities, they do not have a significant economic impact on those entities. The requirements have little or no impact on entry to or exit from the industry. Moreover, requirements generally are consistent with international transportation standards, thereby facilitating international transportation and trade, and the regulations permit shippers to take advantage of exceptions for certain types and amounts of material shipped.
- Plain language: As resources permit, PHMSA will rewrite regulations using plain language techniques.
- General: PHMSA will consider comments provided by industry.

***Note 2: Those sections of the following parts that pertain to the transportation of hazardous materials in cylinders only***

49 CFR part 172 - Hazardous Materials Table, Special Provisions, Hazardous Materials Communications, Emergency Response Information, and Training Requirements

- Section 610: No SEIOSNOSE. While the requirements applicable to cylinders apply to a substantial number of small entities, the economic impact on those entities is not significant. The regulations incorporate by reference a number of industry consensus standards concerning requirements for the design, manufacture, and requalification of cylinders. Incorporation of material by reference reduces the regulatory burden on persons who offer hazardous material for transportation and persons who transport hazardous materials in commerce. Industry standards developed and adopted by consensus are accepted and followed by the industry; thus, their inclusion in the regulations assures that the industry is not forced to comply with a different set of standards to accomplish the same safety goal. Because the HMR incorporate industry standards for the manufacture and maintenance of cylinders, the incremental cost of transporting hazardous materials in cylinders under the HMR (that is, the costs resulting from compliance with HMR manufacture and maintenance requirements over and above the costs a company would incur absent the HMR) are minimal. Further, the regulations permit shippers and carriers to apply for exemptions to the regulations, which permit the use of advanced technological developments and account for unique operational circumstances.
- Plain language: As resources permit, PHMSA will rewrite regulations using plain language techniques.
- General: PHMSA will consider comments provided by industry.

49 CFR part 173 - Shippers -- General Requirements for Shipments and Packagings

- Section 610: No SEIOSNOSE. While the requirements applicable to cylinders apply to a substantial number of small entities, the economic impact on those entities is not significant. The regulations incorporate by reference a number of industry consensus standards concerning requirements for the design, manufacture, and requalification of cylinders. Incorporation of material by reference reduces the regulatory burden on persons who offer hazardous material for transportation and persons who transport hazardous materials in commerce. Industry standards developed and adopted by consensus are accepted and followed by the industry; thus, their inclusion in the regulations assures that the industry is not forced to comply with a different set of standards to accomplish the same safety goal. Because the HMR incorporate industry standards for the manufacture and maintenance of cylinders, the incremental cost of transporting hazardous materials in cylinders under the HMR (that is, the costs resulting from compliance with HMR manufacture and maintenance requirements over and above the costs a company would incur absent the HMR) are minimal. Further, the regulations permit shippers and carriers to apply for exemptions to the regulations, which permit the use of advanced technological developments and account for unique operational

circumstances.

- Plain language: As resources permit, PHMSA will rewrite regulations using plain language techniques.
- General: PHMSA will consider comments provided by industry.

49 CFR part 178 - Specifications for Packagings

- Section 610: No SEIOSNOSE. While the requirements applicable to cylinders apply to a substantial number of small entities, the economic impact on those entities is not significant. The regulations incorporate by reference a number of industry consensus standards concerning requirements for the design, manufacture, and requalification of cylinders. Incorporation of material by reference reduces the regulatory burden on persons who offer hazardous material for transportation and persons who transport hazardous materials in commerce. Industry standards developed and adopted by consensus are accepted and followed by the industry; thus, their inclusion in the regulations assures that the industry is not forced to comply with a different set of standards to accomplish the same safety goal. Because the HMR incorporate industry standards for the manufacture and maintenance of cylinders, the incremental cost of transporting hazardous materials in cylinders under the HMR (that is, the costs resulting from compliance with HMR manufacture and maintenance requirements over and above the costs a company would incur absent the HMR) are minimal. Further, the regulations permit shippers and carriers to apply for exemptions to the regulations, which permit the use of advanced technological developments and account for unique operational circumstances.
- Plain language: As resources permit, PHMSA will rewrite regulations using plain language techniques.
- General: PHMSA will consider comments provided by industry.

49 CFR part 180 - Continuing Qualification and Maintenance of Packagings

- Section 610: No SEIOSNOSE. While the requirements applicable to cylinders apply to a substantial number of small entities, the economic impact on those entities is not significant. The regulations incorporate by reference a number of industry consensus standards concerning requirements for the design, manufacture, and requalification of cylinders. Incorporation of material by reference reduces the regulatory burden on persons who offer hazardous material for transportation and persons who transport hazardous materials in commerce. Industry standards developed and adopted by consensus are accepted and followed by the industry; thus, their inclusion in the regulations assures that the industry is not forced to comply with a different set of standards to accomplish the same safety goal. Because the HMR incorporate industry standards for the manufacture and maintenance of cylinders, the incremental cost of transporting hazardous materials in cylinders under the HMR (that is, the costs resulting from compliance with HMR manufacture and maintenance requirements over and above the costs a company would incur absent the HMR) are minimal. Further, the regulations permit shippers and carriers to apply for exemptions to the regulations, which permit the use of advanced technological developments and account for unique operational circumstances.
- Plain language: As resources permit, PHMSA will rewrite regulations using plain language techniques.
- General: PHMSA will consider comments provided by industry.

**Year 6 (Fall 2003) List of rules continuing to be analyzed**

49 CFR part 193 -- Liquefied natural gas facilities: Federal safety standards

**Year 7 (Fall 2004) List of rules that will be analyzed during the next year**

49 CFR part 173 – Shippers – general requirements for shipments and packagings

49 CFR part 194 – Response plans for onshore oil pipelines

**RESEARCH AND INNOVATIVE TECHNOLOGY ADMINISTRATION (RITA)**

**SECTION 610 AND OTHER REVIEWS**

| Year | Regulations To Be Reviewed | Analysis Year | Review Year |
|---|---|---|---|
| 1 | 14 CFR part 241, form 41 | 1998 | 1999 |
| 2 | 14 CFR part 241, schedule T-100, and part 217 | 1999 | 2000 |
| 3 | 14 CFR part 298, 49 CFR 1420 | 2000 | 2001 |
| 4 | 14 CFR part 241, section 19-7 | 2001 | 2002 |
| 5 | 14 CFR part 291 | 2002 | 2003 |
| 6 | 14 CFR part 234 | 2003 | 2004 |
| 7 | 14 CFR part 249 | 2004 | 2005 |
| 8 | 14 CFR part 248 | 2005 | 2006 |
| 9 | 14 CFR part 250 | 2006 | 2007 |
| 10 | 14 CFR part 374a, ICAO | 2007 | 2008 |

**Year 6 (Fall 2003) List of Rules continuing to be analyzed**

14 CFR part 234 -- Airline service quality performance reports

**Year 7 (Fall 2004) List of Rules that will be analyzed during the next year**

14 CFR part 234 -- Preservation of air carrier records

**SAINT LAWRENCE SEAWAY DEVELOPMENT CORPORATION**

**SECTION 610 AND OTHER REVIEWS**

| Year | Regulations To Be Reviewed | Analysis Year | Review Year |
|---|---|---|---|
| 1 | 33 CFR parts 401 through 403 | 1998 | 1999 |

*SLSDC has completed all its reviews*

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary of Transportation

[Docket No. OST–2005–20112]

### Notice of Regulatory Review

**AGENCY:** Office of the Secretary of Transportation (OST), DOT.

**ACTION:** Notice.

**SUMMARY:** The Department of Transportation intends to conduct a review of its existing regulations and its current Regulatory Agenda. As part of this review, the Department invites the public to participate in a comment process designed to (1) help the Department improve its rules to make them more effective and less costly or burdensome, (2) identify rules no longer needed and/or new rules that may be needed, and (3) help the Department prioritize its rulemaking activities. The Department also intends to hold a public meeting to discuss and consider the public's comments.

**DATES:** Comments should be received on or before April 29, 2005. Late-filed comments will be considered to the extent practicable. In addition, the Department intends to hold a public meeting on April 12 and 19, 2005, in Washington, DC, to discuss public comments. Commenters wishing to have time allocated to them at the public meeting should submit initial comments by February 25, 2005, and clearly indicate their desire to have time allocated at the public meeting.

**ADDRESSES:** You may submit comments (identified by DOT DMS Docket Number OST–2005–20112) by any of the following methods:

- Web Site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 202–493–2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

*Instructions:* All submissions must include the name of the DOT agency that has issued the rule to which the comment pertains and the docket number for this notice. Note that all comments received will be posted without change to *http://dms.dot.gov* including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

*Docket:* For access to the docket to read background documents or comments received, go to http://dms.dot.gov at any time or to Room PL–401 on the plaza level of the Nassif

Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You can access the docket for this notice by inserting the five-digit docket number into the DMS "quick search" function.

**FOR FURTHER INFORMATION CONTACT:** Karen Starring, Attorney Advisor, Office of General Counsel, Department of Transportation, 400 7th St., SW., Room 10424, Washington, DC 20590–0001. Telephone (202) 366–4723. E-mail *karen.starring@ost.dot.gov.*

**SUPPLEMENTARY INFORMATION:**

**Background**

In addition to the Office of the Secretary (OST), the Department of Transportation (Department or DOT) includes the Bureau of Transportation Statistics (BTS) and the following operating administrations (OAs): Federal Aviation Administration (FAA); Federal Highway Administration (FHWA); Federal Motor Carrier Safety Administration (FMCSA); Federal Railroad Administration (FRA); Federal Transit Administration (FTA); Maritime Administration (MARAD); National Highway Traffic Safety Administration (NHTSA); Research and Special Programs Administration (RSPA); and St. Lawrence Seaway Development Corporation (SLSDC). While RSPA and BTS are being reorganized into two new operating administrations as the result of recently-enacted legislation, for commenters' convenience we believe it is sensible to have comments refer to the names of DOT organizations as they were when rules were promulgated.

Each of these elements of DOT has statutory responsibility for a wide range of regulations. For example, DOT regulates safety in the aviation, motor carrier, railroad, mass transit, motor vehicle, commercial space, and pipeline transportation areas. DOT regulates aviation consumer and economic issues, and provides financial assistance and writes the necessary implementing rules for programs involving highways, airports, mass transit, the maritime industry, railroads, and motor vehicle safety. It writes regulations carrying out such disparate statutes as the Americans with Disabilities Act and the Uniform Time Act. Finally, DOT has responsibility for developing policies that implement a wide range of regulations that govern internal programs such as acquisition and grants, access for the disabled, environmental protection, energy conservation, information technology, occupational safety and health, property asset management, seismic safety, security, and the use of aircraft and vehicles.

Improvement of our regulations is a continuous focus of the Department. There should be no more regulations than necessary and those that are issued should be simpler, more comprehensible, and less burdensome. Most rules are issued following notice to the public and opportunity for comment. Once issued, rules should be periodically reviewed and revised, as needed, to assure that they continue to meet the needs for which they originally were designed.

To help implement this goal, the Department wants to obtain written public comments and to hold a public meeting in Washington, DC, on April 12 and 19, 2005 on how to (1) improve our rules to be more effective and less costly or burdensome, (2) identify rules no longer needed and/or new rules that may be needed, and (3) help prioritize our current rulemaking activities, which are set forth in our semi-annual Regulatory Agenda (69 FR 73492, Dec. 13, 2004).

The Department's General Counsel will preside over the public meeting. Senior officials of the Department's operating administrations also will attend this meeting. Because seating may be limited, the Department will reserve seats for participants, and seats for attendees will be available on a first-come, first-serve basis. Please note that seats may become available throughout the public meeting as attendees come and go.

**Existing Reviews of Rules**

The Department regularly makes a conscientious effort to review its rules. We accomplish this in a number of ways. First, we have a 10-year plan for the review of our existing regulations, (see Appendix D to our semi-annual Regulatory Agenda published in the **Federal Register** on December 13, 2004 (69 FR 73492)). We regularly invite public participation in those reviews as well as seeking general suggestions on rules that should be revised or revoked. Under 49 CFR part 5, anyone may petition the Department for rulemaking or for an amendment or exemption to a rule. Some of our operating administrations may also conduct periodic public reviews to focus on specific issues or to obtain comments on rulemaking priorities. For example, on February 25, 2004, FAA requested comments from the public to assist it in identifying those regulations currently in effect that it should amend, remove, or simplify (*see* 69 FR 8575). It is not necessary for the commenters to resubmit those comments unless the commenter desires to provide additional information or to request time during the public meeting. The Department will obtain copies of comments submitted in response to FAA's request and include them in its review.

We have also worked closely with the Office of Management and Budget (OMB) to identify rules appropriate for review and reform. Beginning in 2001, OMB has sought comments from the public on Federal agency rules and guidance that should be reviewed. In 2002, OMB initially referred 38 rules to the Department as possible candidates for reform. Subsequently, OMB has referred additional rules. As of OMB's 2003 report to Congress, DOT had completed, initiated, or planned action for 27 regulatory items, was still considering whether to take action on 13 items, and had decided against taking further action on 13 items. More recently, in connection with OMB's 2004 report to Congress, OMB has provided DOT with another 13 items that relate to manufacturing, and we are considering those. Any items previously submitted to OMB in writing need not be resubmitted, as the Department has received those.

As with regard to the OMB regulatory review nominations process, the Department takes seriously its task of ensuring that its regulations meet the objectives of efficiency, effectiveness, fairness, and practicality. At the same time, it would be very useful to encourage broader participation in the review of the Department's rules than we have received in the past. For example, most of the comments to OMB about the Department's rules came from one public advocacy organization, one state Department of Transportation, and one aircraft manufacturer. While we welcome and appreciate the input of those commenters, we note that other stakeholder groups, associations, and individuals provided only a few comments. Most trade associations, interest groups, and consumer groups, and most individual regulated parties—whether public or private sector organizations—did not comment through the OMB process. The Department strongly encourages all parties affected by DOT regulations to comment in response to this notice, so that the Department has as much information as possible on which to base decisions about the future course of its regulatory reform and improvement efforts.

**Our Current Review Plan**

We recognize that, in carrying out our important regulatory responsibility, DOT has a large amount of rulemaking

activity. For example, we have 89 ongoing significant rulemaking entries on our current Regulatory Agenda and we have issued 85 significant final rules in the last three years. Thus, in making plans for the next few years, the Secretary wants the Department to add to and improve our earlier efforts to review our existing rules, and to provide this additional opportunity for public participation. Hopefully, this will also provide a better opportunity for an exchange of views among participants in the process. For example, the public meeting will provide an opportunity for those affected by our regulations to directly communicate with the Department's senior officials. We are looking forward to positive exchanges that will provide us with a "real world" perspective and data, with in-depth analysis of perceived problems.

For existing regulations, public comments might usefully address, among other things, the following factors: (1) The opportunity to simplify or clarify language in a regulation; (2) the opportunity to eliminate overlapping and duplicative regulations, including those that require repetitive filings for conducting business with the Department; (3) the opportunity to eliminate conflicts and inconsistencies in the Department's regulations and those of its agencies; (4) the opportunity to eliminate outdated regulations; (5) the opportunity to reconsider the burdens imposed on those directly or indirectly affected by the regulation and, specifically, those that are costly when compared to the benefit provided; (6) the opportunity to revise regulations in which technology, economic conditions or other factors have changed in the area affected by the regulation; (7) the opportunity to reconsider burdens imposed on small entities, and (8) the opportunity to reconsider federalism or tribalism impacts and pre-emption issues. The Department is also interested in comments about DOT rules that potentially duplicate or conflict with the rules of other Federal agencies or state, local, or tribal governmental bodies. The Department is specifically interested in the public's suggestions for modifications to existing regulations, that would make the rules more cost-effective, cost-beneficial, or less costly; that would effectively improve public benefits; or that would temper disproportionate impacts. Comments will be most helpful if they reference a specific regulation, by CFR cite, and provide the Department information on what needs fixing and why. Comments do not necessarily need to address how to fix the perceived problem, though such comments are welcome.

In addition, the Department seeks comments on its Regulatory Agenda for the upcoming year. Specifically, the Department seeks public comment on the Department's priorities. Are there rulemakings on which we should place more or less emphasis or give a higher priority in scheduling? Are the Department's rulemaking priorities in line with public need?

In order to make the public meeting beneficial, the Department requests careful analysis of specific regulations and detailed written comments. It is our intent that the public meeting will provide an opportunity for the General Counsel and other Department officials to interact with individuals or stakeholder representatives and to seek clarification and follow-up on comments. To enable those officials to effectively participate in the public meeting, they will need some information in advance of the hearing. As a result, we are establishing the following process.

1. Suggestions for Discussion at Public Meeting:

a. By the end of the first 30 days of the comment period, the Department requests that commenters submit their suggestions for discussion at the public meeting and indicate whether they want time allocated to them at the public meeting. The Department reserves the right to allocate time as necessary to ensure that as many commenters as possible may participate in the public meeting in a meaningful manner. In the event that it becomes necessary to limit the number of participants, the Department initially plans to do so in a first-come, first-serve manner.

b. The initial comments from those intending to participate in the public meeting should contain enough details to permit DOT officials to sufficiently prepare and ask questions.

c. The initial comments may be augmented anytime before the end of the full comment period.

d. Anyone wishing to participate in the public meeting who needs accessibility accommodations, including sign language interpreters, should contact the Department as soon as possible as directed under the For Further Information Contact heading above.

2. Public Meeting:

a. After receiving this initial public comment, the Department will organize those suggestions (including overlapping or duplicate suggestions) by topic and Operating Administration (OA) for discussion during the public meeting.

b. By having the public meeting after receiving initial public comment and by organizing the discussion around topics and OAs, the Department will be in a better position to discuss with commenters the issues with regard to a particular rule, broad category of rules, or affected group or industry, rather than merely recording public comment for later review.

c. The Department plans to hold a public meeting on April 12 and 19, 2005 in Washington, DC, and will provide at least one week's notice of the hearing outline.

d. The meeting will be chaired by the DOT's General Counsel, who has general oversight of the DOT's rulemaking. Other DOT officials will, at a minimum, attend those portions of the meeting pertaining to their areas of responsibility.

3. Other Written Comments:

a. The Department will continue to accept comments through April 29, 2005. Those who do not wish to attend the public meeting may, of course, submit comments at any time during the comment period.

b. This additional time will also allow those who did participate in the meeting to supplement their earlier comments either on their own initiative or in response to comments or questions at the hearing.

c. It will also allow anyone to rebut or otherwise respond to earlier comments submitted in writing or made at the meeting.

4. Follow-up Action by DOT:

a. We will place a transcript of the public meeting in our public docket (*http://dms.dot.gov*) as soon as possible after the end of the hearing. We note that because the docket is Internet accessible, it should allow those with Internet access to review those proceedings as well as other comments. We hope this will further improve the interchange of ideas.

b. This review will provide meaningful and significant input to the Secretary, the General Counsel, and other DOT senior officials. As soon as possible, depending on the number of comments we receive and the issues raised, the Department will publish a report providing at least a brief response to the comments we have received, including a description of any further action we intend to take.

**Regulatory Notices**

*Privacy Act:* Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association,

business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov.*

(Authority: 5 U.S.C. 610; E.O. 12866, 58 FR 51735, Oct. 4, 1993.)

Issued this 14th day of January, 2005, in Washington, DC.

**Jeffrey A. Rosen,**

*General Counsel.*

[FR Doc. 05–1431 Filed 1–25–05; 8:45 am]

BILLING CODE 4910–62–P

Ms. MILLER. Thank you very much. I appreciate both of you coming here today. These are important issues, and I will start the questioning.

I would like to address this issue that OSHA is in the process of looking at and that is the hexavalent chromium rule. I probably have learned more about that particular thing in the last month or so than I even knew before. Even though it is not a household word, if you are in a particular business, it is of utmost importance, certainly, to you.

Some in the industry have actually said that the linear risk model that you have utilized as you have been promulgating your rule there over-predicts lung cancer risks, because the studies that OSHA was using were based on workers employed between the 1940's and the 1970's, when exposure was quite a bit higher. I am just wondering if you might have a comment on whether or not that is a true observation and if so, why would you use that kind of antiquated data basing?

Ms. STIDVENT. Madam Chairman, I will say at the outset that I am a bit limited in what I can discuss at this point, and since this is an open rulemaking and we plan to publish the final rule in January.

But I can assure you that we did receive a number of comments on the analyses used by OSHA in this rulemaking at different stages. We took public comment in the requests for information, during the SBREFA panel, during the number of hearings we held in February of this year. And a number of stakeholders raised a variety of issues with the analyses and the methodology used by OSHA. We are taking all those comments into consideration and will look very carefully at the analysis used and the quality of the data that is being inputted into those models that OSHA is using.

Ms. MILLER. I appreciate that you have to be somewhat guarded, because of where you are in the rulemaking process, but I intend to make a few other comments, to make sure they are on the record and push this case. I hope you take those into consideration as well. Because a number of people have brought to my attention the fact that, and you know, it is interesting, but we had another hearing previous to this about regulatory burdens on manufacturing and the National Manufacturers Association had mentioned, I think I made that point in my opening comments, a study about structural costs for all of our manufacturers are about 22 or 23 points higher than any of our foreign trading partners, including Canada. I come from Michigan, that is really our largest trading partner in my State.

But I was looking at a list of other countries that have standards as well for these particular elements, and in looking at what the proposal is from OSHA, we are going, I guess, from our current 50 down to 1, I think is the proposal that you are looking at in your rules. If you look at every one of our other competitors, Mexico at 50, even Canada, which I have always thought to be an extremely progressive nation, at 50, Japan, European Union, on and on and on, China, India, 50, 50, 50 all the way down the line. Sweden is at 20.

And I am just wondering, don't you think, and I don't know if you can comment on this or not, but it would seem to me that

would certainly put our industries here in the United States at a distinct competitive disadvantage to our foreign trading partners. I have heard from quite a few people in the industry in my area, their total consternation to the point that they have just said they are going to close the doors. I unfortunately come from a State that is continuing to bleed manufacturing jobs. As I say, I think we have to be very cognizant of the fact that OSHA requirements and other kinds of regulations that we pass in the past have raised our standard of living, have increased of course safety standards in the labor force, etc.

But as a reasonable standard, reasonable being the operative phrase, if we put our companies at this kind of a disadvantage, I think we are going to lose a lot more jobs. Can you comment on that?

Ms. STIDVENT. Yes, that is certainly a concern that we have heard in a number of arenas, not just limited to hexavalent chromium. The question about how our work force and our businesses compete on a global level, that is something that we certainly share the concern about. Our utmost priority is the health and safety of workers, of course.

In promulgating OSHA rules, we are constrained by the OSH Act in what we can and cannot consider. But economic and technological feasibility are part of that consideration. I can assure you that we will be looking at all of these factors as we move forward with the hexavalent chromium rule.

Ms. MILLER. Just one other thing on that issue. Those can't be the only factors, of course, that we have to look at. It is interesting, in this particular element, as you are going through your rulemaking process, I was looking at some testimony from a fellow who is a colonel in the Air Force who actually testified, apparently to OSHA, that the compliance with this proposed rule, "would require major reallocation and that productivity would be expected to drop by 50 percent." In other words, that the proposal apparently could have some sort of an adverse impact on national security, because of the way the element is utilized with aircraft.

I also serve on the House Armed Services Committee, so I raise that as well. I am not sure if you wish to comment on that or not, but I certainly want to raise that. I thought that was rather startling.

Ms. STIDVENT. Again, I hope I am not frustrating you with my limited responses, but——

Ms. MILLER. No problem. I just wanted to get it on the record.

Ms. STIDVENT. But we hear you and I can assure you that all of these comments and concerns from all stakeholders will be taken into consideration as we develop the rule.

Ms. MILLER. Thank you.

I yield to the ranking member.

Mr. LYNCH. Thank you.

Let me just go right back into that same issue on hexavalent chromium. It is my understanding that, I am a former welder, I used to weld stainless, I know this is a concern for folks in that industry. I understand that this regulation does not cover the construction industry, so they are not under this reg.

But I am concerned that a lot of these processes have not changed significantly since the data was gathered. I believe the two studies that are out there are the Gibb study and the Lippold study. The Gibb study obviously is the one that is being criticized by some in industry because it dates back to between the 1940's and 1970's.

However, it did involve 2,300 employees, and did involve 70,000 individual routine interventions of gathering data on these people. The one that is being suggested by industry that is more recent in time involves less than 800 employees instead of 2,300. It involves less than 800 interventions instead of 70,000.

So I am reluctant to suggest that we move to something that is more recent in time when it is not as thorough and probably not as indicative or expressive of the threat that is out there. So my suggestion is to proceed with caution and whatever action you take, take it on the basis of sound evidence and not because India has it or because Mexico has it. Because my knowledge of their safety and health standards does not lead me to believe that is some direction that we should go in.

I think that if manufacturers are leaving this country, it is because they can exchange $25 an hour workers for $1 an hour workers. That is the reason folks are closing up shop. And as someone who used to work at a GM plant, I certainly understand the impetus for that plant relocation to Mexico. And it was not because of hexavalent chromium, it was because, as I say, they could exchange $20 an hour jobs for $1 an hour jobs. That is the thing that we have to deal with.

The second issue is that we also have trade laws and tax laws in this country that provide incentives for employers and manufacturers to relocate. Until we deal with that through our trade policy, that trend will continue.

But again, I would ask with respect to this regulation on hexavalent chromium, just to please proceed with caution. There may be room here for a compromise, though I am not sure. Certainly I think it is right to revisit it and make sure that it is as effective and efficient as possible. I do not oppose that, but again, I would not displace the previous study because of the closeness in time of the, I believe it was the Lippold study.

Mr. Rosen, I would like to talk to you about the hours of service piece. I understand we are going to leave the 11 hour standard in place until and unless Congress deals with it, is that correct?

Mr. ROSEN. I don't think I could say that. The rule that was issued in 2003 that has that is in place under the extension that Congress enacted through the end of this year.

Mr. LYNCH. That's the one that the Third Circuit actually vacated, is that correct?

Mr. ROSEN. The court of appeals, I think, for the D.C. Circuit vacated the rule, but then Congress reinstated it. And the current extension from Congress would expire at the end of the fiscal year. Our Motor Carrier Safety Administration is working on a rule that would be issued in August to take effect in the event that the current rule were to expire.

The content of the rule that will be issued—what I am saying is I don't think I could say yet what it will include, in part because

it is a pending, open rulemaking. I don't think I can comment exactly on what its comments will be.

Mr. LYNCH. That's not very helpful to me.

Let me just say that there is a lot of data out there indicating the causality between driver fatigue and fatal accidents. I think at least it has been reported that about 20 percent of those truck accidents, big truck accidents that have fatalities involved, 98 percent of the time, it is a person in a passenger vehicle, it is not the truck driver, that there is some fatigue involved.

What amazes me is that the D.C. Circuit vacated the rule because the Department of Transportation had failed to consider the health of the driver when issuing and formulating its rule. That is particularly troubling to me. Wouldn't that be a good place to start, given the evidence that is out there regarding the connection between fatigue and fatal accidents? These are our families that are on the road. There is a lot of cargo being hauled around and a lot of these trucks are clearly mismatched for the road, and they are a clear threat to passenger vehicles on the road. These are our families and these are the people we are sworn to protect.

Yet you have a rule here by the Department of Transportation that completely ignores that. That is troubling for me.

Mr. ROSEN. Well, let me say a couple of things about that.

Mr. LYNCH. Please.

Mr. ROSEN. First, the primary purpose of the FMCSA, the Motor Vehicle Safety Administration's regulations, is for trucking safety, for the safety of the motorist, to prevent accidents and injuries resulting from crashes with the trucks. With regard to the drivers, there has been a longstanding memorandum of understanding between FMCSA and OSHA by which OSHA has set some of the requirements for driver health and safety.

Now, the statute, and I think what you are referencing and what the court of appeals was referencing, does talk about the physical condition of the driver as one of the criteria. I think it was the agency's view that factor had been considered, the court obviously disagreed and the court has the final say with regard to its ruling.

But ultimately, it is the objective to have these things decided with the best available data. One of the complexities for a rule like this is the knowledge and the data that is available is not always as perfect or as extensive as might be liked. But in the process of working on this rule, the Department is in fact looking at and considering the available data.

Mr. LYNCH. OK, I am not sure that is—I appreciate it, Mr. Rosen, I really do, that you come here and testify, both of you, I appreciate that. I am not trying to hold you to blame for any of the gaps in the process, by any means. I just see a weakness, I guess, in the process, and I am just trying to point that out and asking you to take another look at it, look at it hard and try to remember that the court was fairly clear in their decision.

There was a lot of evidence presented by the Department, extensive in terms of the evidence that you put forward. It is just that none of it covered the health of the driver. They were not complaining that there was not enough evidence in the aggregate presented, they just pointed out that none of it went to the health of the driver. Clearly, the health of the driver, not the condition of the driver,

the health of the driver. I think that is a central concern of any attempt to draft or to reissue a reg in this area.

Thank you, Madam Chair, I yield back.

Ms. MILLER. I was not going to ask this question, but as I was listening to my colleague talk about the health and safety of the driver, I have to ask you this question as well as about when you are actually promulgating these rules, and you are looking at different things. In a former life, before I got this job, I was a secretary of state in Michigan. I served for 8 years as the chairperson of the Michigan Traffic Safety Commission. So we had a lot to do with truck driving incidents and different kinds of things.

One of the biggest problems, whatever you are driving, whether it is trucks or cars or what have you, is driver distraction. Just yesterday I was at a Visteon plant in my district where they are doing some unbelievable things about simplifying within the car for police officers relating to driver distraction, with all the different kinds of things that they have. Do you ever look at those kinds of issues when you are looking at drivers?

In fact, just as a follow-up to that as well, you did mention something about surge brakes and that you had several groups that came to you and talked about surge brakes, etc. Do you often promulgate your rules as an impetus because of private groups or individuals coming to you or is this something you just come to at your own looking at NHTSA statistics?

Mr. ROSEN. Taking the second half first, the impetus for creating new rules can come either way, from the agencies reviewing existing data and determining that there is either a safety need or an opportunity for a safety improvement that is sensible. So sometimes rules are self-initiated. And sometimes members of the public petition us or request that we institute rules.

I think on the list that OMB has provided and the five that I am here primarily to address today, all of those are nominations from the public. So the rule dealing with the brakes is a nomination from a couple of associations as to what they think, what they have suggested would be an improvement and from their standpoint a more fair approach to the rule.

Ultimately the primary consideration for us is the safety consequence. But if the rule can be improved in a way that is beneficial to safety or is less costly without being detrimental to the safety standard, then we are of course open to suggestions from the public as to how to improve it.

Ms. MILLER. You also mentioned in your written testimony about sunset provisions in some of these various regulations. Could you comment on your thought process? Sometimes these regulations seem to take on their own life and then they go on ad infinitum rather than ever having any kind of regulatory review again of how they are actually working and years go by and circumstances change, etc.

What is your thought about sunsetting some of these kinds of things? I wonder if we ought not to codify that in many of the things we do in this town.

Mr. ROSEN. I would agree with that. I think it is a useful mechanism that we ought to do more of, because it forces you to reevaluate the effectiveness and accomplishments of a regulation and de-

cide, is it worth continuing, does it need improvement or has it expired in its usefulness. I think one of the examples I had identified in my testimony, in the written testimony, was the computer reservation system rule that had been promulgated with a sunset provision, but a good number of years ago, when the economic circumstances in both the airlines and the airline reservation business were extremely different than they are today. And at a time when those systems were owned by the airlines, unlike today.

So that was a good example—by having a sunset, it required us to take a careful look at the conditions that were prevalent at the sunset date, rather than because of the press of business or other things, just look at it at a convenient time. I think as a tool, it is extremely useful. It is a very effective way to have agencies, as I say, assess the continuing validity of the assumptions that went into the original rules.

I think there will be sunset provisions that will result in some rules, that will have a decision made to continue them. I think that is likely to happen. But even then, you have the benefit of having made a careful, systematic, thoughtful decision to continue it rather than inertia or ignorance. So I think it is a tool that makes sense and I would like to see us, and others, for that matter, use more of it more often.

Ms. MILLER. I appreciate that. Shifting gears a little bit, but talking about a rule that was made many, many years ago, I think it is 36 years old, is the fire safety standard rule, which was brought to my attention by a number of different industry groups. The thing about any rule that is 36 years old, never having a proper review of it certainly is alarming, I would say, astounding is probably a good categorization of that as well.

But I note in 2001 that OSHA said they could not update it because they did not have adequate resources. I can appreciate that as well. But perhaps there could be some comment on something else OSHA could do. Could you publish a best practices guide? Again, this particular rule being 36 years old is crazy.

Ms. STIDVENT. Yes, that is true, in many instances, as Mr. Rosen pointed out, because rules tend to be on the books and stay on the books, that happens over time. We are aware that there are a number of instances where we have based rules on consensus standards and then those consensus standards have become updated. We currently do not have authority just to go in and update the fast, easy way. We have to go through notice and comment rulemaking.

So the final flammable liquid standard that you mentioned is part of our ongoing project to update those standards based on national consensus standards. That is on the agenda to work on and to update, and we are planning on doing so.

Ms. MILLER. I appreciate that. It is highly likely there will be some legislation introduced in regard to that particular issue.

I would yield to the ranking member for a second round of questions.

Mr. LYNCH. Thank you.

Let me ask you, I just want to go back to Mr. Rosen, we were talking earlier about the process, we got public input and I think there were 189 recommendations. Then OMB went directly to the individual agencies and as a result of that, it was pared down to

I think 76 that were priority recommendations. I am trying to think how many of those were DOT regs, 15, was it?

Mr. ROSEN. From the original set, or how many are in the——

Mr. LYNCH. How many finally made the priority cut?

Mr. ROSEN. Five.

Mr. LYNCH. What was the process? I assume you were part of that process in going from whatever the original pool was, and I do not expect you to know that, but how did you go from 189 to, in your case, 5 final regs on the hit list at the end of the day?

Mr. ROSEN. Ultimately you would need to ask the folks at OMB for exactly how they pared it down. But I think the process——

Mr. LYNCH. Well, they say they work with you.

Mr. ROSEN. I was going to say, I think the process included consultation with us and presumably the other departments as to our reactions to various rules, as to how significant are they, how far-reaching are they, how costly are they, how dated are they, if they are very old. And that we provided back some comments and observations as to those that seemed like they had more potential to be meaningful.

But how the line was drawn as to say, well, here is the exact number, I do not know that I could illuminate very much for you. But I think the process is pretty much what I just said.

Mr. LYNCH. OK. I am just trying to figure out why some made the list and why some did not. It seems like there was a fairly broad spectrum of nominees, and I am just curious as to why particular regs made that list. I am just trying to get an idea of what that process involved.

Mr. ROSEN. Let me try this. We at DOT have done something of our own version of this, where we in January had a Federal Register notice inviting the public to comment on all of our regulations and then held a public meeting in April where people could come and tell us of places they thought our rules could be improved or had provisions that were unnecessary or really whatever they wanted to comment on.

So we have done something parallel, and I can tell you a little bit about my own thought process as to how to go about that. I have some numbers——

Mr. LYNCH. Mr. Rosen, I appreciate it, I really do, I am limited in my time. I really wanted to go not to your own thought processes, but to the actual process of going——

Mr. ROSEN. Well, I think they are related. As I said, we got 66 nominations. And we are in the process of responding to those in a public report. Inherently there is judgment to be applied. That is the process that we have used, is looking at a whole series of criteria and factors. I would assume that OMB did something similar, because the consultations with us would reflect that.

Mr. LYNCH. Just so I am clear on this, was the requirement that drivers drive more hours, was that part of this process, instead of having 10 consecutive hours of driving, was that something that came out of this process?

Mr. ROSEN. No, because the process you are referencing is in the 2005 OMB report. The hours that were set in the current rule were issued by FMCSA in 2003.

Mr. LYNCH. But the issue itself, making truck drivers drive more hours, did that issue come out of this public comment process?

Mr. ROSEN. If I understand the question, I think the answer is no.

Mr. LYNCH. OK, good. That is fair enough. I am just asking a general question.

Let me ask Ms. Stidvent a similar question. I believe there were a number of recommendations that were focusing on DOL, and then you culled it down to how many?

Ms. STIDVENT. I believe the report listed 11.

Mr. LYNCH. Do you remember how many originally were——

Ms. STIDVENT. I do not remember originally how many. Well, actually, my staff has been kind enough—in 2004, there were 37. In 2005, there were 11. To answer your question about process, we received the public comments that had been submitted to OMB's report from OMB. They asked, as Mr. Rosen said, for our input on that.

In many of the instances, some of the nominations were rulemakings we had already completed. Some of them were rulemakings that we were willing to consider, but given the workload we had, others were higher priority for us. So we provided that kind of feedback. Again, I think OMB could shed more light on exactly how they took that input from the agencies and reworked it. But it was a collaborative process where we said, this, we think, is a good idea, we are doing it already, it is done already, that type of thing, because a number of the nominations we received, because of the time delay and the publication of the OMB report, sometimes they are outdated.

Mr. LYNCH. Fair enough. Maybe I could take that up with OMB.

I do want to ask you about the Family Medical Leave Act, though. This has been hugely important to a lot of families. We are requiring both spouses to work at least a couple of jobs nowadays. We have very little support out there for families, and we are supposed to be trying to help them with that. Given all the hours that moms and dads have to work these days and care for families, this is a pretty important piece of legislation for those families who need to raise children and maybe in some cases take care of parents and do a number of things.

I understand that one of the proposals that is being floated, and I am not so sure how solid it is, but it is to recommend that the definition of serious health issue be revised to capture only those illnesses or disabilities that last for 10 days, versus the current definition of 3 days or more. Can you comment on that?

Ms. STIDVENT. Sure, I can comment on it generally and specifically, I think. I can tell you that my condition over the last 7 months has exposed me to a number of people, who, myself included, this definitely is a very important law. I think that they at the Department recognize that. It is important to a lot of people, as you mentioned, for a variety of reasons. Understanding that, we are reviewing the regulations, prompted in part by the Ragsdale decision and other court decisions.

The proposal you mentioned, I do not know where that originates from. I can tell you that no decisions have been made at the Department on what changes to make and what policies to pursue.

This is a deliberative process, and we have received a number of comments. In 2003, we met with over 20 groups, employer and employee groups, who have a variety of concerns about the FMLA. We are processing all of those and mulling all of that over.

No decisions have been made, so I guess I would be wary of reports that say that a particular policy is being pursued or is not being pursued. Because at this point it is definitely at the deliberative stage.

Mr. LYNCH. I understand. There are some reasonable suggestions here about the impact of the law itself. I understand some employers justifiably feel that they should not be required to give perfect attendance to employees who take advantage of the Family Medical Leave Act, because they are not physically there. That is an employee benefit, an employer decision that should be left with the employer, and I understand that.

But on the other hand, I think 10 days is a rather long period of time. I had a major surgery a couple of years ago, and between the HMO trying to boot me out of the hospital and my wife not wanting me at home, I was back to work in about 8 days. [Laughter.]

Mr. LYNCH. It was major in my mind. I just see a whole lot of families out there who do not have the support that I did. This 10-day rule could be very, very damaging to any relief that we might have intended to give those families. So I just ask you to pay close attention to that, if you could.

Ms. STIDVENT. I can assure you that we will. Other rulemakings will follow all the notice and comment process. So there will be nothing that can be rushed into implementation without that notice and comment process.

Mr. LYNCH. Thank you. Thank you, Madam Chair.

Ms. MILLER. Thank you very much.

Now we will move on to the next panel, unless you have any more questions. I would just make one comment about the Family Medical Leave Act as well. It is a very important piece of legislation. Unfortunately, not in place when I was in your condition, in another lifetime, a long, long time ago.

But I do think again, reasonableness, being reasonable, the operative phrase has to be the standard. You hear stories out in the industry about somebody who is 6 minutes late for work or something and then the small company has to go through an unbelievable burden of paperwork, etc., to give this person a half day off under the FMLA. I do not know all the different stories, but you hear these kinds of things.

There are always people, individuals, who take advantage of a very good law and make it difficult for everyone to comply with. So I do think you need to look at some of those kinds of things as well. I recognize the challenges, certainly, that you both face.

We appreciate both of your attendance here today. You have been very, very informative and enlightening. We look forward to working with you together as we try to do what is best for the American people. Thank you so much.

Ms. STIDVENT. Thank you very much.

Mr. ROSEN. Thanks for having us.

Ms. MILLER. We will take a quick break.

[Recess.]

Ms. MILLER. I would like to call the meeting back to order.

Our next panelist will be Mr. Stu Sessions. Mr. Sessions is an economist with over 25 years of experience in supervising and performing analysis of environmental, energy, and natural resource policy. Mr. Sessions also has lengthy experience in analysis of regulatory issues associated with air and water pollution and solid and hazardous material waste as well, having managed the division at EPA which is responsible for this, and also having consulted frequently in this area. He received a B.A. in economics from Amherst College and a Masters in public policy from Harvard.

Mr. Sessions, we certainly welcome you to the hearing today and appreciate your attendance. The floor is yours.

## STATEMENTS OF STUART L. SESSIONS, VICE PRESIDENT, ENVIRONOMICS, INC.; JEFF MELBY, VICE PRESIDENT, ENVIRONMENTAL AND SAFETY, GENMAR HOLDINGS, INC.; AND JOAN CLAYBROOK, PRESIDENT, PUBLIC CITIZEN

### STATEMENT OF STUART L. SESSIONS

Mr. SESSIONS. Good afternoon, Madam Chair and Ranking Member Lynch. Thank you for inviting me to testify.

I am here representing two manufacturing industry groups: the Surface Finishing Industry, representing the U.S. metal finishing industry; and the Specialty Steel Industry of North America. I will be discussing OSHA's proposed regulations lowering the Permissible Exposure Limit [PEL], for worker exposure to hexavalent chromium. The proposed regulation, as was discussed earlier, would reduce the current PEL from 52 micrograms down to 1 microgram.

Industry believes that the regulation would have three significant adverse effects. First, compliance costs will be very high. We estimate the proposed PEL will cost industry nearly $2.9 billion per year. A breakdown of these costs is given in exhibit 1 to my written testimony. This price tag would make this regulation one of the very most expensive environmental, safety or health regulations considered by the government in recent years.

The high cost is due partly to the broad scope of the regulation. It will affect at least 35 different manufacturing industries, plus shipbuilding and construction, which are not considered to be manufacturing industries. The high cost is also partly due to the difficulty in reducing exposure so far below the current PEL.

I will say a little about three particular manufacturing industries that will have the highest costs. First, aerospace manufacturing. The industry estimates a cost of about $1.1 billion per year. This cost for this one industry alone would roughly equal the cost of the most expensive single Federal regulation issued during fiscal year 2004. Metal finishing, a second industry, we estimate a cost of $780 million per year for this industry.

Both aerospace and metal finishing estimate a cost per employee of roughly $15,000 to $18,000 per year. And I reference the chairman's statement indicating that the average regulatory costs for manufacturing overall now is about $8,000. So for affected employ-

ees in these two industries, this single regulation would roughly double the average cost that exists currently.

A third affected industry with very high costs is steel making and steel processing. Costs will be highest for those who make and process stainless steel, in particular. We estimate a cost of about $600 million per year for steelmakers and their customers. Most of the costs for steel processing industries will involve changing welding processes for those who fabricate stainless steel. These changes can reduce a welder's productivity by 25 to 40 percent, plus other costs.

A second major adverse economic impact that we foresee is that many manufacturers will not be able to afford these high compliance costs, and will be forced to close. As facilities go out of business, the employees at these facilities will lose their jobs.

One industry on which we have done detailed studies on facility closures and job losses is metal finishing. We estimate that the rule will cause half or more of all U.S. metal finishing shops to close. In this one relatively small industry, 80,000 employees in these facilities will lose their jobs, and another 70,000 or more jobs will be lost among companies who would have supplied the metal finishing shops and their employees.

In my written testimony I discuss some of the other industries where the rule will also cause plant closures and job losses.

The third major adverse impact, the added cost to comply with the proposed rule, will hurt manufacturers in competition with foreign producers. The proposed rule requires a large reduction in the existing standard and the chairman has already indicated the comparison of the proposed PEL at 1 with the standard that exists for most of our trading partners, which is on the order of 50.

I will review the competitive impacts for a couple of the industries. Aerospace. For many years, aerospace has contributed the largest positive amount to the Nation's balance of trade of any other manufacturing industry. We estimate that this rule will add a cost penalty of about 1 percent of current aerospace costs, 1 percent in addition to the roughly 12 percent that was again cited in the chairman's opening statement. We estimate that the 1 percent might be enough to tip some close aerospace competitions to foreign producers.

Metal finishing. In recent years, the metal finishing industry has suffered a very sharp loss of business to Asia. This rule will cost the metal finishing shops that survive, I indicated that half or more won't, those who survive will bear costs on the order of 2 to 10 percent or more of their current cost of production.

Steel and stainless steel. The stainless industry, many people are quite aware, has suffered intense foreign competition and currently some 25 to 30 percent of the domestic steel market is filled by foreign imports. This will prevent domestic steelmakers from passing through the cost of the regulations to the market and the domestic steelmakers are further worried that the industry's downstream customers will also be seriously affected by this revised PEL.

High compliance costs by the customers will cause many U.S. stainless steel fabricators to outsource more operations to other countries. The work will be performed abroad, and the steel that they buy to work on will be bought abroad.

In conclusion, the statute requires OSHA to promulgate a PEL that eliminates all significant health risks, but subject to the constraint that the standard must be technically and economically feasible. I have discussed the industry's belief that the PEL is not economically feasible for most of the affected industries.

In closing, I would quickly like to comment on technical feasibility and health risks. In short, industry believes that the proposed PEL of 1 is not technically feasible for many affected manufacturing industries. Many facilities have found that the controls that OSHA identifies as adequate to meet the proposed PEL in fact cannot reliably reduce exposures to that level.

With regard to health risks, industry is committed to protecting the health of its workers. Industry believes there is evidence of significant risks to worker health at high levels of exposure well above the current standard of 52. However, as the PEL option being considered is lowered much below the current standard, uncertainty about health risks increases, particularly for those industries where the nature of the exposures differs substantially from those in the industries on which OSHA's studies were based.

On balance, the industry would support a reduction in the exposure limit to somewhere in the 20 to 25 micrograms per cubic meter range. Such a standard would protect worker health, would be operationally feasible and would avoid substantial job losses and the erosion of U.S. manufacturing competitiveness.

Thank you very much.

[The prepared statement of Mr. Sessions follows:]

**Testimony of Stuart L. Sessions**
**Vice President of Environomics, Inc.**
**Before the**
**Subcommittee on Regulatory Affairs**
**of the**
**Committee on Government Reform**
**U.S. House of Representatives**
**June 28, 2005**

**Introduction**

Good afternoon, Madam Chairman and Members of the Subcommittee on Regulatory Affairs. Thank you for inviting me today to testify on the impact of regulation on U.S. manufacturing.

I am Stuart Sessions, Vice President of the consulting firm Environomics, Inc. I am representing two manufacturing industry groups: 1) the Surface Finishing Industry Council, which consists of the three leading national metal finishing trade associations, and 2) the Specialty Steel Industry of North America. I am an economist, and have worked on environment, health and safety regulatory issues for some 30 years, for both government and industry.

For the past nine months I have been retained by several industry groups to work on the Occupational Safety and Health Administration's (OSHA's) proposed regulation lowering the Permissible Exposure Limit (PEL) for worker exposure to hexavalent chromium. The proposed regulation would reduce the current PEL of 52 $ug/m^3$ to 1 $ug/m^3$.

The regulation is on a fast track because of a Court-ordered schedule. The regulation was proposed in October, 2004. OSHA took public comments and held hearings on the rule during this past fall and winter, and is expected to send a draft final rule to the Office of Management and Budget within 60 days. According to the Court-ordered schedule, a final regulation must be promulgated by January 18, 2006.

Industry believes that the regulation as proposed would entail very high compliance costs. It would result in the closure of many U.S. manufacturing facilities and loss of many manufacturing jobs. It would also substantially erode the competitiveness of key U.S. manufactured products in world markets. I will spend most of my time today summarizing these serious adverse impacts that U.S. manufacturers foresee as a result of this proposed regulation.

**1. The projected costs of the regulation are very high**

Our first concern is with the magnitude of the projected costs of the regulation. We estimate that the proposed PEL will cost nearly $2.9 billion per year in compliance costs (see Exhibit 1). This price tag would put this regulation among the very most expensive environment, safety or health

regulations considered by the government in recent years.[1] The high cost is due to both the broad scope of the regulation and the extreme difficulty in achieving the more than 98% reduction it requires relative to the current PEL.

In total, OSHA estimates that the proposed rule limiting worker exposure to hexavalent chromium will affect 31 different manufacturing industries plus shipbuilding and construction. We have identified several additional industries that will be affected, but OSHA and we agree generally that the proposed rule will affect a very wide range of U.S. manufacturing operations. Industry disagrees sharply with OSHA, however, about the magnitude of the total costs of the proposed rule. We believe that OSHA has seriously underestimated costs: by omitting affected industries and segments of industries, by drastically undercounting the number of workers and facilities that will be affected, by overestimating the effectiveness of the control measures that will be implemented to comply, by underestimating the unit costs of these control measures, and for other reasons.

The proposed rule will impose the largest costs on three manufacturing industries:

1. The aerospace manufacturing industry. We estimate a cost of about $1.1 billion per year, meaning that the cost of this rule for this one industry alone would equal the cost of the most expensive Federal regulation issued during Fiscal Year 2004. Furthermore, we have not yet estimated the additional costs this rule would impose on aircraft maintenance operations as opposed to aircraft manufacturing, including Department of Defense and airline and private plane maintenance activities. The Aerospace Industries Association has estimated that compliance with the proposed rule will cost about $15,000 - $18,000 per affected employee per year.

2. The metal finishing industry. We estimate a cost of $780 million per year, spread across the roughly 2,700 U.S. metal finishing facilities that use hexavalent chromium. This amounts to a cost of about $16,000 per affected employee per year.

3. The steel industry and its customer industries that process stainless and alloy steel. We estimate a cost of about $600 million per year for steel makers and their customers. Most of the costs for steel processing industries will involve changing welding processes for stainless and alloy steels. These changes can involve a reduction in worker productivity of 25 – 40%, plus other costs.

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[1] Since 1999, only about 15% of all regulations reviewed by the Office of Management and Budget (OMB) have been economically significant (usually meaning that they cost in excess of $100 million/year) (www.reginfo.gov/public/do/eoCountsSearch). During Fiscal Year 2004 (the most recent period for which such a compilation is available), 4,088 final rules were published in the Federal Register. 364 of these rules were reviewed by OMB, and only one or two of the 26 final rules cited by OMB as "requiring substantial private expenditures or providing new social benefits" cost as much as $1 billion/year: the Department of Homeland Security rule on Required Advance Electronic Presentation of Cargo Information ($1.1 billion/year) and perhaps EPA's rule on Nonroad Diesel Engines and Fuel (costs beginning at $53 million in 2008 and eventually increasing to $2.1 billion/year in 2030). No rule promulgated during Fiscal Year 2004 rules cost as much as industry estimates the proposed OSHA PEL would cost. (See U.S. Office of Management and Budget. Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations.)

Other manufacturing industries will also bear significant costs, as shown in Exhibit 1. Note in the Exhibit that several affected industries have not yet prepared estimates of what the rule will cost them. For these industries the Exhibit shows only the costs that OSHA has estimated, and we believe that OSHA's estimates are generally far too low.

**2. Many domestic manufacturers will not be able to afford these compliance costs and will be forced to close**

For many affected manufacturing facilities, these compliance costs will be more than they can afford and they will have to go out of business. Their employees will lose their jobs. Facility closures will be most common in those affected industries where the industry consists mostly of small businesses, where profit margins are relatively low, and/or where competition from foreign producers is intense. Some examples follow.

Half or more of all metal finishing job shops will close. 80,000 employees in these facilities will lose their jobs, and another 70,000 or more jobs will be lost among suppliers and customers of these closed facilities

The job shop metal finishing industry consists almost entirely of small businesses, with most of them being family-owned. We performed detailed case studies to estimate whether six representative metal finishing facilities could afford to comply with the proposed PEL. Engineers estimated the costs that each facility would have to incur to comply, and economists collected information on the facility's historical revenues and profits and future business prospects. We assessed for each facility the degree to which the facility would be able to pass the compliance costs on to the facility's customers, and the degree to which the facility would have to attempt to absorb the costs out of profits. Ultimately we compared the compliance costs that each facility would have to absorb against that facility's ability to bear these costs. We concluded that more than half of all affected metal finishing job shops will be unable to pay the costs necessary to comply with the proposed rule (see Exhibit 2).

Our conclusion that more than half of all affected job shops would close if faced with the costs to comply with the proposed rule is supported by a recent analysis by the U.S. Environmental Protection Agency (EPA). EPA estimated the economic impact for metal finishers of a water pollution regulation that the Agency was considering. EPA concluded that the water rule's projected compliance costs averaging $61,000 per year per facility would close about half of all U.S. job shop metal finishers. (Because of this, EPA ultimately decided not to promulgate this regulation.) For the proposed OSHA PEL, we estimate costs averaging well over $100,000 per year per facility, and thus anticipate facility closures exceeding the rate that would result from the less expensive EPA rule.

Closure of half of all metal finishing operations would result in the direct loss of about 80,000 jobs. Total job losses, adding a very conservative estimate for the multiplier effect among metal finishers' suppliers and customers, might total about 150,000. Note that this estimate of 150,000 jobs lost is for only one small industry sector impacted by the proposed rule.

Other manufacturing industries also project facility closures and job losses due to the OSHA rule

In written submissions or oral testimony to OSHA, many other industries have estimated that facilities will be forced to close because they can not afford the costs to comply with the proposed PEL, and domestic jobs will be lost in these industries also. Some sample comments:

- The Steel Tank Institute/Steel Plate Fabricators Association projects that the rule will reduce employee productivity and increase costs of production by 10 - 15%, causing "jobs to go offshore to companies that do not have these additional time or cost constraints."

- Two large chromate chemicals producers have stated that they will close their domestic facilities and shift their U.S. production of these chemicals to their overseas plants if the rule is promulgated.

- The sole U.S. producer of strontium chromate pigment indicates that the investment required for compliance would put the company out of business.

- An engineering firm retained by the largest domestic chromium catalyst producer projects that "Resulting profit margins for these products would not warrant retention of the plants by domestic firms. ... there would likely be a shift in production to other countries such as Mexico, Europe or the Far East."

**3. The added costs to comply with the proposed rule will disadvantage domestic manufacturers relative to foreign competitors**

The proposed rule requires a very significant reduction in the existing PEL for hexavalent chromium, at very high expected costs. These costs will seriously disadvantage U.S. manufacturers in several key industries relative to foreign producers who do not face such costs.

Exhibit 3 compares the current and proposed U.S. PELs for hexavalent chromium with the occupational exposure limits in other countries. It is apparent that the proposed PEL of 1 $ug/m^3$ would be far below the limits prevailing for our major trading partners (China, Japan, Mexico, Canada, India, the European Union). I will discuss the impact of the resulting $2.9 billion annual cost penalty that our domestic industry will suffer relative to foreign competitors.

Aerospace

For many years, the aerospace industry has contributed a larger positive amount to the nation's balance of trade than has any other manufacturing industry. In 2004, when the nation's merchandise trade balance was a negative $651 billion, aerospace contributed a positive $31 billion. The industry is clearly exceedingly important to the U.S. in international trade.

However, the competitive outlook for the U.S. aerospace industry is cloudy. Foreign

manufacturers are now competitive in both small and large planes. China has a rapidly growing aerospace industry. Foreign firms are poised to compete seriously for U.S. military aircraft contracts. The positive U.S. balance of trade in aerospace has generally been shrinking since it peaked in 1998.

The $1.1 billion annually in added regulatory costs for domestic manufacturers will amount to a cost penalty of roughly 1 % relative to foreign aerospace manufacturers. This will likely be enough to tip some close competitions to foreign producers. The proposed PEL could hasten the erosion of the longstanding competitive advantage of U.S. aerospace manufacturers.

Metal finishing

In recent years the metal finishing industry has suffered a sharp loss in business to Asian competitors. As one indicator, sales of metal finishing chemicals in Asia have been growing at more than 8% per year since 2000, while sales in the U.S. have declined at roughly 6% per year. The number of metal finishing shops in the U.S. has fallen by 40 - 50% since the mid -1990s, and domestic employment in metal finishing has declined by some 50,000 - 70,000. The issue has not been an increase in foreign surface finishing of items made in the U.S., but instead the increasing number of items for which all the steps in manufacturing, including surface finishing, are performed abroad.

In this deteriorating business environment, the proposed OSHA regulation will be a competitive disaster for U.S. metal finishers. For those domestic metal finishers who can afford to comply with the proposed regulation, the rule will represent a 2 - 10% or more cost penalty relative to foreign metal finishing competitors. The rule will sharply accelerate the already rapid movement of metal finishing business and jobs overseas.

Steel, stainless steel and steel processors

The steel industry is another picture of fierce foreign competition. Global overcapacity and foreign dumping of steel in the U.S. produced numerous bankruptcies among U.S. steel producers in 2000 – 2003. The situation has improved since then, but the most recent data still show imports accounting for 25 - 30% of the total U.S. markets for stainless steel. The high level of imports suggests that domestic stainless steel producers will not be able to increase their prices to cover the costs of the OSHA rule. The costs to comply with the OSHA rule will have to be paid mostly out of profits.

The stainless steel industry's downstream customers will also be affected by the revised PEL. Stainless steel processors include many small businesses in a myriad of different industries that make stainless steel tanks, pipes, machine parts, equipment, consumer products, and more. Labor costs can comprise up to 50% of the cost of these products, and labor costs for welding, grinding, cutting and other hot work will increase substantially due to the much lower PEL. Some of the shifts in welding practices needed to meet the tighter PEL can reduce welding labor productivity by 25 - 40 %, as well as requiring new equipment and training. These compliance costs will force many U.S. steel fabricators to outsource more operations to other countries.

Alternatively, stainless steel processors who have a choice in the raw material they use to manufacture their products will consider substituting a non-stainless product to avoid the high compliance cost of the rule. As a result of this pressure to use other materials, domestic consumption of stainless steel will decline.

Either of these two shifts by steel processors will negatively impact the domestic steel producers. A processor who moves abroad will likely buy foreign steel rather than U.S. steel, while a processor who stops using stainless steel altogether will also no longer buy U.S. stainless steel. Domestic stainless steel producers will suffer a double negative impact from the OSHA rule: a loss in profits when they have to absorb the costs of their compliance measures, and a loss in business due to shifts among their steel processing customers.

**Conclusion**

The proposed reduction of the PEL for hexavalent chromium to 1 ug/m$^3$ will impose significant costs on a wide range of domestic manufacturers. These costs will result in facility closures, job losses, and deterioration in the competitive position of U.S. manufacturers in world markets.

The Occupational Safety and Health Act has been interpreted in court decisions to require OSHA to promulgate a PEL that eliminates all significant health risks, but subject to the constraint that the standard must be technically and economically feasible. I have discussed this afternoon industry's views on the economic feasibility question – the proposed PEL is not economically feasible for most of the affected industries. In closing, I would like briefly to mention industry's views on technical feasibility and on health risks from hexavalent chromium.

In short, industry believes that the proposed PEL of 1 ug/m$^3$ is not technically feasible for many affected manufacturing activities. Facilities that have engineering controls matching or exceeding those identified by OSHA as adequate to meet the proposed PEL can not ensure compliance with the proposed limit, even with the use of respirators.

With regard to health risks from exposure to hexavalent chromium, industry is committed to protecting the health of its workers. Industry believes there is evidence of significant risks to worker health at high levels of exposure well over the current standard of 52 ug/m$^3$. However, as the PEL option being considered is lowered much below the current standard, uncertainty about health risks increases, particularly for those industries where the nature of hexavalent chromium exposures differs substantially from the exposures in the studies on which OSHA relied. A more appropriate approach recognizes the uncertainties and lack of precision with the data and employs more reasonable assumptions regarding the risks.

On balance, industry would support a reduction in the PEL for hexavalent chromium to somewhere in the 20 – 25 ug/m$^3$ range. Such a standard would protect workers' health and would be operationally feasible.

Thank you for the opportunity to participate in this hearing.

**Exhibit 1. Estimated Costs of the Proposed Rule (in Millions of $/yr)**

| | Sector | OSHA Estimate | Industry Estimate | Comments |
|---|---|---|---|---|
| | *Sectors where industry has provided cost comments* | | | |
| 1 | Electroplating | $54.4 | $780.0 | Missed half the industry; other errors |
| 2A | Welding (general industry) | $73.4 | $523.8 | Productivity losses, higher unit costs |
| 2B | Welding (maritime industry) | $1.8 | $95.0 | Many more workers exposed |
| 3A | Painting (general industry) | | ? | |
| | Aerospace Manufacturing | | $1,065.0 | Vastly more workers exposed |
| | DoD | $4.8 | ? | DoD to submit estimates? |
| | Commercial Aircraft Maintenance | | ? | |
| | Coil Coating | | ? | |
| 3B | Painting (maritime industry) | $7.6 | $53.8 | Many more workers exposed |
| 5 | Chromate Pigment Producers | $0.1 | $0.3 | 2-3 times higher |
| 7 | Chromium Catalyst Producers | $3.0 | $29.9 | 10 times higher |
| 10 | Plastic Colorant Producers and Users | $1.7 | $5.2 | 3 times higher |
| 11 | Plating Mixture Producers | $0.2 | $2.4 | |
| 14 | Steel Mills | $1.0 | | |
| 30 | Superalloy Producers | $0.1 | $78.7 | 50-100 times higher |
| | Steel Processors | $0.0 | | |
| 26A | Woodworking (general industry) | $0.9 | $0.3 | |
| 26B | Woodworking (maritime industry) | $0.0 | $0.0 | Lower exposures |
| 26C | Woodworking (construction industry) | $4.0 | $1.2 | |
| 26D | Woodworking (government) | $0.1 | $0.0 | |
| 32 | Precast Concrete Products Producers | $14.4 | $135.3 | 9 times higher; More establishments |
| | *Sectors where industry will incur costs but OSHA has estimated none* | | | |
| | Auto repair and body shops | | | |
| | Mining | | | MSHA std now 100 ug/m3 |
| | Fiberglass insulation mfg | | $61.0 | For one company only |
| | Continuous glass filament mfg. | | | |
| | Refractories (metals, glass) | | | |
| | Industrial laundries | | | |
| | *Sectors where industry has not provided cost comments (OSHA's cost estimates are shown)* | | | |
| 2C | Welding (construction industry) | $28.2 | $28.2 | |
| 2D | Welding (government) | $0.5 | $0.5 | |
| 3C | Painting (construction industry) | $2.2 | $2.2 | |
| 3D | Painting (government) | $0.9 | $0.9 | |
| 4 | Chromate (chromite ore) production | $0.3 | $0.3 | |
| 6 | Chromated Copper Arsenate Producers | $0.0 | $0.0 | |
| 8 | Paint and Coatings Producers | $4.8 | $4.8 | |
| 9 | Printing Ink Producers | $0.2 | $0.2 | |
| 12 | Wood Preserving | $0.0 | $0.0 | |
| 13 | Chromium Material Producers | $0.1 | $0.1 | |
| 15 | Iron and Steel Foundries | $7.1 | $7.1 | |
| 16 | Chromium Dioxide Producers | $0.0 | $0.0 | |
| 17 | Chromium Dye Producers | $0.3 | $0.3 | |
| 18 | Chromium Sulfate Producers | $0.0 | $0.0 | |
| 19 | Chemical Distributors | $5.4 | $5.4 | |
| 20 | Textile Dyeing | $1.5 | $1.5 | |
| 21 | Colored Glass Producers | $0.0 | $0.0 | |
| 22 | Printing | $0.3 | $0.3 | |
| 23 | Leather Tanning | $0.0 | $0.0 | |
| 24 | Chromium Catalyst Users | $0.7 | $0.7 | |
| 24A | Chromium Catalyst Users (Service) | $0.3 | $0.3 | |
| 25 | Refractory Brick Producers | $0.1 | $0.1 | |
| 27 | Solid Waste Incineration | $1.1 | $1.1 | |
| 27A | Incinerators (government) | $0.1 | $0.1 | |
| 28 | Oil and Gas Well Drilling | $0.0 | $0.0 | |
| 29 | Portland Cement Producers | $0.8 | $0.8 | |
| 31B | Construction (Refractory Repair) | $0.0 | $0.0 | |
| 31C | Construction (Hazardous Waste Work) | $0.1 | $0.1 | |
| 31CG | Haz. Waste (government) | $0.1 | $0.1 | |
| 31D | Construction (Industrial Rehabilitation) | $0.1 | $0.1 | |
| 31DG | Industrial Rehab. (government) | $0.0 | $0.0 | |
| | **Total** | $222.9 | $2,887.0 | |
| | General Industry | $178.9 | $2,706.4 | |
| | Construction | $34.6 | $31.8 | |
| | Maritime | $9.4 | $148.8 | |

**Exhibit 2. Summary Results on Affordability of Compliance Costs for the Proposed PEL for Six Electroplating Case Study Facilities**

| Facility and Type | Compliance Cost ($ in thousands/yr) | | Lower Cost Est. as | | Higher Cost Est. as | | Conclusions |
|---|---|---|---|---|---|---|---|
| | Lower Est. | Higher Est. | % Profits | % Revenues | % Profits | % Revenues | |
| A Dec | $115.0 | $405.1 | 30-50% | 1-2% | > 100% | 4-6% | Will close for higher costs, not low |
| B Hard | $75.9 | $212.5 | > 100% | 4-6% | > 100% | 10-15% | Will close |
| C Zinc* | $404.5 | $592.6 | > 100% | 4-6% | > 100% | 6-10% | Will close |
| D Dec | $86.0 | $177.5 | > 100% | 6-10% | > 100% | 15-20% | Will close |
| E Anod + | $89.3 | $165.1 | > 100% | 3-4% | > 100% | 6-10% | Will close Cr(VI) lines |
| F Hard | $96.8 | $188.3 | > 100% | 2-3% | > 100% | 4-6% | Will close for higher costs, maybe for low |

* = Facility performs zinc plating, not hard chrome/decorative chrome/Cr anodizing; thus not included in OSHA's analysis

+ = Only 35% of revenues/profits for this facility derive from Cr(VI)-using processes

**Exhibit 3. Occupational Exposure Limits for Cr(VI): Comparison of Selected Countries (2002)**

| Country | Occupational Exposure Limit |
|---|---|
| United States | |
| ◆ OSHA Proposed | 1.0 ug/m3 |
| ◆ OSHA Current | 52 ug/m3 |
| Mexico | 50 ug/m3 |
| Canada (Ontario) | 50 ug/m3 |
| Japan | 50 ug/m3 |
| European Union | 50 ug/m3 |
| France, Germany, UK, Finland | 50 ug/m3 |
| China | 50 ug/m3 |
| India | 50 ug/m3 |
| *Sweden* | *20 ug/m3* |
| *Denmark* | *5 ug/m3* |

Ms. MILLER. Thank you.

Our next witness this afternoon is Jeff Melby. Mr. Melby is the vice president of environmental and safety at Genmar Holdings, Inc. Joining Genmar in 1996, Mr. Melby's primary responsibilities included coordinating the environmental and safety programs for the nine manufacturing facilities that Genmar has in the United States, and leading Genmar's product compliance program. He is a registered professional engineer in Minnesota, also a member of the Minnesota State Bar.

We appreciate your coming to Washington to testify before our committee this afternoon.

**STATEMENT OF JEFF MELBY**

Mr. MELBY. Thank you, and good afternoon. I am here today on behalf of my company as well as the National Marine Manufacturers Association, which represents many of my fellow recreational boat builders. We urge this committee to direct OSHA to update the spray finishing using flammable and combustible materials standard under 29 C.F.R. Section 1910.107, which I will refer to as the OSHA fire safety standard.

This particular rule has burdened my company and many others with unnecessary complication. In May 2004, NMMA responded to the OMB's request for regulations that are unduly burdensome or that need reform. NMMA nominated the outdated OSHA fire safety standards because they are still based upon the 1969 standards set by the National Fire Protection Association, rather than the 2003 NFPA standards, which are designed specifically for the recreational boat building and composites industries, and are based upon updated information and know-how.

NFPA is the Nation's standard-bearer for fire protection standards, because it is comprised of the Nation's leading insurers as well as the firefighting community. NMMA also nominated the outdated Federal Motor Carrier Safety Administration rules prohibiting the use of surge brakes on trailers used for commercial purposes. I have included discussion of this issue in my written comments and I will work with the committee to address any questions that may arise in connection with it. But admittedly, my focus here is on the OSHA fire safety standards.

As I mentioned, the NFPA fire safety standards were adopted by OSHA in the early 1970's, and have not been updated since that time, even though fire suppression technology and know-how has progressed dramatically. OSHA has even acknowledged that these standards need to be reviewed and updated, but has continued to do nothing about it.

Specifically, the issue has to do with the level of fire protection necessary for operating a boat manufacturing plant. Back in the early 1990's, NMMA and the American Composite Fabricators Association approached OSHA and asked that the fire safety standards be updated. Based on these discussions with OSHA, we were directed to contact NFPA to have them evaluate spray operations at boat manufacturing plants and determine if the hazards from these operations warranted a change to the safety standards.

Subsequently, NFPA revised its standards in 1996 by creating a separate chapter to address the specific hazards and requirements

with regard to applying flammable resin in the manufacturer of recreational boats and other fiberglass composite products. The resin used to make fiberglass is presently regulated under the OSHA fire safety standards because styrene, which is present in the resin, is considered a class I flammable liquid. NFPA created this separate chapter based on extensive testing and several years of evaluation within the NFPA 33–34 Spray Finishing Committee.

We then returned to OSHA in the late 1990's, requesting that they update the 107 standards. In fact, OSHA included this change in 1999 to update its unified agenda, but rescinded the effort in 2001, citing "resource constraints and other priorities." Prior to the rescission, however, OSHA called this rule "one of OSHA's most complex and out of date rules." Yet even with this acknowledgement, OSHA has been unable to correct it.

One of the tests that was performed was to spray resin in an enclosed booth with no ventilation for 15 minutes. After 15 minutes, the concentration of flammable styrene vapor in the booth was 690 parts per million. To put that in perspective, consider that the lower flammable limit for styrene vapor is 11,000 parts per million. The reason why this type of material acts this way is because styrene, which usually totals about 30 percent of the resin, does not volatilize like the solvents in paints and remains within the resin as it is applied and cures to make fiberglass.

In fact, the NFPA tests revealed that the resin does not readily ignite and burns slowly when it does ignite. When OSHA wrote the rules back in the 1970's, they actually examined flammable solvents found in paints and other coatings such as toluene and xylene, which are extremely volatile and flammable.

The main problem we face is that many State OSHA agencies and local fire departments refer to the Federal OSHA standards when enforcing local fire code or worker safety regulations. There have been countless cases in our industry, including two at our plants, where a State OSHA office cited us for not complying with the 107 standards even though the plants were in compliance with the updated NFPA fire safety standards.

After expending a great deal of time and resources, including attorneys fees, we were able to convince one of the State OSHA agencies to withdraw the violation. The other State office refused to withdraw their citation, but did agree to a compromise that did not increase our operational costs to the extent that full compliance with the 107 standards would require. The expended costs and continuing operational costs in that case do not create a safer working environment.

There are three points that I want you to take away from my testimony. First, in writing its regulation, OSHA originally adopted the 1969 NFPA fire safety standards and OSHA has not updated them since then, even though NFPA has revised the standard to reflect new technologies and knowledge.

Second, OSHA has acknowledged that their standard is out of date and actually written letters to other industry manufacturers stating that if a facility is not in compliance with the OSHA fire safety standards but is in compliance with the NFPA 33 standards, OSHA would consider this a de minimis violation under the OSHA de minimis policy. Nonetheless, in our cases, State OSHAs do not

follow the OSHA de minimis policy, which causes us manufacturers great problems.

Finally, as you probably hear from many company representatives that testify on regulatory issues, it is a great challenge and burden to manufacturers to comply with the complex regulations imposed on us today by local, State and Federal Governments. When a regulatory agency has a rule on their books that they understand to be outdated and we understand to be outdated, something needs to be done to fix it. That is why I am here today, to ask you to have OSHA update its 29 C.F.R. Section 1910.107 regulation to reflect the NFPA 33 Chapter 17 consensus standards.

Thank you, and I ask that my written testimony be made part of the permanent record. I am available for questions.

[The prepared statement of Mr. Melby follows:]

**WRITTEN TESTIMONY OF**
**JEFF MELBY, VICE PRESIDENT**
**ENVIRONMENTAL AND SAFETY**
**GENMAR HOLDINGS, INC.**
**BEFORE THE**
**SUBCOMMITTEE ON REGULATORY AFFAIRS**
**OF THE**
**COMMITTEE ON GOVERNMENT REFORM**
**UNITED STATES HOUSE OF REPRESENTATIVES**

**Introduction**

Good afternoon, my name is Jeff Melby and I am Vice President, Environmental and Safety for Genmar Holdings, Inc. Genmar Holdings owns several boat manufacturers, including Carver Yachts; Stratos & Ranger Bass Boats; Wellcraft; Larson; Glastron Boats; and Four Winns, which is located in Cadillac, Michigan and boasts a workforce of over 500 employees. I am here today on behalf of my company as well as the National Marine Manufacturers Association (NMMA), which represents 450 of my fellow recreational boat builders. I have two specific messages to convey to Members of this committee. First, recreational boat manufacturers need this committee to direct OSHA to update the Spray Finishing Using Flammable and Combustible Materials Standards[1], which I will refer to as the OSHA fire safety standard. This rule has burdened my company and many others with unnecessary complication. Second, we wish to commend the Federal Motor Carrier Safety Administration which is moving to correct its outdated surge brake rule.[2]

In May 2004, NMMA responded to the Office of Management and Budget's (OMB) request for regulations that are unduly burdensome or that need reform.[3] NMMA nominated the outdated OSHA fire safety standards because they still are based upon the 1969 standards set by the National Fire Protection Association (NFPA), rather than the 2003 NFPA standards. The 2003 NFPA standards are designed specifically for the recreational boat building and composites industries, and are based on updated information and know-how. NFPA is the nation's standard-bearer for fire protection standards because it is comprised of the nation's leading insurers as well as the fire-fighting community. NMMA also nominated the outdated Federal Motor Carrier Safety Administration (FMCSA) rules prohibiting the use of surge brakes on trailers used for commercial purposes.

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[1] 29 C.F.R. § 1910.107.
[2] 49 C.F.R. § 393.49.
[3] *See* Draft Report to Congress on the Costs and Benefits of Federal Regulations, 69 Fed. Reg. 7,987 (Feb. 20, 2004) and full draft report at http://www.whithouse.gov/omb/inforeg/regpol-reports_congress.html.

**Federal Motor Carrier Safety Administration's Surge Brake Rule**

Today, FMCSA regulations allow surge brakes on trailers towed by consumers. However, the same trailer towed by a professional driver is required to be equipped with more expensive electronic brake systems. Almost three years ago, the national Surge Brake Coalition submitted all safety and technical data requested by FMCSA. And despite assurances to the contrary, the agency took no action for more than two years to remove this expensive and wasteful requirement that caused marine dealers to be ticketed while hauling boats to boat shows or delivering boats to consumers.

The committee should note that the situation has changed significantly in recent months. FMCSA, and particularly Luke Loy, Engineer, Vehicle and Roadside Operation Division, have been quite diligent in moving the regulatory change ahead. We understand our request for regulatory relief has been reviewed by all necessary staff and is in the Office of Secretary Norman Mineta for final approval. Even though the wheels of government can move slowly, we are pleased to report that, in the case of our surge brake concerns, the issue is being addressed and we hope to have resolution in the near future.

**Occupational Health and Safety Administration's Fire Safety Standards**

The OSHA fire safety standards have not been updated since they were adopted in the early 1970's, even though fire-suppression technology has progressed dramatically. OSHA has even acknowledged that these standards need to be reviewed and updated, but continues to do nothing about it.

Specifically, the issue has to do with the level of fire protection necessary for operating a boat manufacturing plant. Back in the early 1990's, NMMA and the American Composite Manufacturers Association approached OSHA and asked that the fire safety standards be updated. Based on these discussions with OSHA, we were directed to contact NFPA to have them evaluate spray operations at boat manufacturing plants and determine if the hazards from these operations warranted a change to the safety standards. Subsequently, NFPA revised its standards in 1996 by creating a separate chapter to address the specific hazards and requirements with regard to applying flammable resin in the manufacture of recreational boats and other fiberglass composite products.[4] The resin used to make fiberglass is regulated under the OSHA fire safety standards because styrene, which is present in the resin, is considered a Class I flammable liquid. NFPA created this separate chapter based on extensive testing that included measuring the level of concentration of flammable vapor in a spray-booth and several years of evaluation within the NFPA 33-34 Spray Finishing Committee.

We then returned to OSHA in the late 1990's requesting that they update their 1910.107 standards. In fact, OSHA included this change in 1999 in its update to the unified agenda[5], but rescinded the effort in 2001, citing "resource constraints and other

[4] NFPA 33 (2003 Edition).
[5] Unified Agenda, Proposed Rule Stage 1218-AB84 – 2149. Spray Applications. http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=UNIFIED_AGENDA&p_id=4116.

priorities."[6] Prior to the rescission, however, OSHA called this rule "one of OSHA's most complex and out-of-date rules." Yet even with this acknowledgement, OSHA has been unable to correct it.

**Extensive Testing of Fire Safety With Respect to Recreational Boat Building**

When we first started working with NFPA, we needed to do some testing to determine what concentration of sprayed resin could cause a fire. And based on that, we could determine what level of fire protection would be necessary to protect the workers as well as the business operations. One of the tests that performed was to operate a spray-gun in an enclosed booth with no ventilation for 15 minutes. After 15 minutes, the concentration of flammable styrene-vapor in the booth was 690 parts per million (ppm). To put that into perspective, the lower flammable limit for styrene-vapor is 11,000 ppm. The reason why this type of material acts this way is because most of the styrene, which usually totals about 30 % of the resin mixture, does not volatilize and remains with the resin as it is applied and cures to make fiberglass. In fact, the NFPA tests revealed that the resin "does not readily ignite and burns slowly when it does ignite."[7] When OSHA wrote these rules back in the 70's they actually examined flammable solvents found in paints and other coatings such as toluene and xylene, which are extremely volatile and flammable.

**The Nature of the Problem with the Current OSHA Fire Safety Standards**

The main problem is that many state OSHA agencies and local fire departments refer to the federal OSHA standards when enforcing local fire code or worker safety regulations. There have been countless cases in our industry, including two of our Genmar plants, where a state OSHA office cited us for not complying with the 1910.107 standards even though the plants were in compliance with the updated NFPA fire safety standards. After expending a great deal of time and resources, including attorney's fees, we were able to convince one of the state OSHA offices to withdraw the violation. The other state OSHA office refused to withdraw the citation, but did agree to a compromise which did not increase our operational costs to the extent that full compliance with 1910.107 would require. The expended costs and continuing operational costs do not create a safer working environment.

**Conclusion**

There are four points that I want you to take away from my testimony:

- First, in writing its regulation, OSHA originally adopted the 1969 NFPA fire safety standards and OSHA has not updated them since then, even though NFPA has revised the standard to reflect new technologies and knowledge.

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[6] Unified Agenda, Completed Actions 1218-AB84 – 2134. Update and Revision of the Spray Applications Standard. http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=UNIFIED_AGENDA&p_id=5061.
[7] *See* NFPA 33 (2003 Edition) Chapter 17, Annex A, Explanatory Material at A.17.3(1).

- Second, OSHA has acknowledged that their standard is out-of-date and actually written letters to other industry manufacturers stating that if a facility is not in compliance with the OSHA fire safety standards, but is in compliance with the NFPA 33 standards, OSHA would consider this a De Minimis violation under the OSHA De Minimis policy.[8] Nonetheless, state OSHAs don't follow the federal OSHA De Minimis policy, which causes manufacturers problems.
- Third, we are pleased that FMCSA is moving forward to update its regulations to allow professional drivers to tow trailers equipped with surge brakes.
- Finally, as you probably hear from many company representatives who testify on regulatory issues, it is a great challenge and burden to manufacturers to comply with the complex regulations imposed on us today by local, state, and federal governments. When a regulatory agency has a rule on the books that *they* understand to be outdated, and we understand to be outdated, something needs to be done to fix it. That's why I am here today; to ask you to encourage OSHA to update its 29 CFR 1910.107 regulation to reflect the NFPA 33 Chapter 17 consensus standard.

[8] *See* OSHA's De Minimis policy, OSHA Instruction 2.103, September 26, 1994, Field Instruction Reference Manual, Chapter III – 19 and 20.

Ms. MILLER. Thank you. Your written statement will be entered into the record, and we certainly appreciate your testimony here today.

Our next witness is Joan Claybrook. Ms. Claybrook is the president of Public Citizen. She has an extensive career in automobile safety and public interest, dating back four decades. She has worked on Capitol Hill and in the Department of Transportation, as well as founding Public Citizen's Congress Watch in 1973 and directing it until 1977. She received a B.A. from Gaucher College and a law degree from Georgetown Law Center. We appreciate your being here today, Ms. Claybrook, and look forward to your testimony.

**STATEMENT OF JOAN CLAYBROOK**

Ms. CLAYBROOK. Thank you very much, Madam Chairman and Mr. Lynch. I appreciate the opportunity to testify. I am a former regulator myself, as administrator of the National Highway Traffic Safety Administration in the U.S. Department of Transportation. I have worked extensively in motor vehicle safety, but also in other regulatory areas.

The first point I would like to make is that well designed regulations stimulate the economy, produce better products and improve the overall quality of life. While it may seem intuitive that regulation costs businesses a lot of money in jobs, there is little actual research to suggest that this is true. The industry mainly cites a study called Crain and Hopkins, which is badly flawed and inflated. The OMB often cites World Bank and OECD studies.

But these studies do not in fact address the economic consequences of rollbacks of our well-justified health, safety, and environmental rules. Most of the evidence points in just the opposite direction in terms of the effectiveness. Just as pollution wastes resources, unchecked harm to society is a squandered opportunity to prevent injury or save lives. We all pay, in terms of higher insurance and medical costs, lost worker productivity and illness, even traffic delays.

In the automobile area, 42,000 people die every year, 3 million are injured. This in terms of economic costs is $230 billion in 2000 dollars, or $800 for every single man, woman and child in America.

Well-crafted regulation actually spurs innovation and growth. Regulation helps to protect industries from the consequences of short-term profit made decisions. For example, the fuel economy standards I issued in 1977 helped the auto industry when it found itself in a competitive problem during the domestic oil crisis of the late 1970's. Both the literature and the core insights from my years of participation in the regulatory process show that rules can improve economic well-being. I have four that I would like to mention.

It is far cheaper to prevent harm than to clean it up afterwards. Stimulating investment in sustainable practices also benefits industry. Regulation levels the playing field and reduces societal costs for beneficial innovations. Health, safety, and environmental rules are beneficial on balance.

The assault on regulation is a very convenient lobbying strategy, and not that there are not certain areas where regulation should be changed, I completely agree that it should be, but it is far easier

to blame the government standards than to deal with economic truths. A wealth of research shows that direct labor costs such as wages for comparably skilled workers are the major driver for industrial decisions to relocate jobs and not regulatory costs, which are less than 1 percent of the cost of shipped goods.

While manufacturing losses are devastating, very few major regulatory burdens were added to the manufacturing sector since the 1990's and that has been, there is no reason then to blame regulatory burdens for changes and fundamental shifts that have occurred in our global economy since 2000.

My second point is that OMB's 2000 draft report lacks objectivity and balance. OMB has earned more than skepticism in the public interest community by repeatedly publishing reports that make no mention of the serious objections that have been endlessly submitted to OMB. It is a miscarriage of OMB's assignment to conduct a notice and comment process on draft versions of its report, yet never actually respond to the comments that are presented.

Every government agency in its preambles does that, and I commend, by the way, the Department of Transportation both for its extensive response to commets that are submitted to it in its dockets, even if they do not agree with us, and also for its transparency, which has been better than any other government agency. I don't know if you are aware of that, but it is excellent in terms of the availability of information of proposed regulations and comments. The docket is all on the web, and they are really a model for the government.

I have detailed the continuing grave deficiencies of OMB's 2000 draft report in my full written testimony.

My third point is that OMB's hit list is an inappropriate interference with agency functions. First of all, the hit list is a list of rules to remove. They never asked us for rules to improve. New rules, areas where they are lacking information or lacking protection. So Public Citizen submitted 30 proposals last time to the OMB when they asked for their hit list. They took two of them and put them in their final version, which is still called a hit list, even though there are two positive proposals that we recommended. One was for stopping ejections when vehicles roll over, the other was for vehicles that are in a vehicle mismatch, for lessening the impact of that on the smaller vehicle.

OMB casts this process as a method for unearthing commonsense regulatory fixes. But two of the major ones highlighted that you have been discussing in this hearing are ongoing rulemaking decisions. They are not things that no one ever heard about or know about. They are highly controversial. One is the hours of service rule, which Public Citizen has been deeply involved in, and actually brought the lawsuit that overturned the rule. The other is the hexavalent chromium rule, which I would like to discuss further, perhaps in questions. I think there are some things that are inaccurate that have been said here today. That is also one which Public Citizen brought a lawsuit and forced the agency to actually act.

I appreciate the opportunity to testify today, Madam Chairman, and would be pleased to answer any further questions.

[The prepared statement of Ms. Claybrook follows:]

**Testimony of Joan Claybrook, President, Public Citizen,**
**before the**
**Subcommittee on Regulatory Affairs of the**
**House Committee on Government Reform**
***Submitted* June 28, 2005**

Thank you, Ms. Chairman and members of the Subcommittee on Regulatory Affairs, for the opportunity to offer this testimony on the Office of Management and Budget's (OMB's) nominations to the U.S. Departments of Transportation and Labor that came out of its 2004 Report to Congress.

My name is Joan Claybrook and I am the President of Public Citizen, a national non-profit public interest organization with over 160,000 members nationwide. We represent consumer interests through lobbying, litigation, regulatory oversight, research and public education. I am also a former regulator, as the Administrator of the National Highway Traffic Safety Administration (NHTSA) in the Department of Transportation from 1977 to 1981. I have worked to improve motor vehicle safety for more than 40 years.

Today I would like to make three major points.

**1. Well-designed health, safety and environmental protections stimulate the economy, result in better products and improve the overall quality of life.**

We are here today because regulated industry, like most of us, would prefer not to be told what to do. The question is whether this dislike for rules is justified because it causes economic harm to industry or to all of us. While it may seem intuitive that regulations cost businesses and jobs, there is little actual research to suggest that this claim is true. There is in fact strong scholarship and empirical evidence to the contrary.

The industry mainly cites badly inflated and repackaged data from a flawed study by Crain and Hopkins, in which the data dates from 1990 and 1991.[1] The OMB cites a study by the World Bank and an economist from the Organization for Economic Co-operation and Development (OECD) that dealt with the constraints on capital under regulated economies – including constraints on property and contractual rights.[2] Yet the U.S. is already the least restrictively regulated industrial country in the world.[3] The OMB-cited studies do not address the economic consequences that might arise from

rollbacks of our existing, relatively robust and well-justified health, safety and environmental rules.

In fact, most of the evidence on environmental and safety protections points in the opposite direction. Just as pollution wastes resources, unchecked harm to society is a squandered opportunity to prevent injury or save lives. We all pay, in terms of higher insurance and medical costs, in lost worker productivity and illness, and even in traffic delays. As just one example, the annual cost of all traffic crashes in the U.S., which take more than 42,000 lives and inflict more than 3 million injuries every year, is more than $230 billion in 2000 dollars, or $800 for every man, woman and child in the U.S.

It is not mere conjecture that well-crafted and well-justified regulation spurs innovation and growth – it is fact. Regulation also enhances competitiveness and helps to ensure that industries are shielded from the often dire consequences of short-term, profit-driven decision making. For example, the fuel economy standards put in place while I was Administrator helped to shield the domestic auto industry from a disaster during the late 1970s domestic oil crisis, created jobs in more sustainable technologies, insulated fuel costs from inflation-inducing spikes and reduced harmful pollution.

The literature on manufacturing competitiveness and regulation, and core insights from my 40 years of participation in the regulatory process, shows that well-designed rules can improve economic well-being in the following ways:[4]

- **It is far cheaper to prevent harm than to clean up afterwards.** Regulation that corrects market failures and requires the internalization of costs that would otherwise be inflicted on society turns a failure into a win-win. The innovation that it stimulates often results in cleaner, higher quality products with more consumer appeal and export value, and creates new industries and jobs (*i.e.*, in recycling, manufacturing pollution abatement technologies, antilock brakes, or air bags). Rules that internalize the real costs of activities connect cause with effect, focus attention on mitigation at the source, and generate useful information about inefficiencies. While in theory this brings the price of goods closer to the actual resource costs, in practice it often does even better by stimulating greater efficiencies – both improving quality and reducing harm.
- **Stimulating investment in sustainable practices is a core government function that also benefits industry.** According to the "Porter hypothesis," a theory authored by Michael Porter of Harvard's Kennedy School of Government which posits that well-crafted regulations lead to economic growth, the stimulation effect is far greater when regulations are more rather than less stringent. This is because growth from such "innovation offsets" can encourage true progress: extraordinarily creative measures which leap-frog industrial practices to new levels of quality, utility, environmental responsibility and societal well-being. To the extent that OMB's meddling introduces unjustified uncertainty into the regulatory process, its actions can incur additional delay and unwarranted costs in the form of investment insecurity, undermining these benefits.

- **Regulation levels the playing field and reduces total societal costs for beneficial innovations.** Rolling back regulations, or not implementing appropriate regulations, unfairly imposes costs on the public. In contrast, rules that set minimum motor vehicle safety standards, for example, assure that the safety investment will be made by every manufacturer, and that suppliers will compete to bring down costs over time. These cost reductions can happen quickly and be quite dramatic. In the case of air bags, according to testimony by Fred Webber of the Alliance of Automobile Manufacturers at a hearing last week in the House Energy and Commerce Committee, the cost of frontal air bags fell from $500 in the early 1990s to "well below $100" today. The public and industry both benefit from far greater economies of scale when optional equipment becomes standard. For example, while side impact air bags can cost as much $500 today, government estimates for side impact air bags as standard equipment in the near future are in the $120 per vehicle range, including automaker and dealer profit.
- **As OMB concludes, health, safety and environmental rules are beneficial on balance.** While much of industry's complaints focus on costs alone, every accounting report by OMB has found that regulations on the whole produce benefits that exceed costs by over threefold.[5] This is remarkable, as OMB's accounting of benefits ignore many unmonetized and qualitative benefits.

The assault on regulation is a convenient lobbying strategy: it is far easier to blame the rules than deal with the truth. A wealth of research shows that direct labor costs, such as the wages for comparably skilled workers, are the major driver for industrial decisions to relocate jobs, not regulatory costs, which are less than one percent of the cost of shipped goods.[6] A closer look at recent history tells us there is little merit to industry's claims that manufacturing rules are the cause of recent job losses in the manufacturing sector.

While these losses are both devastating and pervasive, very few new major regulatory burdens have been added to the manufacturing sector since 2000. In short, job losses have skyrocketed while the level of regulatory compliance has remained essentially unchanged since the mid-1990s, which was a time of record economic gains. It thus makes no sense to blame regulatory burdens for changes more likely attributable to fundamental shifts in the U.S. and global economy since 2000.

It appears far more likely from the literature and recent events that free trade agreements and tax loopholes encouraging foreign investment are the cause for industry job flight, as corporations seek out countries offering the lowest wages for workers. For example, a major study by the Economic Policy Institute shows that between 1993 and 2002, the North American Free Trade Agreement (NAFTA) resulted in a net loss of 879,280 American jobs.[7]

**2. OMB's 2005 Draft Report lacks objectivity and balance.**

What is the sound of one hand clapping? OMB has more than earned the skepticism and antipathy of the public interest community by repeatedly publishing drafts

and final reports that make no mention of the serious objections submitted in comments to it. It is frustrating for regulatory experts who raise principled, well-documented critique, to receive no response, or even acknowledgment, from OMB regarding their potent analysis.[8]

This is in sharp contrast to the regulatory agencies, which must respond to comments under the Administrative Procedures Act in regulatory preambles. It is a miscarriage of OMB's assignment to conduct a notice and comment process on the draft versions of its report, yet never to actually respond to the arguments and facts presented. The outcome is a sloppy report, developed in a self-imposed vacuum, that provides little meaningful insight into crucial questions about regulatory needs.

The uncorrected flaws and omissions pointed out in comments but largely ignored by OMB are evidence of OMB's anti-regulatory bias and include the following:

- **Some rules in, others out.** OMB's decision to limit analysis of costs and benefits to a 10-year window is arbitrary. A regulation does not arbitrarily stop producing costs and benefits when it falls out of the temporal scope of OMB's analysis. For example, a range in benefits from $433 million to $4.4 billion with costs of $297 million flowing from an EPA rule on acid rain (NOx) reductions, was excluded from the 2005 draft as untimely. OMB's 2005 draft also cherry-picked the specific rules included for analysis, presenting monetized costs and benefits for only 11 of its embarrassingly small ten-year total of 26 major rules.[9] The report's accounting omits all homeland security rules, as well as what OMB nonsensically designates as "transfer rules."[10] Adding to the incoherence, OMB admits to serious difficulty in aggregating cost and benefit estimates from different agencies, which apply different assumptions over different time periods.[11]
- **Some studies in, others ignored.** OMB again neglected recent publications and studies detailing serious flaws in its current cost-benefit analysis practices, including several seminal look-back studies previously submitted to OMB by Public Citizen.[12]
- **Structural and informational flaws in cost-benefit analysis disregarded.** While cost estimates are inflated by industry sources, benefits information is underfunded, lacking or incomplete. Static cost projections prior to a rule's implementation usually become inaccurate over time as costs decline significantly, and innovations reduce compliance costs. Agencies also fail to factor in off-setting economic gains resulting from regulation-spurred innovation and growth in sustainable industries.
- **Costs and benefits of deregulatory actions utterly omitted.** OMB's single-edged sword fails to count lost benefits suffered by the public when safeguards are weakened or blocked, such as the Environmental Protection Agency's crippling of the New Source Review program under the Clean Air Act. The neglect of these costs to the public in OMB's report misrepresents the true costs of the failure to regulate effectively.
- **Ethical problems invalidate attempts to monetize the value of human life.** OMB's random assignment of a $6.1 million value to a human life is grounded in dubious and totally discredited research on willingness-to-pay for risk reductions by

outdated studies of workers in high-risk jobs.[13] This habit, and the discounting of life that accompanies it, are both morally offensive and intellectually bankrupt.

- **Information gaps and uncertainties are compounded by macro-level attempts to compute overall costs and benefits.** Without answering the criticism already addressed to OMB's overly simplistic accounting methods, the 2005 draft report solicits comments on a "net benefits" approach which would conceal lost opportunities to significantly increase benefits for a minimal increase in costs and would even further diminish the already questionable value of OMB's conclusions.

Finally, OMB's role directly conflicts, in many cases, with authorizing mandates agencies receive from Congress. For many workplace health, safety and environmental protections, as the Supreme Court has recognized, cost-benefit analysis in standard-setting is forbidden or is not an authorized basis for a standard.[14]

OMB's drive to impose cost-benefit analysis may stem from a confusion about the difference between decisions about *means* and decisions about *ends*. Cost-benefit analysis may be helpful in order to develop the most cost-effective *means* for carrying out a policy. In contrast, it is unethical to set the ends or goals for safeguards based upon any other factor than their impact on human health and well-being.

**3. OMB's "hit list" is an inappropriate interference in agency functions.**

There are two fundamental hypocrisies in OMB's interference in agency activities in the form of the "hit list," a process initiated by Office of Information and Regulatory Affairs (OIRA) Administrator John Graham that would irrationally discard those rules most disliked by industry:

1) The nomination and selection process for OMB's hit list lacks the minimum indicia of accountability and transparency that it would reasonably expect of any agency process; and
2) Its unwarranted and unauthorized interference in agency and Congressional priorities is unsupported by any analysis of the costs and benefits of the regulatory rollback it recommends or of the harm caused by delay in agency issuance of important new rules.

The consequence of these two flaws is that OMB's list is intellectually incoherent. OMB's choices for the hit list remain unexplained and unjustified. When OMB summarized the original 189 submissions in December 2004, it stated that it would instruct agencies to review the suggestions and respond. OMB then summarily announced the 76 hit list endorsements, without revealing any of the rationales for the presence of these on or off the list or the responses of the relevant agencies. OMB merely repeated the reasons offered by nominators in the first instance. The public deserves to be informed of the reasons for prioritizing these suggested rollbacks of their safeguards.

OMB also must justify the need for this process in view of the many other ways in which special interests can and do affect regulatory policy, which include petitions for rulemaking, comments to regulatory dockets, lobbying Congress, litigation and the direct lobbying of agencies. Instead, the hit list process lacks any disclosure where it counts most – OMB's substantive decision making about priorities.

While OMB may attempt to cast this process as a method for unearthing long-neglected and commonsense regulatory "fixes," at least two of the matters highlighted in testimony today, the hours-of-service rule and the hexavalent chromium rule, are the subject of ongoing agency rulemakings that have been pending for more than a few years. OMB does not explain why the rulemaking processes of agencies, as well as, in the case of hexavalent chromium, a review process initiated by the Small Business Administration, are insufficient to address the industry's concerns.

Moreover, OMB must provide a good reason for its provision of yet another special access porthole in view of the tremendous and uneven power that regulated interests already have to weaken and derail regulation. The public, with only a relatively diffuse interest in the outcome of particular rules, is systematically disadvantaged by high-level attempts to highjack public priorities. OMB's dabbling only exacerbates this profound inequality.

Leaving agenda-setting to Congress and the agencies makes much more sense. Congress is available to identify emerging public policy issues and to direct agencies to act, while the agencies know their issues with a depth and breadth that a handful of economists and a scientist or two at OMB cannot match. The courts also play a constitutionally assigned oversight role in safeguarding Congressional intent and assuring that evidence presented in the regulatory docket drives agency action.

While regulations may end up being far from perfect, the point is that the process involves a carefully designed balance, embedded in the separation of powers, and that OMB's interference has no place in this purposeful architecture. OMB's sole appropriate function is to assist in the coordination of delegated authorities among the agencies. It should not be a political gatekeeper or provide an appeal of last resort to derail rules for corporate interests.

Public Citizen's 2004 comments called OMB to task for focusing on creation of a hit list rather than on unmet health safety and environmental needs. To that end, we submitted recommendations for affirmative action on 32 pressing social problems. OMB's misappropriation of two of our nominations for its hit list does not alleviate the process deficiencies outlined above. While both of our rulemaking actions now on its hit list are legitimate areas for action by NHTSA, OMB fails to explain its rejection of our 30 other nominations, all of which were equally deserving of attention by NHTSA or another agency. This committee should direct OMB to explain its reasons for rejecting or accepting candidates for its hit list and to publicly share agency responses.

We were somewhat surprised to note that OMB appears to agree with our assessment that a motor vehicle compatibility standard is needed, and that voluntary manufacturer activity to address vehicle mismatch in crashes is insufficient. Vehicle compatibility is a long-neglected area. The design of light trucks — and large SUVs and pickup trucks in particular — with a high center of gravity, high bumpers, and steel bars and frame-on-rail construction, makes these vehicles highly aggressive in crashes.

A car driver is twice as likely to die if their vehicle is struck on the driver's side by an SUV rather than by another car. A vehicle compatibility standard is needed to mitigate harm done by aggressive vehicle designs. In addition, a consumer information program for an incompatibility rating would allow consumers to make more ethical decisions about the likely harm inflicted on others when purchasing a vehicle. Rather than pushing for these needed items, OMB appears content with NHTSA's promise to publish a report on this issue. This certainly ranks among the most tepid responses by any agency to a hit list prompt, and is far from good enough.

A requirement for an occupant ejection safety standard is pending in the Senate version of H.R. 3, the highway reauthorization bill and has received widespread bipartisan support. More than 13,000 highway fatalities involve ejection each year. Government estimates are that advanced glazing in side windows would save between 500 and 1,300 people each year, while stronger door locks and latches would prevent hundreds of deaths annually. Especially troubling is the fact that safety belts are not designed to protect occupants in rollovers, and more than 400 belted occupants are killed annually in rollover ejections.

We strongly support Congressional enactment of a requirement for a new ejection prevention safety standard, particularly when combined, as it is in H.R. 3, with a new standard for roof crush. A strong roof crush rule could dramatically reduce ejections by closing the ejection portals caused by roof deformation and broken side window glass.

Two of the other hit list nominations to be discussed today fall more squarely into OMB's typical anti-regulatory approach. In the case of both the hours-of-service and hexavalent chromium rules, court involvement initiated by Public Citizen was required to assure that the federal agencies act according to their statutory mandate. Also in both cases, Public Citizen's litigation was founded on a science-based challenge, and our claims were upheld by the reviewing court, U.S. Courts of Appeal in rulings by a three-judge panel.

I will address the hours of service rulemaking first. In 2003, Public Citizen sued the Federal Motor Carrier Safety Administration (FMCSA) over a final rule extending allowable driver time from 10 to 11 hours and for other serious flaws that diminished safety. The overall impact of the various parts of the overturned rule was to increase total work time by nearly 40 percent and total driving time by 20 percent.

A U.S. Court of Appeals for the District of Columbia Circuit overturned the rule, harshly criticizing FMCSA for failing to consider the effect of the rule on the health of

truck drivers as well as other challenged aspects of the rule. The Court strongly suggested that the agency's rule was not founded in science, which shows an increase in risk every hour of driving beyond eight hours on the road. The agency is now in rulemaking to respond to the court's decision.

Truck drivers are currently exempt from the Fair Labor Standards Act, and receive no overtime pay despite having to work 14-hour shifts – nearly double the daily hours of the average American. Truck driving is very strenuous work, involving operating a heavy vehicle for long periods of time, as well as unloading and loading shipments. Motor vehicle crashes involving commercial trucks kill nearly 5,000 Americans each year,[15] and many of these crashes are fatigue-related.[16]

OMB's endorsement of a nomination to extend maximum driving time from 10 to 11 hours is entirely without basis in science and would greatly jeopardize the safety of both the public and commercial drivers. As FMCSA acknowledges in its rulemaking, performance degrades geometrically after eight hours, and in fact, the risk of a crash *doubles* between the 10th and 11th hours of consecutive driving.[17]

The local or short-haul drivers that are the focus of OMB's hit list item are not exempt from the cumulative fatigue of these long work shifts. Although fatigue effects for these workers may be relatively less severe when compared to long-haul drivers, long on-duty hours, regardless of driving time, still degrade performance and increase risk. One major study by FMCSA of short-haul drivers found that fatigue was a factor in 20 percent of the 77 critical incidents over a two week period where the driver was deemed at fault.[18] Studies show that the overall impact of long work shifts negatively impacts safety, with risk approximately doubling after 12 hours of work.[19] Long work days are exhausting, in and of themselves, and allowing drivers to continue driving at the tail-end of these long shifts merely would exacerbate risks to others on the road.

OMB's inclusion of OSHA's hexavalent chromium rulemaking on its list is similarly unjustified. All reputable scientists agree that hexavalent chromium is a lung carcinogen. The National Institute for Occupational Safety and Health in 1975, the National Toxicology Program in 1980, the Environmental Protection Agency in 1984, the International Agency for Research on Cancer in 1990 and the Agency for Toxic Substances and Disease Registry in 2000 have all reached this conclusion. So has OSHA itself. In 1994, in response to a petition from Public Citizen and a union now allied with the United Steelworkers to reduce occupational hexavalent chromium exposure levels, Joseph Dear, then Assistant Secretary of Labor for Occupational Safety and Health, stated that there is "clear evidence that exposure ... at the current [Permissible Exposure Limit] PEL ... can result in an excess risk of lung cancer."

Because of OSHA's failure to act on this conclusion, we sued the agency in 1997 and again in 2002. We prevailed in the second case, resulting in a court order from the U.S. Court of Appeals for the Third Circuit that OSHA produce a final rule by January 18, 2006. The court decried OSHA's "indefinite delay and recalcitrance in the face of an admittedly grave risk to public health" and held that "OSHA's delay in promulgating a

lower permissible exposure limit for hexavalent chromium has exceeded the bounds of reasonableness."

On October 4, 2004, OSHA produced its court-ordered proposed rule, reducing the PEL from the current 52 micrograms to 1 microgram per cubic meter. In general, this rule is thoughtfully assembled, and comprehensively analyzes all data available to the agency. OSHA acknowledges that its new PEL leaves "clearly significant" health risks; we believe that it is economically and technologically feasible to lower the PEL still further to reduce these risks.[20] Based on the leading epidemiological study in the field (the Gibb study), exposure to hexavalent chromium at the current PEL of 52 micrograms per cubic meter for a working lifetime (the required assessment under the Occupational Safety and Health Act) would result in 351 excess lung cancer deaths per 1,000 workers. Even at the proposed PEL, nine excess lung cancer deaths per 1,000 workers would occur, well in excess of the standard set in the Supreme Court's 1980 *Benzene* decision. At present, the agency estimates that over 85,000 workers (22.4 percent of chromium-exposed workers) exceed the proposed PEL.

The industry has already made full use of its numerous opportunities to influence this rulemaking. Through individual chromium-using companies, industry associations and the so-called Chrome Coalition, the industry intervened in both lawsuits, provided written comments during the three stages of the rulemaking, testified and cross-examined witnesses at a ten-day OSHA public hearing, participated in the Small Business Regulatory Enforcement Fairness Act (SBREFA) process, and held at least two meetings with the OMB. The chromium industry testimony in this hearing is simply the latest round in an effort, stretching back over a decade, to undermine a proposed rule that could save hundreds of lives.[21]

It is not as if OSHA has been too busy to regulate hexavalent chromium. The agency has not completed a single regulation on an occupational chemical since 1997 and, except for this court-ordered proposal, has not proposed any such regulation since at least the beginning of the Clinton administration. There is little else of substance on the agency's regulatory agenda at present.

**Conclusion: OMB misses the point.**

Regulations are a modern form of the social contract. They embody a fundamentally democratic idea about the exchange of responsibilities among participants in a society. The expression of values and moral judgments enacted by government safeguards are completely neglected in OMB's econometric accounting of what government is or does.

To illustrate the depth of commitment and salience of the common sentiments captured in government standards, I'd like to suggest the following five principles for understanding the purposes of government regulation. These are my own version of the ideals at stake in debates over the nature of the regulatory process and decisions about whether and how to regulate:

1) Corporations, like people, should clean up after themselves and be required to prevent the foreseeable harm of actions and choices.
2) Government action should correct social and political wrongs, set out fair rules for participation, distribute resources fairly and preserve and protect shared resources and the public commons.
3) Government activity both reflects and enacts moral values and collective goals – clarifying who we are and what matters to us.
4) People have a responsibility to actively respect the lives and health of people we do not know, as well as the natural environment and its limitations and gifts.
5) Voluntary risks are morally distinct from risks imposed upon the public without their knowledge or consent.

The principles encapsulate some of what is systematically disregarded by OMB's cynical view of both government and the people whom government protects under the constitutional prescription that it "promote the general Welfare."

Because much government activity is motivated by equitable concerns for others, rather than narrow self-interest, OMB's basic framework excludes a real understanding of its subject. Members of Congress, on the other hand, must be responsive to the human concerns that animate government action. They therefore should recognize the crippling limitations of OMB's analytical tools and worldview.

**Endnotes**

[1] In a hearing in 2003, Graham thoroughly dismissed the Crain and Hopkins study regularly cited by industry, stating:

> "The fact that attempts to estimate the aggregate costs of regulations have been made in the past, such as the Crain and Hopkins estimate of $843 billion mentioned in Finding 5, is not an indication that such estimates are appropriate or accurate enough for regulatory accounting. Although the Crain and Hopkins estimate is the best available for its purpose, it is a rough indicator of regulatory activity, best viewed as an overall measure of the magnitude of the overall impact of regulatory activity on the macro economy. The estimate, which was produced in 2001 under contract for the Office of Advocacy of the Small Business Administration, is based on a previous estimate by Hopkins done in 1995, which itself was based on summary estimates done in 1991 and earlier, as far back as the 1970s. The underlying studies were mainly done by academics using a variety of techniques, some peer reviewed and some not. Most importantly, they were based on data collected ten, twenty, and even thirty years ago. Much has changed in those years and those estimates may no longer be sufficiently accurate or appropriate for an official accounting statement. Moreover, the cost estimates used in these aggregate estimates combine diverse types of regulations, including financial, communications, and environmental, some of which impose real costs and others that cause mainly transfers of income from one group to another. Information by agency and by program is spotty and benefit information is nonexistent. These estimates might not pass OMB's information quality guidelines."

***Hearing on H.R. 2432, Paperwork and Regulatory Improvements Act of 2003***, July 22, 2003, Transcript at 21 (statement of John Graham). Nonetheless, the 2005 Draft Report refers to this study without further qualification. *See* Office of Info. & Reg. Affs., OMB, 2005 Draft Ann. Rept. on Costs and Benefits of Fed. Regs. (hereinafter "Draft Report") (calling the Crain and Hopkins study a "recently sponsored . . . study" proving a disproportionate burden on small businesses).

[2] The Center for Progressive Reform (CPR) highlighted in comments last year to the 2004 draft report that OMB relied upon flawed and inapposite studies to support its claim of a regulation-economic strength trade-off. *See* Heinzerling, Lisa and Frank Ackerman, Letter to Lorraine Hunt, OIRA, May 20, 2004, at 4. OMB repeats this mistake in this year's draft report, citing the same flawed and inapposite studies, such as the Heritage Foundation index. OMB states that "[s]ince 1995, the Heritage Foundation and the *Wall Street Journal* have published jointly a yearly index of economic freedom for 161 countries. They find a very strong relationship between the index and per capita GDP." OMB Draft report, at 30. OMB uses the Heritage Foundation index in support of the "impact of smart regulation on economic growth," even while acknowledging that a "correlation between degrees of economic freedom and per capita GDP does not prove that economic freedom causes economic growth." *Id.* OMB also cites an index published by the Fraser Institute, which CPR also criticized in comments to the 2004 draft report. OMB uses both the Heritage Institute and the Fraser Institute indexes, even though, according to OMB, both "have several drawbacks," such as "the data are based largely on subjective assessments and survey results" and "include non-regulatory indicators." Additionally, OMB cites a World Bank study despite an extensive critique of OMB's use of the report last year by CPR that showed the report's conclusion to be inapplicable to OMB's purposes.

[3] OMB, "Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations," at 33.

[4] The leading article in this line of study is the justly famous Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 J. Econ. Perspectives 97 (1995). Other important studies include the following: Ebru Alpay, Steven Buccola & Joe Kervilet, *Productivity Growth and Environmental Regulation in Mexican and U.S. Food Manufacturing*, 84 Amer. J. Agr. Econ. 887 (2002) (finding that Mexican food manufacturers developed improved efficiencies in operations as a result of increasing stringency of environmental regulation); Eli Berman & Linda T.M. Bui, *Environmental Regulation and Productivity: Evidence from Oil Refineries*, 83 Rev. Econ. & Stats. 498 (2001) (finding that L.A. Air Basin oil refineries achieved improved operations directly because of heightened environmental standards); Eban Goodstein, *Polluted Data*, Amer. Prospect, Nov.-Dec. 1997, at 64 (charting many cases in which regulations resulted in innovations that significantly offset the initial cost of compliance); Stephen Meyer, *Environmentalism and Economic Prosperity: An Update* (MIT, Feb. 1993) (finding that states with stronger environmental protections tended to have higher GDP growth than states

with laxer regulation); Office of Tech. Assessment, U.S. Cong., Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health: An Appraisal of OSHA's Analytical Approach (Rep. No. OTA-ENV-635, Sept. 1995), *available at* <http://www.wws.princeton.edu/~ota/disk1/1995/9531_n.html>.

[5] OMB, Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations, at 4.

[6] *See generally* Kevin Gallagher, Trade Liberalization and Industrial Pollution in Mexico: Lessons for the FTAA (Global Dev. & Envt. Inst. Working Paper, Oct. 2000) (finding that labor costs rather than pollution abatement regulation drive overseas relocation of industries); Eban Goodstein, A New Look at Environmental Protection and Competitiveness (Econ. Pol. Inst. Briefing Paper, 1997) (concluding that industries that spent more on regulatory compliance between 1979-1989 exhibited superior performance to foreign competitors); Eban Goodstein, Jobs and the Environment: The Myth of a National Trade-Off 19 (1994) ("Highly polluting industries are relocating to poor countries; but the reason, overwhelmingly, is low wages."); Jaffe et al., *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?*, 33 J. Econ. Lit. 132 (1995) (finding that "overall, there is relatively little evidence to support the hypothesis that environmental regulations have had a large adverse effect on competitiveness"). *See also* Testimony of Sidney A. Shapiro, before the Subcommittee on Regulatory Affairs Committee on Government Reform, U.S. House of Representatives, April 12, 2005.

[7] Scott, Robert E., "The High Price of 'Free' Trade: NAFTA's Failure Has Cost the United States Jobs Across the Nation," November 17, 2003, Economic Policy Institute Briefing Paper #147.

[8] For just one example of this imperviousness, OMB claimed in the 2005 draft report that the costs associated with regulations is borne by workers, providing no support for this strong claim except for a citation to a single economics textbook. In its 2004 comments, CPR excoriated OMB for this thinly veiled and inaccurate attack on regulation, stating: "Textbooks, of course, do not all agree with each other, and they do not represent peer-reviewed literature, the standard of proof that OMB requires in other areas. OMB cites no empirical evidence for its claim. OMB should exclude this claim from the Report unless it produces evidence for it. Moreover, if OMB does produce evidence for this claim, it should address the significant evidence that exists on the other side of the issue. For example, University of California-Berkeley economist David Card and Princeton University economist Alan Krueger have written widely on empirical studies of minimum wage laws, finding that – contrary to assumptions in many textbooks – moderate increases in the minimum wage have a zero to slightly positive effect on employment. Their work has appeared twice in the prestigious *American Economic Review*, and the book-length version has been published by Princeton University Press." Heinzerling, Lisa and Frank Ackerman, Letter to Lorraine Hunt, OIRA, May 20, 2004, at 3. Regardless of this well-reasoned objection, OMB's 2005 draft report repeated the assertion verbatim and without noting CPR's critique.

[9] OMB, "Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations," at 6. This year's draft report lists only 26 major rules, of which 15 lack fully quantified costs, benefits, or both. Eight of those 15 state that the benefits are unquantifiable "homeland security" benefits, which OMB declares are simply too hard to quantify. (Two of those are food safety regulations securing the food supply against bioterror.) The remaining seven are a grab bag of protective policies and deregulation decisions, which include protections against mad cow disease (which lacks benefits estimates, because "the exact quantitative relationship between human exposure to the [mad cow disease] agent and the likelihood of human disease is still unknown"); a rule implementing a ban on trade with Syria while it continued to occupy Lebanon (which lacks benefits estimates); two regulations of migratory bird hunting (lacking cost estimates); the controversial rollback of overtime rights (which lacks benefits estimates and does have cost estimates, although it excludes an estimated 6 million workers who could lose overtime protections); and the regulation of computerized reservation systems for travel agents.

[10] As CPR pointed out in 2004 comments in a critique which went unanswered by OMB, the designation by OMB of some rules as transfer rules makes little sense. One so-called "transfer rule" is of particular interest, as it concerns a rule currently being challenged in court by Public Citizen. The rule allocates credits under the Corporate Average Fuel Economy (CAFE) program to automakers for the production of vehicles with a "dual-fuel" capacity. Because these vehicles actually use alternative fuel less than 1 percent of the time, according to the government's own published estimates, the rule permits overall fuel economy standards to be considerably lower than those set under CAFE. There are few clearly quantifiable public benefits and no monetizable benefits, according to NHTSA's regulatory impact analysis (RIA) on the subject, which also provides a cost estimate range for the rule as between 2.6 billion and 3.2 billion gallons

of gasoline, at a corresponding discounted value of between $1.9 billion and $2.2 billion. *See* "Final Economic Assessment, Alternative Fuel ed Vehicles, Extension of CAFE Option, Part 538," Feb. 2004, Docket No. NHTSA-2001-10774-37. OMB has therefore designated a "transfer rule" a rule that has nothing to do with the budget, that NHTSA clearly thought required preparation of an RIA, and for which NHTSA estimated massive costs and only highly contingent, and possibly nonexistent, benefits.

[11] OMB, "Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations," at 39.

[12] Overlooked studies included: Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 Tex. L. Rev. 1997, 2030-33(2002); Ruth Ruttenberg & Assocs., Public Citizen, Not Too Costly After All: An Examination of the Inflated Cost-Estimates of Health, Safety, and Environmental Protections, Feb. 2004 (available on-line at http://www.citizen.org/documents/Not%20Too%20Costly.pdf); Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection,* 150 U. PA. L. Rev. 1553, 1554 (2002). Lisa Heinzerling and Frank Ackerman, Priceless: On Knowing the Price of Everything and the Value of Nothing, New Press, Jan. 2004; Richard W. Parker, *Grading the Government*, 70 U. Chi. L. Rev. 1345 (2003).

[13] *See* Lisa Heinzerling and Frank Ackerman, Priceless: On Knowing the Price of Everything and the Value of Nothing, New Press (2004) at 75-6 (providing ample discussion of the grave deficiencies in willingness-to-pay calculations, including its basis in studies rife with methodological problems); *see also* Heinzerling, Lisa and Frank Ackerman, Letter to Lorraine Hunt, OIRA, May 20, 2004.

[14] *See* American Textile Manufs. Inst. v. Donovan, 452 U.S. 490 (1981) (Cotton Dust case); AFL-CIO v. American Petrol. Inst., 448 U.S. 607 (1980) (The "Benzene Case").

[15] National Highway Traffic Safety Administration, "2004 Projections: Motor Vehicle Traffic Crash Fatalities and Injuries," Washington, D.C.: NHTSA, Apr. 21, 2005, at 33.

[16] The National Transportation Safety Board has estimated driver fatigue as a probable cause in 58 percent of single-vehicle large truck crashes it investigated and 30 to 40 percent of all large truck crashes. *See* National Transportation Safety Board, "Factors That Affect Fatigue in Heavy Truck Accidents," Washington, D.C.: NTSB, 1995, at v.

[17] Federal Motor Carrier Safety Administration; Notice of Proposed Rule: Hours of Service of Driver, Drivers Rest and Sleep for Safe Operations; Docket No.FMCSA-97-2350-972; Washington, D.C.: FMCSA; May 2, 2000; at 25544.

[18] The study involved 42 drivers only and classified 77 of the total 249 critical incidents recorded as the fault of the driver. *See* Impact of Local/Short Haul Operations on Driver Fatigue, U.S. Department of Transportation, Federal Motor carrier Safety Administration, Report No. DOT-MC-00-203, Sept. 200, at ix.

[19] S. Folkard, "'Time On Shift Effects' In Safety: A Mini-Review," Abstract in the *Shiftwork International Newsletter*, May 1995, 12:1, Timothy Monk, ed., presentations from the 12th International Symposium On Night- and Shiftwork, Ledyard, CN, June 13-18, 1995. Multiple studies show that working past the 11th hour of a shift decreases performance and alertness. Additionally, long hours can lead to further decreased sleep time, as sleep is sacrificed to perform personal activities, and the cumulative effect of long hours can lead to unresolved sleep debt. *See* Roger Rosa and Michael Colligan, "Extended Workdays: Effects of 8-Hour and 12-Hour Rotating Shift Schedules On Performance, Subjective Alertness, Sleep Patterns, and Psychological Variables," *Work and Stress*, 1989, 3:1, 21-32; Roger Rosa and Michael Colligan, "Extended Workdays: Effects of 8-Hour and 12-Hour Rotating Shift Schedules On Performance, Subjective Alertness, Sleep Patterns, and Psychological Variables," *Work and Stress*, 1989, 3:1, 21-32; and Roger Rosa and Michael Bonnet, "Performance and Alertness On 8 H and 12 H Rotating Shifts At a Natural Gas Utility," *Ergonomics*, 1993, 36:10, 1177-1193.

[20] Gibb HJ, Lees PSJ, Pinsky PF, Rooney BC. "Lung cancer among workers in chromium chemical production," Amer. J. of Industrial Med. 2000; 38:115-26.

[21] The timeline for efforts to establish rules for hexavalent chromium exposure is as follows:

- **July 1993** - Public Citizen files a petition for a rulemaking for an occupational health standard for hexavalent chromium.
- **Feb. 1994** - OSHA agrees there is clear evidence of an excess risk of lung cancer with exposure at the existing standard, and states that it will publish a notice of proposed rulemaking no later than March 1995.
- **Aug. 1997** - After repeated delay in issuance of a notice (accompanied by repeated acknowledgments that the existing standard was inadequate and should be lowered by a factor of

10 to 100), OSHA denies Public Citizen's request for a rulemaking schedule but says it will move as quickly as possible.

- **Oct. 1997** - Public Citizen brings an action in the Third Circuit claiming unreasonable delay and seeking to compel action. OSHA tells the court that the agency expects to issue a notice of proposed rulemaking (NPRM) by Sept. 1999.
- **March 1998** – The court denies the Public Citizen petition to compel agency action, holding that agency delay is not yet extreme enough to warrant action and emphasizing the agency's intention to act in 1999.
- **August 2000** - The Gibb study is published and confirms that hexavalent chromium causes lung cancer at exposure levels far below those permitted by the existing standard.
- **Dec 2001** - OSHA's regulatory agenda demotes revision of hexavalent chromium to a "long-term action" with a timetable "to be determined."
- **March 2002** - Public Citizen files another action in court, claiming unlawful delay.
- **December 2002** – The court finds that the agency has engaged in unlawful delay and orders the parties to mediate over a possible remedy.
- **Feb. 2003** - In mediation, OSHA proposes to take over four more years to issue a final rule; Public Citizen proposes a two-year schedule. The mediator recommends a three-year schedule.
- **March 2003** - The court accepts the mediator's proposed schedule, calling for issuance of the NPRM by October 2004, and a final rule by January 2006.
- **Oct. 2004** - OSHA issues the NPRM on schedule. The proposal calls for a 50-fold reduction in the exposure standard for hexavalent chromium, although OSHA acknowledges that significant risks will remain at that level. OSHA's cited rationale for not lowering the standard further is a concern about the technological feasibility of a lower standard for only two industries, out of dozens, in which workers are exposed.
- **Feb. 2005** - OSHA holds two weeks of hearings on the proposed rule. Public Citizen, the National Institute for Occupational Safety and Health (NIOSH), and labor groups testify that OSHA should reduce the exposure level still further to eliminate the significant risks that remain at the proposed exposure levels. Industry comes out in force to claim the proposed rule will be economically infeasible and to ask for a much more permissive standard.
- **April 2005** - Industry groups present a new study to OSHA in post-hearing comments, claiming that it shows that low levels of exposure do not elevate cancer risks. Public Citizen points out that the study is underpowered to support any such conclusions.

Ms. MILLER. Thank you. We appreciate all of our witnesses being here. In regards to the auto industry and traffic safety, I think Government has done such a great job of regulating the automobile industry in the last several decades that we have been an integral part of driving them to bankruptcy, quite frankly, to the brink of bankruptcy, I think, with General Motors, of where they are right now, and some of the other problems.

Living in Michigan, in the Motor City, I see it every day, these kinds of things. They are not leaving the United States or Michigan always because of $1 an hour jobs. That certainly is a part of a business decision. But I think the burden, unbelievable regulatory burden that the Government has placed, certainly the Federal Government as well as the State government, we have been handmaidens.

That old saying, I am from the Government and I am here to help you—it is a choking grain of truth, I suppose.

I would like to ask a question of Mr. Melby, if I could. I thought your testimony was interesting, sir. You mentioned a couple of your plants, the Genmar plants, have actually been cited for adhering to the outdated Federal fire standards. But that the States sometimes will not listen to what the Federal Government's lead is on this. How often does that actually occur? Do you have quite a bit of consternation with the way that the individual States are dealing with the Federal standards as well, and making it even worse?

Mr. MELBY. On two occasions it was States that operate their own, and have authority to run their OSHA programs. They have adopted the Federal standards. They are comfortable with the 107 standards as far as looking at any supporting information running back through that this is the consensus standard NFPA. It has been changed. You shouldn't cite us for this.

They have told us, they do not have de minimis policies. They are not able to do that. The rules are the rules. If we wanted to take and contest it and spend the money, who knows how that would turn out. But they are not able to vary from the 107 standards the way they are written.

Ms. MILLER. Does your industry have any data on what kind of a burden you think financially this particular, by OSHA not updating the fire standard, what actually the financial burden might be on perhaps a small business, as a general amount, and a large business? Any idea at all?

Mr. MELBY. I am not sure, but I can tell you what the standard is requiring for us in this particular part of the standard, which is dealing with what we put in the floor of our booths to keep the sticky resin off the floor. If we went with the flameproof cardboard that would be required under 107 as opposed to a workplace standard with cardboard, it was going to be a couple hundred thousand a year.

And that was the reference that I made that we were able to compromise. We are probably going to increase our costs $50,000 in that instance. But under the standards, what we are doing meets best practice.

Ms. MILLER. Now, in full disclosure, I have to tell you why I am asking you some of these questions. My dad built one of the first fiberglass boats ever, back in the 1950's. In fact, he had a big

placque up in his shop that said, if God wanted us to have fiberglass boats, he would have made fiberglass trees. [Laughter.]

But I am somewhat familiar with the utilization of the different elements that you use in the manufacturing of boats. This is an area that I have some interest in. I watched during the 1980's when the Federal Government put the Federal excise tax on the boat manufacturing, thinking they were going to tax the rich. And of course, what they did is destroy an industry where they just simply went to another country, quite frankly. And those that are rich amongst us would just order their boats from a different country and document them somewhere else and bring them in.

So I do have some consternation with this, and it looks like you have some numbers there of what kind of impact this is actually having on your industry.

Mr. MELBY. What I have been handed, it says that the total boat builders with fewer than 20 employees, very, very small businesses, 794, the regulatory costs for these businesses would be approximately $5.6 million. That is a conservative estimate.

Ms. MILLER. And if you think of the boat manufacturing industry today, for the most part, outside of the larger ones, there are so many small boat manufacturing industries. They are not unionized and they are trying to comply. As has been indicated with a number of these different studies, the cost of compliance is particularly hard felt on small businesses as well, as they are trying to comply with these things.

I would like to ask a question of Mr. Sessions in regard to the hexavalent chromium rule that we have been discussing somewhat today. It was interesting to me, listening to your testimony about what your industry estimates the cost to be. I wrote down here, I think you said $2.9 billion. Yet the OSHA estimates for compliance costs fluctuate wildly from that. Do you have any comment on why the huge difference?

Mr. SESSIONS. Yes. OSHA's estimates are far, far smaller than industry estimates. I think the reasons encompass sort of every step in the technical process of estimating the cost of regulations. For example, there are a number of additional industries affected by the rule beyond those that OSHA considered, such as fiberglass insulation manufacturing, the mining industry, the auto repair and body shops.

Second, for the industries that were identified as affected, in general, industry thinks that far more of the industry will be affected than OSHA assumes. For example, in the steel industry, OSHA estimated costs for the specialty steel producers but estimated no costs for the carbon steel producers. But in fact, some of the carbon steel operations will be affected.

Or in the metal finishing industry, OSHA estimated costs for three particular varieties of metal finishing. But in fact, hexavalent chromium is used in many more varieties and in probably about twice as many facilities as metal finishing. So the number of affected industries, the number of affected sectors, the number of affected plants, the number of affected workers. For example, the U.S. Navy has estimated that ship repair workers, somewhere on the order of three to six times as many of them will be affected by the regulation as OSHA costed costs for.

Beyond that, the number of entities or workers affected, there are differences about the capability of control technologies, there are strong disagreements, as I mentioned, about the technical feasibility of getting to one with the control technologies that OSHA asserts will do the job.

Further differences in such kind of mundane things as unit costs, a very small portion of the cost of this rule involves more workers having to take showers and change their clothes more often. So a part of the cost analysis is, how long does it take a worker to shower and change. OSHA's estimate to shower and change was 7 minutes. We think on average it takes quite a bit more than that.

So across the whole range of bits and pieces that have to be aggregated together to estimate costs, we disagree substantially with OSHA. We wish that there were more time in the rulemaking to sort of hash out these differences and get some agreement and get a more reasonable agreement on what the cost will be.

Ms. MILLER. OK. I would like to yield to the ranking member.

Mr. LYNCH. Thank you, Madam Chairman.

Let me start with you, Mr. Sessions. To kind of follow this court order that required the standard to be changed, and then OSHA through its own process reduced the PEL from 52 micrograms per cubic meter to 1 microgram per cubic meter. I do know that the court was particularly incensed by OSHA's unwillingness to proceed in a timely fashion.

Is it your estimation that the new standard, the 1 microgram per cubic meter, is that arbitrary, or are you saying there is no science behind that? I just wanted to get a sense of your perspective, and then I am going to ask Ms. Claybrook the same question.

Mr. SESSIONS. First, a clarification. The existing limit is 52 right now; the 1 is a proposed new standard.

Mr. LYNCH. That's correct.

Mr. SESSIONS. I think industry's opinion is that, as I mentioned, the standard must eliminate significant risks, but the standard must also be technically and economically feasible. Industry believes strongly that one is not technically nor economically feasible for most of—I don't know, I am not sure I should say most—for many of the regulated industries.

Mr. LYNCH. I was just curious. That seems to be a drastic shift, going to from 52 to 1. I just am not familiar with the methodology that was used by OSHA.

But let me ask the same question of Ms. Claybrook.

Ms. CLAYBROOK. First of all, Mr. Lynch, this existing standard is 33 years old. It is a very old standard. And many of the companies and industries that are going to be covered by this already meet the standard of 1. So it is not something that is not technologically or economically feasible in many companies and many industries.

There are some that have a harder time than others, which we will acknowledge. I think it is the electroplaters and there is another industry that also has difficulties with this.

One of the solutions for a problem like this, where many companies can do something about this, this is a carcinogen, a well-recognized carcinogen that causes lung cancer. There are thousands and thousands, tens of thousands of workers that are affected by this.

It is time, it is past time to do something about this issue. But one possible solution is under OSHA's authority, they can have a separate engineering control air limit called a CCAL that if there is justification for it, can have a separate limit.

So we would urge and recommend, and we have to OSHA, that they address the standard as they have proposed. In fact, we proposed a more stringent one. But at a minimum, most companies will have to comply with it and can. And it has been shown in the industry that they can. Then where there are exceptions, to have this other process.

Mr. LYNCH. It sounds like progress.

Ms. CLAYBROOK. If I could make one other comment in response to the chairman's point on the use of this old data. The exposure time is very long for the development of lung cancer. And the studies that have been, the data is the best we have available, it is through the 1980's. So it is really not all that old given the development time for lung cancer.

The linear risk model that is used is the standard for occupational cancer. That is the standard that is used. The industry-funded study, the Lippold study, acknowledges that the linear model is good in predicting lung cancer. So it is not that it is something that is not common and well understood in the science.

Mr. LYNCH. Thank you. Ms. Claybrook, I want to stay with you for a minute. I had been trying in the previous panel to shed a little light on the process that OMB used to target certain regulations. I am particularly troubled by the hours of service rule targeting, if you will. Could you discuss, you are the former NTSB administrator, and I think you might have the ability to speak to this, but could you speak to the issue of the OMB process and what the suggested changes in the hours of service rule might mean to the general public?

Ms. CLAYBROOK. First of all, to drivers, to truck drivers, it is the most hazardous occupation in America. Let's start there. There are almost 800 truck drivers a year that are killed in truck crashes, even though they are in these huge, huge vehicles; 5,000 Americans are killed, and about 130,000 are seriously injured. So it is a huge issue.

Between 20 and 40 percent, depending on which study you look at, of the crashes in trucks are from fatigue, fatigue-related crashes. And so this is an issue of dire importance.

The Congress in 1996 I think it was, or 1997, commanded the Department of Transportation to issue a new standard to protect the public. Instead, they issued one that increases the number of driving hours from 10 to 11 hours a day, even though all the studies show that after 8 hours there is a drastic increase in fatigue related crashes.

But they didn't only do that. They also said that you have to have only 34 hours off before you have to start driving again. The overall impact of this rule is a 20 percent increase in driving time. Also, they did not put in the requirement for a black box to enforce so that there would be an efficient enforcement mechanism. Everybody knows that every driver has three log books, which they call comic books, so they have different ones for different purposes, one for getting paid, one for the police and so on.

So that is why the court was outraged by this rule, it went in the opposite direction from what the Congress had asked them to do. Also, when the Federal Motor Carrier Safety Administration was created in 1999, written right into the statute it says that safety is the priority of this agency. So that is why the rule was overruled then. On the day that the highway bill was about to expire, on October 1st, that day they snuck into the highway bill a 1-year extension for keeping the rule that was vacated by the court. It was never debated, no one had a chance to discuss it.

So it is in there for another year, and now they are doing a new rulemaking and it looks like they are going to try and keep essentially the old rule, the vacated rule, as the one they are going to reissue. We have been extremely upset about this and very concerned for both the public and for drivers.

Mr. LYNCH. Thank you. I am equally as troubled. I find it unbelievable. Maybe we can do something about it.

Thank you, Madam Chair. I yield back.

Ms. MILLER. Thank you.

I want to go back to Mr. Sessions and talking about OSHA, as they are going through promulgating their rule right now in regard to this particular element. I thought it was interesting when you were talking about the aerospace industry, in particular. I think you said $1.1 billion we could lose because of that. Certainly when you think of France, which is at about 50 as well, with Airbus, and these kinds of things, it is rather startling, or even foreign steelmakers, you mentioned the steel.

Obviously the cost of steel is something with the economic modeling forever changing, with China and some of the other emerging nations, with the cost of steel, scrap steel, etc., and then this rule on top of all of that is rather mind boggling. I have had a number of the metal finishing shops in my areas, just the smaller ones that have come forward with their consternation about this rule. Basically these fellows are just throwing their hands up in the air and saying, look, we are out of business if this happens. We're out of business. And you don't know if that is really true or not, but obviously there is great angst on their part about what is going to happen here.

And you were estimating that more than half of all the metal finishing shops would close. I am always trying to understand how these estimates are actually done. What is the construct for these estimates? Could you talk about that a little bit more, why you really think half of them will close?

Mr. SESSIONS. Sure. There are kind of two lines of analysis that get there. The starting point in estimating what the impact of any regulation will be is estimating the cost that the regulated entities will have to try to bear. For this rule, for example, we had engineers go to a sample of six representative metal finishers and work with the facility owners and look at their current exposure data and estimate exactly what they would have to do to reliably meet the proposed standard. They developed for these six facilities estimates of the cost to meet the standard.

Then the question is, are these costs affordable. Part of the answer to that is, will the producer be able to pass some of the costs on to his customers, or will the facility owner have to try to absorb

the cost. Essentially we had economists look at the markets served by each of these six facilities and exactly what products they were selling where, what was the nature of the competition. Some of them in fact were serving industries where they could well pass costs through, but many others were in cut-throat competition with producers from Mexico or China or whatever.

So anyway, the next step is to assess how much of the cost will have to be absorbed by the facility, then you can compare the cost that is to be absorbed with some estimate of the facility's ability to pay those costs in terms of its revenues and its profits and its business outlook for the long term. So in essence, the decision as to whether a facility will close is a balancing of the cost impacts against the ability to pay. And with these six facilities ,we did a very detailed analysis on and concluded that at least three of them will definitely close. It is likely that the others would be threatened substantially also.

The second half of the analysis, though, is a very similar analysis that the Environmental Protection Agency did a couple of years ago for a water pollution rule that would affect this very same industry. EPA did a very similar process of taking case study facilities, collecting economic data, estimating the costs and weighing the costs against the ability to pay.

EPA concluded in this rule that a cost averaging $61,000 would close more than half of the industry. This was another regulatory agency a couple of years ago. And in fact, EPA decided that its rule, which would cost an average of $61,000, they would not promulgate because it would close so much of the industry.

Well, we take that as a benchmark. And here is a rule that we contend will cost on average more than $100,000 per facility. And EPA's impacts that they see at $61,000 we think provides substantial guidance to what we see with costs of $100,000 or more. So we have the case studies as well as the EPA study that lead us to this conclusion.

Ms. MILLER. As we sort of conclude our hearing here, do you have any comment on what Congress could do perhaps to facilitate with the various agencies and how they might streamline their rulemaking process or things that you have seen over your years dealing with the various agencies, and what kinds of things Congress might be able to do that would be helpful?

Mr. SESSIONS. I think a number of the things Congress has done are extremely helpful already, the Small Business Regulatory and Enforcement Fairness Act is very important for identifying impacts on small entities and getting agencies to seriously consider alternatives that can reduce the burden on small entities. I think the ultimate congressional authority to overturn regulations if need be, it has been used very, very, very rarely, but that is important.

I think there are a number of requirements, and people have been talking about the OMB requirements for regulatory analysis and the OMB list, etc. I submit that contributes to good analysis. It contributes to identifying the impacts on health, on economics, on jobs for any regulation that is under consideration. I think Congress in its oversight role, perhaps as you are doing here, encouraging agencies to take those requirements seriously and to do as good a job as is possible of identifying those impacts so that it can be

sorted out and balancing decisions can be made, I think that is a critical role.

Ms. MILLER. I want to thank you all for your comments. They have called us for a vote.

Do you have any other questions before we adjourn?

Mr. LYNCH. Just one final question. In the area of hexavalent chromium, since proper ventilation equipment and those types of technologies for containment are seen as probably the best way of addressing the danger, would it be helpful if Congress, if we decided to adopt this rule in this fashion, provided a tax credit for those who purchase this ventilation equipment? Would that lessen the impact of the rule if it were adopted?

Mr. SESSIONS. I think that a significant share of the cost for many of the industries will be additional ventilation. And so a reduction in the cost of that ventilation would be helpful. I think there are some industries where the answer is not ventilation, but for many that would be very helpful.

Mr. LYNCH. It is something we might look at.

Thank you, and I yield back, Madam Chair.

Ms. MILLER. I certainly appreciate all of you attending today. We appreciate your testimony so very, very much. And with that, we are going to adjourn the meeting.

[Whereupon, at 3:47 p.m., the committee was adjourned.]

[Additional information submitted for the hearing record follows:]

TOM DAVIS, VIRGINIA,
CHAIRMAN

CHRISTOPHER SHAYS, CONNECTICUT
DAN BURTON, INDIANA
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ONE HUNDRED NINTH CONGRESS

# Congress of the United States
## House of Representatives

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DISTRICT OF COLUMBIA

BERNARD SANDERS, VERMONT,
INDEPENDENT

July 11, 2005

Jeffrey A. Rosen
General Counsel
Department of Transportation
400 7th Street, SW
Washington, DC 20590

Dear Mr. Rosen:

I would like to take this opportunity to thank you for appearing before our Subcommittee on June 28, 2005, in our hearing entitled, "The Impact of Regulations on U.S. Manufacturers: Spotlight on Department of Labor & Department of Transportation." Because of time constraints at the hearing, I am enclosing the following questions for your reply to be included in our record.

Please hand-deliver the agency's response to the Subcommittee majority staff in B-373B Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building no later than 5 p.m. on Wednesday, July 20, 2005. If you have any questions about this request, please contact Dena Kozanas at 225-4407. Thank you for your attention to this matter.

Sincerely,

Candice S. Miller

Candice S. Miller
Chairman
Subcommittee on Regulatory Affairs

Enclosure

cc: The Honorable Tom Davis
The Honorable Stephen F. Lynch

1.) From your testimony, it is apparent that the Department of Transportation (Department) has an institutional commitment to regulatory review and improvement. In your written testimony, you mention that the Department requires its component agencies to have such regulatory review programs in place but that the Federal Aviation Administration's (FAA) program differs slightly from the rest of the operating administrations. (p. 5). Please explain why the Department has chosen not to prescribe to a uniform regulatory review program.

2.) In your written testimony, you mention that "in appropriate situations the various agencies of the Department have also undertaken special reviews of existing regulations, often limited to specific subject areas." (p. 5). Please explain what type of regulations would warrant such "special reviews," and how these particular reviews would differ from your usual regulatory review program.

3.) In your oral testimony, you discussed how the Department has put into practice adding sunset provisions to various regulations. Please explain the analytical process in which the Department decides to add such provisions to rules. Additionally, would you recommend Congress follow in your footsteps and codify this regulatory reform measure for all agencies?

**U.S. Department of Transportation**

**Office of the Secretary of Transportation**

**GENERAL COUNSEL**

400 Seventh St. S.W.
Washington, D.C. 20590

July 20, 2005

The Honorable Candice S. Miller
Chairman, Subcommittee on Regulatory Affairs
Committee on Government Reform
United States House of Representatives
Washington, D.C. 20515-6143

Dear Chairman Miller:

This is in response to your letter dated July 11, 2005, requesting clarification to several written and verbal statements given during a June 28, 2005 hearing entitled "The Impact of Regulations on U.S. Manufacturers: Spotlight on Department of Labor & Department of Transportation." Your questions are listed below followed by our response.

QUESTION 1: From your testimony, it is apparent that the Department of Transportation (Department) has an institutional commitment to regulatory review and improvement. In your written testimony, you mention that the Department requires its component agencies to have such regulatory review programs in place but that the Federal Aviation Administration's (FAA) program differs slightly from the rest of the operating administrations. (p. 5). Please explain why the Department has chosen not to prescribe to a uniform regulatory review program.

RESPONSE: The FAA does subscribe to the uniform regulatory review program established by the Department. However, in addition to these requirements, the FAA has established a process by which they periodically (every three years) ask the public for comments on rules that need review the most.

QUESTION 2: In your written testimony, you mention that "in appropriate situations the various agencies of the Department have also undertaken special reviews of existing regulations, often limited to specific subject areas." (p. 5). Please explain what type of regulations would warrant such "special reviews," and how these particular reviews would differ from your usual regulatory review program.

RESPONSE: An example of a "special review " is when the FAA received, in February 1997, a recommendation from the White House's Commission on Aviation Safety and Security requesting that it review its existing regulations to identify those that could be rewritten as performance-based or plain language regulations.

These types of reviews differ in that under the usual review cycle the review is scheduled for a certain year and allows a great deal of public notice and participation in the order of the reviews. The "special reviews" generally respond to a particular need, such as a Secretarial initiative, an accident, or a need to review paperwork burdens.

QUESTION 3: In your oral testimony, you discussed how the Department has put into practice adding sunset provisions to various regulations. Please explain the analytical process in which the Department decides to add such provisions to rules. Additionally, would you recommend Congress follow in your footsteps and codify this regulatory reform measure for all agencies?

RESPONSE: In general, I hold the view that the use of sunset provisions should become more common than has been the past practice, but we are not ready to use such provisions in all rules. We have not yet established formal criteria, but experience is suggestive. There are various issues that may arise during the rulemaking process that can lead an agency to decide that, under the special circumstances of that rulemaking, a sunset provision is appropriate. The Department has found in some cases that a rule should have a sunset date because technological or business changes in the regulated industry create a likelihood that the rule may become ineffective or counterproductive within several years. For example, when the Department readopted its airline computer reservations system rules in 1992, it included a sunset date because the Department believed that a reexamination of those rules should be done within several years due to the rapid, on-going technological changes in the computer reservations system business. When the Department completed that reexamination two years ago, it found that the rules had become unnecessary and that all of them should be phased out within six months.

Other examples include: (1) Regulations on over-the-road-buses (OTRBs). The Department established a review provision as the result of meetings organized by the Small Business Administration Advocacy Office with small bus companies. The review provision was one of several innovations that came out of those discussions which were incorporated in the final rule. The time interval chosen was roughly half the time between the issuance of the rule and the time when OTRBs in fixed route fleets were, by attrition, expected to become fully accessible. (2) Regulations on Disadvantaged Business Enterprise (DBE) for airport concessions. The sunset provision for this rule was modeled on the review provisions in the OTRB rule. Moreover, the U.S. Supreme Court has indicated that narrow tailoring requirements for a rule of this type militate against an infinite duration.

We would not currently recommend that Congress codify uniform sunset provisions as a mandatory regulatory reform measure, because it may result in early termination of some safety rules that need to continue in effect or of rules that are uncontroversial, plainly beneficial, and not worth the cost and time associated with a sunset review. Moreover, agencies may not have the available resources (staff, technical expertise, funding) needed to conduct the review needed before a sunset date or to re-establish the rule after sunset. Establishing sunset dates should be done with greater frequency, but on a case-by-case basis. However, the question of how to make this reform measure more effective and more common is worthy of further consideration.

If I can provide further information or assistance, please feel free to call me.

Sincerely yours,

Jeffrey A. Rosen

July 11, 2005

Ms. Joan Claybrook
President
Public Citizen
1600 20th Street, NW
Washington, DC 20009

Dear Ms. Claybrook:

I would like to take this opportunity to thank you for appearing before our Subcommittee on June 28, 2005, in our hearing entitled, "The Impact of U.S. Regulations on Manufacturing: Spotlight on the Department of Labor & Department of Transportation." Because of time constraints at the hearing, I am enclosing the following questions for your reply to be included in our record.

Please hand-deliver the agency's response to the Subcommittee majority staff in B-373B Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building no later than 5 p.m. on Wednesday, July 20, 2005. Thank you for your attention to this matter.

Sincerely,

Stephen F. Lynch
Ranking Minority Member
Subcommittee on Regulatory Affairs

Enclosure

cc: The Honorable Tom Davis
The Honorable Candice S. Miller

1.) In your written testimony, you state that "[w]ell-designed health, safety and environmental protections stimulate the economy, result in better products and improve the overall quality of life." Please provide additional information on what impact, if any, health, safety, and environmental protections have on the competitiveness of the manufacturing industry.

2.) It is my understanding that cost and benefit estimates of rules, including health, safety, and environmental protections, have many uncertainties and flaws. Please provide additional information on the limitations of cost and benefit estimates of agency rules.

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

July 5, 2005

The Honorable Candice Miller
228 Cannon House Office Building
Washington, DC 20515

The Honorable Stephen F. Lynch
319 Cannon House Office Building
Washington, DC 20515

Dear Chairwoman Miller and Congressman Lynch,

I would like to thank you, as well as the other members of the Subcommittee on Regulatory Affairs, for the opportunity to offer testimony on June 28 regarding the nominations that the Office of Management and Budget made to the U.S. Departments of Transportation and Labor in its 2005 report, *Regulatory Reform of the U.S. Manufacturing Sector*.

Near the end of the hearing, Chairwoman Miller remarked that the nation's automakers — and in particular, General Motors — are losing sales and jobs due to government regulations. As the former administrator of the National Highway Traffic Safety Administration (NHTSA), the agency responsible for many of the rulemakings that affect the auto industry, and as a long-time public safety advocate, I had hoped to share with you a few insights into the connection between auto safety regulations and the tough road ahead for domestic automakers. Because there was not time before the pending vote to comment on this very important issue, I respectfully request that you submit this letter to the record.

The best evidence suggests that well-crafted government safety and environmental standards help — and do not harm — the auto industry and the public. There are three compelling reasons why this is so:

- *Government auto safety regulations impose minimal costs and confer maximal benefits.* A recent NHTSA study estimates that the total cost of compliance for all auto safety regulations adopted since 1960 averages at most $839 per passenger car and $711 per light truck (as of model year 2001 vehicles) — costs that may not even account for production efficiencies and economies of scale. In return, Americans are assured that the vehicles they purchase are equipped with life-saving technologies like safety belts, air bags, child safety seats, shatter-resistant windshields, energy-absorbing steering columns, improved roof strength and side impact protection, and anti-lock brakes. These critical safety features cost little but save more than 25,000 lives each year, a figure that continues to rise. Even the simplest cost-benefit analysis shows that auto safety and environmental standards are nothing but a best bargain for the public.

- *Safety sells: Foreign automakers that exceed auto safety regulations are thriving.* Automakers of all nationalities compete on the level playing field of government regulation. But some foreign manufacturers, such as Honda, have chosen to exceed minimal government

standards in their design and production process, and have been rewarded with great success for their efforts. Research shows that safe vehicles appeal to consumers for their life-saving features, and that the public will readily pay more for their installation. Improved auto safety regulations, in other words, can help domestic automakers become more, not less, competitive in the marketplace.

- *GM executives do not cite regulatory burdens as the cause of their recent economic problems, nor do independent financial analysts.* GM Chairman and Chief Executive Rick Wagoner recently outlined a four-point plan for restoring the company to profitability: speeding the release of new models, improving marketing, cutting costs, and reducing pension and health care obligations. Far from attempting to roll back government safety standards, Mr. Wagoner has called on GM to improve vehicle quality in order to attract and retain customers. This idea is echoed by independent analysts, who point out even more problems confronting GM, such as rising gas prices, underinvestment in design and engineering, and the failure to include popular vehicles like hybrids and crossovers in the GM fleet. GM executives, financial analysts, and industry observers agree: it is these kinds of obstacles that threaten GM's bottom line, not government safety and environmental standards.

The problems facing domestic automakers are real. But they are simply not the result of federal product standards. After all, GM's problems have surfaced at a time when the government has not issued a major substantive safety or environmental standard for years.

I have attached a few articles that further elaborate on this issue.

Sincerely,

Joan Claybrook
President, Public Citizen

Attachments:

- Ingrassia, Paul. "Junk Cars." *Wall Street Journal*. 17 May, 2005.
- Keller, Maryann N. "Dull at Any speed: GM Never Learned to Shift Gears." *Washington Post*. 13 June 2005.
- "What's going on at GM?" *Washington Times*. 1 May, 2005.

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July 8, 2005

The Honorable Candice S. Miller
United States House of Representatives
228 Cannon House Office Building
Washington, DC 20515

The Honorable Stephen F. Lynch
United States House of Representatives
319 Cannon House Office Building
Washington, DC 20515

Re: Hearing of the Subcommittee on Regulatory Affairs of the House Committee on Government Reform, June 28, 2005

Dear Ms. Miller and Mr. Lynch:

I am writing to supplement the record of the June 28, 2005, hearing of the Subcommittee on Regulatory Affairs of the Committee on Government Reform concerning the impact of regulation on U.S. manufacturing, and specifically, to respond to statements contained in the testimony of Stuart Sessions regarding OSHA's proposed regulation of hexavalent chromium.

I will begin where Mr. Sessions ended his testimony, with his assertion that a revised permissible exposure limit (or "PEL") for hexavalent chromium of 20-25 micrograms per cubic meter ($\mu g/m^3$) "would protect workers' health." (Sessions Testimony at 6.) It is surprising, to say the least, that Mr. Sessions would make such a statement in sworn testimony before the Subcommittee, because in his testimony before OSHA on February 15, 2005, he admitted that he was unaware of any scientific basis for the assertion that such a PEL would protect workers. Specifically, Mr. Sessions testified as follows:

> MR. NELSON: Let me ask you this just again. Maybe you don't know but *do you know whether there are any independent evaluations of health data that support the recommendation that you signed onto of a 23 microgram per cubic meter PEL*?
>
> MR. SESSIONS: *I don't know.*

*In the Matter of Proposed Rule on Occupational Exposure to Hexavalent Chromium*, OSHA Docket No. H-054-A, Hearing Transcript at 2421 (Feb. 15, 2005) (emphasis added) (hereafter cited as "OSHA Tr.").

Mr. Sessions' acknowledged inability to identify support for his assertion that a PEL in the range of 20-25 $\mu g/m^3$ would protect workers was not surprising, because the extensive documentary and testimonial record in the OSHA docket provides overwhelming evidence that such high levels of exposure carry significant risks of lung cancer and other adverse health effects for exposed workers.

The evidence presented at the OSHA hearing established that the "Gibb study" of workers exposed to hexavalent chromium at a plant in Baltimore from the 1950s through the 1980s provides the best source for estimating risks of hexavalent chromium exposure. That study not only involved relatively recent data from a plant with relatively low exposure levels comparable to those of contemporary workplaces, but also was based on a large population of workers, with a very large amount of exposure data and many years of follow-up. Dr. Gibb's analysis, unlike most other studies, also controlled for the effects of smoking by workers. As Dr. Gibb aptly testified, his study is the best available on the health effects of hexavalent chromium because of the great "information advantage" he had over other researchers. OSHA Tr. 129 (Feb. 1, 2005).

As the record compiled by OSHA demonstrates, risk assessments based on Dr. Gibb's study show that exposures in the range of 20-25 $\mu g/m^3$ pose very substantial risks of cancer and, indeed, that a significant risk (on the order of approximately 9 excess lung cancer deaths per 1,000 exposed workers) remains even at OSHA's proposed PEL of 1 $\mu g/m^3$. In addition, the study of the Baltimore plant demonstrated that exposure levels around 25 $\mu g/m^3$ were also associated with acute health effects, such as skin ulcers and nasal perforations. Moreover, Dr. Gibb's data demonstrated that a statistically significant excess risk of lung cancer would remain even at Public Citizen's proposed PEL of .25 $\mu g/m^3$. OSHA Tr. 130-31 (Feb. 1, 2005). In the face of this evidence, Mr. Sessions' unsupported assertion that a PEL up to100 times higher than that would adequately protect workers is completely irresponsible.

At the OSHA hearings, industry placed its principal reliance on a study referred to as the Luippold study, which was inferior to the Gibb study in virtually every measure: It was based on fewer workers and had fewer exposure measurements, fewer years of follow-up, no smoking data, and much less data on workers with low exposure levels. Even so, the Luippold study's authors conceded that their data were consistent with the hypothesis that there is a linear dose-response relationship between levels of hexavalent chromium exposure and cancer risk, and risk assessments derived from their data also show a significant risk of cancer (approximately 2 deaths per 1,000 exposed workers) at OSHA's proposed PEL. Industry's contention that Luippold provides support for the view that there is no risk below approximately 20-25 $\mu g/m^3$ overlooks that, as the study's authors again conceded, their study involves so few workers exposed below that level that it cannot support the conclusion that there is a threshold below which there is little or no risk. OSHA Tr. 1845-46 (Feb. 11, 2005).

Thus, Mr. Sessions was forced to acknowledge in his testimony before OSHA that he was aware of no basis for relying on the Luippold study to support the adequacy of a 20-25 $\mu g/m^3$ PEL:

> MR. NELSON: ... Do you know whether any of the authors of the Luippold study concur with the notion that their study demonstrates that there's no significant risk below that level of about 23 micrograms?
>
> MR. SESSIONS: I don't know.
>
> MR. NELSON: Do you know whether there's any scientific evidence that has been submitted to the record on behalf of your clients that substantiates the assertion that the Luippold data support the conclusion that there is no significant risk below 23 micrograms?
>
> MR. SESSIONS: Sorry, I can't help on that.

OSHA Tr. 2420.

OSHA is required by statute to eliminate significant health risks to the extent economically and technologically feasible. The Supreme Court in the *Benzene* case (*Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980)) acknowledged that a 1 in 1,000 risk of death from regular workplace exposure to a carcinogen is a significant risk (*id.* at 655), and OSHA has generally used that as a benchmark. Here, the scientific evidence overwhelmingly demonstrates that a significant risk remains even at OSHA's proposed PEL of 1 $\mu g/m^3$ and that Mr. Sessions' proposed standard would not even come close to fulfilling the agency's statutory duty to protect workers.

Mr. Sessions' assertion that OSHA's proposed PEL is not "technologically feasible" for "many affected manufacturing activities" because facilities with engineering controls "can not ensure compliance with the proposed limit, even with the use of respirators" (Sessions Testimony, at 6) is also unsubstantiated. Not surprisingly, Mr. Sessions does not cite any testimony or other evidence from OSHA's hearing in support of his assertion. The record developed by OSHA in fact shows that most affected industries are already in compliance for most of their workers, and that engineering controls can bring the great majority of workplaces into compliance, with only a small number of types of operations requiring respiratory protection to achieve compliance with OSHA's proposed PEL. While some industry witnesses testified about practical problems with the use of respirators (which we acknowledge exist and render reliance on respirators generally less desirable than use of engineering controls), they did not demonstrate that there are significant numbers of operations (or perhaps any operations at all)

where the PEL could not be achieved through some combination of engineering controls and respirators.

Finally, as to costs, to which Mr. Sessions devoted most of his testimony, OSHA's proposed rule is supported by an exhaustive industry-by-industry analysis of what engineering controls are necessary for compliance and what those controls can be expected to cost. Mr. Sessions' analysis of costs rests largely on self-serving assertions by various industry representatives, which Mr. Sessions acknowledges he has made no effort to confirm. OSHA Tr. 2465-66 (Feb. 15, 2005). In addition, the industry cost estimates Mr. Sessions has compiled reflect widely varying assumptions, methodologies, and discount rates, *see* OSHA Tr. 2466-67 (Feb. 15, 2005), rendering the total costs shown on Mr. Sessions' tables unreliable as a basis for reasoned decisionmaking.

Moreover, many of the industry witnesses on whose costs estimates Mr. Sessions relies acknowledged on cross examination at the OSHA hearing that they did not even have data indicating whether their facilities would require any modifications to bring them into compliance with OSHA's proposed standard, and/or that some of the controls that their cost estimates were based on were already in place and thus would not be attributable to OSHA's rule. For example, the witness who testified on behalf of the carbon steel industry, while claiming that the standard would impose huge new costs on that industry's operations, admitted that he did not know if any worker in the typical facility that he described (and whose operations formed the basis for his cost estimates) was currently exposed at levels above the proposed standard. OSHA Tr. 2522-26 (Feb. 15, 2005). Even in the industry that Mr. Sessions worked with most closely, the chrome plating industry, his estimates were based on an analysis of only a handful of workplaces, some of which were unprofitable operations at risk of going out of business regardless of what OSHA did. *See* OSHA Tr. 2470 (Feb. 15, 2005).

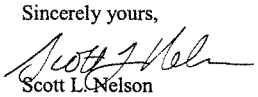
Dire predictions about the cost effects of regulation on industry are commonplace and are typically not borne out by actual experience. In particular, OSHA rulemakings have often elicited high industry estimates of compliance costs, but when the rules are put in place actual industry costs are much lower. *See* OSHA Tr. 2374-76 (Feb. 15, 2005) (discussing OSHA's cotton dust and vinyl chloride rules). In addition, one of the industries most affected by OSHA's proposed hexavalent chromium PEL, the chrome plating industry, faced a new EPA air emissions standard in the mid-1990s, which industry predicted would drive many small operations out of business, much as Mr. Sessions predicts here. Eight years of actual experience under the EPA standard has contradicted those predictions. *See* OSHA Tr. 417-18 (Feb. 3, 2005).

OSHA's consideration of a new hexavalent chromium PEL has been a very lengthy administrative process, and one that has not yet concluded. Despite overwhelming scientific evidence, acknowledged by OSHA, that the existing PEL is woefully inadequate to protect

workers from the threat of lung cancer, it required a court order to get the process going. Even after the court order, OSHA's rulemaking process will require a total of three years to complete. The agency has compiled a massive record on the risks associated with hexavalent chromium as well as the technological and economic feasibility for each affected industry of the controls needed to reduce exposures to safer levels. Industry has been heard at every step along the way: in the litigation, in the SBREFA process, in the written notice-and-comment rulemaking process, in the over two-week hearing that generated a transcript exceeding 2,500 pages, and in extensive post-hearing comments and briefs. OSHA has been attentive to concerns about feasibility, and indeed has bent over backwards (unwisely, in our view) by proposing a standard that leaves workers at significant risk because of feasibility concerns applicable only to a few of the affected industries. There is no reason to doubt that OSHA will fully consider the evidence industry has proffered. Mr. Sessions' one-sided and selective presentation, however, fails to do justice to the full record before OSHA and suggests an outcome — a standard 20 to 25 times higher than OSHA's proposal — that could only be reached if the agency were to disregard completely its obligation to protect workers against the health risks posed by this dangerous carcinogen.

I ask that this letter be included in the record of the Subcommittee's hearing.

Sincerely yours,



Scott L. Nelson

Senior Attorney
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July 26, 2005

The Honorable Candice S. Miller
United States House of Representatives
228 Cannon House Office Building
Washington, D.C. 20515

The Honorable Stephen F. Lynch
United States House of Representatives
319 Cannon House Office Building
Washington, D.C. 20515

Re: Supplement to Testimony at June 28, 2005 Hearing Before the House Committee on Government Reform, Subcommittee on Regulatory Affairs

Dear Ms. Miller and Mr. Lynch:

I am writing to supplement the record of the June 28, 2005 hearing of the House Committee on Government Reform, Subcommittee on Regulatory Affairs regarding the impact of regulation on U.S. manufacturing and the proposed OSHA workplace exposure rule for hexavalent chromium. We are also responding to the misleading claims made by Public Citizen in their July 8, 2005 letter on this matter.

At the hearing before the Subcommittee, Mr. Stuart Sessions of Environomics testified on behalf of the Surface Finishing Industry Council and the Specialty Steel Industry of North America. As an economist working on the proposed OSHA rule, Mr. Sessions's testimony focused on the serious adverse economic impact that the proposed rule would have on several important U.S. manufacturing industry sectors. Interestingly, Public Citizen's letter focused instead primarily on the health risks potentially posed by exposure to hexvalent chromium, a topic that Mr. Sessions merely referenced in the concluding sentences of his testimony when summarizing the industry's overall position

regarding the proposed regulation. While the response of Public Citizen was clearly misdirected as to content, it was also misleading in its characterization of the state of knowledge about health risks and how OSHA assessed those risks.

Provided below is a brief clarification of industry's views regarding the proposed regulation and issues involving health risks, technological feasibility, and economic impacts. Detailed industry testimony on each of these issues is part of the full record before OSHA for the hexavalent chromium workplace exposure rulemaking.

**OSHA's Health Risk Analysis Is Fraught with Uncertainties**

In his testimony, Mr. Sessions accurately stated the industry position that a chromium workplace exposure limit of 20-25 ug/m$^3$ would be protective and operationally feasible. Industry has repeatedly stated this position in comments and testimony submitted to OSHA as part of the administrative record for this proposed rule. It is important to note that this position results from balancing all three of the elements required of an OSHA standard: worker health, technological feasibility, and economic feasibility.

Industry's views regarding health risks are based on the following: 1) numerous studies on worker exposure across critical industries impacted by the proposed rule (*e.g.*, aerospace and welding); 2) particularly detailed peer-reviewed studies on worker exposures in the chromate production industry; and 3) a report on health risk issues from workplace exposure to hexavalent chromium prepared for the Small Business Administration, Office of Advocacy. Based on industry's experience with workplace exposures and the engineering controls to meet a PEL of 20-25 ug/m$^3$ on a consistent basis, such a PEL would be protective of workers' health, while at the same time operationally feasible. This information is all part of the full administrative record that OSHA must consider in promulgating a final standard.

*OSHA Should Not Rely Exclusively on the Gibb Study*

On of the weaknesses of the arguments put forth by Public Citizen is its over-reliance on the Gibb study. This single study – of high historical exposures to workers at one chromate production facility that closed in 1985 -- cannot provide an informed assessment of current risks at much lower exposure levels across all of the numerous industry sectors impacted by the proposed rule. Inherent in any type of risk assessment is uncertainty. Dr. Herman Gibb, the lead author of this study, testified at the OSHA hearings in February 2005 to the great uncertainties associated with risk assessment and opined that being within an order of magnitude would be considered good for risk assessment. Accordingly, OSHA must not ignore the substantial uncertainties associated with the Gibb study.

*The Gibb Study Is Not Representative of Health Risks for Other Impacted Industry Sectors*

The Gibb study is limited to one small industry sector, the chromate production industry. Many studies of other industry sectors with many more potentially affected workers, such as welding and aerospace, reached completely different conclusions than the Gibb study, finding no statistically significant relationship between exposure and lung cancer for those industries. Using only studies of chromate production workers to apply to all workers in other industry sectors would not be appropriate, particularly when, by OSHA's estimates, the 150 chromate workers now exposed to hexavalent chromium represent only 0.04% of all workers exposed to hexavalent chromium across all of the different industry sectors.

Similarly, the pre-1985 exposure profiles and workplace conditions of the chromate production facility studied by Gibb are not representative of the exposure profiles and workplace conditions of manufacturing facilities today. Recent studies of chromate production facilities in the U.S. and Germany also suggest that the Gibb study has over-estimated the health risks to workers exposed to low levels of hexavalent chromium in chromate production facilities. These recent studies are reflective of the more modern workplace environments that exist at facilities today. Considerable uncertainties would, therefore, be associated with applying the results of the Gibb study to workers exposed to hexavalent chromium at present-day chromate production facilities and to industry sectors beyond the chromate production industry.

*Gibb's Assumptions On Smoking Over Estimated Health Risks to Workers Exposed to Hexavalent Chromium*

Whereas cigarette smoking was taken into account in the workers studied by Gibb, the assumptions used by Gibb tended to over-estimate the health risks to non-smokers. In his study, Gibb assumed that the risk of lung cancer for smokers is additive, while in its studies NIOSH assumed that the risk to smokers is multiplicative. In short, Gibb attributed less of a causal link between smoking and lung cancer than did NIOSH. Use of the "additive" assumption over the "multiplicative", therefore, raises additional uncertainties associated with the results of the Gibb study.

*The Gibb Study Had No Exposures Measured At or Near the Proposed PEL*

The Gibb study is also limited by the fact that workers were not exposed to concentrations at or near the proposed PEL of 1 $ug/m^3$. Gibb assumed risk based on cumulative exposure over a worker lifetime of 45 years. This means that exposure of 45 $ug/m^3$ for one year or 90 $ug/m^3$ for six months equates to exposure to 1 $ug/m^3$ for 45 years. Workers in the Gibb study were in fact exposed to concentrations well in excess of the proposed PEL, but in many cases were exposed/employed for considerably shorter time periods measured in months rather than years. Substantial uncertainties in the risk assessment are associated with the assumption used by Gibb and the lack of actual measured exposures at or near the proposed PEL.

To illustrate this point, both the Gibb and Luippold studies were on workers at chromate production facilities. The Luippold study did not include many of the short-term workers and identified a significantly lower health risk. The differences in the results from these two similar studies for lung cancers avoided increases at the lower exposure levels approaching the proposed PEL y a factor of 4 or 5. Uncertainties are, therefore, greater at lower exposures levels at or near the proposed PEL, in part because the results rely on the assumptions used in the studies and the modeling beyond the actual measured exposure levels.

In addition, the Crump study used the same cohort as the Luippold study, but eliminated more of the short-term workers and used a maximum exposure level rather than cumulative exposure. Based on this analysis, Crump concluded that 23 $ug/m^3$ was an acceptable health risk for workers. The two order of magnitude difference in results between the Gibb and Crump studies of chromate production workers further illustrates the substantial uncertainties associated with the health risk studies for workers exposed to hexavalent chromium.

*The Gibb Study Did Not Accurately Reflect Levels of Hexavalent Chromium to Which Workers Were Exposed*

The Gibb study had additional important uncertainties associated with it. The devices used to measure hexavalent chromium concentrations at this plant failed to capture the fine particles that contained much of the chromium. Accordingly, the concentrations of hexavalent chromium to which workers were actually exposed appear to have been systematically underestimated. In effect, more hexavalent chromium than was was measured (*i.e.*, higher exposure levels) may be responsible for the cancers that were observed among workers at this plant. The Gibb study likely overestimated the potency of the hexavalent chromium in causing cancer.

*OSHA Identified Uncertainties Associated with Health Risks*

Finally, even OSHA identified in the Federal Register notice for the proposed rule numerous uncertainties in the estimates used to calculate the baseline risk levels of workers exposed to hexavalent chromium including: measurement methods, data deficiencies, difficulties in converting measurements of total chromium into the fraction that is hexavalent chromium, personal exposures to hexavalent chromium and other uncertainties associated with the reconstruction of historical dose information. Accordingly, OSHA's conclusions must be considered in light of these uncertainties.

*OSHA Must Consider the Full Record on Health Risks*

In assessing the health risks to workers exposed to hexavalent chromium, OSHA should not rely on just one study from one industry sector. OSHA must acknowledge all of the uncertainties associated with both the study itself and with the extrapolating the study to other industries and to much lower exposures. Failure to consider all of the evidence before OSHA increases the uncertainties associated with the health risks exponentially. OSHA must rely on the full administrative record for the proposed rule that includes studies from other chromate production worker cohorts as well as other studies from other industry sectors. Based on consideration of the full record before OSHA and the uncertainties associated with the health risk assessment for exposure to hexavalent chromium, a PEL of 20-25 ug/m$^3$ would be reasonably protective for workers exposed to hexavalent chromium across all industry sectors impacted by the proposed rule.

**The Proposed Rule Is Not Technologically Feasible**

In addition to protecting workers' health, an OSHA standard must be technologically feasible. OSHA has proposed a PEL of 1.0 ug/m$^3$ with an action level of 0.5 ug/m$^3$ for hexavalent chromium. Facilities must, therefore, design engineering controls to meet the proposed action level of 0.5 ug/m$^3$ on a consistent basis. The extremely low proposed PEL and action level are not technologically feasible for many affected facilities in many industry sectors.

In its administrative record, OSHA has failed to consider this critical issue adequately for the impacted industry sectors. Even OSHA's own data do not support its claims of technological feasibility.

In its letter, Public Citizen summarily dismissed industry's claims that the proposed rule is not technologically feasible and, thereby, ignored the evidence submitted to the record demonstrating that OSHA has relied on flawed data, over-optimistic assumptions about the performance of potential control measures, and unrealistic control technology scenarios when assessing the technological feasibility of the proposed PEL. The technological in feasibility of the proposed PEL of 1 ug/m$^3$ prevents facilities from complying with the proposed PEL, regardless of cost.

Some specific technological feasibility problems are discussed below for three affected industry sectors. In his testimony before the Subcommittee, Mr. Sessions addressed economic impacts for each of these industry sectors, but not technological feasibility issues.

*Electroplating*

OSHA concluded that hard chrome electroplaters could feasibly meet the proposed PEL and action level, even though nearly 80 percent of the exposure samples that OSHA obtained from these facilities exceeded the proposed action level and 70 percent exceeded the proposed PEL. The exposure data that OSHA used has some serious technical flaws that the industry identified in its March 21, 2005 post-hearing comments. After correcting some of these flaws, 99 percent of the exposure data points from hard chrome electroplating facilities exceeded the proposed action level and 98 percent exceeded the proposed PEL. These data are drawn from facilities with the engineering controls already in place that OSHA identified as necessary to comply with the proposed PEL.

A major error in OSHA's technological feasibility analysis is its assumption that exposures below the proposed PEL achieved by some facilities for some workers implies that similar controls can reduce exposures at all facilities for all workers below the proposed PEL. In fact, exposures vary substantially across facilities, across processes within a facility and across workers at different processes. Under OSHA's own compliance guidance, a facility must comply with the PEL for every exposed worker for at least 95 percent of each worker's eight-hour work shifts. Accordingly, the task facing an employer in complying with the workplace exposure standard is to reduce the exposure of the single most exposed worker at each facility to below the applicable PEL. It is against this test that technological feasibility must be assessed. OSHA is incorrect in assuming that technological feasibility is demonstrated if controls can reduce exposures for some or even most of the workers at a facility below the PEL.

Furthermore, the engineering controls identified by OSHA to comply with the proposed PEL would not be sufficient to meet the proposed PEL and action level. The industry's experience can be summed up in simple terms: even facilities with advanced engineering controls (*e.g.,* redundant systems with double or triple OSHA's recommended air flow) that are well beyond the controls OSHA identified as needed to comply with the proposed PEL *cannot meet the proposed PEL for all of their workers.*

*Aerospace*

In the early 1990s, the FAA and DOD mandated enhanced corrosion prevention and control programs for US aircraft, partly in response to the crash of an Aloha Airlines plane due to undetected corrsion. Aircraft are mostly built of aluminum, which must be coated with hexavalent chromium paints and coatings to protect it from corrosion and structural failure. Many of these structural components are located in inaccessible areas that make it difficult to detect corrosion problems through routine inspection and maintenance programs.

Despite more than a decade of research and millions of dollar spent, at this time there is no known effective substitute for hexavalent chromium for most corrosion control applications in the aerospace industry. Because of flight safety implications, years of

testing (*e.g.*, screening, qualification, and flight) will be required before any viable substitute could be fully implemented on aircraft exteriors, interiors, and fuel tanks.

Much of the aerospace industry has very specialized needs for spray-painting facilities. The range of sizes of parts and their geometries (*e.g.*, wings/stabilizer areas, interior parts, etc.) create many challenges to providing effective control technologies. A number of technical recommendations by OSHA are not feasible and do not take into account the wide variation of operations and products in the industry.

Many of the control measures recommended by OSHA for the aerospace industry are already in place. When using the best known engineering controls, the aerospace industry cannot comply with a 1 ug/m$^3$ PEL in almost all operations or even a 20 to 25 ug/m$^3$ PEL when coating and removing paint from aircrafts in the tight, enclosed areas of the fuselage and wings. Particularly problematic are the coating of large aircraft (*e.g.*, 747's, C-130's, etc.).

The industry submitted hundreds of data points in comments that demonstrated that various operations using the best OSHA identified engineering controls exceeded the proposed PEL at least 84 percent of the time. In contrast to the extensive data submitted by industry from many facilities, OSHA relied on selected data from only two facilities taken over a few days to attempt to justify that the aerospace industry could comply with the proposed PEL.

The aerospace industry cannot meet the proposed PEL with engineering controls for many operations, but aerospace workers are appropriately protected in areas of concern by respirators. Additional engineering controls are not needed for the industry because according to the health risk studies on aerospace workers that are part of the record before OSHA, there is no increase in the rate of cancer in aerospace workers at higher exposures (at or near the existing PEL), where respirators are already in use.

*Shipbuilding*

For corrosion control, more and more parts of ships are constructed with high-chromium alloys such as stainless steel and over 50 percent of existing ships are coated with high-chromium paints. For the shipbuilding industry, OSHA underestimated how frequently these materials are used and the associated technological feasibility and cost of the proposed PEL.

Worker exposures in many welding and paint removal activities in shipbuilding and repair cannot be reduced to meet a PEL of 1.0 ug/m$^3$ using the OSHA prescribed engineering controls. The confined spaces inside of ships pose particular problems that make the use of some OSHA recommended engineering controls for welding impractical. Controls that OSHA recommends that are frequently impractical include portable local exhaust ventilation (LEV) systems, fume extractor welding guns, and many others.

Such large, tethered, cumbersome equipment often cannot be fit into tight spaces in the ships. The increased weight of this portable equipment can result in ergonomic problems for workers. The equipment must be moved as a welder moves. These types of controls will likely result in a 30 to 40 percent reduction in worker productivity. OSHA failed to consider these issues adequately when assessing the technological feasibility of the proposed PEL

**The Proposed Rule Will Impose Serious Adverse Economic Impacts**

In his testimony before the Subcommittee, Mr. Sessions focused on the very high compliance costs for the proposed rule and the serious adverse economic impacts of the proposed rule that included facility closures, loss of U.S. manufacturing jobs and diminished competitiveness of key U.S. manufactured products in world markets. Specifically, Mr. Sessions summarized the detailed compliance cost estimates and the economic impact analysis provided by industry in the comments to the proposed rule, testimony at the OSHA hearings, and post-hearing comments.

*Compliance Cost Estimates*

Public Citizen in its July 8, 2005 letter dismissed both the industry compliance cost estimates and the detailed economic impact analysis provided in the record before OSHA. The compliance cost estimates of $2.9 billion per year provided by Mr. Sessions were compiled from analyses and comments submitted by industry groups regarding the impact of the rule on individual industry sectors. Many companies and industry associations estimated the costs that the proposed regulations would impose on their particular affected facilities. In most cases, these costs estimated by companies and trade associations included costs that OSHA had failed to include in its analysis, many of which OSHA admitted for the record in the OSHA hearings in February 2005. This aggregated industry cost estimate was not a series of "self-serving assertions" by industry as Public Citizen asserts, but rather a compilation of numerous detailed comments submitted to OSHA for the record in this rulemaking procedure.

If anything, the nearly $3 billion per year estimated for industry compliance costs are understated because amounts are not included for many affected industry sectors such as: commercial aircraft maintenance, Department of Defense installations, mining operations, auto repair shops and fiberglass insulation manufacturing. In addition, the compliance cost estimate did not include revised compliance costs (but rather simply used OSHA's estimates) for a variety of industry sectors including: some welding and painting activities, paint and coating production, iron and steel foundries, textile dyeing, chromium chemical producers and distributors, refractory brick production, solid waste management, and Portland cement production. Even without these additional compliance costs, the proposed workplace exposure rule for hexavalent chromium would be more expensive than any federal regulation issued during Fiscal Years 2002, 2003 0r 2004.

The reasons for the wide difference between OSHA's cost estimate of $223 million and industry's estimate of nearly $3 billion per year included the following that were enumerated in Mr. Sessions' testimony before the Subcommittee.

- OSHA omitted entire industries from its analysis.
- In industries OSHA analyzed, the Agency omitted numerous affected sectors.
- In affected sectors that were analyzed, OSHA greatly underestimated the number of workers exposed at greater than 1 ug/m$^3$.
- OSHA made incorrect over-optimistic assumptions about the performance of proposed control technologies.
- OSHA wrongly assigned much of the cost of compliance measures needed to meet the proposed PEL to other supposed existing "baseline" regulatory requirements.
- OSHA employed incorrect assumptions and analytical methods in translating the profile of exposed workers into an estimate of the compliance burden that facilities will face in meeting the proposed PEL.
- In estimating costs for the measure that the Agency identified as likely to be employed for compliance, OSHA omitted several important sorts of costs.
- OSHA also underestimated many sorts of unit costs.

As part of its comments, testimony and post-hearing comments, industry provided examples of each of these deficiencies in OSHA's compliance cost estimates. Industry also provided several fully detailed spreadsheet analyses in which costs were estimated for individual key industry sectors.

To understand the potential economic impact of the proposed rule, OSHA must first get the magnitude of the compliance costs correct. Estimates that differ by a factor of 10 to 15 times indicate at the very least that some of the compliance costs have not been included in OSHA's estimate. OSHA must correct these costs to address appropriately the economic impact of this proposed rule on industry.

*Economic Impact Analysis*

By its own admission, OSHA did not conduct a comprehensive economic impact analysis for the proposed rule. Accordingly, for electroplating the industry conducted its own detailed economic impact analysis and submitted it to the record for OSHA's proposed rule. In testimony provided by Mr. Sessions at the OSHA hearing in February 2005, a comparison was made between the economic impact analysis conducted by OSHA and by industry. Of the eight critical criteria needed for a good economic impact analysis, OSHA included only two in its analysis, whereas industry's analysis addressed all eight. The economic impact analysis for this industry included an industry-wide analysis, a modeled facility analysis and six individual facilities as case studies. In short, industry's economic impact analysis was far more comprehensive that the analysis conducted by OSHA.

For the electroplating industry, the economic impact of the proposed rule would be devastating. More than half of the impacted electroplating facilities would be forced to close as a result of OSHA's proposed PEL. In fact, the individual facility case studies predicted that at least four of the six facilities examined would be forced to close by the proposed PEL at a low cost option and all six would likely close at the higher cost option. Despite this comprehensive economic impact analysis, Public Citizen took issue with the conclusions claiming (without basis) that the facilities examined were unprofitable and would go out of business regardless of what OSHA did. Public Citizen further claimed based on its limited and incorrect knowledge of the electroplating industry that the estimates of how many facilities would close due to the rule were exaggerated and unfounded – in essence just another example of industry "crying wolf."

Industry's economic impact analysis was based on actual data from real, small family-owned businesses that would be impacted by the proposed rule. The conclusion that over 50 percent of electroplating facilities would close was also based on a detailed economic impact analysis conducted by the U.S. Environmental Protection Agency for a recent water discharge rule for the electroplating industry. Based on its comprehensive economic analysis of the electroplating industry (that included extensive surveys requesting financial information from facilities), EPA concluded that compliance costs of approximately $60,000 per facility per year would close 50 percent of electroplating facilities. As a result of this analysis, EPA did not promulgate the final rule. Using EPA's analysis as a benchmark, the economic impact of OSHA's proposed PEL would be devastating to the electroplating industry because this rule would impose compliance costs ranging from $75, 000 to nearly $600,000 per year per facility. A rule that produces such a devastating economic impact is not economically feasible.

In addition to the facility closures in the electroplating industry, other industry sectors will experience serious adverse economic impacts from this rule. The impacts including loss of U.S. manufacturing jobs and reduced competitiveness for critical U.S. products (*e.g.*, many of those in the defense supply chain) in world markets were discussed by Mr. Sessions in his testimony before the Subcommittee. OSHA cannot ignore or dismiss these economic impacts as they have serious implications for industries that are critical to the U.S. economy. OSHA must consider these impacts fully to address the economic feasibility of the rule adequately.

**A PEL of 20-25 ug/m$^3$ Is Needed for Worker Health and Operational Feasibility**

While we disagree with the misleading claims and unfounded assertions that Public Citizen made in its July 8, 2005 letter, we do agree with Public Citizen that OSHA must consider the full record before it in this rulemaking. Upon consideration of all of the evidence in the record, a PEL of 20-25 ug/m$^3$ represents an appropriate balance among workers' health, technological feasibility and economic feasibility, which is consistent with OSHA's mandate in setting workplace exposure standards. A PEL of 20-25 ug/m$^3$ would be a significant reduction below the existing standard of 52 ug/m$^3$.

Furthermore, with all of the U.S.'s major trading partners having occupational exposure limits of 50 ug/m$^3$, a PEL of 20-25 ug/m$^3$ would help to keep more manufacturing jobs in the U.S and would continue American leadership in worker protection.

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We appreciate the opportunity to submit these supplemental comments and ask that this information be included in the record of the Subcommittee's hearing. If you have any questions or would like additional information, please contact Christian Richter or me at 202-457-0630.

Respectfully submitted,

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cc: Kathryn McMahon-Lohrer (SSINA)
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